Principle, History, and Power: The Limits of the First Amendment Religion Clauses

Stephen M. Feldman, University of Wyoming

Available at: https://works.bepress.com/stephen_m_feldman/26/
Principle, History, and Power: The Limits of the First Amendment Religion Clauses

Stephen M. Feldman*

"[W]here expectations are few disappointments are rare."¹

In recent years, constitutional scholars have disputed vehemently the meanings of the Free Exercise and Establishment Clauses of the First Amendment.² Do the religion clauses prohibit the injection of religious values into the so-called public square of political debate?³ What doctrinal tests should courts use to determine the scope of the two clauses? ⁴ Does the Establishment Clause prohibit praying, moments of silence, and other religious or quasi-religious activities in public schools? ⁵ Does the Free Exercise Clause require the government to grant religious exemptions from laws of general applicability? ⁶ Yet, regardless of the particular topical issue, nearly all discussions of the religion clauses build upon one

* Professor of Law, University of Tulsa. I thank Steven D. Smith for his helpful comments on an earlier draft. This essay is partially derived from a longer work-in-progress: Please Don’t Wish Me a Merry Christmas: A Critical History of the Separation of Church and State (NYU Press, forthcoming 1997). I want to acknowledge those individuals who already have read and commented upon sections of that book and, in so doing, have contributed (albeit indirectly) to this essay. Consequently, I thank Richard Delgado, Gary Minda, Mark Tushnet, Tom Wartenberg, Lary Catá Backer, Lundy Langston, Marla Masfield, Nick Rostow, Laura Feldman, and Virginia Lockman for the helpful comments. I also thank the participants at the 1994 Mid-South Philosophy Conference for their comments on a related presentation. Finally, I appreciate the financial support of the Faculty Summer Research Grant Program of the University of Tulsa College of Law.

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..." U.S. Const. amend. I.
dominant or standard story of the separation of church and state. This oft-repeated and almost universally accepted story presents the separation of church and state as a distinctly American constitutional principle that simultaneously promotes democracy and protects religious freedom, especially for religious outgroups.7

Both Steven Smith, in Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom,8 and Naomi Cohen, in Jews in Christian America: The Pursuit of Religious Equality,9 contribute significantly to the jurisprudence of the religion clauses by challenging this dominant story.10

7. Supreme Court justices and American legal scholars long have celebrated this dominant story of the separation of church and state. In the nineteenth century, David Dudley Field wrote:

The greatest achievement ever made in the cause of human progress is the total and final separation of church and state. If we had nothing else to boast of, we could lay claim with justice that first among the nations we of this country made it an article of organic law that the relations between man and his Maker were a private concern, into which other men have no right to intrude.

David D. Field, American Progress, in Jurisprudence 6 (1893), quoted in Leo Pfeffer, Church, State, and Freedom ix (1953). In the late twentieth century, Stephen L. Carter wrote that "[t]he separation of church and state is one of the great gifts that American political philosophy has presented to the world." Stephen L. Carter, The Culture of Disbelief 107 (1993); see Leo Pfeffer, Church, State, and Freedom 604-05 (1953) (giving perhaps the definitive statement of the dominant story); Philip B. Korland, The Origins of the Religion Clauses of the Constitution, 27 Wm. & Mary L. Rev. 839, 856-57, 860 (1986) (describing the uniqueness of the framers' goal of protecting individual religious liberty); Sheldon H. Nahmod, The Public Square and the Jew as Religious Other, 44 Hastings L.J. 865, 867-88 (1993) (assuming establishment clause protects Jews from governmental power that had oppressed Jews in other nations); see also Anson P. Stokes, 1 Church and State in the United States 6, 26, 37 (1950) (giving the standard story a distinctly Christian twist).

In the mid-twentieth century, the Supreme Court wrote:

These words [in the religion clauses] of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity. . . . The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.

Everson v. Board of Educ., 330 U.S. 1, 8, 18 (1947). More recently, the Court reiterated: "[The religion clauses] are recognized as guaranteeing religious liberty and equality to 'the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.'" County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 590 (1989) (quoting Wallace v. Jaffree, 472 U.S. 38, 52 (1985)).


10. It is worth noting that some commentators, in articulating the dominant story, acknowledge that the framers drew upon Enlightenment political thought. The principle of separation of church and state is then understood as a political idea spawned during the Enlightenment but culminating in the religion clauses of the American Constitution. See e.g., Gerard V. Bradley, Church-State Relationships in America 122 (1987); James E. Wood, Jr. et al., Church and State in Scripture History and Constitutional Law 57 (1958).
Smith directly questions whether the Constitution embodies a principle of religious freedom, while Cohen interprets the historical development of the separation of church and state from the perspective of a prototypical religious outgroup—American Jews. Cohen's outsider viewpoint suggests that the religion clauses of the First Amendment have not adequately protected American Jews through much of the nation's history. Despite the originality and importance of each book, both Smith and Cohen ultimately succumb to the allure of the dominant story.

Part I of this Article focuses on Smith's argument that the Constitution does not embrace a principle of religious freedom. Smith's argument tends to be highly abstract, with little attention paid to the social and historical context of religion in America. Thus, Part II focuses on Cohen's contextual analysis and her history of church-state relations as told from a Jewish standpoint. Cohen's outsider perspective aptly leads her to emphasize antisemitism, but she too complacently explores the ramifications of her viewpoint. She overlooks the full critical potential that the American Jewish experience provides in understanding the separation of church and state. Part III, therefore, directly opposes the dominant story of the separation of church and state. I argue that Christianity hegemonically controls American society and culturally oppresses outgroup religions, particularly the prototypical minority religion of Judaism. My specific purpose, then, is to diagnose how Christian social power operates through the constitutional concept of separation of church and state; how does the separation of church and state contribute to the Christian domination of American society, including Christian cultural imperialism over religious outgroups, particularly Jews?


12. See infra notes 28-53 and accompanying text.

13. See infra notes 54-79 and accompanying text.

14. See infra notes 80-222 and accompanying text.

15. My approach to power is heavily influenced by the work of Michel Foucault. Foucault's works on power include: Michel Foucault, Discipline and Punish: The Birth of the Prison (Alan Sheridan trans., 1977) [hereinafter Foucault, Discipline and Punish]; I Michel Foucault, The History of Sexuality (Robert Hurley trans., 1978) [hereinafter Foucault, History of Sexuality]; Michel Foucault, Truth and Power, in The Foucault Reader 51 (Paul Rabinow ed., 1984); Michel Foucault, Two Lectures, in Power/Knowledge 78 (1980) [hereinafter Foucault, Two Lectures]; Michel Foucault, How is Power Exercised?, reprinted in Hubert L. Dreyfus & Paul Rabinow, Michel Foucault, Beyond Structuralism and Hermeneutics 216 (2d ed. 1983); Michel Foucault, Why Study Power: The Question of the Subject, reprinted in Dreyfus & Rabinow, supra at 208 [hereinafter Foucault, Why Study Power]. For an outstanding synthesis of Foucault's work, see Dreyfus & Rabinow, supra. For an excellent collection of essays critiquing Foucault, see Foucault: A Critical Reader (David C. Hoy ed., 1986). Some other helpful sources on understanding the postmodern concept of power
In order to diagnose Christian social power, Part III presents a synchronic critique of the separation of church and state. I critically analyze how the constitutional principle of separation of church and state contributes to the current orientation of power within American society. To pursue this analysis, I approach the problem of Christian social power from three perspectives, which correspond to the three sections of Part III. The first section focuses on how symbolic power—especially in the form of language—contributes to Christian hegemony; in particular, it examines how the constitutional discourse of the Supreme Court in religion clause cases sustains this hegemony. The second section focuses on structural power, examining how the separation of church and state relates to the structural relations within American society. The third section examines the relationship between symbolic and structural power; this section analyzes, in particular, how the symbolism of the separation of church and state creates an ideology that simultaneously hides and legitimates Christian domination. Part III gives special attention to the Supreme Court's important religion clause decisions of the last two terms: *Rosenberger v. Rectors and Visitors of the University of Virginia*, *Capitol Square Review and
Advisory Board v. Pinette,21 and Board of Education of Kiyas Joel Village School District v. Grumet.22

Two related points should be clarified at the outset. First, I approach the question of power in society from a postmodern perspective.23 Unlike a modernist approach to power, which typically locates power in some conscious or intentional center such as an individual, a group of individuals, or a sovereign, a postmodernist approach underscores that "power is everywhere and in everyone."24 Second, because I explore Christian power in American society, I extensively discuss antisemitism.25 Throughout Western history, Jews have been victims of many forms of


24. Fraser, supra note 15, at 26; accord Feldman, The Persistence of Power, supra note 16, at 2258-66; cf. Ian Hacking, The Archaeology of Foucault, in Foucault: A Critical Reader, supra note 15, at 27, 27-36 (stating that power and knowledge are not located with specific individuals who are in control). Modernists tend to cabin power for the sake of methodological and experimental ease: It is easier to analyze and test for power if it is supposedly centered on some conscious agent. See e.g., Peter Morris, Power: A Philosophical Analysis 124-26 (1987) (describing how to test for and measure power).

overt antisemitism, from the physical violence of pogroms to the legally-enforced expulsion of Jews from many medieval European countries.26 From a postmodern standpoint, though, antisemitism cannot be limited to such intentional or conscious anti-Jewish actions and attitudes. Instead, antisemitism refers broadly to the intentional or unintentional, conscious or unconscious hatred, dislike, oppression, persecution, domination, and subjugation of Jews qua Jews for whatever reason or motivation, whether it is religious, cultural, ethnic, racial, or political. As will become evident, Christian cultural imperialism stands as the most significant and pervasive manifestation of antisemitism in America today.27

I. THE PRINCIPLE OF RELIGIOUS FREEDOM?

Smith initially reasons that “it is simply misleading to suppose that

---


27. See Tom W. Smith, Anti-Semitism in Contemporary America, 19-22 (1994) (discussing briefly the difficulty of empirically examining hidden, latent, and new antisemitism). While acknowledging that Jews often were treated better in America than in other western Christian nations, Frederic C. Jaher, a historian, details the origins and rise of antisemitism in America. He concludes: “Christianity has a powerful anti-Semitic impulse, America is a Christian country, and America is anti-Semitic. The truth of this syllogism has been empirically demonstrated . . . .” Jaher, supra note 25, at 249.

On the strength of Christianity in America, Steven D. Smith reports:
Upwards of 90 percent of the American population affirms some belief in the existence of God . . . . [N]ine persons in ten believe Jesus Christ actually lived, seven in ten believe he was truly God, and six in ten think one must believe in the divinity of Christ to be a Christian. The results of studies documenting consistently high levels of belief in life after death, heaven, and Christ’s presence in heaven also point to the survival of a strong element of religiosity in American culture.


Survey evidence from the 1980s . . . . suggests that most of the more educated citizens hold religious beliefs. Among college graduates in this country, only 3% say they do not believe in God, while 77% report that their relationship with God is either “extremely close” or “somewhat close.” The percentage of college graduates who believe in life after death (76%) is the same as that for the general population, and the percentage of college graduates who attend church nearly every week (50%) is slightly higher than the national average. College graduates express greater confidence in organized religion than persons who have graduated from high school only. And although college graduates are far less likely to be biblical literalists, 80% believe the Bible to be the “actual word of God” or the “inspired word of God.” . . . . In addition, survey evidence reveals that 63% of educators regard themselves as “religious”; the figure for individuals in vocations associated with law and justice is 53%. More than three-quarters of those in both groups attend church at least occasionally, and over one-third attend frequently. About the same percentages participate occasionally, or frequently, in prayer . . . .

Smith, supra, at 174-75 (citing Unsecular America app. at 142 tbl. 20 (Richard J. Neuhaus ed., 1986)).
there is a univocal principle of religious freedom, hovering in some Platonic realm. Yet, he acknowledges that while there is no unitary principle of religious freedom, there are many versions of or individual opinions about religious freedom. Hence, to defend judicial review under the religion clauses, constitutional scholars (and Supreme Court justices) necessarily have attempted to specify a single version of religious freedom embodied in the Constitution itself. For even if there are multiple versions or understandings of religious freedom, if only one is contained in our Constitution, then the Supreme Court can justifiably enforce that single constitutionalized version in judicial review. The additional versions of religious freedom would be irrelevant to the Court's enforcement of the religion clauses. Consequently, Smith maintains, judges and constitutional scholars have long been asking "something like the following question: 'What is the meaning and scope of the principle of religious freedom embodied in the Constitution?'"

According to Smith, scholars have tried to discern the version of religious freedom embodied in the Constitution through two different approaches: originalism and theory. Because Smith concludes that there is "no constitutional principle of religious freedom," the bulk of the book consists of Smith's attacks on each of these two approaches. Turning first to originalism, Smith observes that many scholars argue that the First Amendment framers articulated or intended to articulate a principle of religious freedom. Those scholars thus analyze the history of the drafting and adoption of the First Amendment as they attempt to glean the principle supposedly contained within the religion clauses. In disputing this originalist argument, Smith notes that some critics insist that originalism never leads to determinate answers for constitutional questions.

28. Smith, supra note 8, at 11.
29. Smith writes: "[T]here is no single or self-subsisting 'principle' of religious freedom; there is only a host of individuals with a host of different opinions and notions about how much and what kind of scope government ought to give to the exercise of religious beliefs and practices." Id.
30. See id. at 12-15 (discussing the unitary conception of religious freedom).
31. Id. at 6. Smith adds that, frequently, scholars either efface or fail to recognize the variety of possible versions of religious freedom. Consequently, these scholars seek to identify "the principle" or "the real meaning" of religious freedom instead of specifying the one version among many that is embodied in the Constitution. Of course, in these instances, the scholars nonetheless assert (or assume) that our Constitution embraces this singular principle of religious freedom. See id. at 15 (discussing scholar's unitary conception of religious freedom).
32. See id. at 14-15 (discussing two approaches scholars use to discern the Constitution's principle of religious freedom).
33. Smith, supra note 8, at 122.
34. Smith's argument, to some extent, resembles Nietzsche's attack on the many Western philosophers who attempted to offer a rational foundation for morality but never questioned the existence of morality itself. See Friedrich Nietzsche, Beyond Good and Evil § 186 (Walter Kaufmann trans., 1965).
35. See generally Smith, supra note 8, at 15-54.
Smith, however, suggests otherwise; in fact, he argues that an originalist approach yields a clear answer regarding religious freedom. The First Amendment framers, Smith argues, intended to say nothing at all about religious freedom; instead, they intended merely to assign jurisdiction over religious matters to the states. The religion clauses thus prohibited the federal government from meddling in religious affairs and in so doing, the clauses did not articulate any principle of religious freedom or liberty. The states themselves remained unencumbered in religious matters: They were free to prefer religion over non-religion, to favor one religion over others, or even to establish a church. In short: "[The religion clauses] were... simply an assignment of jurisdiction over matters of religion to the states—no more, no less." Significantly, then, when the Supreme Court eventually held that the Fourteenth Amendment incorporated the religion clauses and applied them against the states, the Court repudiated the original meaning of the First Amendment. By constitutionalizing questions of religious freedom, the Court contravened the intentions of the framers.

While some constitutional scholars, according to Smith, use an originalist approach to explicate the supposed principle of religious freedom embodied in the First Amendment, other scholars base their arguments on various forms of constitutional theory, such as a theory of governmental neutrality toward religion. Smith insists, however, that decisions regarding religious liberty are necessarily prudential and cannot be based on any general theory of religious freedom. More important, Smith argues that a general theory of religious freedom is impossible: Any such theory inevitably founders on a logical conundrum.

The function of a theory of religious freedom is to mediate among a variety of competing religious and secular positions and interests, or to explain how government ought to deal with these competing positions and interests. To perform that function, however, the theory will tacitly but inevitably privilege, or prefer in advance, one of those positions while rejecting or discounting others. But a theory that privileges one of the competing positions and rejects others a priori is not truly a theory of religious freedom at all—or, at least, it is not the sort of theory that modern proponents of religious freedom have sought to develop.

In other words, any theory of religious freedom necessarily rests upon particular, often tacit, background beliefs or assumptions. Those

36. Smith, supra note 8, at 18.
38. Smith, supra note 8, at 49.
39. Id. at 57-61.
40. Id. at 55-118.
41. Id. at 63.
background beliefs or assumptions always remain controversial and are exactly the types of assertions that the theory itself supposedly reconciles neutrally with other competing beliefs. But of course, the theory cannot neutrally reconcile its own assumptions with other competing beliefs exactly because the theory rests on those very assumptions.42

Thus, based on his reading of originalist history and his argument against a theory of religious freedom, Smith concludes that the religion clauses do not embody any principle of religious liberty. Smith’s challenge to a component of the dominant story of separation of church and state marks an important and welcome turn in religion clause jurisprudence. When most constitutional scholars too readily accept that a principle of separation of church and state promotes democracy and protects religious freedom, Smith’s argument forces us to pause. His book problematizes the existence of such a principle by raising fundamental questions: What is the source or foundation for the principle of separation of church and state? If there is no such foundation, then does the principle truly exist?

Despite the significance of Smith’s book, the method of his challenge ultimately reaffirms the dominant story. Smith casts his argument (including his anti-theory contention) almost entirely at the level of abstract theory. Even though Smith devotes nearly half of his book to criticizing constitutional scholars who have failed to recognize the background assumptions of their various theories, Smith himself never seriously questions the background assumptions of his own theoretical argument. Smith, of course, believes that his argument can and should persuade the reader, yet such an abstract and theoretical approach implicitly assumes that a more persuasive theoretical argument would be trump. Smith’s belief that a more persuasive argument does not exist is beside the point; at the pure level of theory, a stronger argument would win. And Smith’s theoretical argument, albeit elegant, does contain certain problems. For example, Smith argues that a general theory of religious freedom is impossible because decisions regarding religious liberty cannot be based on theory. Simultaneously, though, he argues that originalism reveals that there is no principle of religious freedom embodied in the Constitution. In making this argument, Smith conveniently ignores that originalism is nothing but one theoretical approach to understanding the Constitution. Moreover, originalism itself is a highly controversial theory that is not universally accepted.43 Thus, the two strands of Smith’s argument—his attack on theory and his reliance on originalism—seem to

42. Id. at 68 (“The problem, simply put, is that theories of religious freedom seek to reconcile or to mediate among competing religious and secular positions within a society, but those competing positions disagree about the very background beliefs on which a theory of religious freedom must rest.”).

43. See e.g., John H. Ely, Democracy and Distrust 1-73 (1980) (criticizing various constitutional theories, including originalism); Stephen M. Feldman, Republican Revival/Interpretive Turn, 1992 Wis. L. Rev. 679, 701-14 (tracing the historical development of different constitutional theories).
be in tension with each other.

While Smith makes his entire argument at the level of high theory, a stronger challenge to the dominant story of separation of church and state could be made in a deeply contextual tone. The abstractness of Smith's argument suggests that the questions of religious freedom and separation of church and state in American society can be resolved by paying closer attention to originalist history and theoretical niceties. His originalist approach suggests that if we were to discover strong evidence of the framers' intentions to impose a principle of religious liberty, then America suddenly (or once again?) would have such a principle. Likewise, his abstract anti-theory reasoning leaves the reader with the impression that if only there were a stronger theoretical argument, then America actually would have a constitutional principle of religious freedom. But religious freedom and separation of church and state are matters of social reality, not mere academic questions of originalist history and abstract theory.

To a large degree, Smith ignores the social reality of separation of church and state. Indeed, in the final chapter of the book, Smith admits that his argument may have been overly theoretical, so at last he attempts to become more contextual. He writes: “Lest it seem that the [foregoing] analysis is relevant only in a hypothetical world, it may be helpful to reflect briefly on how the modern project of devising and implementing a constitutional principle of religious freedom has affected the actual American political community.” Smith’s turn to social reality leads him to conclude that the Supreme Court’s attempt to impose a principle of religious freedom has backfired, producing political division and civil strife revolving around religious differences. “In retrospect,” Smith writes, “the Court undertook the enforcement of principles [of separation of church and state] calculated to avoid remote or nonexistent evils, and in doing so it helped bring those evils into being.” Consequently, he argues that the Court should seriously consider withdrawing from the field of religious freedom. The Court then would not attempt to articulate and enforce a principle of religious freedom or separation of church and state; instead, the protection of religious freedom would be appropriately left to the “political process.”

44. Smith, supra note 8, at 115-16.
45. Id. at 117 (emphasis added).
46. Smith insists that he does not intend to surreptitiously advocate judicial withdrawal. He writes:
   So it is not as unthinkable for me as it may be for some legal scholars that the courts perhaps should simply withdraw from the business of trying to define and protect religious freedom. But to say that this possibility deserves serious, respectful consideration, as the final chapter suggests, is not to advocate such a course; and in fact I do not mean surreptitiously to advocate judicial withdrawal, as some reviewers seem to have believed. I mean no more than the final chapter says—that the possibility should not be regarded as beyond serious consideration.
   Id. at viii.
47. Id. at 126.
Smith’s belated effort to add context is not only uncritical, but also dangerous in its superficiality. Smith too glibly dismisses the problems for outgroup religions in a democracy when he refers to “remote or nonexistent evils.” When he suggests that the political process can protect religious freedom, he acknowledges that religious minorities might find this approach problematic, but he again waves off these difficulties.

To be sure, leaving religious freedom to the political process has its risks. Most obviously, unpopular religious minorities may have little power in the political process. On the other hand, it is arguable that the political process is more responsive to religious freedom concerns than the courts have been. . . . Experience suggests that a judicial withdrawal from the field might not detract from, and indeed might amount to a net gain for, religious freedom.

In the end, somewhat surprisingly, Smith further re-enacts the dominant story by suggesting that, before the Supreme Court intervened in the 1940s, America already had a principle (or principles) of religious freedom “constitutive” of our political community.

Unfortunately, Smith’s contextual argument seems to be based more on abstract conjecture than on historical knowledge and analysis. The social reality of separation of church and state is highly complex; it can be reduced neither to offhand suggestions that religious outgroups would be freer without judicial protection (as Smith suggests) nor to celebratory declarations of the American victory over religious oppression (as the dominant story suggests). Thus, to be sure, although I criticize Smith, I do not intend to reassert the dominant story: I am not suggesting that there exists an abstract principle of separation of church and state that simultaneously protects democracy and promotes religious liberty, especially for outgroup religions. Rather, I advocate taking a more nuanced contextual approach to constitutional principle—one more reflective of social reality and the orientations of power within society. Such an approach, in some instances, might critically alter our understanding of doctrine and history. For example, Smith argues that recent Supreme Court decisions have strongly “contributed to the political mobilization of the religious Right,” but he ignores the substantial history showing that Christian activists and evangelicals have sought periodically throughout American history to use various methods, including the political process, to impose Christian practices and beliefs.

48. Id. at 117.
49. Smith, supra note 8, at 126.
50. Id. at 123-24. Smith argues that this principle or principles would be derived from tradition, would be narrower than the common scholarly conception of the constitutional principle of religious freedom, and would not support judicial review.
51. Id. at 117.
52. See, e.g., Robert T. Handy, A Christian America (2d ed. 1984); Martin E. Marty, Protestantism in the United States: Righteous Empire (2d ed. 1986).
In another instance, Smith argues that the framers did not resolve issues regarding religious freedom and separation of church and state because these were "some of the most difficult and divisive issues likely to arise in a diverse political community." Contrary to Smith's assertion, however, insofar as the framers did not resolve these issues, it was more because of consensus and homogeneity than divisiveness and diversity. The nation of the framers' generation was so completely Christian (Protestant) that the primary issue—that this was a Christian nation—was undisputed and needed no further resolution. Secondary matters related to the enforcement and following of Christianity could have, however, generated disagreement and hence were not worth discussing—exactiy because the Christian nature of America was already so deeply entrenched. But if Smith's book ultimately falters because of its inadequate attention to social context of this sort, then Naomi Cohen's book provides at least a partial remedy. Cohen richly details the historical development of the separation of church and state in American society from the perspective of an archetypal religious outgroup—American Jews.

II. AMERICAN JEWS AND THE SEPARATION OF CHURCH AND STATE

As Cohen recounts the history of the separation of church and state from the perspective of American Jews, the notion that this nation has enforced a principle of religious freedom or equality since the late eighteenth or even the late nineteenth century seems perilously naive. Cohen describes a nation that, from its inception, was ridden by Christian cultural imperialism and rife with antisemitism both inside and outside of government. Starting in colonial times, Cohen notes, Christianity was "the national public religion." The Revolution and the era of constitution writing, including the federal and many state constitutions, did not change this social reality. After the Revolution, nine state constitutions mentioned Christianity and its teachings, and two other states continued to function well into the nineteenth century under explicitly pro-Christian colonial charters. Early in the nineteenth century, most states still demanded that governmental officeholders subscribe to Christian oaths, and even when state constitutions supposedly protected freedom of conscience, statutory laws often imposed disabilities on religious outgroups. Cohen explains

53. Smith, supra note 8, at 119.
54. Cohen, supra note 9, at 3; cf. Jaher, supra note 25, at 82-113 (describing the development of antisemitism in the American colonies).
55. See Cohen, supra note 9, at 23; cf. Jaher, supra note 25, at 112-13 (explaining that the American Revolution and the Constitution did not significantly change life for American Jews).
56. There were so few Jews in America during the colonial times and the early years of the nation that the first legislative focus on Jewish rights did not arise until around 1818 in the debate over the so-called "Jew Bill." This bill would have eliminated Maryland's Christian oath barring Jews from office. Significantly, Christian supporters of the bill seemed more concerned with New Testament doctrine, asserting that Jews could not be forced to convert,
the occasional divergence between state constitutions and statutes in the following manner:

[This fact is] best explained by fundamental, popular assumptions on the subject of religion in society. In the first place, Americans believed—whether written into the constitutions or not—theirs was a Christian if not a Protestant nation. Furthermore, all good citizens agreed that the state was obligated to encourage religion, the base on which civic virtue and successful republican government rested. Freedom of religion hardly translated to freedom from religion or into equal encouragement of non-Christians or non-Protestants.

In this already hegemonic Christian context, the Second Great Awakening erupted during the early nineteenth century, spreading evangelical Protestantism across America. As Cohen notes, although the Protestant evangelical activists claimed to seek voluntary conversions to and reaffirmations of Christianity, the line between voluntarism and coercion often blurred.

Affirmations of voluntarism projected the image of a situation more open than the one which actually obtained. In the first place, the religious causes of the first half of the nineteenth century fed upon fixed customs and laws bequeathed by the early settlers on subjects like Sunday observance, blasphemy, and religious instruction in the schools. Americans were historically and in fact a homogeneous Protestant people; the task of the churches was to breathe new life into Christian roots already embedded, to create not a Christian nation but a more religious Christian nation.

America already had been a Christian nation, now it just became more so. Governmental actions repeatedly affirmed the significance of Christianity. For example, state governments incorporated Christian associations devoted to the organized proselytization of American Jews, while the federal government negotiated treaties that protected only Christians. Throughout the nineteenth century (and indeed, into the twentieth), judges assumed that Christianity was part of the common law. For instance, Sunday Blue Laws originated in this Christian-derived

---

57. Id. at 28.
58. Cohen calls the Second Great Awakening a "rude awakening" for Jews. Id. at 37-38.
59. For discussions of the Second Great Awakening, see Handy, supra note 52, at 24-56; Nathan O. Hatch, The Democratization of American Christianity (1989); Winthrop S. Hudson & John Corrigan, Religion in America 133-38 (5th ed. 1992); Marty, supra note 52, at 45-62.
60. Cohen, supra note 9, at 38.
61. For instance, the American Society for Meliorating the Condition of the Jews (ASMCJ) was incorporated in 1820. Id. at 39.
62. See id. at 55-56 (surveying the ties between religion and nineteenth century common
common law. In one case, a state court rather typically upheld the conviction of a Jew for selling gloves on Sunday, but the court then gratuitously added that religious freedom was due to Christian mercy and love. Rabbi Isaac Leeser, the editor of The Occident, an antebellum Jewish periodical, observed: "We have our theoretical rights, but practically they are dependent on the will of those who have numbers on their side; and if we make all the noise in the world, and brag aloud after our heart's content, we are yet strangers in stranger lands." In 1853, The Occident speculated that if the Constitution had been written at that time, American Jews probably would have been expressly denied civil rights.

During the latter part of the nineteenth century, many Christian Americans feared that immigration, industrialization, and secularization were undermining the Christian nature of the nation. Consequently, various movements crystallized to help fortify Christianity as the American religion. In the 1860s, the National Association to Secure the Religious Amendment to the Constitution, claiming to uphold freedom of conscience and separation of church and state, spearheaded a national movement to amend the preamble of the Constitution as follows: "We, the people of the United States, humbly [acknowledge] Almighty God as the source of all authority and power in civil government, the Lord Jesus Christ as the Ruler among the nations, his revealed will as the supreme law of the land, in order to constitute a Christian government ...." Meanwhile, the National Reform Association (NRA) pushed for anti-liquor laws, Protestant Bible reading in public schools (which already was a fact of life), and the enforcement of Sunday Blue Laws to symbolically underscore that Jesus Christ was "the nation's ruler." Lest one assume that the NRA was a reactionary fringe group, Cohen notes that its president, William Strong, was appointed to the Supreme Court in 1870.

Remarkably, the first part of the twentieth century brought even greater antisemitism. Jews were faced with constant economic and social discrimination and occasional street violence. Henry Ford accused the "Bolshevik Jew" of conspiring to overthrow the Christian nation, and

---

63. See id. at 61-62 (citing City Council of Charleston v. Benjamin (1846)).
64. Cohen, supra note 9, at 54.
65. See id. at 39; cf. Jaher, supra note 25, at 114-69 (discussing often underestimated but extensive antisemitism in the early Republic until 1840).
66. Cohen, supra note 9, at 66 (quoting the sponsors of the movement called the National Association to secure the Religious Amendment to the Constitution).
67. Id. at 72.
68. See id. at 69. For further discussion of American antisemitism during the latter part of the nineteenth century, see Benjamin Ginsberg, The Fatal Embrace: Jews and the State 59-91 (1993); Jaher, supra note 25, at 170-241 (emphasizing that already prevalent antisemitism intensified during the latter part of the nineteenth century).
69. See Cohen, supra note 9, at 95 (summarizing early twentieth century history of Jewish discrimination). Benjamin Ginsberg considers the 1920s to be, perhaps, the most overtly antisemitic period in American history. Ginsberg, supra note 68, at 96.
Prohibition was hailed as "a striking victory for the advance of Christian civilization." In 1905, Supreme Court Justice David Brewer gave a series of lectures explaining why America was and would remain a Christian nation. Antisemitism as a form of racism intensified: The 1903 and 1907 Immigration Laws required that the country of origin be specified for each immigrant, except Jews who were designated as Hebrews (this practice continued into the 1930s). Tens of thousands of Jews were arrested for violating Sunday Blue Laws and between the World Wars, the movement to mandate Bible reading in the public schools became yet more determined. "By 1941 twelve states and the District of Columbia required Bible reading, seven states permitted it, eleven prohibited it, and eighteen made it optional." Rabbi Arthur Gilbert described the dire consequences for Jews who protested the Christianizing in the public schools: "Jewish parents... endured cross burnings on their lawns, harassing phone calls, the threat of economic boycott, and the mass distribution of anti-Semitic hate literature." I have mentioned only a few of the many events and developments that Cohen extensively details as she implicitly challenges the dominant story of church and state. The dominant story assumes that religious liberty has triumphed in America, but Cohen brilliantly links the development of American antisemitism and religious oppression to the story of the separation of church and state. She underscores that religious freedom and church-state relations are social issues best understood in historical context. Quite clearly, through at least the mid-1940s, any celebratory declarations of broad religious freedom and equality for American Jews ring hollow. Consequently, if we view Cohen and Smith together and recall that Smith ultimately recommended that we seriously consider judicial withdrawal from the field of religious freedom, then Cohen's historical narrative should cause us at least to contemplate rejecting this possibility (assuming it is a real possibility). Despite Smith's claim that judicial withdrawal might generate a "net gain" in religious freedom, the history of antisemitism before World War II, and hence before the Court's heavy involvement in religious affairs, suggests that American Jews and other non-Christian religious outgroups probably will not realize any such gain.

Nonetheless, like Smith, Cohen also ultimately reaffirms the dominant story. A major theme for Cohen is the Jewish contribution to the development of religion clause jurisprudence. She maintains that from early in the nineteenth century and throughout the twentieth century, Jews (with occasional support from liberal Christians) have been primarily

70. Cohen, supra note 9, at 93-94.
71. Id. at 100-01 (citing David J. Brewer, The United States a Christian Nation (1905)).
72. Cohen, supra note 9, at 94-99.
73. Id. at 110-11.
74. Id. at 108.
75. Id. at 138 (quoting Arthur Gilbert, A Jew in Christian America 157 (1956)).
76. Smith, supra note 8, at 126.
responsible for the development of the principle of separation of church and state. Furthermore, she argues that after World War II, it was Jewish litigation in the Supreme Court that led to the eventual triumph of religious freedom and separation of church and state. And to Cohen, because of the triumph of religious freedom, American antisemitism effectively disappeared in the postwar era; "[a]fter 1965," she writes, "Christianity was no longer synonymous with public religion...." Indeed, the second half of Cohen's book describes the postwar victory of religious freedom and the Jewish contribution to it by recounting numerous Supreme Court religion clause decisions, many of which involved one or more of the three largest Jewish defense agencies: the American Jewish Committee, the Anti-Defamation League, and the American Jewish Congress. Consequently, Cohen re-enacts the dominant story in two ways. First, she argues that a principle of religious freedom and separation of church and state has triumphed in America; she merely defers the time of victory until the 1960s. Second, Cohen argues that the development and triumph of the separation of church and state was due largely to the strong advocacy of the Jewish defense agencies. In making this argument, Cohen leaves us with the impression that separation of church and state necessarily protects religious outgroups.

III. CHRISTIANITY, POWER, AND AMERICAN SOCIETY

This Part challenges these two aspects of Cohen's argument by presenting a synchronic critique of the separation of church and state in postwar America. Cohen adroitly used the distance of history to facilitate her critique of the separation of church and state in America before World War II, but then she too easily accepted the dominant story of church and state in the more recent postwar era. Thus, I seek to analyze critically how the constitutional principle of separation of church and state contributes to the current orientation of power within American society. My postmodern approach to the question of power in society facilitates a challenge to Cohen's final conclusions, and it also stands somewhat opposed to Smith's argument. As already discussed, Smith argues that any theory of religious freedom necessarily fails because all such theories must be based on background beliefs or tacit assumptions. Smith, however, does not acknowledge that this type of argument is standard postmodernist fare: The notion that all theory—in fact, all communication and understand-

77. See, e.g., Cohen, supra note 9, at 123-30 (describing the activities of the American Jewish Committee, Anti-Defamation League, and American Jewish Congress and their links with Christian liberals).
78. Id. at 244. Similarly, Cohen adds: "By [the mid-1960s]... Christianity had lost its place as the public religion of the nation and most of the major issues that had troubled American Jews since the nineteenth century had been resolved." Id. at vii.
79. See Cohen, supra note 9, at 131-239 (discussing cases involving church-state issues that reached the Supreme Court between 1948 and 1963).
80. See supra notes 23-27 and accompanying text.
ing—arises from one's current horizon of cultural prejudices and interests would hardly surprise anyone familiar with postmodernism. Smith, though, insists that he does not wish to become embroiled in larger jurisprudential controversies regarding theory; he merely wants to critique the jurisprudence of the religion clauses. Smith's hesitancy here is understandable: the status of theory in postmodernism represents a veritable (postmodern) bramble bush.

Yet, at the same time, Smith's decision to bracket (or ignore) the larger jurisprudential issues regarding postmodernism and theory skews the conclusion of his theoretical argument. On the one hand, if Smith correctly concludes that there is no solid basis for a principle of religious liberty, but nonetheless there are many other valid constitutional principles, then he would be apt to reach (and, in fact, does reach) the conclusion that courts should no longer attempt to enforce a principle of religious liberty. On the other hand, there is no solid basis for a principle of religious liberty (as Smith concludes) and also there are no other valid constitutional principles (because postmodern insights undermine the traditional conception of constitutional principles), then one might reach a very different conclusion. For example, one might conclude that the concept of constitutional principles needs to be completely rethought or, perhaps, that a coherent abstract constitutional principle is unnecessary to the practical or pragmatic enforcement of general norms. Smith, however, precludes considering these alternatives because he assumes that the thrust of his argument can be limited readily to a critique of the principle of religious liberty.

In a sense, Smith wants to take a postmodern insight—that theory always is based on background beliefs or tacit assumptions—and relegate it to the lawyer's toolbox, as if it were merely another modernist tool helpful in constructing legal arguments. But postmodern insights are not new modernist instruments that can be taken out occasionally and then put safely away. Smith's attempt to do so facilitates his politically conservative, albeit qualified, suggestion that the Court should refuse to attempt to enforce a principle of religious freedom. But by bracketing the more general postmodern critique of theory, Smith sidesteps the potentially radical postmodern political implications for constitutional jurisprudence. Smith's argument, then, is not necessarily wrong; it just does not go far enough to explore the full potential of its critical perspective. Hence, this Part examines the constitutional principle of separation of church and

81. See Feldman, The Persistence of Power, supra note 16, at 2258-66 (emphasizing that the enabling and distortive effects of power are always present).
82. Smith, supra note 8, at 60-61.
83. See generally Karl Llewellyn, The Bramble Bush (1930) (comparing the study of law to getting caught in a bramble bush).
84. See Stephen M. Feldman, Exposing Sunstein's Naked Preferences, 1989 Duke L.J. 1395, 1347-48 (explaining that Cass Sunstein used a postmodern insight as if it were a tool in the lawyer's toolbox).
state from a more thoroughly postmodern perspective.

A. Symbolic Power

Symbolism should be understood as a technique for or a means of implementing power and, simultaneously, as a consequence or effect of power. The most pervasive type of symbolism is language. In one way, language represents a technique of power because words directly and indirectly implement power. Some words, such as those constituting a promise or a threat, amount to performative acts, while other words trigger certain feelings, actions, or both in the interpreter who hears or reads the words. For example, particular words can trigger specific coercive and violent social actions or practices: The legal discourse denying a petition for habeas corpus can lead to a capital defendant's execution. Yet, in a second way, language looms as an even more direct means of implementing power. As Michel Foucault says: "Discourse transmits and produces power." Our "distinct ways of talking about and interpreting events" constitute the shape of our very being-in-the-world. The conceptual

85. See Bourdieu, supra note 15, at 38, 77, 166, 170 (stating that language is a means of communication and a medium of power). Foucault writes that "in any society, there are manifold relations of power which permeate, characterise and constitute the social body, and these relations of power cannot themselves be established, consolidated nor implemented without the production, accumulation, circulation and functioning of a discourse." Foucault, Two Lectures, supra note 15, at 93.

86. Another type of symbolic power is art. Bourdieu, supra note 15, at 164.

87. In Austinian terms, utterances (or speech acts) are performatives because they have illocutionary and perlocutionary force. Illocutionary force arises from an act done in uttering—for example, a promise or a threat. Perlocutionary force arises when an utterance has an effect on others—for example, embarrassment or fright. J.L. Austin, Performatives, in The Philosophy of Language 13 (John Searle ed., 1971); John Searle, Introduction, in The Philosophy of Language, supra, at 1.

88. Foucault, History of Sexuality, supra note 15, at 101. Foucault adds: "Discourse reinforces power, but also undermines and exposes it, renders it fragile and makes it possible to thwart it." Id. Richard Bernstein writes: "[Foucault] is always showing us how discursive practices exclude, marginalize, and limit us." Richard J. Bernstein, Foucault: Critique as a Philosophic Ethos, in The New Constellation 142, 160 (1991). Critical race theorists also emphasize the significant power of speech. For example, Charles Lawrence writes: "[R]acist speech constructs the social reality that constrains the liberty of non-whites because of their race." Charles R. Lawrence, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431, 444; cf. Patricia J. Williams, The Alchemy of Race and Rights 61 (1991) (stating that the legacy of slavery and Jim Crow exists in the "powerful and invisibly reinforcing structures of thought, language, and law").

89. Merry, supra note 15, at 217-18.

90. To be clear, I do not mean to suggest that all words or forms of language are equally constraining or coercive. Without suggesting that words have force totally apart from the context of their use, we can still recognize that different linguistic practices may be more coercive and violent than others. For example, hate speech is usually more violent and harmful than saying, "Hello." See Richard Delgado, Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling, 17 Harv. C.R.-C.L. L. Rev. 133, 157 (1982) (arguing for an independent tort to provide relief for victims of racial insults); Mari Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320, 2376
distinctions and criteria of legitimation embedded in our discursive practices shape our understandings and perceptions of social events and reality. Hence, in this second way, language appears as a technique of power because it helps to produce and reproduce meaning and, thus, social reality.

The philosophical hermeneutics of Hans-Georg Gadamer elucidates this power of language. Gadamer explains that our prejudices and interests, derived from communal traditions (including the culture and history of our community), simultaneously enable and constrain understanding and interpretation. Prejudices and interests open us to

---

(1989) (arguing that the viewpoint of the intended victim of racial slurs should be taken into consideration when formulating a response to hate speech). But cf. R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (holding unconstitutional an ordinance punishing hate speech). Moreover, different linguistic practices are associated with different social practices, some of which are more coercive and violent than others. For example, the Supreme Court's linguistic practices sometimes are associated with social practices—such as capital punishment—that are of the more violent variety.

91. Linda Nicholson writes: "[C]onceptual distinctions, criteria of legitimation, cognitive procedural rules, and so forth are all political and therefore represent moves of power [though] they represent a different type of power than is exhibited in, for example, physical violence or the threat of force." Linda J. Nicholson, Introduction, in Feminism/Postmodernism, supra note 23, at 1, 11.

Thomas Wartenberg writes:

Power, in the form of discursive influence, can take place at the most basic level of the constitution of a human being's understanding of the world, it need not be limited to the restructuring of options already given to an agent. Such domination works by first making social agents aware of the options that they face as having a certain character. It is a use of power, since it affects an agent's understanding of his action-environment; but it is not interventional, because it does not so much restructure an agent's action-environment as constitute his awareness of it in the first place.

Wartenberg, supra note 15, at 135.


94. With regard to how prejudices enable understanding, Gadamer writes: "[T]he historicity of our existence entails that prejudices, in the literal sense of the word, constitute the initial directedness of our whole ability to experience. Prejudices are biases of our openness to the world." Hans-Georg Gadamer, The Universality of the Hermeneutical Problem, in Josef Bleicher, Contemporary Hermeneutics 133 (1980) [hereinafter Gadamer, The Universality]. Stanley Fish writes similarly that "already-in-place interpretive constructs are
the possibility of understanding; without prejudices and interests, understanding and communication are impossible. At the same time, our prejudices and interests necessarily constrain and direct our understanding and communication. One's life within a community and its cultural traditions always limits or "distorts" one's range of vision—what one can possibly perceive or understand. In short, we can never step outside the horizon of our prejudices and interests to find some firmer foundation for understanding. Moreover, according to Gadamer, language is the "medium" of tradition and understanding: "Language is the fundamental mode of operation of our being-in-the-world and the all embracing form of the constitution of the world." Hence, from a Gadamerian perspective, language (as tradition) appears as a technique of power insofar as it enables and constrains (or produces and limits) understanding and meaning (and hence social reality).

Simultaneously, though, language appears as a consequence or effect of power. According to Gadamer, we are historical beings who live in tradition, just as we live in a community. Tradition is not a thing of the past; it is something in which we constantly participate. We continuously constitute and reconstitute our tradition and hence our language as we engage in dialogical understanding. The use of a language is recursive; language reproduces itself. In sum, language can be understood as a condition of consciousness." Stanley Fish, Dennis Martinez and the Uses of Theory, 96 Yale L.J. 1773, 1795 (1987).

95. See Stanley Fish, Critical Self-Consciousness, Or Can We Know What We're Doing?, in Doing What Comes Naturally 436, 450-55 (1989) (arguing that by becoming antifoundational, one does not escape the implications of antifoundationalism). Gadamer writes:

This formulation certainly does not mean that we are enclosed within a wall of prejudices and only let through the narrow portals those things that can produce a pass saying, "Nothing new will be said here." Instead we welcome just that guest who promises something new to our curiosity. But how do we know the guest whom we admit is one who has something new to say to us? Is not our expectation and our readiness to hear the new also necessarily determined by the old that has already taken possession of us?

Gadamer, The Universality, supra note 92, at 133.

96. Gadamer uses the metaphor of the "horizon" to communicate the notion that one's possibilities for understanding are limited. The horizon is "the range of vision that includes everything that can be seen from a particular vantage point." Gadamer, supra note 91, at 302.

97. Id. at 384.


99. Gadamer writes: "Tradition is not simply a permanent precondition; rather, we produce it ourselves inasmuch as we understand, participate in the evolution of tradition, and hence further determine it ourselves." Gadamer, supra note 93, at 293. Steven L. Winter writes: "Every actual self begins as part of a community that it does not choose and cannot escape . . . ." Steven L. Winter, Contingency and Community in Normative Practice, 139 U. Pa. L. Rev. 963, 987 (1991).


both a technique and an effect of power because as language helps (re)produce meaning and social reality, language itself is part of the (re)produced social reality.\textsuperscript{102}

Within any large society, different cultures or subcultures have their own distinctive (though often overlapping) languages. Different (sub)cultures therefore offer contrasting discursive interpretations of social events and reality (or, in effect, different social realities). There is, in short, a struggle between discourses.\textsuperscript{103} Cultural imperialism arises when one discourse or culture manages to dominate another. And when one culture emerges to thoroughly dominate the competing (sub)cultures, then that dominant culture exercises hegemonic power. The dominant culture so completely controls the understanding of social events and reality that its understanding becomes the normal, the neutral, and the natural.\textsuperscript{104} As Dick Hebdige declares, the dominant culture tends "to masquerade as nature."\textsuperscript{105} The contingent assumptions and interpretations of the dominant culture become tacit, invisible, or appear as mere common sense; they become so neatly woven into the social fabric that they no longer are understood as cultural or as manifestations of power.\textsuperscript{106} In
short, power hides behind its own productions.  

As discussed, we constantly constitute and reconstitute our traditions. Cultural traditions, therefore, are neither static nor permanent. Gadamer writes: "Even the most genuine and pure tradition does not persist because of the inertia of what once existed. It needs to be affirmed, embraced, cultivated." Like any cultural tradition a dominant and imperialistic culture must constantly be reproduced and sustained.

For that reason, subcultural discourses or interpretations of reality represent "oppositional readings," deviant threats to the complex web of meanings enforced by the dominant culture. For the dominant culture to maintain its position, it must neutralize or subdue any such threats. One common technique for subduing a subcultural discourse is the redefinition of the subculture—the redefinition of the "Other." This redefinition can occur in at least two different ways.

First, the differences between the dominant culture and subculture can be denied. That is, the difference of the Other is denied; the Other becomes the Same.

The distinct elements of the subculture are ignored or obscured as the dominant culture imperialistically absorbs the subordinate group. Second, the dominant culture can actively exclude and objectify physical reality (or "truth") of the human subject.


107. Dick Hebdige writes: "The struggle between different discourses, different definitions and meanings within ideology is therefore always, at the same time, a struggle within signification: a struggle for possession of the sign which extends to even the most mundane areas of everyday life." Hebdige, supra note 15, at 17.

108. See supra text accompanying notes 97-99 (discussing how we continuously constitute and reconstitute our tradition and language).


110. See Hebdige, supra note 15, at 16 (arguing that even hegemonic cultures must be sustained).

111. Id. at 102.

112. Id. at 17.


114. See Hebdige, supra note 15, at 94-99. Another technique for subduing the subcultural discourse is to co-opt the subcultural signs by converting them into marketable and mass-produced commodities. Id.


116. In his discussion of Levinas, Richard Bernstein suggests that "the primary thrust of Western tradition has always been to reduce, absorb, or appropriate what is taken to be 'the Other' to 'the Same.'" Richard J. Bernstein, Incommensurability and Otherness Revisited, in The New Constellation, supra note 88, at 57, 68.
the members of the subcultural group.\textsuperscript{117} With this latter form of redefinition, the dominant group may acknowledge the differences of the subculture, but those differences now establish the inferiority of the subcultural group.\textsuperscript{118} In short, the dominant culture defines difference from itself as inferiority. In many instances, the dominant culture consigns the members of the subcultural group to a position beyond common decency, sometimes outside of humanity itself. From the perspective of members of the dominant culture, such objectification can seem to justify the most heinous emotional and physical abuses of the subcultural members. Most important, with either form of redefinition—denial of difference, or exclusion and objectification—the dominant culture attempts to define the subculture itself. The struggle between the dominant and subcultural discourses encompasses the very being and social identity of the subcultural group and its members.

This viewpoint reveals partly how Christian cultural domination has historically produced antisemitism. For most of the last two millennia, Christians have maintained a position of hegemonic domination in Western society in part by implementing both forms of redefinition to subdue the threat of a Jewish subculture.\textsuperscript{119} To some extent, the difference between Christianity and Judaism lies in the meaning attributed to the life and death of Jesus.\textsuperscript{120} To Christians, but not to Jews, Jesus was the Messiah and the Son of God. Consequently, the New Testament,\textsuperscript{121} as Christian discourse, seeks to subdue the threat of the Jewish counterdiscourse—the Jewish refusal to accept the Christian meaning of Jesus. For example, the New Testament denies the Jewish difference by appropriating Jewish history and the Hebrew Bible (literally renamed as the Old Testament) to support the Christian interpretation of reality (the coming of Jesus as the Messiah). After Jesus’ death, his followers or disciples searched the Hebrew Bible for historical passages which they could

\begin{itemize}
  \item \textsuperscript{117} Boyne, supra note 115, at 124; Hebdige, supra note 15, at 94-99.
  \item \textsuperscript{118} See Drucilla Cornell, Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law 136 (1991) (criticizing the notion that the feminine identity has an inherent normative perspective). Social psychologists suggest that, in a workplace, if an individual belongs to a group that constitutes less than 15-20% of the workforce, then the individual becomes highly visible and likely to be viewed and evaluated according to stereotypes. See Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1502-03 (M.D. Fla. 1991) (explaining how minority groups in the workplace are evaluated using stereotypes); Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117-18 (D.D.C. 1985), aff'd in relevant part, 825 F.2d 458, 467 (D.C. Cir. 1987), rev'd on other grounds, 490 U.S. 228 (1989) (recognizing the value of testimony regarding sexual stereotypes in the workplace).
  \item \textsuperscript{119} Religious discourse is one of the most significant means for producing meaning and social reality. Its significance is magnified, moreover, because it denies the meaning-producing role of humans in society. Peter L. Berger, The Sacred Canopy 100-01 (1967).
  \item \textsuperscript{120} This definition of difference is itself oriented toward Christianity. That is, from a Jewish perspective unconnected with Christianity, no special meaning is attributed to the life and death of Jesus because he is of no importance in Judaism. Jesus becomes important to Jews only because they live in a pervasively Christian world.
  \item \textsuperscript{121} All citations to the New Testament will be from the King James version.
\end{itemize}
interpret to show that Jesus' life and death as the Messiah had been prophesied. The disciples sought to deny or negate the Jewish understanding of Judaic history in their effort to bolster the Christian interpretation of history as leading to Jesus as the Messiah. The New Testament, in short, attempts to (re)define Judaism itself to serve Christian purposes. Furthermore, the New Testament objectifies Jews and attempts to establish their inferiority. According to Christian discourse, Jews refused to accept Jesus because they were from the Devil. The New Testament narrative therefore expressly designates the Jews as deserving a fate of endless persecution and suffering—until they finally realize their blindness and come to believe that Jesus was Christ.

The initial redefinition of Jews in the New Testament has generated

122. Christians therefore read the Old Testament differently from how Jews read the Hebrew Bible. In each religion, the text (of the Hebrew Bible or Old Testament) is understood within the context of a larger canon (and each religion has a different larger canon). See Neusner, supra note 25, at ix-x (discussing these relationships); Ruether, supra note 25, at 117-82 (discussing the negation of the Jews); Gregory Baum, Introduction, in Ruether, supra note 25, at 1, 11-12. In fact, the New Testament at times seems to blatantly misread the Hebrew Bible. See Ruether, supra note 25, at 86, 109 (describing the inconsistencies between the New Testament and the Hebrew Bible).

123. Parkes, Judaism, supra note 25, at 107-08; Ruether, supra note 25, at 89-95; Wistrich, supra note 25, at 13-14.

124. The New Testament maintains that Jews had misunderstood their own laws and covenant with God. "Search the scriptures; for in them ye think ye have eternal life: and they are they which testify of me. And ye will not come to me, that ye might have life." John 5:39-40; see Matthew 22:34-46 (Jesus argues that Pharisees misunderstood the Hebrew Scriptures); Galatians 2:21 (attacking Jewish law). Moreover, the New Testament insists that the Jewish covenant with God had always been defective. In short, the Jews never had known God: "And the Father himself, which hath sent me, hath borne witness of me. Ye have neither heard his voice at any time, nor seen his shape. And ye have not his word abiding in you: for whom he hath sent, him ye believe not." John 5:37-38; accord Matthew 22:29, 34-46 (stating that Pharisees did not understand God); Galatians 2:21 (attacking Jewish law); Acts 28:26-28 (stating that Jews never understood God); Hebrews 8:6-13 (stating that the Jewish covenant was defective); see Ruether, supra note 25, at 70-73 (arguing that Jesus' Disciples searched the Hebrew Bible to show that it meant that Jesus was the messiah).

125. The New Testament states:

Jesus said unto them, If God were your Father, ye would love me: for I proceeded forth and came from God; neither came I of myself, but he sent me. Why do ye not understand my speech? even because ye cannot hear my word. Ye are of your father the devil, and the lusts of your father ye will do. He was a murderer from the beginning, and abode not in the truth, because there is no truth in him. When he speaketh a lie, he speaketh of his own: for he is a liar, and the father of it. And because I tell you the truth, ye believe me not.

John 8:42-45.

126. The New Testament states: O Jerusalem, Jerusalem, thou that killest the prophets, and stonest them which are sent unto thee, how often would I have gathered thy children together, even as a hen gathereth her chickens under her wings, and ye would not! Behold, your house is left unto you desolate. For I say unto you, Ye shall not see me henceforth, till ye shall say, Blessed is he that cometh in the name of the Lord.

and appeared to justify many subsequent imperialistic acts by Christians. For hundreds of years during the Middle Ages, Jews were persecuted, subjugated, and sometimes even banished from Christian society. They were forced to wear badges or other signs of identification, isolated in ghettos, and exiled from entire countries. In twentieth-century Europe, the persistent objectification of Jews facilitated the Holocaust. Average Germans more readily performed their jobs within the bureaucratic state because they felt spiritually and emotionally distant from Jews, and, eventually, this distance was solidified by the physical isolation of Jews in ghettos and concentration camps. In sum, for nearly two thousand years of Western history, Christian hegemonic power has been remarkably complete. Indeed, the Christian discourse of redefinition has created a "conceptual Jew" that is so unconnected to reality that it can be blamed for just about anything, including capitalism, communism, the Bubonic Plague, the deaths of Christian children, and even the Holocaust.


128. Metaphorically speaking, Jews were transformed into weeds to be removed rationally and efficiently from the Christian garden. Bauman, supra note 25, at 65, 70, 73, 91-92, 113-14.

129. Id. at 39-41; cf. Jaher, supra note 28, at 59 (exploring how Jews were no longer seen as real people, but became semblances of Christian doubts and anxieties). Jonathan A. Bush describes how Jews were used as prototypical outsiders to help construct legal hypotheticals in the early common law. Since Jews were barely present in England at the time, the dominant Christian legal discourse freely defined Jews. Jonathan A. Bush, "You're Gonna Miss Me When I'm Gone": Early Modern Common Law Discourse and the Case of the Jews, 1993 Wis. L. Rev. 1225.

130. Johnson, supra note 26, at 207; Wistrich, supra note 25, at 26-32, 96, 164-65; see, e.g., Karl Marx, On the Jewish Question (1843), in The Marx-Engels Reader 26, 49 (Robert C. Tucker ed., 2d ed. 1978) (blaming Jews for causing Christians to become capitalists). Wistrich writes: "Austrian 'antisemitism without Jews' (they constitute only 0.1 per cent of the total population) seemed to be illustrating the truth of Henryk Broder's remark about the Germans: that they will never forgive the Jews for Auschwitz!" Wistrich, supra note 25, at 96. Nazi Germany continued to oppress Jews when only the conceptual Jew remained: "Even
In America today, the more common form of antisemitic redefinition is denial of difference. Many Christians seem to consider Judaism to be merely a quirky Protestant sect: Chanukah, for example, becomes the Jewish Christmas when Jews erect Chanukah bushes. Christian hegemony and the concomitant denial of difference are so complete in America that the most egregious examples of cultural imperialism fade to invisibility. Jews must accept the public display of a crèche as representative of secular American traditions. Jews must participate in annual Christmas parties, plays, carol singing, and other Christian traditions. Any Jew who objects is (take your pick) pushy, odd, a kill-joy, or ridiculous. Jews, after all, are (supposedly) no different from other (Christian) Americans, and therefore, they should participate in the "neutral" and "secular" social activities of the school, business, and community.\(^1\) In short, even the most blatant, ostentatious, and public celebratory symbols of Christianity are considered neither extraordinary nor offensive; to the contrary, they usually are accepted, condoned, and sometimes even governmentally financed.\(^2\) From this perspective, many if not most Christian individuals do not intentionally oppress or discriminate against Jews. Rather, Christian Americans (as well as members of American religious outgroups, such as Jews) are born and mature within a pervasively Christian society that acculturates them to (immediately and unconsciously) understand Christian views, symbols, and activities as neutral, normal, and natural.\(^3\)

when deportations and mass murder were already under way, decrees appeared in 1942 prohibiting German Jews from having pets, getting their hair cut by Aryan barbers, or receiving the Reich sport badge." Bauman, supra note 25, at 17 (quoting Christopher R. Browning, The German Bureaucracy and the Holocaust, in Genocide: Critical Issues of the Holocaust 147 (Alex Grobman & Daniel Landes eds., 1983)).


132. John M. Hartenstein writes:

Children searching for the meaning of Christmas will have no trouble discovering a religious message that has been carried worldwide for nearly two thousand years. The ritual is emblazoned on stamps and repeated in television and radio advertisements, "news" stories, broadcasts of midnight mass, and the lyrics of ubiquitous Christmas hymns; it is on storefronts, private lawns, churchyards—even in public parks and on the courthouse steps.


133. The theologian, James Parkes, writes:

[D]ay by day, week by week, year by year, century by century, the New Testament is read "as the word of God" without omission or comment. Is not this the reason why Jews are treated differently from others, why protest is not made which would be made for any other people? It has sunk into the sub-conscious—or unconscious—of Christians that "after all, Jews ought to have become Christians, and, if they don’t see it, they can fairly be expected to take the consequences." Their conduct two thousand years ago is constantly brought before us: they are never shown as a
The legal discourse of the religion clauses contributes to this cultural imperialism by construing or labeling oppressive Christian displays and revelries either as secular or as protected private sphere activities. Understood at its most basic level, the principle of separation of church and state supposedly prohibits the conjunction of government and religion. Hence, the religion clauses theoretically protect and legitimate any activity or symbol that somehow is divorced from either government or religion or both. When, for example, a particular activity is defined or coded as private—separate from government—then the constitutional constraints imposed upon state actors are rendered irrelevant. The Court found this public versus private dichotomy to be crucial in Capitol Square Review and Advisory Board v. Pinette. The Court held that the display of a large Latin (Christian) cross on public property did not violate the Establishment Clause. The public property, a "state-owned plaza surrounding the Statehouse in Columbus, Ohio," qualified as a traditional public forum because "[f]or over a century the square [had] been used for public speeches, gatherings, and festivals." The plurality opinion emphasized that a private actor, the Ku Klux Klan, and not the government had erected the cross: "[P]rivate religious expression receives preferential treatment under the Free Exercise Clause. It is no answer to say that the Establishment Clause tempers religious speech. By its terms that Clause applies only to the words and acts of government. It [does not impede] purely private religious speech . . . ." Thus, even when the government must grant a permit to a speaker, as in Pinette, the constraints of the Establishment Clause do not apply; private actors are free to disseminate their Christian messages on publicly owned property. In fact, quite predictably, after the district court issued an injunction permitting

normal, contemporary people with a normal contemporary religion.


Hartenstein writes similarly:

Whether or not children are formally instructed in religion, modern school holiday observances are likely to socialize on the informal level. For example, a teacher probably would not give a formal lesson on why children should decorate Christmas trees or instruct children on the feelings and expectations they should develop at Christmastime, but might have children make Christmas decorations or read a Christmas story.


134. Mark Tushnet observes that "where the Justices feel pressure to validate a religious activity, they are likely to respond by treating it as essentially nonreligious." Tushnet, supra note 4, at 399.


136. Id. at 2444.

137. Id.

138. Id. at 2449 (emphasis added); accord id. at 2447-49.
the Klan to erect its cross, the state "then received, and granted, several additional applications to erect crosses on [the public plaza]." 139

Employment Division, Oregon Department of Human Resources v. Smith, 140 when viewed in conjunction with Pinette, elucidates the intimate link between the public/private dichotomy and Christian societal domination. The religious rituals of the Native American Church include the supervised consumption of peyote, but Oregon criminal law prohibited the use of peyote without exception. The Smith Court held that the state law did not violate the Free Exercise Clause: "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" 141 In so holding, the Court expressly modified free exercise doctrine. State laws, in most instances, will no longer be subject to the (supposedly) strict judicial scrutiny of the compelling state interest test. 142 Instead, the protection of free exercise values should be left to the "political process." 143 Even the Court acknowledged that this constitutional doctrine might harm religious outgroups: "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that [is an] unavoidable consequence of democratic government . . . ." 144 Thus, while the Pinette Court emphasized that the Free Exercise Clause extends preferential treatment to private religious expression, the Smith Court declared that the Free Exercise Clause allows the majority, through legislation, to restrict the religious practices of minorities. If these two cases are read together in the context of American society, they suggest that the Free Exercise Clause extends preferential treatment to the majority's (Christian) religious expression and beliefs. Because the overwhelming majority of Americans are Christian, most private religious expression will be Christian (and protected by Pinette), and most legislative actions will reflect Christian beliefs and practices (and be protected by Smith). 145

139. Id. at 2445.
141. Id. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). The Smith Court reasoned that the Free Exercise Clause extends greater protection to religious beliefs than to religious conduct. Smith, 494 U.S. at 877-79. This preference for belief (or faith) over conduct corresponds with a distinctly Protestant Christian world view. Mard 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, 716-17 (1993).
142. Smith, 494 U.S. at 883-86. Rather bizarrely, the Smith Court limited the applicability of the compelling state interest test to cases involving the denial of unemployment compensation. Id. at 883; see, e.g., Sherbert v. Verner, 374 U.S. 398 (1963) (finding it unconstitutional to disqualify an employee who refused to work on Saturday for religious reasons from receiving unemployment benefits).
143. Smith, 494 U.S. at 890.
144. Id.
145. In O'Connor's Pinette concurrence, she at least recognized the possibility of majority domination and stated, "At some point, for example, a private religious group may so
In a similar vein, when a particular activity is defined or coded as secular, the activity supposedly has been "removed from the domination of religious institutions" and is therefore legitimated by the principle of separation of church and state. Despite the possibility that a Jew or a member of another religious outgroup might experience or perceive that very activity as decidedly Christian, the declaration of secularity by the Supreme Court or some other empowered governmental actor or institution, such as a School Board, justifies the activity within the dominant discourse. And quite often, constitutional rhetoric imperially ignores religious outgroups and the oppressive consequences of Christian activities and symbols for members of such outgroups; in other words, there is a denial of experiences and perceptions that differ from the Christian viewpoint. In this manner, constitutional rhetoric effectively neutralizes or normalizes many common forms of Christian societal domination by declaring or coding them to be secular.

For example, in McGowan v. Maryland and Braunfeld v. Brown, the Supreme Court upheld the constitutionality of Sunday closing laws in the face of Establishment and Free Exercise Clause challenges. The Court claimed to identify the general sentiments of the American people by effacing the differences between Christian Americans and other Americans (the plaintiffs in Braunfeld, for instance, were Orthodox Jews).

"It is common knowledge that the first day of the week has come to have special significance as a rest day in this country. People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like. "Vast masses of our people, in fact, literally millions, go out into the countryside on fine Sunday afternoons in the Summer...." Sunday is a day apart from all others. The cause is irrelevant; the fact exists. It would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a State to dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval." Pinette, 115 S. Ct. at 2454 (O'Connor, J., concurring).

The Christian majority might express its toleration for outgroup religions by occasionally extending protection to the outgroup's religious practices. See, e.g., Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994) (restoring the compelling state interest test for laws of general applicability that infringe free exercise rights). As will become evident by the end of this Article, when these acts of toleration occur, they usually benefit the majority (sometimes more so than the minority) and almost never harm the majority.

choose a common day of rest other than that which most persons would select of their own accord. The Court, trivializing the long history surrounding Sunday Blue Laws, concluded that the governmental choice of Sunday for a day of mandated rest was "of a secular rather than of a religious character." Consequently, the Orthodox Jewish plaintiffs in _Braunfeld_ effectively were forced to observe the Christian day of rest, Sunday, even though their own sabbath was Saturday.

Based on similar though perhaps more outrageous reasoning, _Lynch v. Donnelly_ held that the public display of a crèche does not violate the Establishment Clause. The Court wrote:

> When viewed in the proper context of the Christmas Holiday season, it is apparent that... there is insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message. In a pluralistic society a variety of motives and purposes are implicated. The City... has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.... The narrow question is whether there is a secular purpose for Pawtucket's display of the crèche. The display is sponsored by the City to celebrate the Holiday and to depict the

---

150. _McGowan_, 366 U.S. at 451-52 (citations omitted) (emphasis added).
151. See id. at 431-35 (noting the increased significance of secular reasons for establishing Sunday as a day of rest).
152. Id. at 444. In _Braunfeld_, the plurality stated:

> [The statute does not force] the choice [on] the individual of either abandoning his religious principle or facing criminal prosecution... because the statute... does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive.

_Braunfeld_, 366 U.S. at 605 (emphasis added). The plurality appeared to be reasoning that keeping one's business open or closed is merely a secular activity. While that assertion may be correct, it is certainly not true that keeping one's business open or closed on Sunday is secular. Rather, the choice of Sunday obviously reflects the religious preferences of the dominant Christian majority. Id. at 614 (Brennan, J., dissenting).

153. As Mark Tushnet observes: "[T]he pattern of the Court's results in mandatory accommodation cases is troubling because, put bluntly, the pattern is that sometimes Christians win but non-Christians never do." Tushnet, supra note 4, at 381.
154. 465 U.S. 668 (1984). The crèche was displayed in conjunction with several other objects, most of which were Christmas decorations. The Court described the display as follows:

> The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the crèche at issue here. All components of this display are owned by the City.

Id. at 671.
RELIGION CLAUSES

origins of that Holiday. These are legitimate secular purposes. This passage illustrates how the Court used legal discourse to neutralize the Christian message of a crèche for purposes of constitutional adjudication. In the Court's terms, Christmas—the Christian holiday celebrating the birth of Jesus Christ—somehow becomes secular. The Court coded (or labeled) Christmas as a traditional and historical event, and the very birth of Jesus himself became merely the historical origin of that event. Hence, members of religious outgroups are symbolically absorbed into the Christian mainstream so that they too must enjoy and celebrate "the Holiday.

Regardless of how a dominant culture attempts to redefine a subculture and its members—either through denial of difference, or exclusion and objectification, or both—one symptom (and cause) of redefinition is the silence (and even invisibility) of the Other. Members of the subcultural group go unheard (and sometimes unseen) by members of the dominant cultural and other subcultural groups. Indeed, in the face of cultural imperialism, outgroup members sometimes figuratively and sometimes literally stop speaking, so that there is nothing to be heard. In Lynch, for example, the Court supported its conclusion by noting that, prior to that lawsuit, nobody had complained about the crèche even though it had been publicly displayed for forty years. To the Court, this silence meant that the crèche had not generated dissension—apparently, everybody happily supported the Christmas display. The Court overlooked the possibility, however, that Christian cultural imperialism had produced the silence of religious outgroup members. Silence often demonstrates domination, not consensus.

B. Structural Power

Although language is both a technique and an effect of power that contributes to cultural imperialism, language simultaneously floats or plays at a distance from power. For instance, when the Supreme Court denies the habeas petition of a capital defendant, the consequences that follow are unrelated to the niceties of legal reasoning in the Court's opinion. The reality of an execution does not turn on whether the legal doctrine or discourse mandated a particular conclusion. To the contrary, the justices on the Supreme Court exercise power over habeas petitioners not

155. Id. at 680-81 (emphasis added).
156. In another case, the Court reasoned that a military rule that prevents an Orthodox Jew from wearing a yarmulke (skull cap) is neutral and evenhanded. Goldman v. Weinberger, 475 U.S. 503, 510 (1986).
158. Cf. Scott, supra note 15, at 3 (stating that the greater the domination of a subordinate group, the more likely the subordinated will say, if anything, what the dominant wants to hear).
159. Lynch, 465 U.S. at 684-85; accord id. at 693 (O'Connor, J., concurring).
necessarily because of legal acumen or judicial expertise, but exactly because they are Supreme Court justices. Each justice operates from a position or role of extraordinary power within the social institution of the criminal justice system. From this perspective, we see that power frequently is structural. That is, power "exists in relationships—it has a primary location in the ongoing, habitual ways in which human beings relate to one another." Individuals often exercise power not because of their personal qualities, abilities, or knowledge, but because they occupy certain relatively embedded though contingent social roles that endure within complex social practices and institutions. To be clear, social roles do not exist in some pure or idealistic sense; they are neither self-defining nor defined solely through language (though discourse contributes to the construction of social roles). Rather, social roles are defined in part by the relations between various institutional positions, by the organizational scheme of the society.

160. See Feldman, Diagnosing Power, supra note 16, at 1071-72 (focusing on structural power in the context of habeas petitions); cf. Douglas Hay, Property, Authority and the Criminal Law, in Albion's Fatal Tree 17, 44-45 (Douglas Hay et al. eds., 1975) (noting that in eighteenth century England, the rule of law did not determine which criminal defendants were executed; more broadly, the rule of law did not control the exercise of power).

161. Margaret A. Coulson and Carol Riddell write:

[A] watch is not just the sum of its parts, but the sum of its parts plus the way they are put together, related to each other, organized. In the same way, society is more than the sum of the people in it. It is not only the people, but also the way they are related to each other, organized—the social structure. If this is correct, what goes on in society can't be explained solely in terms of individuals, but only by understanding the way they are related to each other.

Margaret A. Coulson & Carol Riddell, Approaching Sociology: A Critical Introduction 44-45 (1970); cf. Peter L. Berger, Invitation to Sociology: A Humanistic Perspective 86-98 (1963) (emphasizing how social institutions pattern human conduct as if individuals were playing various roles as in a play); Kennedy, supra note 15, at 158 (stating that sign systems and social structures shape the world).

162. Wartenberg, supra note 15, at 165 (emphasis omitted).

163. Cf. Anthony Giddens, Central Problems in Social Theory 12-18 (1979) (emphasizing that a social role should be understood, in part, as the product of the differences or oppositions from other such roles). Wartenberg writes that "power . . . accrues to individuals when they occupy certain social roles." Wartenberg, supra note 15, at 157. He adds that an "expert may be an authority about certain subject matters, [but] this authority is distinguishable from the authority she comes to have as a result of being situated as an empowered agent." Id. at 154; see Barry Barnes, The Nature of Power 61 (1988) ("[T]he powerful agent possesses power in a sense, but the power he possesses resides in the social context and outside its possessor."); Berger, supra note 119, at 86-98 (emphasizing how social institutions pattern human conduct as if individuals were playing various roles).

One should not, however, overestimate the stability of social roles, which are always contingent. See Coulson & Riddell, supra note 161, at 17-18, 39, 46-47 (emphasizing that social roles or "positions" change). Coulson and Riddell write:

[A] person's behaviour in a position depends on an interaction between his own learned expectations and the pressures put upon him by others with possibly different expectations . . . which also depends on the power they have over him, an interaction which will be in constant change as the power relationships change—in
Furthermore, social roles do not merely empower individuals, such as Supreme Court justices, to perform certain actions; rather, social roles also help produce perceptions, attitudes, and actions. In other words, social structures and the resultant social roles at least partly construct or constitute subjects or persons. The very identity and being of an individual is partly constituted by the position or role that he or she holds within the organizational scheme of the society—by the set of social relations that the individual’s position or role holds vis-à-vis other positions and roles. Hence, some feminists emphasize that a nurturing relationship between parent and infant can produce certain pro-social identities. At the same time, however, this perspective underscores that cruelty, hatred, and inhumanity are also at least partly socially produced through the structural organization of society. An otherwise ordinary and moral person can readily perform incredible atrocities against others if placed in the appropriate social role. In one psychology experiment, for example, subjects were divided into two groups, prisoners and guards, with the guards having complete control over the prisoners. Beyond all expectations, the guards enthusiastically fulfilled their authoritarian roles by brutally mistreating the prisoners. As Iris Marion Young writes:

Oppression [including cultural imperialism] in the structural sense is part of the basic fabric of a society, not a function of a few people’s choice or policies. You won’t eliminate this structural oppression by getting rid of the rulers or making some new laws, because oppressions are systematically reproduced in major economic, political, and cultural institutions.

From this perspective, we can understand antisemitism to be at least partly structural. Once again, we see that antisemitism is not merely a

---

other words, a dialectical relationship.

Id. at 41.


166. Craig Haney et al., Interpersonal Dynamics in a Simulated Prison, 1 Int’l J. Criminology & Penology 69, 84 (1973); see Stanley Milgram, Obedience to Authority: An Experimental View (1974) (discussing psychology experiments that suggest that social roles produce inhumanity); see also Bauman, supra note 25, at 152-67 (discussing implications of Milgram and Zimbardo’s experiments).

matter of intentional discrimination against Jews. Rather, individuals (typically, Christians) fulfill their roles within an antisemitically structured society—a society organized in a manner to produce social relations manifesting antisemitism. Moreover, since social structures partly constitute subjects, the antisemitic structures embedded in society partly construct or constitute the Christian subject or individual to be antisemitic. To be clear, I do not mean that every Christian person intentionally discriminates against Jews, but rather that most Christians participate in cultural imperialism by assuming that certain inherently Christian symbols and interpretations of social reality represent the normal, the neutral, and the natural. And most Christians participate in cultural imperialism exactly because they are Christians: Whether or not they actively practice Christianity, they occupy the position of a Christian in a society hegemonically dominated by Christian culture and religion.

I discussed earlier how the legal discourse of the religion clauses contributes to Christian cultural imperialism. Yet, once Christian imperialism and antisemitism are revealed to be also structural, legal discourse appears in an alternative light, as but one factor affecting the strength and pervasiveness of religion in society. Consequently, legal discourse might, in some circumstances, have little effect on the Christian domination of America, what might be called the societal establishment of religion. In a comparative study of religion in nineteenth century America and England, Martin Marty observes:

The program of the disestablished national churches in America was almost identical with that proposed by leaders of the established national church in England. They would serve as educators, providers of a moral foundation, preservers of order, and inculcators of virtue and piety and would provide a network of voluntary associations which became, said critic-from-within Calvin Colton, "so numerous, so great, so active and influential, that, as a whole, they now constitute the great school of public education, in the formation of those practical opinions, religious, social, and political, which lead the public mind and govern the country."  

168. See supra notes 129-31 and accompanying text (describing the acculturation of Christian Americans to understand Christian symbols as neutral).
169. See supra notes 132-57 and accompanying text (explaining how religion clauses are contributing factors to Christian cultural imperialism).
170. Martin E. Marty, Living With Establishment and Disestablishment in Nineteenth-Century Anglo-America, in Readings on Church and State 55, 67 (James E. Wood, Jr., ed., 1989) (quoting Calvin Colton, A Voice from America to England: By an American Gentleman 97 (1839)). In a similar vein, Richard S. Kay notes that, in 1982, Canada adopted the equivalent of a free exercise clause but did not adopt an establishment clause. To Kay, before that time, Canada already had a liberal, tolerant society, and since that time, the Canadian record on religious tolerance appears as good as that of the United States. On the other hand, Kay argues that Canada does not prohibit the type of noncoercive injuries that the American establishment clause prevents. Richard S. Kay, The Canadian Constitution and the Dangers of Establishment, 42 DePaul L. Rev. 361 (1992). Meanwhile, Susan M. Gilles argues
Thus, the existence or non-existence of an officially (or governmentally) established church does not necessarily affect the power of Christianity pulsing through the social body. In some instances, establishment might not alter the degree of Christian cultural imperialism. Historian Frederic Cople Jaher underscores that antisemitism increased in nineteenth century America even as more and more states disestablished their churches. Thus, legal discourse, even Supreme Court constitutional discourse on the religion clauses, does not completely control the manifestation of power in the religious realm. Rather, the power of Christianity is partly structural; it arises from the organization of social relations, from the daily, mundane social interactions of individuals fulfilling certain social roles or positions.

C. The Interaction of Symbolic and Structural Power

Symbolic and structural power can interact to produce ideology: symbolism, usually language, that either justifies, legitimates, explains, masks, or renders uncontroversial particular structured social relations. In the particular context of separation of church and state, the constitutional discourse of the religion clauses masks and legitimates Christian hegemony. The dominant story of church and state maintains that the Church establishment in England has both advantages and disadvantages. She underscores, however, that mainstream religions are favored in government funding and that outgroup religions occasionally encounter free exercise problems. Susan M. Gilles, "Worldly Corruptions" and "Ecclesiastical Depedations": How Bad Is an Established Church?, 42 DePaul L. Rev. 349 (1992).

173. Cf. Berman, supra note 127, at 556 ("Law spreads upward from the bottom and not only downward from the top."); Merry, supra note 15, at 209-10 (asserting that law helps constitute social relations, and simultaneously, law is constituted through social relations).

174. The relation between linguistic and structural power is complex, and the production of ideology is merely part of it. On the one hand, linguistic power helps reconstruct the social relations that generate societal structures both directly (for instance, by coding the existence of certain social roles) and indirectly (for instance, by providing the ideological rhetoric that hides the structural imposition of power). On the other hand, structural power helps reconstruct language because structures help produce both the individual (who uses language appropriate to his or her role) and the entire social system (which provides the environment for nurturing the particular language of that social system). Pierre Bourdieu writes:

[I]t is in the correspondence of structure to structure that the properly ideological function of the dominant discourse is performed. This discourse is a structured and structuring medium tending to impose an apprehension of the established order as natural (orthodoxy) through the disguised (and thus misconceived) imposition of systems of classification and of mental structures that are objectively adjusted to social structures.

Bourdieu, supra note 15, at 160.
175. See generally Alan D. Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn. L. Rev. 1049
that the religion clauses of the Constitution protect minority religions against oppression. Supposedly, the principle of separation of church and state secures religious liberty fully and equally for all, including religious outgroups. Hence, the story continues: To safeguard the all-important principle of separation of church and state, the Supreme Court stands vigil, enforcing the religion clauses by ensuring that the government does not become overly involved in religion. Yet, contrary to the rhetoric of the dominant story, the structure of American society constantly produces and reproduces Christian hegemonic domination, regardless of governmental involvement or noninvolvement in religion. In other words, constitutional discourse furnishes a facade of governmental neutrality and individual religious freedom, but behind that legitimating facade, Christian cultural imperialism pulses through the social body of America.

County of Allegheny v. American Civil Liberties Union\(^\text{176}\) illustrates in an interesting fashion how constitutional discourse can legitimate Christian cultural imperialism. In that case, the Court held that the public display of a crèche violated the Establishment Clause; the Court distinguished Lynch v. Donnelly\(^\text{177}\) by underscoring that the crèche in Lynch was part of a larger display, while the crèche at dispute in Allegheny stood alone.\(^\text{178}\) Although Allegheny initially appears to recognize the strong Christian symbolism of Christmas and Christmas displays, the Court nonetheless noted: “The presence of Santas or other Christmas decorations elsewhere in the county courthouse . . . fail[s] to negate the endorsement effect of the crèche. The record demonstrates clearly that the crèche, with its floral frame, was its own display distinct from any other decorations or exhibitions in the building.”\(^\text{179}\) Hence, the Court held that a crèche standing alone is religious, but in so doing, the Court legitimated as secular the display of many other Christmas, and hence Christian, symbols such as a Santa Claus and a Christmas tree.\(^\text{180}\) In fact, the Court bizarrely suggested that a crèche would be rendered secular if it were displayed with other Christmas decorations.\(^\text{181}\)

This discussion of ideology suggests that, perhaps, I too quickly criticized Smith’s assertion that a judicial withdrawal from the field of religious liberty might improve the position of outgroup religions by

---

\(^{176}\) County of Allegheny v. American Civil Liberties Union, 492 U.S. at 598-602.


\(^{178}\) County of Allegheny v. American Civil Liberties Union, 492 U.S. at 598-602.

\(^{179}\) Id. at 598-99 n.48.

\(^{180}\) Indeed, Justice Blackmun explicitly stated that a “Christmas tree . . . is not itself a religious symbol.” Id. at 616; accord id. at 632-33 (O’Connor, J., concurring).

\(^{181}\) On a personal note, I have known many Jewish children who wanted a Christmas tree or to visit with Santa Claus, but I have never known any Jew who believed that Christmas, Christmas trees, and Santa were Jewish or anything other than Christian. Cf. Allegheny, 492 U.S. at 639-43 (Brennan, J., dissenting) (stating that a Christmas tree is not secular).
generating a "net gain" in religious freedom.\textsuperscript{182} After all, a judicial withdrawal would prevent the Supreme Court from producing the constitutional discourse that functions as an ideological justification for Christian cultural imperialism. Nonetheless, Smith does not claim that constitutional discourse would no longer be produced, but rather that the Supreme Court would not be generating it. Instead, the more political branches and the so-called private sphere would continue to produce ideological and constitutional discourse. More important, Smith's assertion fails to account for the intricacy of church and state relations in American society. For outgroup religions, the costs and benefits of separation of church and state cannot be tallied simply on some imaginary balance sheet.

Derrick Bell's interest-convergence thesis can help further elaborate the ideological quality of religion clause jurisprudence. According to Bell, African Americans historically have gained social justice only when their interests happened to converge with the interests of the white majority.\textsuperscript{183} For example, Bell argues that the Supreme Court decided \textit{Brown v. Board of Education}\textsuperscript{184} not because it was morally or legally right, but because it coincided with the interests of middle- and upper-class whites.\textsuperscript{185} If we attempt to transfer this interest-convergence thesis to the realm of religion, specifically to the separation of church and state, then we can generalize and enhance the thesis, understanding it anew as representing a technique of power.

The doctrine of separation of church and state assumes that the \textit{state} poses the greatest threat to religious liberty.\textsuperscript{186} This assumption arises in

\begin{itemize}
  \item \textsuperscript{182} Smith, supra note 8, at 126.
  \item \textsuperscript{183} Bell writes: "[T]he degree of progress blacks have made away from slavery and toward equality has depended on whether allowing blacks more or less opportunity best served the interests and aims of white society." Derrick A. Bell, Jr., \textit{Race, Racism and American Law} 39 (2d ed. 1980). Similarly, Malcolm X states: "Uncle Sam has no conscience. They don't know what morals are. They don't try and eliminate an evil because it's evil, or because it's illegal, or because it's immoral; they eliminate it only when it threatens their existence." Malcolm X, \textit{The Ballot or the Bullet}, in \textit{Malcolm X Speaks} 23, 40 (G. Britman ed., 1965).
  \item \textsuperscript{184} 347 U.S. 483 (1954).
  \item \textsuperscript{185} Derrick A. Bell, Jr., \textit{Brown v. Board of Education} and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518 (1980); \textit{see also} Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 Stan. L. Rev. 61, 64 (1988) (stating that \textit{Brown} resulted, at least in part, from the white majority's interest in improving the image of the United States in foreign affairs).
  \item \textsuperscript{186} In \textit{Lynch v. Donnelly}, 465 U.S. 668 (1984), the Court recognized that the despotic state is less of a problem today than during the framers' generation, yet the Court continued to interpret the Establishment Clause as if the state posed the only danger to outgroup religions. The Court wrote:
  \begin{quote}
  The Court has acknowledged that the "fears and political problems" that gave rise to the Religion Clauses in the 18th century are of far less concern today. We are unable to perceive the Archbishop of Canterbury, the Bishop of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of establishment of a state church is far-fetched indeed.
  \end{quote}
\end{itemize}
part from a vision of a pre-capitalist and pre-democratic despotic state establishing an official religion and forcing individuals to support that favored religion.\(^{167}\) In the modern/postmodern Western world, however, this vision of a despotic state is anachronistic.\(^{168}\) Today, the state exercises "infrastructural power."\(^{169}\) Whereas the despotic state stood separate from and ruled over the rest of society, the infrastructural state exhaustively permeates society—influencing, shaping, and coordinating all aspects of social life.\(^{169}\) While the infrastructural state still occasionally exercises despotic power, it emerges more often as one force or realm of power that, together with other forces or realms of power, spreads and pulses through the social body.\(^{193}\) As such, the democratic modern/postmodern state represents little threat to a hegemonically dominant cultural group, such as Christians in America. Quite simply, in a democracy dominated by Christians, the government can no longer muster the despotic power to oppress Christians \textit{qua} Christians.\(^{192}\)

---

167. Id. at 686 (citations omitted).

168. Foucault discusses "the juridical-political theory of society," in which law developed and still revolves around the notion of a sovereign king, his rights, and limits on his power. Foucault, Two Lectures, supra note 15, at 94-95, 103.

169. See id. at 104-05 (explaining that in the seventeenth and eighteenth centuries, a new mechanism of power, disciplinary power, replaced the juridical-political emphasis on a king's power); Michael Mann, The Autonomous Power of the State, in Power in Modern Societies 314, 315-16 (Marvin E. Olsen & Martin N. Marger eds., 1993) (distinguishing despotic from infrastructural power); cf. Cornell, supra note 118, at 122-23 (explaining that the constitutional protection of only negative liberties is based on social equality, where the state is the primary threat to liberty).

170. Mann, supra note 168, at 315 (emphasis omitted); cf. Foucault, Why Study Power, supra note 15, at 213-16 (discussing how the modern western state exercises pastoral power).

171. Olsen and Marger write:

Despotic power is the power of the state to exert its will through the application of coercion, primarily through military and police force. This type of power has declined among states in modern societies, having been replaced by infrastructural power. Infrastructural power is the state's power to coordinate and influence all areas of social life, especially the distribution of economic resources, and at the same time provide for the protection of life and property. In performing these functions, the state becomes an increasingly centralized institution. Political authority rests with a relatively small set of coordinated elites who are supported by complex and far-reaching bureaucratic organizations.

Power in Modern Societies, supra note 188, at 251.

172. "In contrast to the often sporadic, violent power over a relatively anonymous social body exercised under older, monarchical forms of power, biopower emerges as an apparently benevolent, but peculiarly invasive and effective form of social control." Sawicki, supra note 15, at 67.

173. Cf. Bourdieu & Wacquant, supra note 15, at 76 & n.16 (explaining that field of power is field of forces).

174. See Mann, supra note 168, at 315-16 (noting that in many capitalist democracies, such as the United States, the state's great infrastructural power gives it great despotic power over marginal and minority groups, but little despotic power over dominant groups). According to Foucault, an "ideology of right" is an ineffective protection against state power because it developed to protect against a king's (juridical) power, not to protect against the disciplinary
The infrastructural state, however, can muster the despotic power to oppress religious outgroups, such as Jews. This realization underscores that religious outgroups might benefit, at least to some degree, from the separation of church and state. In the American democracy, the overwhelmingly Christian majority largely controls the government, if only because of sheer numbers. To the extent that the constitutional doctrine of separation of church and state actually prevents the Christian-dominated government from actively and directly conjoining with religion, then Christianity cannot be imposed on members of outgroup religions through the instrumentality of the government. And as Cohen’s history of church and state stresses, the courts do occasionally interpret the religion clauses to prevent a conjuncture of Christianity and government. For example, in *Abington School District v. Schempp*, the Court held that the recitation of the Lord’s Prayer in public schools is unconstitutional. Likewise, in *Edwards v. Aguillard*, the Court held that a state statute requiring public schools to teach creation science whenever they taught the theory of evolution is unconstitutional. Nevertheless, while the separation of church and state occasionally protects minority or outgroup religions, that protection often dwindles into a limited, hypothetical, or even nonexistent refuge. In reality, Christianity can be imposed on members of outgroup religions through the instrumentality of the government so long as legal discourse labels or codes the governmental action as secular. Governmental actions that are conducted in the guise of secularity can endorse, propagate, and otherwise support Christianity because, from the perspective of constitutional doctrine, the government has not impossibly conjoined with religion.

Derrick Bell’s interest-convergence thesis helps explain why the separation of church and state often provides only minimal benefits to outgroup religions, such as Judaism: To a great extent, outgroup religions benefit only when their interests happen to converge or correspond with the interests of Christians. The benefits to outgroups, in other words, are merely incidental, while the primary benefits of separation of church and

and pastoral power of the modern/postmodern state. See Foucault, Two Lectures, supra note 15, at 105-08.

193. 374 U.S. 203, 223 (1963). Cohen argues that *Schempp* was one of the key cases in legitimating the secular public schools. Cohen, supra note 9, at 213.


195. See supra notes 132-54 and accompanying text (discussing the power of legal discourse to label activities as secular). In Foucauldian terms, the juridical-political theory of sovereignty tends to conceal power. See Barry Smart, Foucault, Marxism and Critique 85 (1983).

196. The code or guise of secularity, situated in the context of First Amendment discourse, provides the background in which American Jews must live: American Jews operate within a world where Christian activities and symbols are coded and potentially coded as secular. This background tends to shape or influence the possibilities of American Jews for religious freedom and for imagining that freedom. See generally Kennedy, supra note 15, at 120 (explaining how the law provides context for certain social interactions, such as those of the economic marketplace).
state flow, in fact, to Christianity, the hegemonically dominant religion in America. Furthermore, while the accrual of primary benefits to Christianity occasionally entails incidental benefits for outgroup religions, it also frequently imposes certain costs on those outgroup religions. For instance the principle of separation of church and state simultaneously benefits Christianity and harms minority religions by furnishing a facade of governmental neutrality and religious freedom that hides and legitimates the Christian cultural imperialism that pulses through the American social body. Indeed, the concept of neutrality that lies entrenched in the separation of church and state forestalls considering seriously that the religion clauses could be read to prohibit governmental commingling with Christianity while nonetheless allowing governmental succor to outgroup religions, which are otherwise subject to the hegemonic domination of Christianity.

The Court recently faced this very problem and reacted predictably. In _Board of Education of Kiryas Joel Village School District v. Grumet_, the state of New York statutorily created a special school district following the boundary lines of the Village of Kiryas Joel. All of the residents of the Village belonged to a small Jewish sect, the Satmar Hasidim. The Satmars sent most of their children to private religious schools, but these schools were unable to provide adequate facilities for handicapped children. When the Satmars initially sent these children to public schools in neighboring communities, the children suffered "panic, fear, and trauma . . . in leaving their own community and being with people whose ways were so different." New York therefore created the special public school district so that the Village could operate a publicly funded school for handicapped children. The Court held, however, that the state violated the Establishment Clause because the statute failed "the test of neutrality." State assistance of the Satmar Hasidim offended the "principle at the heart of the Establishment Clause, that government should not prefer one

---

197. See supra notes 175-81 and accompanying text.
198. Without governmental protection and assistance, a religious outgroup in America resembles an unprotected individual confronted by the overwhelming power of a cartel in the economic marketplace. Cf Berger, supra note 119, at 140-44 (discussing cartelization in religion). Daniel Conkle argues that the Supreme Court should focus on the message or effect of governmental actions on religious outsiders because insiders already are embraced strongly by the community. Nonetheless, he simultaneously defends traditional or longstanding governmental practices, despite their offense to religious outsiders. See Daniel O. Conkle, Toward a General Theory of the Establishment Clause, 82 NW. U.L. Rev. 1113, 1178-84 (1988) (discussing traditional governmental practices). Smith even criticizes Conkle's somewhat attenuated suggestion that the Court emphasize the inclusion of religious outsiders. Smith, supra note 8, at 114-15.
200. Id. at 2485 (quoting Board of Educ. v. Wieder, 527 N.E.2d 767, 770 (N.Y. 1988)).
This reasoning underscores the Court's refusal to recognize differences between the social realities of mainstream Christians and outgroup sects such as the Satmar Hasidim. To the Court, neutrality is the criterion for constitutionality, yet in a hegemonically Christian society, such as America, "neutrality" equals Christianity.

The link between neutrality and Christianity becomes even dearer when Grumet is compared with Rosenberger v. Rectors and Visitors of the University of Virginia. Once again emphasizing governmental neutrality, the Rosenberger Court held that the Establishment Clause did not prohibit the University of Virginia from funding an explicitly Christian magazine created and run by students. The Christian nature of the magazine was undisputed; it expressly challenged "Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." In dissent, Justice Souter unequivocally characterized the magazine as evangelical proselytization. Nonetheless, the majority reasoned that the governmental action was neutral because the University funded other student activities as well as the magazine. In fact, the Court stated that if the University failed to fund the magazine, the University "could undermine the very neutrality the Establishment Clause requires." Thus, by ostensibly enforcing governmental neutrality, the Court—first in Grumet and then in Rosenberger—reinforced Christian hegemony. According to the Court,

---

203. Id. at 2491.
204. The Court wrote: "Here the benefit flows only to a single sect, but aiding this single, small religious group causes no less a constitutional problem than would follow from aiding a sect with more members or religion as a whole." Id. at 2492. Jeffrey Rosen argues, however, that the Satmar Hasidim used coercive measures to maintain their own hegemonic position within their small community. Jeffrey Rosen, "Village People," The New Republic, Apr. 11, 1994, at 11.
206. Id. at 2521-24.
207. Id. at 2515.
208. Id. at 2535, 2539 (Souter, J., dissenting) (arguing that the magazine was an evangelical attempt to indoctrinate its readers).
209. Id. at 2525. More completely, the Court wrote:
To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint. The neutrality commanded of the State by the separate Clauses of the First Amendment was compromised by the University's course of action. The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.
Id. at 2524-25.
210. In his concurrence in Grumet, Justice Kennedy almost seems to understand this outsider viewpoint. He wrote:
The Satmars' way of life, which springs out of their strict religious beliefs, conflicts in
neutrality prohibited New York from creating a public school for the handicapped children of a small and insular Jewish sect, yet neutrality also somehow required Virginia to fund a magazine devoted to Christian proselytizing.

The Court’s insistence on governmental neutrality supposedly prevents the justices from expressly considering the orientation of power in American society. To the Court, the Christian domination of America should not explicitly affect the interpretation of the religion clauses—though, as I argue, the Christian domination of America implicitly or unconsciously shapes the Court’s understanding of the First Amendment. Yet, because the Court refuses to expressly acknowledge Christian domination, the justices readily equate Christian and Jewish symbols. For example, the Court deems as constitutionally equivalent the governmental displays of a crèche and a Jewish menorah. But, of course, the governmental displays of a crèche and a menorah do not carry equal symbolic weights exactly because of the orientation of power in American society—exactly because of Christian domination. Most broadly, the effect or significance of a particular symbol—as a manifestation of power—depends partly on how it aligns with other contemporaneous forces or manifestations of power. When a Jew sees a governmentally displayed crèche, he or she understands the crèche within the context of Christian imperialism. A Jew likely experiences the crèche as having significant symbolic weight because it is yet another affirmation of Christian power, because it stands in a consistent line with other symbols and structures establishing Christian domination. As such, the crèche might readily cause a Jew to feel humiliated, angry, speechless, excluded, or alienated. When, on the other hand, a Christian sees a governmentally displayed menorah, he or she probably experiences it quite differently. The menorah is not

...[B]y creating the district, New York did not impose or increase any burden on non-Satmars, compared to the burden it lifted from the Satmars, that might disqualify the District as a genuine accommodation.

Grunet, 114 S. Ct. at 2502 (Kennedy, J., concurring). Kennedy nonetheless concluded that the statute ultimately violates the Establishment Clause. Id. at 2505.

211. See, e.g., County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989) (failing to acknowledge that the government displays of a crèche and a menorah might be constitutionally distinct exactly because one symbol is Christian and one is Jewish). Even in his dissent in Pinette, Justice Stevens went so far as to equate a Latin (Christian) cross with a menorah. See Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2470 (1995) (Stevens, J. dissenting).

aligned consistently with most other symbolic or structural manifestations of power in American society. To the contrary, the governmental display of a menorah conflicts with the usual symbolic and structural components of Christian domination (except insofar as the menorah serves an ideological function). Consequently, to a Christian, the potential symbolic power of the menorah is neutralized; the menorah rarely carries significant force. Many Christians, undoubtedly, will not even know what the menorah is or what it stands for. Put in simple terms, a Christian child who occasionally sees a menorah is not going to come home and ask her parents if they can celebrate Chanukah or become Jewish. But a Jewish child who constantly is exposed to Christmas displays and constantly told about Christmas is, quite possibly, going to come home at some point and ask for a Christmas tree or even a full celebration of Christmas. In American society, there is a difference between being Christian and Jewish. Yet the Court steadfastly ignores this difference by claiming to insist upon governmental neutrality, and in so doing, the Court contributes to the reproduction of Christian domination.

In sum, constitutional principles such as the separation of church and state can arise from a cauldron of political and social interests, but those interests then constitute the elemental components of the principle. Even if such a principle eventually becomes a causal factor within society, the principle retains its elemental components, albeit altered in form, and thus seldom acutely contravenes the interests that engendered it. Consequently, in the context of American society, the principle of separation of church and state should be understood as a political development that primarily benefits the dominant religion, Christianity. Benefits occasionally flow to outgroup religions, but those benefits typically are incidental, not primary. Moreover, the separation of church and state sometimes disadvantages outgroup religions in distinct ways. Before concluding, I will discuss three additional ways in which the ostensible principle of separation of church and state benefits Christianity and harms minority religions, including Judaism.

First, the principle of separation of church and state increases the likelihood that Christian-oriented governmental action will be labeled or coded as secular and therefore legitimated. That is, the very existence of the separation of church and state as a constitutional principle tends to reify the state as a secular organ or instrumentality. Because the separation of church and state supposedly stands as a foundational principle of our governmental system, most individuals tend to presume that any action


214. Cf. Kennedy, supra note 15, at 186-88 (asserting that many consequences flow from having a legal system that condemns sexual abuse in the abstract while allowing and tolerating many instances of abuse).
taken by the government is, of course, secular (merely because it is governmental action, and the government is, by definition, secular). In other words, governmental action is presumptively secular and therefore consistent with the constitutional principle of separation of church and state exactly because it is governmental action. For example, in *Marsh v. Chambers*, the Court relied on a tradition of governmental action to justify holding that a state legislature could constitutionally open each day with a prayer from a publicly paid chaplain. The Court wrote:

The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.

The Court suggested, in other words, that the mere fact the government traditionally had performed or sponsored a particular activity might render that activity secular (or at least not an establishment of religion). In *Marsh*, then, the Court found it irrelevant that a single Christian minister had served as the state chaplain for sixteen consecutive years and that his prayers occasionally had referred expressly to Jesus Christ.

A second way in which the ostensible principle of separation of church and state benefits Christianity and harms outgroup religions stems from the need of cultural traditions to reproduce themselves. The constitutional discourse of the religion clauses tends to constantly reconstruct and inflate the importance of the principle of separation of church and state, which in turn reinforces Christian cultural imperialism. In particular, whenever any incidental benefit is afforded to a religious outgroup, Americans can pound their chests and boast about the significance of the First Amendment. By magnifying the importance of the incidental benefits flowing to Jews and other outgroups, constitutional rhetoric sustains and even invigorates the dominant story of the separation of church and state as a great principle protecting religious freedom. Thus, the constitutional discourse of the dominant story bolsters the dominant

216. Id. at 786.
217. See id. at 785, 793 n.14 (noting the minister removed all references to Christ after a Jewish legislator complained). It is at least worth noting that in *Marsh* the Court relied on tradition to uphold the constitutionality of a religiously oriented governmental practice, but in *McGowan* and *Braunfeld*, see supra notes 146-51 and accompanying text, the Court reasoned that the recent secularization of Sunday closing laws overcame their clear historical roots in Christianity. *McGowan*, 366 U.S. at 451-35.
218. See supra notes 99-101 and accompanying text.
story itself. If cultural traditions need to reproduce themselves to remain vital,\textsuperscript{219} then the tradition of church and state assiduously gratifies this internal need.

Third, the incidental benefits flowing to religious outgroups contribute to the social construction of American Jews. In short, Christians are not the only Americans to boast about the significance of the First Amendment. Although Christian domination is, to a great extent, imposed upon American Jews, Jews also frequently acquiesce in Christian cultural imperialism because, in part, of the separation of church and state. The First Amendment appears to protect and occasionally does protect Jews from governmental oppression, which historically has been conspicuous, though sporadic; the Holocaust is an ominous reminder of the grim potential for state-imposed persecution. Because of this apparent protection from such egregious impositions of state power, American Jews often support and even celebrate the separation of church and state; indeed, Cohen underscores that Jews strongly advocated for the separation of church and state throughout American history.\textsuperscript{220} But in their avid support for strict separation, many Jews fail to perceive the more insidious contemporary danger—Christian cultural imperialism—that lurks within the American social body.\textsuperscript{221} Thus, the American Jew is "normalized": He or she becomes an American, like any other (Christian) American, only with a different religion (which is a purely private matter, anyway). And as an American, he or she of course celebrates the extraordinary protection of religious liberty that all Americans enjoy.\textsuperscript{222}

\textsuperscript{219} See id.

\textsuperscript{220} As Leo Pfeffer notes, throughout most of Jewish history, "there was no line between the religious and the secular." Pfeffer, supra note 7, at 8.

\textsuperscript{221} Cf. Sawicki, supra note 15, at 64 (stating that a disciplinary technology can subjugate more readily because it also enhances power). Sawicki wrote about the social construction of women:

Foucault’s model of power [shows how] technologies subjugate by developing competencies, not simply by taking power away. . . . [O]ne reason such technologies are so effective is that they involve the acquisition of skills, and are associated with a central component of feminine identity, namely, sexuality. The disciplines enhance the power of the subject while simultaneously subjugating her. Hence, women become attached to them and regard feminist critiques of the feminine aesthetic as a threat.

\textsuperscript{222} In effect, then, American Jews acquiesce to an exchange: The threat of overt and flagrant governmental conjunction with religion is traded for the tacit Christian cultural imperialism imposed by supposedly secular, private, and legitimate social practices.

Sawicki wrote about normalization and patriarchy:

[An] emphasis on normalization as opposed to violence represents a major advantage of the disciplinary model of power. If patriarchal power operated primarily through violence, objectification and repression, why would women subject themselves to it willingly? On the other hand, if it also operates by inciting desire, attaching individuals to specific identities, and addressing real needs, then it is easier to understand how it has been so effective at getting a grip on us.
IV. CONCLUSION

Although American Jews acquiesce in Christian cultural imperialism to some extent, one should not overlook that Jews also resist Christian domination in many ways—sometimes by merely remaining Jewish. In America, where Christianity is so ubiquitous and firmly embedded as to appear neutral and natural, separation from the normalized Christian order of the social world can produce a type of existential anxiety or even terror. Yet, the only alternative for American Jews is submission to the final step of Christian hegemonic domination, the elimination of the Jewish subculture. Furthermore, although many American Jews accept and support the separation of church and state, they never just choose to do so; rather, they are always in part compelled. Many Jews who publicly acquiesce in and even celebrate the principle of separation of church and state might harbor a "hidden transcript," a discourse of resistance and opposition expressed primarily to other Jews or outgroup members. To these Jews, a more open or public statement of resistance seems impolitic or even dangerous. From this perspective, seeking judicial enforcement of the strict separation of church and state may not be ideal, but it offers the

---

Id. at 85.

223. To go from a position of inclusion to exclusion resembles crossing from a "safe circle into wilderness." Williams, supra note 88, at 129. Hence, for example, many Jews in nineteenth century Europe were tempted to seek inclusion in the dominant social order by converting to Christianity, not because of religious faith, but because, in the words of the German author, Heinrich Heine, "[t]he baptismal certificate [was] the ticket of admission to European culture." Heinrich Heine, A Ticket of Admission to European Culture, reprinted in The Jew in the Modern World: A Documentary History 223, 223 (Paul R. Mendes-Flohr & Jehuda Reinharz eds., 1980).

224. Kimberle Crenshaw wrote: "Black people do not create their oppressive worlds moment to moment but rather are coerced into living in worlds created and maintained by others. Moreover, the ideological source of this coercion is ... racism." Kimberle Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1357 (1988); cf. Kennedy, supra note 15, at 151 (discussing ways in which men enforce traditional identities on women).

225. See e.g., Scott, supra note 15, at 25. Scott wrote:

If subordinate discourse in the presence of the dominant is a public transcript, I shall use the term hidden transcript to characterize discourse that takes place "offstage," beyond direct observation by powerholders. The hidden transcript is thus derivative in the sense that it consists of those "offstage" speeches, gestures, and practices that confirm, contradict, or inflect what appears in the public transcript. We do not wish to prejudge, by definition, the relation between what is said in the face of power and what is said behind its back. Power relations are not, alas, so straightforward that we can call what is said in power-laden contexts false and what is said offstage true. Nor can we simplistically describe the former as a realm of necessity and the latter as a realm of freedom. What is certainly the case, however, is that the hidden transcript is produced for a different audience and under different constraints of power than the public transcript. By assessing the discrepancy between the hidden transcript and the public transcript we may begin to judge the impact of domination on public discourse.

Id. at 4-5.
best possible means for opposing Christian cultural imperialism within the perceived political realities of America.

In a sense, the Jewish position on separation of church and state in Christian America represents a structured predicament: A dilemma produced in part by the American Jewish position or role in society and history. As noted, some Jews might advocate strict separation of church and state, not because it would be their choice in an ideal world, but rather because they are resigned to working within certain perceived political constraints. This structured predicament, though, can be further elaborated: The American Jewish commitment to separation of church and state reflects, in a rather odd way, a historical tendency for Jewish communities to embrace or commit to the state. Throughout Western history, not just American history, Jews often have turned to the state for protection against the Christian masses (and mobs). For instance, during the fourteenth century, Christians accused Jews of causing the Bubonic Plague by poisoning water supplies. Individual Jews were tortured until they confessed to the crime, and then entire Jewish populations were burned in retribution. In such circumstances, Jews often turned to governmental officials for defense from the Christian mobs.226

In America, Jews again have turned to the state for support and protection from the Christian masses, but because America is a democracy, this turn has produced a paradox. To a great degree, Jews have looked to the state for protection from the state itself—that is, from the Christian masses acting through the instrumentality of the state. More precisely, Jews have sought the protection of the state through the institution of the judiciary, with the courts protecting Jews from the reach of the more political branches of government, which are largely controlled by the Christian majority.228 The means used by the courts to protect Jews from political overreaching is, of course, the constitutional principle of separation of church and state. Hence, Jews embrace the state—as embodied in the courts—to enforce the principle of separation of church and state, in order to be protected from the Christian masses who democratically control the state—as embodied in the legislative and executive branches.

Frequently in Western history, when Jews have turned to a state for

226. See A Source Book, supra note 127, at 43-47 (providing a detailed account of the persecution of Strasburg Jews during the outbreak of the Black Plague in 1348-1349); see also Johnson, supra note 26, at 250-51 (noting kings protected Jews in Poland during the late sixteenth century).

227. See Ginsberg, supra note 68, at 197 (noting that alliances and opportunities with national and state governments enabled Jews to combat religious threats).

228. I do not mean to suggest that Jews have not also sought the embrace of the executive and legislative branches of the federal government. See id. at 97-144 (discussing the political empowerment of Jews beginning with the New Deal); see also Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America 158-230 (1976) (describing the reactions of the legal professional elite to Jewish attorneys participating in the New Deal).
protection, governmental officials provided the desired refuge, but usually only so long as it remained in their own interest to do so. If a governmental official perceived that further protection of Jews might threaten his or her economic or political stability, then the official typically sacrificed Jewish subjects to placate the mob. Benjamin Ginsberg, therefore, refers to the Jewish tendency to rely on the state as a "fatal embrace" because it so often ended in disaster. Significantly, Ginsberg argues that the American Jewish embrace of the state (manifested largely in judicial protection) has begun to sour: Even overt public antisemitism, which nearly had disappeared, has begun to reemerge as a potent political force. The Anti-Defamation League’s 1992 Audit of Anti-Semitic Incidents concludes that approximately fifty million Americans hold "strong" antisemitic beliefs. Worse still, these Americans "qualified" as strongly antisemitic only by answering affirmatively to at least six out of eleven questions that tested for overt antisemitism, such as whether Jews are more willing than others to use shady practices to get ahead. Many more Americans answered one or more of these questions affirmatively without reaching the number needed to qualify as strongly antisemitic. For example, approximately 77.5 million Americans believe that Jews have too much power in the United States.

Nonetheless, as Cohen and others have correctly observed, antisemitism diminished in America after World War II. The significance of this reduction, though, is easily misinterpreted. First, while overt antisemitism has decreased dramatically, the linguistic and structural components of Christian hegemony have remained largely in place. Second, because these underlying components remain extant but obscure, Cohen overestimates the permanence of the reduction in antisemitism. In contrast to Ginsberg, Cohen neglects the historical tendency of

229. In 1321, the King of France demanded 150,000 pounds from Jews accused of poisoning water supplies. Synan, supra note 127, at 129-30; see also Johnson, supra note 26, at 243 (noting that during the Reformation in Germany, Catholic emperors and princes found Jews to be useful allies against Protestants).


231. Ginsberg, supra note 68, at 224.

232. Id. Ginsberg discussed various public figures, such as James Baker, Pat Buchanan, David Duke, Pat Robertson, and Kirk Fordice, who have uttered expressly antisemitic statements. Id. at 223-35.


234. Telephone Interview with Alan Schwartz, Director of Research, Anti-Defamation League, New York Office (Apr. 5, 1994); see Quinley & Glock, supra note 25, at 1-20 (discussing the method of testing for antisemitism).

235. See 1992 Audit, supra note 233, at 1. The Anti-Defamation League does not report on the number of Americans who harbor antisemitic attitudes but do not express them overtly either because of social etiquette or because their antisemitism operates primarily at an unconscious or unintentional level. For a brief discussion of hidden and latent antisemitism, see Tom W. Smith, Anti-Semitism in Contemporary America 19-22 (1994).

236. Cohen, supra note 9, at 123.
antisemitism to ebb and flow. Third, in analyzing the postwar reduction in antisemitism, Cohen probably attributes too much importance to the Supreme Court and its enforcement of the constitutional principle of separation of church and state. In previous historical instances, state protection of Jews usually reflected a propitious and temporary convergence of interests between the Jewish community and governmental officials. Similarly, the postwar reduction in antisemitism might be attributed to several factors besides the judicial resolve to protect religious outgroups. For example, during the 1920s, changes in the immigration laws sharply curtailed Jewish immigration.\(^{237}\) As the Jews already in the United States increasingly assimilated into the Christian culture during the 1950s, they provoked less of the open hostility characteristic of earlier eras. More important, after World War II, overt antisemitism resounded too closely with the violence of the Holocaust and thus became socially embarrassing; for their own psychological well-being, Americans needed to differentiate themselves sharply from Germans.\(^{238}\)

Meanwhile, Smith might be correct insofar as he perceives some Christian backlash against Supreme Court protection of Jews through the constitutional principle of separation of church and state. Yet, he incorrectly believes that this backlash can be corrected by paying closer attention to originalist history and theoretical precision; he ignores the societal and historical context in which this fatal embrace has unfolded. Smith’s unstudied suggestion that outgroup religions, including American Jews, would do better without judicial enforcement of the separation of church and state reveals his failure to understand (or even consider) the American Jewish predicament.

To be sure, I am not arguing that American Jews and other religious outgroups would be better off without the separation of church and state. I do maintain, though, that the dominant story of church and state tends simultaneously to overstate the benefits and to deny the costs to Jews and other outgroups. In a democratic nation overwhelmingly dominated by

\(^{237}\) See Wistrich, supra note 25, at 117-18 (noting that the mass immigration of Russian Jews in the late nineteenth and early twentieth centuries inflamed antisemitism, leading to the passage of the racist immigration law of 1924); see also Congressional Committee on Immigration, Temporary Suspension of Immigration, H.R. 1109, 66th Cong., 3rd Sess. (1920), reprinted in The Jew in the Modern World, supra note 223, at 405 (lamenting the large numbers of Jewish immigrants arriving shortly after World War I, and therefore calling for a total suspension on immigration into the United States); Richard D. Breitman & Alan M. Kraut, Anti-Semitism in the State Department, 1933-44: Four Case Studies, in Anti-Semitism in American History 167 (David A. Gerber ed., 1986) (focusing on individuals within the pre-war and World War II State Department, which had a general consensus of opposing the loosening of immigration restrictions that would have saved European Jews).

\(^{238}\) Likewise, as Derrick Bell and others have argued, several factors contributed to a postwar reduction in racism. For instance, overt racism hindered the nation’s efforts to woo Third World countries during the Cold War and interfered with economic development, especially in the South. Bell, supra note 185; Dudziak, supra note 185. Insofar as antisemitism is a form of racism, the reduction in racism contributed to a reduction in antisemitism.
Christians, Jews stand in a precarious and paradoxical position. As Ginsberg observes, "Jews are trapped by the logic and structure of their situation." To advocate for the strict separation of church and state presents insidious harms, yet to stand by idly while Christians use the government to impose their religion and culture seems near-suicidal. For better or worse, American Jews remain ensnared in "a dilemma that has no solution."