Religion and Schools: The Rehnquist Court's Decision-Making Process in Establishment Clause Cases

Matthew Beck

Department of Political Science, Southern Methodist University

PLSC 4332: Supreme Court Seminar

Dr. Kobylka

May 2, 2023

Introduction

With the first line of the Bill of Rights, the Framers of the Constitution declared that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (US Const. amend. I). While this statement seems relatively clear, the Court's interpretation and implementation of the Establishment and Free Exercise Clauses has been anything but straightforward. One area of religion clause analysis that has been particularly controversial and frequently addressed is the appropriate relationship between education and religion. In the Court's first major case addressing the relationship between religion and education, *Everson v. Board of Education*, the Court referred to Thomas Jefferson's description of a "wall of separation between church and state" (*Everson v. Board of Education*, 1947, quoting *Reynolds v. United States*, 1879). Despite the ambiguity of *Everson*, as later Justices who desired a high wall and those who desired a low wall quoted differing parts of *Everson* to support their claims, the "wall of separation," while still a "blurred, indistinct, and variable barrier," was a dominant force within the Court's Establishment Clause jurisprudence and led to a strong barrier between religion and public education (*Lemon v. Kurtzman*, 1971).

Despite the prevalence of the "wall of separation" in the Court's Establishment Clause jurisprudence before 1980, a shift in public opinion and the election of Republican presidents who wanted to promote "religion and morality" threatened to change the Court's semi-consistent view of the Religion clauses and their relationship with education (Greenawalt, 2004; McAndrews, 2003). There are two categories of Establishment Clause interpretation that the Justices' ideologies conform with: accommodationist and separationist. Accommodationists favor a lower wall and view the Constitution as allowing religion to advance into education. Separationists, inversely, favor a higher wall of separation and view the encroachment of religion

into education as a violation of the Establishment Clause. Despite public and political pressure, the Rehnquist Court, between 1980 and 1994, failed to adopt an interpretation of the Establishment Clause that was more accommodating of religion. This paper analyzes the Court's jurisprudence from *Lemon* in 1971 to *Kiryas Joel* in 1994 and explains why, despite being appointed almost wholly by accommodationist Republican presidents, the Court did not adopt a more accommodationist view of the role of religion within schools.

The question of why the Justices failed to produce the changes desired by the Republican presidents who appointed them could provide insight into the future decisions of the modern Court. Today's Court, like the Rehnquist Court, has a clear conservative majority. However, if the factors that prevented the conservative justices of the 1980s and 1990s from furthering accommodationist goals are present today, one could infer that these factors may also hinder the efforts of the conservative justices to make accommodationist rulings. However, if such factors are absent, the Court may have greater leeway to reverse or revise precedent and establish a more accommodationist view of the Establishment Clause. While there are situational differences between the Rehnquist Court and the modern Court, the similarities between the Court's environments allow analysis of the Court's failure in the 1980s and 1990s to adopt a more accommodationist interpretation of the Establishment Clause to provide insight into the future actions of the modern Court.

Further, this question raises important questions about the relationship between politics and law and the independence of the Court. The Court, according to the Constitution, is supposed to be an independent institution that interprets the law and the Constitution. However, while the early Rehnquist Court was able to ignore the accommodationist wishes of Republican presidents and the public, the influence of political attitudes continues to threaten the Court's independence.

Analysis of this issue can provide insight into the true level of independence of the Court and identify the factors which most directly threaten the judicial independence of the Court.

Many scholars have studied the Rehnquist Court, producing varying explanations for the Court's failure to adopt a stronger accommodationist interpretation of the Establishment Clause. Most research analyzes the Court's decision-making within the main three models of judicial decision-making: legal, attitudinal, and strategic. Some literature, promoting the attitudinal model, argues that the Republican Presidents of the 1980s and 1990s either didn't know about the Establishment Clause views of their Court nominees or simply favored other judicial and political values, leading to them appointing Justices with less accommodationist attitudes than the presidents desired (Filter, 1998; King, 1996; McFeatters, 2005; O'Brien, 1991). Further scholars who accept the attitudinal model argue that the diversity of Establishment Clause interpretation within the accommodationist coalition led to a lack of unity and often caused the swing Justices to adopt a more separationist view (Mortyn, 1992; Schlosser, 1988). Other literature, favoring the legal model, argues that precedent was the most influential factor in the Court's decision-making and that precedent constrained the goals of the Court's accommodationist Justices (Kritzer and Richards, 2003). Further, some literature promotes the strategic model, arguing that the separationist coalition's strategic methods were more successful and that both coalitions utilized precedent as a tool to influence the swing Justices and support their decisions (Colker & Scott, 2002; Cooley, 2022; Hensley & Tudor, 1999; Merrill, 2003).

Drawing from the research of others, two hypotheses have developed. First, I hypothesize that the Republican-appointed Justices were less accommodationist than the presidents that appointed them. Further, I claim that the Justices' attachment to precedent, while varying, often enabled the separationist Justices to maintain majorities and deter accommodationist efforts.

After my analysis of the Justices' papers and voting records, I have identified two other hypotheses. I hypothesize that the coalitional strategies of the separationist coalition led to frequent separationist decisions. Further, I hypothesize that public opinion influenced the arguments some Justices used in their decisions.

Having looked at the research of others and my own, I argue that, as accommodationist Republican presidents appointed nine consecutive Supreme Court Justices, there was an expectation that the Supreme Court would adopt a more accommodationist view of the role of religion in schools and weaken the wall of separation. I argue that due to the varying views of the Republican-appointed Justices, successful strategic choices by separationist justices, and the differing interpretations and levels of attachment to precedent, the accommodationist coalition was largely unsuccessful in its goals. Finally, I conclude that the failure to establish a consistent understanding of the relationship between religion and education has led to the Court being unable to produce a consensus on the issue, and cases continue to reach the Court today.

I will structure my analysis by addressing each of my hypotheses and will use this analysis to come to my conclusion about the validity of my thesis. I will address my first hypothesis by analyzing the voting records of the Justices and the case decisions from cases where the Justices' attitudes about the Establishment Clause were most pronounced. Next, I will analyze my second hypothesis, relying on voting records and the papers of the Justices. These two sources of evidence will allow me to view which cases had the largest public reactions and analyze if these reactions led to any changes in voting. Further, evidence from the papers allows me to make claims about if and how the Justices reacted to public opinion. Finally, I will address my third and fourth hypotheses together, as the role of precedent was largely a product of the coalitional dynamics of the Court and the strategic choices made by the Justices. Using case

decisions and the papers of the Justices, I will analyze the differing interpretations of precedent and examine how the views of the Justices changed when coalitional dynamics changed. This analysis will allow me to view how the attitudes of the Justices influenced strategic decisions and how precedent was impactful in the strategic choices of the Justices.

Having looked at voting records, case decisions, and the papers of the Justices, I conclude that the Justices appointed by the Republican presidents varied greatly in their interpretations of the Establishment Clause; this diversity led to a Court that was unable to find a common interpretation of the Clause and relied on coalitional dynamics to determine which interpretation would win the day. Further, I conclude that public opinion was not directly influential, but the reactions of lower courts and state legislatures affected the arguments (but not the voting decisions) of some Justices. I also argue that precedent, while "controlling," was mostly used as a tool that coalitions could rely on to explain their attitudes and influence the views of other Justices. This use of precedent as a tool led to varying interpretations of past cases and produced an Establishment Clause jurisprudence that was convoluted and inconsistent. Finally, I conclude that the separationist coalition was highly successful in its use of strategy to form separationist majorities. While the accommodationist coalition employed many similar tactics, their efforts yielded fewer successes.

Case Review

The Court's first major Establishment Clause case that involved education was *Everson*, in which the Court declared its support for a "wall of separation" between church and state, though it upheld a program reimbursing students for transportation costs of going to both public and private schools (*Everson v. Board of Education*, 1947). The Court produced a framework for Establishment Clause cases in *Lemon*, where the Court ruled that a salary aid program for private school teachers and subsidies for

educational materials were violative of the Establishment Clause (*Lemon v. Kurtzman*, 1971). *Lemon* built on the prior rulings of *Schempp*, *Engel*, and *Walz*. *Schempp* and *Engel*, cases surrounding prayers in public schools, established the requirement of a secular purpose and a primary effect of neither advancing nor inhibiting religion that was reiterated in *Lemon* (*Abington v. Schempp,* 1963; *Engel v. Vitale,* 1962). *Walz*, striking down a tax exemption program for religious schools, established the *Lemon* requirement of a program or law not creating excessive entanglement between church and state (*Walz v. Tax Commission*, 1970).

However, while *Lemon* was used in every Establishment Clause case that dealt with education, its application varied. In *Hunt*, addressing a program to fund the construction of colleges, the Court declared that the prongs of *Lemon* were "no more than helpful signposts" in deciding Establishment Clause cases (*Hunt v. McNair*, 1973, 741). Conversely, in *Meek* and *Wolman*, two cases addressing the loaning of instructional materials to public and private schools, the Court directly applied *Lemon*, and the programs were partially struck down (*Meek v. Pittenger*, 1975; *Wolman v. Walter*, 1977). In *Regan*, the Court held that a program that reimbursed private schools for performing state functions was not violative of the Establishment Clause, reinterpreting the separationist decisions of *Meek* and *Wolman* to produce an accommodationist result (*CPERL v. Regan*, 1980). In *Grand Rapids* and *Mueller*, addressing state-funded programs for students in private schools and tax exemptions for students at private schools, the Court again relied on *Lemon* but interpreted *Lemon* to strike down the *Grand Rapids* programs and uphold the *Mueller* tax exemptions (*Grand Rapids v. Ball*, 1985; *Mueller v. Allen*, 1983).

The consistent use of *Lemon* was interrupted in *Marsh*, as the Court, not using *Lemon*, ruled that a legislative prayer by a state-funded chaplain was not violative of the Establishment Clause (*Marsh v. Chambers*, 1983). Further, in *Lynch*, which ruled that a creche display was not violative of the Establishment Clause, the Court claimed that they were not bound to *Lemon* and O'Connor, writing for the majority, relied on a different method of Establishment Clause analysis to decide the case (*Lynch v. Donnelly*, 1984). In *Wallace*, which ruled that a provision allotting public school time for "meditation or voluntary prayer" was a violation of the Establishment Clause, the Court, while producing a separationist

decision, utilized O'Connor's endorsement test and slightly moved away from *Lemon* (*Wallace v. Jaffree*, 1985). *Allegheny County* displayed the Court's convoluted Establishment Clause jurisprudence, as, in deciding on the constitutionality of a menorah display and a creche display, the Court attempted to conform to both *Lynch* and *Lemon*, resulting in a holding that allowed the menorah and declared the creche to be unconstitutional (*County of Allegheny v. ACLU*, 1989). The Court continued to move away from *Lemon* in *Lee*, as Kennedy, writing for the majority, used the presence of coercion, rather than a violation of *Lemon*, to declare a graduation prayer to be violative of the Establishment Clause (*Lee v. Weisman*, 1992). This pattern continued in *Kiryas Joel*, as the Court, declaring that a school districting law that created a district that was only comprised of an enclave of Hasidic Jews was unconstitutional, refused to either abandon or uphold *Lemon* (*Kiryas Joel v. Grumet*, 1994).

The Court's Establishment Clause jurisprudence, while relying largely on the *Lemon* test, has varied from the rigorous application of *Lemon* to ignoring *Lemon* and applying an entirely different standard. The Court's inconsistency in how it interpreted *Lemon* created an Establishment Clause jurisprudence that is inconsistent and often contradictory.

Literature Review

The Rehnquist Court and its developing Establishment Clause jurisprudence, specifically in cases that deal with education and funding for religious schools, has been the subject of a plethora of research. Many scholars have attempted to determine why, despite most Court experts predicting an accommodationist shift in the Court's Establishment Clause jurisprudence, the Court failed to adopt a more accommodationist view of the Establishment Clause (Greenawalt, 2004). While a wide range of answers have been proposed, most fall within three distinct categories. These explanations either rely on the attitudinal, legal, or strategic model. Despite the great amount of research that has covered this topic, disagreements within the scholarly community remain and this question lacks an answer that has a solid consensus.

Attitudinal Model

The attitudinal model asserts that Justices, rather than relying on legal arguments, make decisions based on their personal preferences and policy goals (Segal & Spaeth, 1993, 1). In this view, Justices use legal arguments to support their personal preferences (Segal & Spaeth, 1993, 1). Thus, this view considers precedent to be little more than a tool that the Justices utilize to support their attitudinal goals (Segal & Spaeth, 1993). This view is emphatically adopted by Richard Schragger, who, in analyzing the Court's Establishment Clause jurisprudence, argues that the central factor that determines the result of Establishment Clause cases is the attitudes of the Justices (Schragger, 2011). Schragger, viewing how many Establishment Clause violations are not addressed and how the Court has failed to enforce much of its Establishment Clause doctrine, argues that the attitudes and goals of the Justices determine how the Court will rule and which cases the Court will take, regardless of precedent (Schragger, 2011).

Other attitudinal model literature has attempted to examine how the attitudes of the Justices affected the Rehnquist Court's Establishment Clause jurisprudence and identity the factors that affected the Justices' interpretation of the Establishment Clause. Many scholars have argued that the differing attitudes of the Justices led to a lack of accommodationist unity and created a jurisprudence that was and continues to be convoluted and inconsistent. Marie Failinger, studying the 'endorsement test' proposed by O'Connor, Daniel Gordon, describing the coercion test proposed by Kennedy, and Barry McDonald, describing Rehnquist's narrow view of the Establishment Clause, all argue that the accommodationist Justices, differing in their interpretations of the Establishment Clause, attempted to influence other Justices to adopt their interpretation (Failinger, 2006; Gordon, 2007; McDonald, 2016). Further, these scholars, alongside others such as R.M Mortyn, claim that the ideological diversity of the accommodationist coalition resulted in competing efforts by the accommodationist Justices to promote their individual views and led to the coalition being less unified in their Establishment Clause goals (Mortyn, 1992).

Other research has argued that the appointment processes of the Justices appointed to the Court in the 1980s and early 1990s led to Justices having less accommodationist views than the Republican presidents who appointed them and thus prevented the Court from adopting a more accommodationist

view. John A. Filter, studying the evolution of Justice Souter's interpretation of the Religion Clauses, argues that Souter was a "stealth nominee" whose views were largely unknown by President H.W. Bush (Filter, 1998, 389). Filter argues that Bush's lack of familiarity with Souter's views resulted in Bush, an accommodationist president, appointing a separationist Justice (Filter, 1998, 389). Ann McFeatters, studying O'Connor's role as a swing Justice, argues that O'Connor's views were mostly unknown by President Reagan, with her nomination being largely the result of his promise to appoint the first female Supreme Court Justice (McFeatters, 2006, 67). Thus, much like Bush with Souter, McFeatters argues that Reagan somewhat unknowingly appointed a Justice who was not as fervently accommodationist as he was (McFeatters, 2006, 14).

Other scholars argue that Republican presidents, prioritizing other values of their nominees, ignored their nominees' Establishment Clause views. David O'Brien and David Yalof, analyzing the appointments of John Paul Stevens and Anthony Kennedy, both argue that the presidents appointing these Justices did so due to their lack of controversy (O'Brien, 1991; Yalof, 2001). O'Brien asserts that President Ford, nominating Stevens after the Watergate scandal, wanted a nominee who would not cause any further controversy (O'Brien, 1991). Similarly, Yalof argues that President Reagan, after the failed nomination of Bork (and the withdrawn nomination of Douglas Ginsburg), chose Kennedy as he was not a controversial figure (Yalof, 2001, 164). Jeffrey King, describing the appointment process of Justice Blackmun, makes a similar argument. King argues that President Nixon wanted to nominate a Justice who was "strong of law and order, and weak on civil liberties" and thus didn't focus on Blackmun's separationist Establishment Clause views (King, 1996, 281). These scholars, while describing different appointment processes and highlighting different concerns of presidents, come to a similar conclusion: the presidents' focus on aspects of the Justices other than their Establishment Clause views led some presidents to appoint Justices less accommodationist than the presidents themselves were.

Some scholars, also accepting the framework of the attitudinal model, have attempted to explain how public opinion shifted the attitudes and goals of the Justices and thus has affected the Court's Establishment Clause jurisprudence. While few scholars have suggested that the public's view of

religious liberty affected the Justices' attitudes, some have argued that the public's view of the Court was influential in the Court's decision-making. Amanda Cooley argues that the Court, while largely rejecting *Lemon*, continued to use it to maintain the Court's reputation of consistency and legitimacy (Cooley, 2022). According to Cooley (and others who share similar arguments), the Justices desired to maintain the Court's reputation and were willing to ignore their ideological goals if they threatened the legitimacy of the Court (Cooley, 2022).

Despite this view of the Court being influenced by the public, a far greater amount of research has examined the claim that public opinion, in the form of political pressure, influenced the Court's Establishment Clause decisions. Rodney Grunes argues that the Reagan administration, through Solicitor Generals and amicus briefs, was moderately successful in influencing the attitudes and decisions of the Court (Grunes, 1991). Others, such as Thomas Merrill, claim that certain members of the Court were very aware of and influenced by political pressure (Merrill, 2003). Merrill claims that Souter, Kennedy, and O'Connor all became less accommodationist and refused to take conservative positions in controversial cases in the early 1990s as a response to the growing political rejection of conservative ideals (Merrill, 2003). However, contrary to the arguments of Grunes and Merrill, other scholars have claimed that the Court is relatively insulated from political pressures, citing times when the Court rejected attempts by political actors to influence the Court's interpretation of the Establishment Clause. Hensley and Tudor argue that the Bush (H.W.) administration saw *Lee v. Weisman* as an opportunity to remove the *Lemon* framework and urged the Court to produce a new, more accommodationist framework for Establishment Clause cases (Hensley & Tudor, 1999). Hensley and Tudor argue that the Court was able to ignore the political pressures created by the Bush administration and thus denied the administration's request to remove *Lemon* (Hensley & Tudor, 1999). Hensley and Tudor's findings contradict the conclusions of Merrill; this lack of a consensus reflects the need for further research about the effects of political pressure and public opinion on the attitudes of the Court and its Justices.

Legal Model

While the previous theories rely on the attitudinal model to explain the Court's decision-making process, other scholars argue that the legal model is more accurate in explaining the Rehnquist Court's Establishment Clause jurisprudence. The legal model, in contrast to the attitudinal model, argues that precedent and legal rules guide the Court's decision-making as the Justices apply the law rather than attitudes (Friedman et al., 2020, 55). Kritzer and Richards make an agreement that largely supports the assumptions of the legal model, as they argue that, after *Lemon*, precedent was the main factor that determined the outcome of Establishment Clause cases (Kritzer and Richards, 2003). Further, contradictory to the attitudinal model, Kritzer and Richards assert that judicial attitudes were less influential after *Lemon* (Kritzer and Richards, 2003). Cooley, describing the future of *Lemon*, makes a similar argument about *Lemon*'s status as an all-purpose test for Establishment Clause cases (Cooley, 2022). Cooley argues that the strong precedential backing of *Lemon* obliged the Justices to use the *Lemon* test in Establishment Clause cases (Cooley, 2022). Both Cooley and Kritzer and Richards, viewing the strength of *Lemon*, argue that the Court has relied on precedent to guide its decisions.

However, while scholars like Kritzer and Richards have concluded that the legal model is accurate, others disagree and argue that the legal model is a highly flawed explanation for the Court's Establishment Clause jurisprudence. Many scholars, rebuking the validity of the legal model in the Rehnquist Court's Establishment Clause cases, note exceptions to *Lemon* and describe how *Lemon* has been "eroded" over time (Zarrow, 1986, 478). Nicholas Roberts argues that *Marsh* was a major exception to *Lemon* and claims that the Court saw *Lemon* as an obstacle rather than a guiding element of their decision-making (Roberts, 2015). Similarly, Rodriguez and Zarrow argue that the Court, desiring to avoid the precedent of *Lemon*, weakened the test by providing alternative methods of Establishment Clause analysis (Rodriguez, 1992; Zarrow, 1986). Rodriguez argues that Kennedy and O'Connor, by proposing their coercion and endorsement tests, wanted to escape the precedent of *Lemon* (Rodriguez, 1992). Rodriguez further argues that the Court only continued to use *Lemon* due to the flaws of the coercion and endorsement tests (Rodriguez, 1992). Zarrow, analyzing the role of *Lemon*, claims that exceptions and alternatives to *Lemon* "eroded" the test and allowed the Court to avoid *Lemon*'s holdings (Zarrow, 1986,

478). These scholars, while focusing on different methods the Court has used to avoid precedent, argue that, in Establishment Clause cases, precedent has not been as carefully followed as the legal model would suggest.

Strategic Model

Other scholars, observing flaws in the attitudinal and legal models, argue that the strategic model most accurately describes the Court's Establishment Clause jurisprudence. Under the logic of the strategic model, Justices are strategic actors that make decisions based on the expected reactions of others (Epstein & Knight, 1998). Prior research that adopts the strategic model has highlighted the role of swing Justices and coalitions in Establishment Clause decision-making and has identified various strategic methods that prevented the accommodationist coalition from forming majorities and furthering their goals.

Many scholars, analyzing the Court's decision-making under the assumptions of the strategic model, argue that the strength of the coalitions was a major factor in the decisions of Establishment Clause cases. Thomas Merrill, analyzing the early Rehnquist Court's coalitional dynamics, argues that the accommodationist Justices were far less committed to the accommodationist coalition and thus the coalition was less organized in its strategic methods and goals (Merrill, 2003). Merrill concludes that this lack of commitment and organization was a substantial factor in the accommodationist coalition's failure to guide the Court to a more accommodationist interpretation of the Establishment Clause (Merrill, 2003).

Many scholars, examining the role of the swing Justices rather than coalitions, have argued that the voting decisions of the swing Justices were a highly influential factor in determining the Court's use of *Lemon* and interpretation of the Establishment Clause. Jay Schlosser, examining the Court's coalitional dynamics after the appointment of Scalia, argued that Kennedy would be the most influential Justice and that both coalitions would attempt to influence Kennedy (Schlosser, 1988). Similarly, Hensley and Tudor, analyzing the role of swing Justices during the Rehnquist Court, argued that the coalition that could best influence Kennedy and O'Connor would prevail in determining the use of *Lemon* and the Court's direction for Establishment Clause analysis (Hensley & Tudor, 1999). Both Schlosser and Hensley and Tudor note that the fate of *Lemon* was largely reliant on the decisions of the swing Justices (Hensley &

Tudor, 1999; Schlosser, 1988). Other scholars, also viewing the importance of swing Justices, have examined the methods coalitions used to gain the support of the swing Justices. Daniel Ray, examining the Court's developing Establishment Clause jurisprudence, argues that the continual use of O'Connor's endorsement test was merely a product of coalitional strategies, as both coalitions were willing to adopt the endorsement test to ensure her support (Ray, 2009). Accordingly, Ray predicted that the endorsement test would no longer be used after O'Connor exited the Court (Ray, 2009).

While much research on the strategic model has highlighted the importance of coalitions and swing Justices, other scholars have attempted to identify the strategic methods that allowed the coalitions to influence the swing Justices, maintain majorities, and influence the Court's interpretation of the Establishment Clause. Prior literature has argued that defensive denials were a prominent strategy of the separationist coalition that resulted in moderate success. Epstein and Knight describe a defensive denial as the process of a Justice denying a petitioner a writ of certiorari (cert) for a case in fear that the majority opinion will produce an undesirable outcome (Epstein & Knight, 1998, 79-80). Caldeira et al. claim that Justices, acting with the knowledge of how other Justices will react, use defensive denials frequently (Caldeira et al., 1999). Similarly, Colker and Scott contend that the separationist Justices of the Rehnquist Court applied defensive denials often (Colker & Scott, 2022). However, Colker and Scott also acknowledge that the appointment of Justice Thomas effectively removed defensive denials as a valid separationist strategy, as the accommodationist coalition would always have enough votes to grant cert (Colker & Scott, 2022). Other scholars, studying the use of precedent in Establishment Clause cases, have argued that precedent was used as a strategic tool and highly influenced the Court's decision-making. Amanda Cooley argues that *Lemon* served as a useful strawman that either coalition could critique to attack the views of the opposing coalition (Cooley, 2022). Further, Cooley claims that the strategic benefit of *Lemon* was a crucial factor in its longevity, as this benefit made it convenient for both coalitions to continue using *Lemon* despite their varying individual beliefs about its validity (Cooley, 2022).

Conclusion

Despite the great amount of research that has attempted to explain the Rehnquist Court's failure to shift the Court's interpretation of the Establishment Clause in a more accommodationist direction, no single answer has been sufficient to consider the countless factors that affected the Court's decision-making. Thus, scholars have adopted the attitudinal, legal, and strategic model to analyze the Court's decision-making and provide an explanation for the Court's actions. However, these models often refute each other and, as a result, many scholars have produced contradictory answers to this question. This lack of consensus and ongoing controversy reflects the need for further analysis of the Rehnquist Court's decision-making and Establishment Clause jurisprudence.

Research Methods

To analyze my hypotheses, I use case decisions, the Justices' voting records, and archival information from the papers of the Justices (obtained from the Library of Congress). From the papers of the Justices, I collected data from the papers of Justices Blackmun, Brennan, Marshall, Stevens, White, and Black. By examining bench memos, correspondence between the Justices, memos from clerks, drafts of opinions, conference notes, letters to the Justices, and newspaper clippings about certain cases, I was able to obtain an expansive view of the decision-making process within Establishment Clause cases that dealt with schools.

Findings and Analysis

Hypothesis 1: "Republican" Justices were less accommodationist than the presidents that appointed them.

While this hypothesis is partially true, as some Republican-appointed Justices were only moderately accommodationist and others were separationist, some of the Justices were fiercely accommodationist and were almost always accommodationist in their rulings. Figure 1 depicts the voting records of the Republican-appointed Justices, with the Justices more consistently accommodationist on

the right and the most separationist Justices on the left. As Figure 1 shows, some Justices, such as Burger (CJ), Rehnquist (WHR), Scalia (AS), and Thomas (CT) were highly accommodationist and voted in favor of a lower wall of separation in every case that came before them (except for Burger, who did so in almost every case). However, other Justices, such as Stevens (JPS), Souter (DS), and Blackmun (HAB) were very separationist and rarely voted to allow religion to encroach into public education. Further, Justices Powell (LP), O'Connor (OC), and Kennedy (AMK) had the most moderate views, frequently voting with both coalitions. Thus, according to the voting records of the Justices, the ideologies of Burger, Rehnquist, Scalia, and Thomas aligned with the accommodationist presidents who appointed them. However, the moderate Justices (Powell, O'Connor, and Kennedy) only sometimes adopted accommodationist views and the separationist Justices (Stevens, Souter, and Blackmun) rarely did. Thus, this hypothesis, while not true for all Justices, was correct for many of the Republican-appointed Justices of the 1980s and early 1990s.

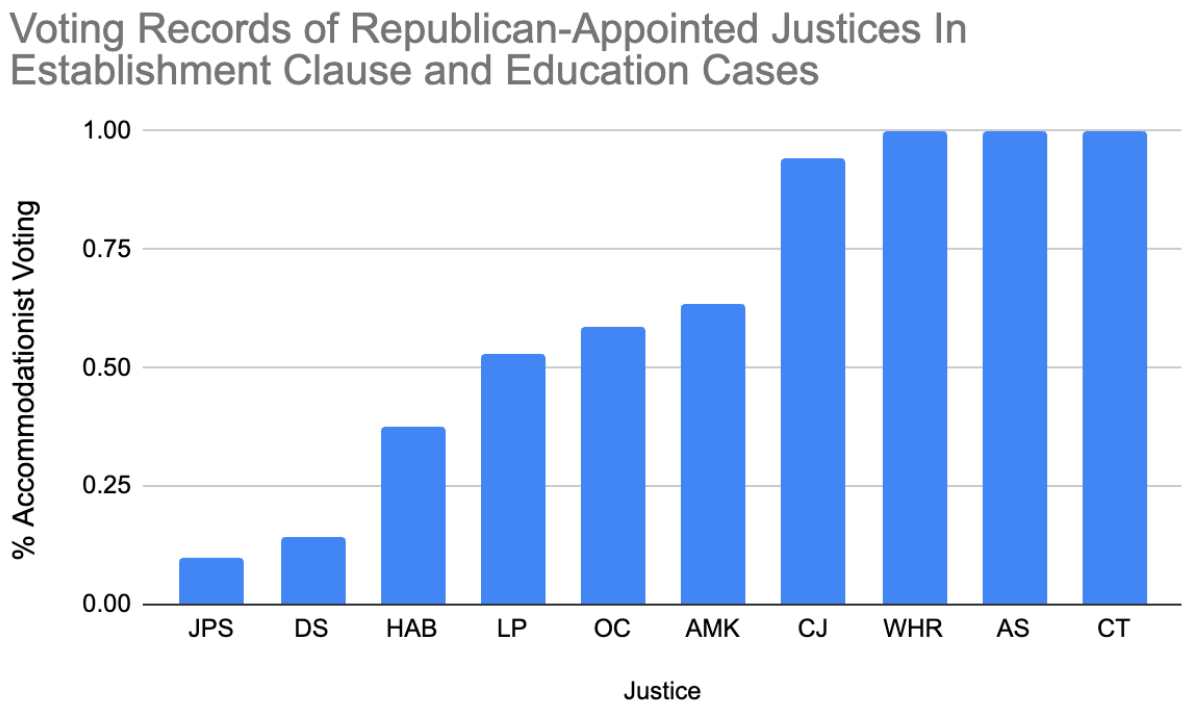

Figure 1: Voting Records of the Republican-appointed Justices

Hypothesis 2: Public opinion influenced the arguments and decisions of the Justices.

While not all Justices displayed a concern for public opinion, public opinion influenced how some Justices viewed the potential impact of their decisions and the importance of certain cases.

Public Opinion – Reactions from the Public

Blackmun's folders, containing the most letters and newspaper clippings, presented the most in-depth information about the specific cases that yielded larger public reactions. In certain cases, most often those that produced separationist decisions, there was a considerable negative public reaction, as evidenced by the countless angry letters sent by citizens which demanded the Justices change their decisions. This was most clear in *Lee*, *Lynch*, and *Allegheny County*. While *Lynch* was an accommodationist result, *Lee* was a separationist decision and *Allegheny* was a mixed decision, with the overwhelming majority of the correspondence surrounding the case addressing the separationist half of the decision (Blackmun, Box 527). Justice Blackmun's papers contained twelve folders of mail from *Allegheny County*, ten folders from *Lynch*, and nine folders from *Lee* (Blackmun, Boxes 399, 527, 586-587). Almost all the correspondence in Blackmun's files surrounding these three cases was negative, as citizens expressed their discontentment with the decisions (Blackmun, Boxes 399, 527, 586-587). One concerned citizen, upset with the *Lee* decision, asked the Court if "God will become illegal in this 'Nation under God'?" (Blackmun, Box 586). Further, in *Lynch*, one citizen compared the Court to Pontius Pilate, the Roman governor of Judaea who sentenced Jesus to death (Blackmun, Box 399).

However, despite these large public reactions, there was no evidence of these letters or general statements of discontent influencing how the Justices voted. Justices Burger (the author of the *Lynch* opinion), Kennedy (the author of the *Lee* opinion), and Blackmun (the author of the *Allegheny County* opinion) showed no substantial deviation in their voting patterns after these cases that produced noticeably greater levels of public outrage. Burger, one of the strongest accommodationist Justices on the Court, only sided with the separationist coalition in *Lemon* and solely voted accommodationist after *Lemon*. Thus, despite the outrage that followed *Lynch*, Burger stayed consistent with his

accommodationist position. Similarly, Blackmun, while facing significant public backlash over his *Allegheny County* decision, maintained his voting pattern after the case (Figure 2). Blackmun's voting record was consistently around 40% of his votes being accommodationist, with no noticeable shift occurring after *Allegheny County* (Figure 2).

Further, Kennedy, while voting with the separationist coalition in *Lee*, continued to vote with both coalitions in future cases. While *Lee* was a notable shift for Kennedy, as it was his first instance of voting with the separationist coalition, his voting pattern didn't substantially shift after *Lee* (Figure 3). Kennedy's voting, while not perfectly consistent after *Lee*, maintained a similar pattern in future cases (Figure 3). However, Justice Kennedy was one of the few Justices who noted if a decision would be popular as, in a letter to Justice Blackmun concerning changes to his *Lee* opinion, noted that the separationist decision was "likely to be quite unpopular" (Blackmun, Box 399). The unpopularity of his *Lee* decision did influence certain elements of Kennedy's decision, as he wanted to ensure that the Court's decision was not perceived as hostile toward religion (Blackmun, Box 399). However, despite this awareness of the reality of public opinion and the small alteration of his decision, Kennedy did not change his voting pattern and continued to act as a swing vote in Establishment cases.

There was an instance where a Justice accused another of succumbing to the pressure of public opinion, as Blackmun, in his *Regan* dissent, claimed that Justice Powell (and somewhat Chief Justice Burger) switched from the separationist coalition to the accommodationist coalition largely due to the "continuing and emotional controversy" surrounding the case (*CPERL v. Regan*, 1980, Blackmun, J., dissenting, 664). While Blackmun was correct, in that Powell voted with the separationist coalition in *Lemon II, Meek*, and *Wolman*, Powell's voting record was mostly consistent before and after *Regan* (Figure 4). Prior to *Regan*, Powell voted with both coalitions, taking both accommodationist and separationist stances. This trend continued after *Regan*, as Powell continued to be a swing Justice and split his votes almost evenly between the coalitions (Figure 4). However, Powell did display a shift in his voting pattern across his career as a Justice. In the 1980s, Powell became more accepting of government funding for religious schools, as he voted with the accommodationist majority in cases such as *Mueller*

and *Witters*. This was a clear shift away from the separationist views he adopted in *Meek* and *Wolman* (*Mueller v. Allen*, 1983; *Witters v. Blind*, 1986). Despite this shift in ideology, there was no evidence that this was a result of pressure from public opinion, as Powell continued to vote with the separationist coalition in other Establishment Clause cases (Figure 4). Regardless of Justice Blackmun's claims and the eventual shift in Powell's views of parochial aid, there was no evidence of Powell's voting record being influenced by public opinion.

Despite the ferocity of public opinion in many Establishment Clause cases that dealt with education, there was no substantial evidence to support the claim that the Justices changed their voting decisions as a result of reactions from the public.

Public Opinion – Reactions from Legislatures and Lower Courts

While there is little evidence that public opinion was influential in affecting the voting behavior of the Justices, there is evidence to demonstrate that the Justices were receptive to the opinions and reactions of state legislatures and lower courts.

The Justices, aware of how their decisions affected the rulings of lower courts, often acknowledged that they had to produce easy-to-interpret rulings that would allow lower Courts to rule consistent with the Court's desired interpretation of the Establishment Clause. Justice Powell, in a letter to Justice Marshall about Marshall's *Witters* opinion, takes issue with Marshall's failure to address how his separationist *Witters* decision existed alongside the accommodationist decision of *Mueller* (Blackmun, Box 438). Powell understood that lower courts were bound to be confused by the lack of clarification about the Court's interpretation of the Establishment Clause and thus decided to write separately in order to alleviate the potential confusion of lower courts (Blackmun, Box 438). Justice Brennan displays a similar concern in his dissent in *Marsh*, as he attempts to clarify the majority's decision and guide lower courts in their interpretation of the decision. (*Marsh v. Chambers*, 1983, Brennan, J., dissenting). Brennan emphasizes that the majority's upholding of legislative prayer is a solitary exemption to *Lemon* rather than a substantial change in the Court's Establishment Clause jurisprudence (*Marsh v. Chambers*, 1983, Brennan, J., dissenting, 795-796). Brennan's dissent reflects both the Court's desire to produce opinions

that will clearly instruct lower courts and the Court's awareness of how their decisions affect how lower courts interpret the Constitution.

While the Justices were responsive to the potential reactions of lower courts, they also were aware of the effects of their decisions on state legislatures. Justice Blackmun, in a conference memo for *Wolman,* noted that the Ohio law under dispute in *Wolman* was a direct result of the Court's earlier decision in *Meek* (Marshall, Box 192). Blackmun acknowledges that the Ohio law was the result of the Ohio legislature's interpretation of *Meek* (Marshall, Box 192). Thus, Blackmun understood that the Court's decision in *Wolman* would likely "emerge as the pattern for other state aid programs" (Marshall, Box 192). Blackmun's awareness of the effects of the Court's rulings reflects the Court's responsiveness to the needs of state legislatures, as the Court understood that legislatures relied on the Court's rulings to develop what they believed to be constitutional legislation.

The Justices, while not influenced by the pressure of public opinion, crafted their opinions with a concern for the future decisions of lower courts and the future legislation state legislatures and Congress would produce as a response to the Court's decisions. While the voting records of the Justices show little evidence of these concerns affecting their voting decisions, there is evidence that these concerns influenced the arguments Justices used in certain cases.

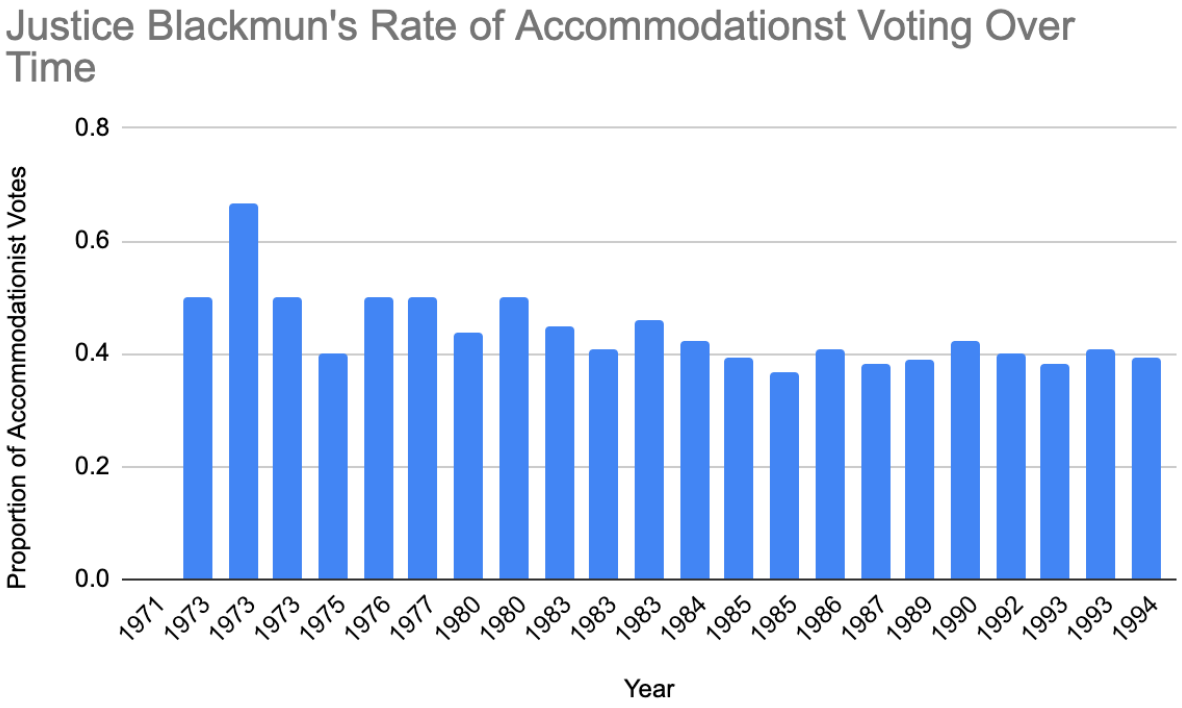

Figure 2: Blackmun's Voting Over Time

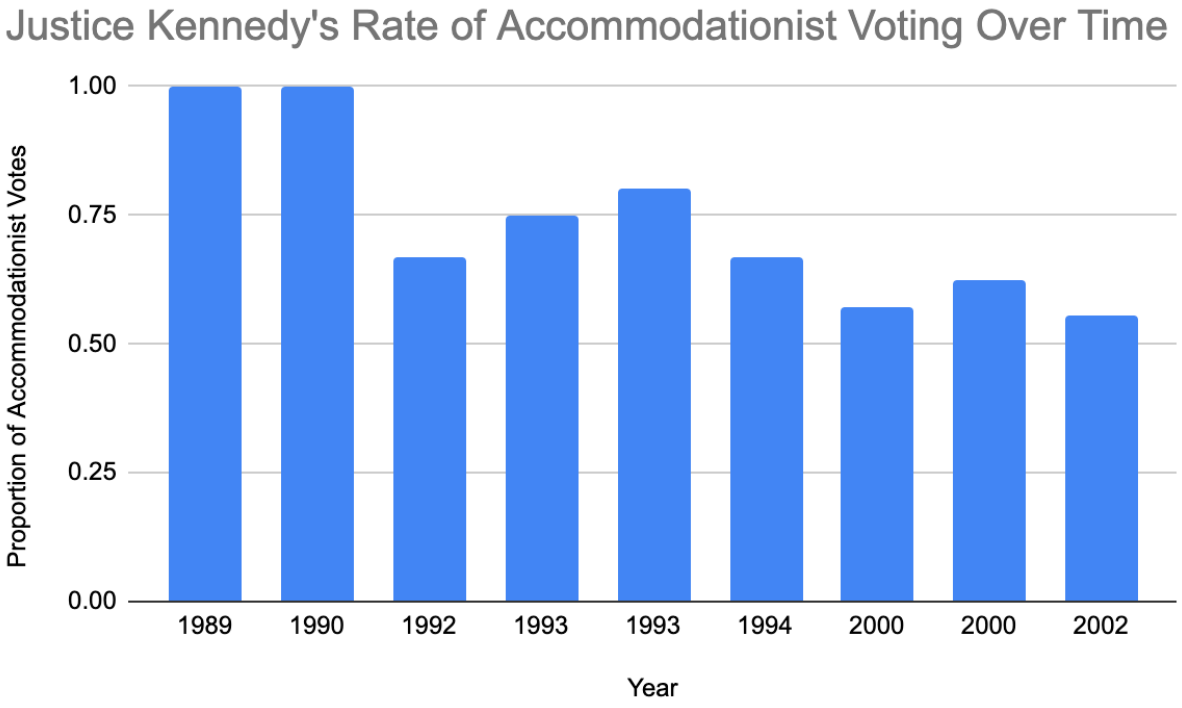

Figure 3: Kennedy's Voting Over Time

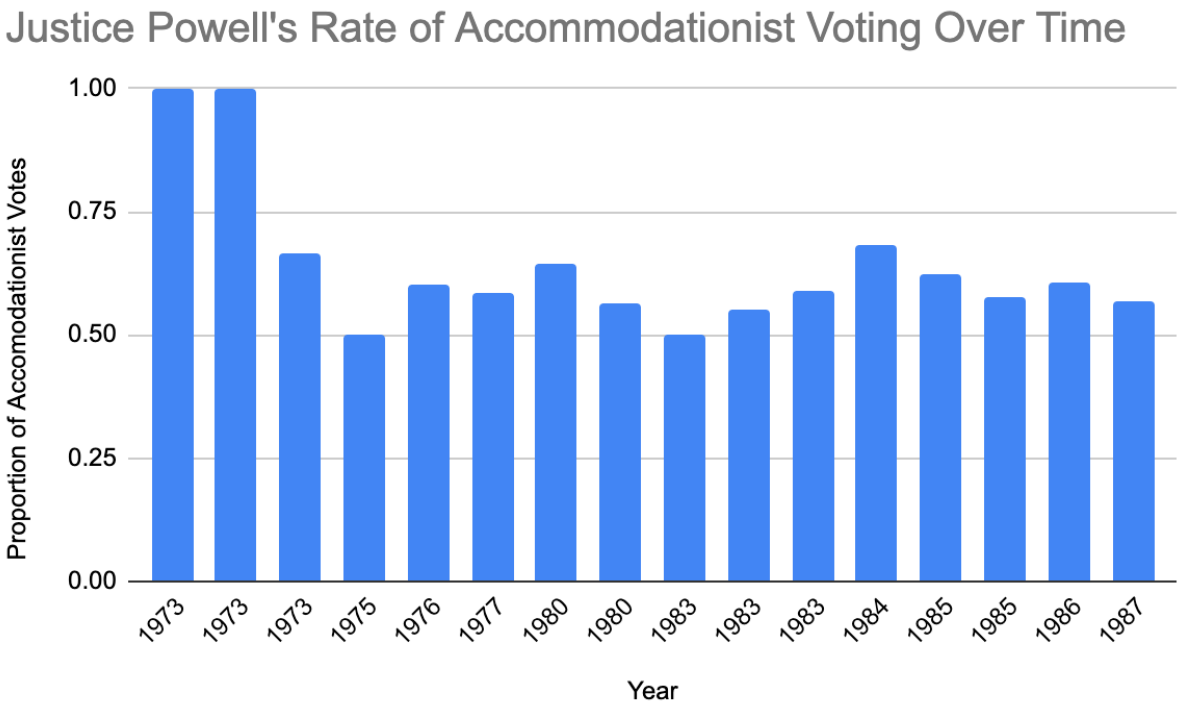

Figure 4: Powell's Voting Over Time

Hypothesis 3: The separationist coalition made better strategic choices; these choices allowed the separationist coalition to better influence swing Justices and form majorities.

Hypothesis 4: The Justices' attachment to precedent upheld the 'wall of separation'.

Though the use of precedent varied in Establishment Clause cases dealing with education, its consistent presence in the arguments of the Justices was not a product of the Justices' desire to follow a legal model of judicial decision-making but was rather a strategic choice that allowed the Justices to promote their attitudes about the Establishment Clause and give legitimacy to their views. Further, the coalitional strategies adopted by the Justices were a necessity for both coalitions to ensure that their desired view of the Establishment Clause was established as precedent and as a part of the Court's jurisprudence. While the Rehnquist Court was split into three major factions, the accommodationist coalition, the separationist coalition, and the swing Justices, each Justice had their own view of the

Establishment Clause that influenced how they decided on cases. These individual views shaped the way the Justices used precedent to explain and support their decisions.

Use of Precedent by the Separationist Coalition

The separationist coalition, favoring a "high and impregnable" wall between church and state, relied on a strict reading of *Lemon* to support their interpretation of the Establishment Clause (*CPERL v. Regan*, 1980, Stevens, J., dissenting, 646, quoting *Everson v. Board of Education*, 1947). Justice Marshall, a strong separationist who almost always voted to uphold a separationist reading of the Establishment Clause, consistently promoted the use of a separationist and strict interpretation of the *Lemon* test. For example, in *Mueller*, Marshall and Rehnquist, writing opposing opinions, both used the *Lemon* test to analyze the constitutionality of a tax credit program for students at primary and secondary schools (*Mueller v. Allen*, 1983). Marshall's interpretation of *Lemon* was far stricter than Rehnquist's, thus he declared the program to be unconstitutional whereas Rehnquist saw the program as not violative of the Establishment Clause (*Mueller v. Allen*, 1983). Justice Souter and Stevens, sharing the separationist views of Marshall, adopted a similar use of precedent and relied on a strict reading of *Lemon* to promote a separationist interpretation of the Establishment Clause (*CPERL v. Regan*, 1980, Stevens, J., dissenting; *Lee v. Weisman*, 1992, Souter, J., concurring). Justice Brennan, also a strong separationist, favored a different reading of *Lemon*, although to achieve the same goal as Marshall, Souter, and Stevens. Brennan, first in *Meek*, relied on the potential for political divisiveness to declare a program unconstitutional (*Meek v. Pittenger,* 1975, Brennan, J., concurring in part and dissenting in part, 372). Brennan used the potential for political divisiveness, described as an element of excessive entanglement in *Lemon*, to further a stricter and more separationist reading of *Lemon*. In later cases, such as *Marsh*, Brennan again used the political divisiveness of certain programs and practices to conclude that they are unconstitutional (*Marsh v. Chambers*, 1983, Brennan, J., dissenting, 799). This strict reading of the *Lemon* test's prohibition of excessive entanglement between church and state allowed Brennan to use precedent to support his separationist interpretation of the Establishment Clause.

Justice Blackmun, while also a frequent member of the separationist coalition, displayed a more legalistic decision-making process in Establishment Clause cases and occasionally strayed from the narrow reading of *Lemon* that was favored by other separationist Justices. Blackmun, in *Marsh*, accepted a majority opinion that entirely ignored the mandates of *Lemon* and accepted a policy of legislative prayer that had a religious purpose, advanced religion, and created excessive entanglement with religion (*Marsh v. Chambers*, 1983). This rejection of *Lemon* was an anomaly in Blackmun's jurisprudence, as he often relied on precedent to inform his decisions, despite his disagreement with many of the Court's Establishment Clause rulings (*County of Allegheny v. ACLU*, 1989). The *Marsh* decision continued to make future cases difficult for Blackmun, as he had to explain his departure from *Lemon* in *Marsh* and then his return to using *Lemon* in later cases (Blackmun, Box 586-587). In a memo discussing *Lee*, Blackmun's clerk emphasized the need to explain that *Marsh* was an isolated case and that only other situations with almost identical facts would produce a similar exception to *Lemon* (Blackmun, Box 586). Further, in a letter to Justice Brennan about Brennan's *Lynch* dissent, Blackmun urged Brennan to use less negative language when describing the *Marsh* decision, as Blackmun was part of the *Marsh* majority and still held that it was a correct decision (Blackmun, Box 399).

However, despite the exception of *Marsh*, Justice Blackmun showed far greater attachment to following precedent than other separationist Justices. In *Allegheny County*, Blackmun produced a decision that was partly accommodationist (upholding the constitutionality of the menorah display) and partly separationist (holding that the creche display was unconstitutional and violative of the Establishment Clause) (*County of Allegheny v. ACLU*, 1989). This decision was the product of Blackmun attempting to follow both a separationist reading of *Lemon*, which Blackmun preferred, and the accommodationist precedent of *Lynch*, a case that upheld the constitutionality of a creche display (*County of Allegheny v. ACLU*, 1989, 588). While Blackmun wanted to promote a separationist reading of the Establishment Clause, his dedication to accepting the authoritative role of precedent caused him to produce a decision that partially aligned him with the accommodationist coalition. Blackmun, while still utilizing a narrow

view of *Lemon* to produce a separationist view of the Establishment Clause, was more legalistic in his decision-making process than the other separationist Justices.

While the Justices of the separationist coalition differed in their use of precedent and their preferred methods of Establishment Clause analysis, the coalition often relied on a strict reading of *Lemon* to promote their separationist attitudes and hinder accommodationist efforts to change the Court's interpretation of the Establishment Clause.

Use of Precedent by the Accommodationist Coalition

The accommodationist Justices, while almost unanimously rejecting the *Lemon* test and favoring alternatives, often accepted the use of a weaker, more accommodationist reading of *Lemon* to maintain majorities and promote an accommodationist interpretation of the Establishment Clause. Rehnquist, in his *Wallace* dissent, asserted that the wall of separation between church and state was a "misleading metaphor" and that "the repetition of this error in the Court's opinion in *McCollum* and *Engel* does not make it any sounder historically" (*Wallace v. Jaffree*, 1985, Rehnquist, C.J., dissenting, 38, 92). Rehnquist claimed that the separationist decisions of *Lemon*, *Engel*, *Schempp*, and *Allen* were incorrect, produced "hopelessly divided pluralities," and that the Court should return to the neutrality standard of *Everson* (*Wallace v. Jaffree*, 1985, Rehnquist, C.J., dissenting, 38). However, despite these claims, Rehnquist used *Lemon* as the instrument of his Establishment Clause analysis in cases before and after *Wallace*. In his *Mueller* opinion, while favoring the view of *Lemon* as a "signpost" rather than as a functional test for all Establishment Clause cases, Rehnquist used the *Lemon* test to analyze the Minnesota law and found that the law did not violate the Establishment Clause (*Mueller v. Allen*, 1983). Further, in Rehnquist's *Zobrest* opinion, a case dealing with state funding of interpreters for students at religious schools that was decided almost a decade after *Wallace*, he continued to use the *Lemon* test, using his loose reading of *Lemon* to produce an accommodationist majority (*Zobrest v. Catalina*, 1993).

Justices Scalia and Thomas, however, held much more negative views of *Lemon* and refused to apply it in many cases. In *Lamb's Chapel*, a case dealing with a religious group being denied equal access to school facilities, Scalia describes *Lemon* as a "ghoul in a late-night horror movie" that "stalks our

Establishment Clause jurisprudence" (*Lamb's Chapel v. Moriches*, 1993, Scalia, J., dissenting, 398). Scalia notes that a majority of the Court rejects the *Lemon* test and thus argues that the Court should not use it to examine Establishment Clause cases (*Lamb's Chapel v. Moriches*, 1993, Scalia, J., dissenting, 398). Further, Scalia claims that the Court only continues to use *Lemon* as it is a useful tool to further individual preferences, acknowledging that the Court invokes *Lemon* when it wants to strike down a law but ignores *Lemon* when it wants to uphold a law (*Lamb's Chapel v. Moriches*, 1993, Scalia, J., dissenting, 399). However, Scalia and Thomas, much like Rehnquist, joined opinions that used *Lemon* in order to maintain accommodationist majorities. In *Zobrest*, despite Rehnquist's use of *Lemon*, Scalia and Thomas joined to ensure Rehnquist's accommodationist position commanded a majority of the Court (*Zobrest v. Catalina*, 1993). Additionally, Scalia also used *Lemon* as a tool to further his attitudinal goals, as, in *Lee*, he criticized the majority for using coercion analysis rather than *Lemon*, using this critique to both attack the argument of the separationist majority and to display the "irrelevance" of *Lemon* (*Lee v. Weisman*, 1992, Scalia, J., dissenting, 644). The accommodationist Justices, while generally opposed to the *Lemon* test, continued to use it within Establishment Clause cases to support their judicial views with well-established precedent and to maintain accommodationist majorities.

Use of Precedent by the Swing Justices

The swing justices (Powell, Kennedy, and O'Connor) held more moderate views about the usefulness of *Lemon* and proposed alternatives to *Lemon* that were far more moderate than those favored by the accommodationist Justices. Justice Powell described *Lemon* as "the only coherent test a majority of the Court has ever adopted," appreciating the consistency of *Lemon* (*Wallace v. Jaffree*, 1985, Powell, J., concurring). While Powell was aware of the criticisms of *Lemon*, as he saw that O'Connor wanted to refine the standards of *Lemon* and Rehnquist wanted to remove *Lemon* entirely, he used *Lemon* to further his goal of maintaining consistency and clarity in the Court's Establishment Clause jurisprudence (*Wallace v. Jaffree*, 1985, Powell, J., concurring). However, Powell adopted both an accommodationist and a separationist interpretation of *Lemon*. Powell, in his *Aguilar* concurrence, noted that political divisiveness was a relevant factor in some Establishment Clause cases and adopted a more separationist

reading of both *Lemon* and the Establishment Clause (*Aguilar v. Felton*, 1985, Powell, J., concurring). Inversely, Powell joined Byron White's *Regan* opinion, which relied on an accommodationist reading of *Lemon* (*CPERL v. Regan*, 1980).

Kennedy and O'Connor, holding less favorable views of *Lemon*, proposed alternatives to the *Lemon* test that were modifications of *Lemon* rather than entirely new tests. Kennedy, prior to his *Lee* opinion, joined many opinions that relied on an accommodationist interpretation of *Lemon*. However, in *Lee*, Kennedy joined the separationist coalition and refused to overturn *Lemon* (as the US' amicus brief urged the Court to), instead promoting a new standard for Establishment Clause analysis: coercion (*Lee v. Weisman*, 1992). Kennedy, citing *Engel*, *Mergens*, and *Schempp*, viewed the presence of coercion as the most important element in determining if a law or practice was violative of the Establishment Clause (*Lee v. Weisman*, 1992, 592-593). The coercion test allowed Kennedy, who cared most about the presence of coercion, especially the coercion of children, to apply his own view of the Establishment Clause within decisions. Justice O'Connor, with her endorsement test, was able to achieve a similar end. In *Lynch*, O'Connor proposed the endorsement test, which was her attempt at modifying *Lemon* in a more accommodationist direction (*Lynch v. Donnelly*, 1984, O'Connor, J., concurring). O'Connor claimed that the two ways the Establishment Clause could be violated were if there was excessive entanglement between church and state or if the government was endorsing or disapproving of religion (*Lynch v. Donnelly*, 1984, O'Connor, J., concurring, 687-688). This test, applying the entanglement prong of *Lemon*, allowed O'Connor to provide an alternative to *Lemon* and promote her individual interpretation of the Establishment Clause. While the swing Justices voted with both the separationist and accommodationist coalitions, their individual interpretations of *Lemon* and their proposed alternatives allowed them to apply their judicial attitudes in their decision-making process, as both coalitions had to adopt their tests and views to ensure the swing Justices' support in forming majorities.

Role of the Swing Justices

The swing Justices, acting as the deciding votes in Establishment Clause cases, were highly aware of their position and adopted strategies to help them easily transition between either coalition.

While the separationist and accommodationist coalitions were largely solidified, with their members infrequently defecting, the swing Justices were open to being persuaded and often changed their minds during cases. Kennedy, in *Lee*, originally wrote for the accommodationist coalition (at the request of Chief Justice Burger, who assumed he had a majority) (Blackmun, Box 586). However, after declaring that his draft "looked quite wrong," Kennedy switched his vote and joined the separationist coalition (Blackmun, Box 586). Further, in many cases, Justice Blackmun left conferences with a "?" in his conference notes, as he couldn't predict which coalition certain swing Justices would join (Blackmun, Boxes 169, 415). The swing Justices, while more often siding with the accommodationist coalition, joined both coalitions and were willing to accept the arguments of either coalition. However, this consistent switching of sides occasionally resulted in the swing Justices joining the opinions of Justices who, in previous cases, produced harsh judicial critiques of the swing Justices' opinions. This was most clear in *Lee*, as Kennedy, in a letter to Blackmun, noted how the two shared "barbs" in *Allegheny*, as both Justices were highly critical of each other in discussion of the constitutionality of the creche under dispute in *Allegheny* (Blackmun, Box 586). However, Kennedy and Blackmun were able to cooperate and produce a decision that Blackmun's clerk described as "the greatest victory of the year" (Blackmun, Box 586). The swing Justices' lack of consistent coalitional support produced a Court where they were the deciding votes in almost all Establishment Clause cases.

Both the accommodationist coalition and the separationist coalition, to influence the decisions of the swing Justices and ensure their continuing support, were often very willing to accept changes to opinions that the swing Justices requested. In *Zobrest*, Kennedy, joining the accommodationist majority as the fifth vote, wanted Rehnquist to include in his opinion a statement that confirmed that his decision was not attempting to remove *Lemon* or propose another test (White, Box II:201). Rehnquist, needing Kennedy's vote to maintain the majority, sent the edits to Thomas and White, asking for permission to include them (White, Box II:201). Similarly, in *Wallace*, Powell, who initially voted with the accommodationist coalition but switched to join Stevens' separationist opinion, wanted to make certain changes to Stevens' opinion, most notably the inclusion of a brief discussion of the purpose test as

interpreted in *Schempp* (Blackmun, Box 415). Stevens, showing the edits to Blackmun, Brennan, and Marshall, wanted to include them as he believed it would "enable Lewis to change his vote and to join our opinion" (Marshall, Box 362). After making these edits, Powell joined Stevens' opinion and the separationist majority was far stronger, no longer relying on a single vote (Powell made the vote 6-3 instead of 5-4) (Blackmun, Box 415). The swing Justices, more moderate in their view of the Establishment Clause, accepted their role as the deciding votes in Establishment Clause cases and were often swayed by the willingness of the coalitions to adopt their suggested alterations of decisions.

Strategic Methods

To account for the tendency of the swing Justices to change their votes and the swing Justices' willingness to join either coalition, both coalitions adopted many strategic methods to form stronger coalitions and gain the votes of the swing Justices. A prominent strategy used by the separationist coalition was what Epstein and Knight call "defensive denials" (Epstein & Knight, 1998, 79-80). In many cases, Blackmun's clerk recommended denying cert for cases that could serve as potential "blows to *Lemon*" or threaten the status of *Lemon* as the framework for Establishment Clause analysis (Blackmun, Box 415). Further, in *Bender v. Williamsport*, the separationist coalition, seeing that the case would produce an accommodationist majority if decided on the merits of the case, instead chose to rule that the appellant lacked standing (*Bender v. Williamsport*, 1986). This strategic move relied on the vote of O'Connor, who voted with the accommodationist coalition on the merits of the case but with the separationist coalition on the issue of standing (*Bender v. Williamsport*, 1986). To protect this result, the separationist Justices were willing to "blast her [O'Connor] for her jurisprudence" if she described her accommodationist views about the merits of the case (Blackmun, Box 436).

A similar strategy of the coalitions was the production of narrow opinions. This strategy allowed both coalitions to produce opinions that more members of the Court would agree with and, for the separationist coalition, avoid dealing with constitutional questions that could lead to a more accommodationist reading of the Establishment Clause. In *Lee*, Blackmun's clerk noted that Kennedy's opinion was far narrower than what Blackmun would have written (Blackmun, Box 586). However, this

narrow opinion ensured that Kennedy would join the separationist coalition and that no members of the coalition would disagree with any potentially divisive constitutional views that the opinion produced (Blackmun, Box 586). Similarly, in *Lamb's Chapel*, Blackmun's clerk described Kennedy's opinion as "very narrow" and argued that it "resolves little uncertainty" about the constitutional questions of the case (Blackmun, Box 618). However, this narrow opinion ensured that the entire Court (*Lamb's Chapel* was a unanimous decision) agreed on the opinion, despite its shortcomings. Further, Blackmun's clerk also noted that if Kennedy produced a broader opinion, it could be broad in the "wrong way", as he might promote views that many Justices disagree with (Blackmun, Box 618). This strategy of relying on narrow opinions, while employed by both coalitions, more often helped the separationist coalition maintain unity and form stronger majorities.

Further, the separationist coalition attempted to use narrow opinions to avoid answering potentially complicated constitutional questions that the Justices thought would lead to accommodationist decisions. However, despite these efforts, there was not much evidence of their success in this goal. In *Zobrest*, Stevens and other separationist Justices wanted to avoid constitutional arguments and simply answer the non-constitutional questions of the case (Blackmun, Box 622). However, as the accommodationist coalition had the majority for this case, Rehnquist's decision addressed the Establishment Clause questions raised by the dispute and Rehnquist was able to apply his accommodationist attitudes to the case (*Zobrest v. Catalina*, 1993). Similarly, in *Lyng v. Northwest*, a free-exercise case, the separationist Justices (adopting a rights-based position) wanted to avoid the lower court's discussion of the Free Exercise question posed by this case, as they feared the outcome would result in an accommodationist majority (Marshall, Box 444). Despite these efforts, the accommodationist Justices and Justice Stevens (adopting a majoritarian position) voted to grant cert, produced a decision that addressed the Free Exercise Clause, and argued for a majoritarian view of the Free Exercise Clause (*Lyng v. Northwest*, 1988). While the separationist coalition often attempted to avoid the constitutional questions in cases that would produce unfavorable decisions, there was minimal evidence of this strategy succeeding.

Both coalitions also relied on the reality of needing five Justices to form a majority to make strategic requests for changes to draft opinions. Blackmun, in *Marsh*, knew that O'Connor had certain suggestions for Burger's opinion that both she and Blackmun wanted to be implemented (Blackmun, Box 382). Seeing that the majority only had six votes and two of those votes wanted similar changes, Blackmun's clerk suggested that Blackmun send the request for changes individually to Burger, as Burger, not wanting to lose two votes and become part of a four-vote minority, would be far more "receptive" to Blackmun's requests (Blackmun, Box 382). Further, Justices utilized the opinion assignment process as a tool to ensure that their coalition would remain in the majority. Blackmun, in *Lee*, had the assigning power, as Kennedy had switched his vote to join the separationist coalition (Blackmun, Box 586). Not wanting to lose Kennedy, Blackmun assigned him the opinion to ensure that Kennedy would remain as the crucial fifth vote (Blackmun, Box 586). However, Blackmun's clerk also suggested that Blackmun assign the opinion with certain requested changes, to increase the leverage Blackmun had in ensuring that Kennedy made Blackmun's desired changes (Blackmun, Box 586). While Blackmun didn't adopt this strategy, its suggestion reflects a common strategic pattern throughout the decision-making process of all the Justices. The Justices, attempting to promote their individual Establishment Clause attitudes, were highly aware of the necessity of strategic choices and held a strong appreciation for the coalitional dynamics of the Court.

Conclusion

The current literature surrounding this topic has produced a variety of explanations as to why the Court didn't adopt the strong accommodationist position desired by the presidents who appointed the members of the Rehnquist Court. Expectedly, some research has come to opposing conclusions and there are still many elements of the Rehnquist Court's Establishment Clause decision-making that are unexplained. As a result, these findings, while supporting some pre-existing arguments within the literature surrounding this topic, also contradict the findings and arguments of other scholars.

While my findings confirm and support much of the previous literature on this topic, my analysis provides a novel perspective on the issue. Almost all research that has analyzed this question fails to use the papers of the Justices and thus is missing key insights into the decision-making processes that determined the outcomes of these cases. The ability to have intimate information about the cases and learn how Justices' views evolved throughout a case makes my research far better supported than other research that only relies on voting records and case decisions. Further, being able to view which Justices saved and responded to letters from citizens and which cases generated the most letters from citizens allowed for a more complete view of how public opinion affected the views and decisions of the Justices. While some pieces of literature on this topic have referred to the papers of the Justices, the majority of literature fails to do so and is unable to analyze the many strategic choices and shifts in voting decisions that changed the outcomes and arguments of cases.

Further, while most analysis of the Rehnquist Court's Establishment Clause decision-making highlights one of the three models of judicial decision-making (attitudinal, legal, and strategic), this research addresses the validity of all three models and supports the idea that both the attitudinal and strategic models have merit. This method of analysis, while broader than other literature, provides a more expansive and all-encompassing analysis of the Court's decision-making process in Establishment Clause cases than most other research. While other methods of analysis that highlight the validity (or invalidity) of a single decision-making model are important, and they provide a more in-depth view of certain elements of the Court's decision-making, these other methods largely fail to account for the wide variety of factors that affect the Court's decision-making process. However, by combining various literature that discusses each model, this research provides a comprehensive analysis of the Rehnquist Court's Establishment Clause decision-making in cases addressing education.

Analysis of my first hypothesis produces the conclusion that a majority of the Republican-appointed Justices held either moderate or separationist views and that these attitudes prevented the Court from adopting a more accommodationist view of the Establishment Clause. These findings support the arguments of scholars like Filter and McFeatters, who argue that some Republican-appointed Justices

held less accommodationist views than the presidents who appointed them (Filter, 1998; McFeatters, 2006). Further, these findings concur with the arguments made by Schragger, who suggested that attitudes are the primary factor in judicial decision-making (Schragger, 2011).

From analysis of my second hypothesis, I conclude that public opinion was moderately influential in altering the arguments of some Justices in more controversial cases. While public opinion was not directly influential, the reactions of lower courts and state legislatures affected the arguments Justices used in some high-profile Establishment Clause cases. These findings parallel those of Grunes and Merrill, who also observed the effect of political pressure on the Court (Grunes, 1991; Merrill, 2003). However, these findings also support the arguments of Hensley and Tudor, as the Court was not as visibly affected by public opinion as scholars like Merrill and Cooley claim (Cooley, 2022; Hensley & Tudor, 1999; Merrill, 2003).

My third hypothesis, while not always accurate, as in some cases the accommodationist coalition prevailed, was largely accurate in its claims. I conclude that, through the use of defensive denials, narrow opinions, and accommodating the requests and attitudes of the swing Justices, the separationist coalition was more successful in forming majorities and avoiding accommodationist decisions. This conclusion mirrors the findings of other scholars, such as Caldiera et al. and Ray, who describe the strategic methods of the separationist coalition (Caldiera et al., 1999; Ray, 2009). While the accommodationist coalition applied similar strategies and occasionally influenced the swing Justices, the accommodationist coalition had fewer successes. This finding coincides with the arguments of scholars such as Merrill who acknowledge the strategic failures of the accommodationist coalition and the successes of the separationist coalition (Merrill, 2003).

Another conclusion stemming from analysis of my third hypothesis is that swing Justices, highly influential in the Court's decision-making process, were aware of their role and used their importance to influence the Court's interpretation of the Establishment Clause. The swing Justices, having their own attitudes about the Establishment Clause and the appropriate relationship between religion and education, used their independence from coalitions to join whichever coalition presented a more persuasive view.

This conclusion provides support for Schlosser's findings and the view that the swing Justices had the power to determine the direction of the Court's Establishment Clause jurisprudence (Schlosser, 1988).

Further, I conclude that my fourth hypothesis, while correct in its assumption of precedent preventing the Court from shifting towards a more accommodationist reading of the Establishment Clause, was not correct in its assumption that the Court held an 'attachment to precedent.' While some Justices (most notably Blackmun) respected precedent and tried more genuinely to follow it, most of the Justices used precedent to support their attitudinal arguments and relied on heavily biased interpretations of precedent to support their own attitudes about the appropriate relationship between religion and education. This conclusion opposes prior literature that favors the legal model, as precedent was far less influential in determining the outcome of Establishment Clause cases than scholars like Kritzer and Richards asserted it was (Kritzer and Richards, 2003). Rather, these findings produce similar conclusions to those who rejected the validity of the legal model in the Rehnquist Court's Establishment Clause jurisprudence, such as Roberts and Rodriguez, as there were many exceptions to *Lemon* and many alterations of *Lemon* that weakened its strength as the Court's Establishment Clause jurisprudence evolved (Roberts, 2015; Rodriguez, 1992).

After analysis of my fourth hypothesis, I additionally conclude that the role of precedent as a tool rather than as a guide for Establishment Clause analysis created an Establishment Clause jurisprudence that was inconsistent. As the Justices proposed various tests and frameworks for Establishment Clause analysis, the Court failed to adopt a consistent view of the Establishment Clause. Further, as the Justices altered their interpretation of precedent to further their attitudinal goals, later Courts were unable to clearly understand precedent and could not rely on precedent to produce a clear path for the Court to analyze Establishment Clause cases. These findings concur with the arguments of Cooley, as both Cooley and my analysis suggest that *Lemon* and other precedents were used as strategic tools rather than as guidelines for future Establishment Clause decisions (Cooley, 2022).

Overall, I conclude that the varying Establishment Clause attitudes of the Justices, the use of precedent as a strategic method, the lack of unity of the accommodationist coalition, the success of

separationist coalitional strategies, and the reactions of lower courts and state legislatures prevented the Court from adopting a more accommodationist view of the Establishment Clause. This analysis of the Rehnquist Court's failures to lead the Court in a more accommodationist direction, while examining the Rehnquist Court's Establishment Clause decision-making, also has implications for the modern Court. While the Rehnquist Court of the 1980s and early 1990s was somewhat ideologically balanced, as the majority of decisions were 5-4 votes, no such balance is present in the Roberts Court of 2022. Following President Trump's appointment of three conservative Justices, the Court now has a strong conservative majority (with six of the Court's nine Justices being ideologically conservative). This conservative majority is far stronger than the accommodationist coalition of the Rehnquist Court and will likely have the power to shift the Court in a more accommodationist direction to a degree far greater than occurred during the first half of the Rehnquist Court.

However, despite the accommodationist majority of the modern Court, the Court still must address past precedent and interpret it to serve its accommodationist goals. This task will likely be difficult, as the Court's Establishment Clause jurisprudence has a distinct lack of "clarity and predictability" (*CPERL v. Regan*, 1980, Blackmun, J., dissenting, 662). Although, the Court has begun to accomplish this, as the 2022 case of *Kennedy v. Bremerton* effectively declared the *Lemon* test to be useless and, in all likelihood, ended its use in Establishment Clause analysis (*Kennedy v. Bremerton*, 2022). While the accommodationist coalition (and, to a degree, the swing Justices) of the Rehnquist Court desired the same outcome, they were unable to achieve similar levels of success. However, the modern Court's success in this accommodationist goal suggests that the factors that restrained the Rehnquist Court from taking similar action are either less influential on the decision-making process of the modern Court or entirely absent from the Court's decision-making.

Further, while this research has implications for the modern Court and could aid predictions about the future of the Court's interpretation of the appropriate relationship between religion and education, it also provides insight into the relationship between politics and law. While the Supreme Court is supposed to be an independent institution, not swayed by the pressures of the legislative branch, executive branch,

or by public opinion, many (especially in recent years) have claimed that the Court is a politicized institution. This research neither refutes nor supports these claims, as there was evidence that the Court, in certain situations, responded to public opinion and was influenced by external pressures. However, other evidence and other literature suggest the opposite and support the view of the Court as an independent institution. While this research provides insight into the decision-making of the Rehnquist Court, it does little to settle the modern controversy surrounding the susceptibility of the modern Court to external pressures.

Case List

Everson v. *Board of Ed. of Ewing,* 330 U. S. 1 (1947)

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

School Dist. of Abington Township v. *Schempp,* 374 U. S. 203 (1963)

Board of Ed. of Central School Dist. No. 1 v. *Allen,* 392 U. S. 236 (1968)

Epperson v. *Arkansas,* 393 U. S. 97 (1968)

Walz v. *Tax Comm'n of City of New York,* 397 U. S. 664 (1970)

Lemon v. *Kurtzman,* 403 U. S. 602 (1971)

Wisconsin v. *Yoder,* 406 U. S. 205 (1972)

Lemon v. *Kurtzman,* 411 U. S. 192 (1973)

Hunt v. *McNair,* 413 U. S. 734 (1973)

Committee for Public Ed. & Religious Liberty v. *Nyquist,* 413 U. S. 756 (1973)

Meek v. *Pittenger,* 421 U. S. 349 (1975)

Roemer v. *Board of Public Works of Md.,* 426 U. S. 736 (1976)

Wolman v. *Walter,* 433 U. S. 229 (1977)

Committee for Public Ed. and Religious Liberty v. *Regan,* 444 U. S. 646 (1980)

Stone v. *Graham,* 449 U. S. 39 (1980)

Widmar v. *Vincent,* 454 U. S. 263 (1981)

Mueller v. *Allen,* 463 U. S. 388 (1983)

Marsh v. *Chambers,* 463 U. S. 783 (1983)

Wallace v. *Jaffree,* 472 U. S. 38 (1985)

School Dist. of Grand Rapids v. *Ball,* 473 U. S. 373 (1985)

Aguilar v. *Felton*, 473 U. S. 402 (1985)

Witters v. *Washington Dept. of Servs. for Blind,* 474 U. S. 481 (1986)

Goldman v. *Weinberger,* 475 U. S. 503 (1986)

Bender v. *Williamsport Area School Dist.,* 475 U. S. 534 (1986)

Edwards v. *Aguillard,* 482 U. S. 578 (1987)

Lyng v. *Northwest Indian Cemetery Protective Assn.,* 485 U. S. 439 (1988)

County of Allegheny v. *American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U. S. 573 (1989)

Employment Div., Dept. of Human Resources of Ore. v. *Smith,* 494 U. S. 872 (1990)

Board of Ed. of Westside Community Schools (Dist. 66) v. *Mergens,* 496 U. S. 226 (1990)

Lee v. *Weisman,* 505 U. S. 577 (1992)

Lamb's Chapel v. *Center Moriches Union Free School Dist.,* 508 U. S. 384 (1993)

Zobrest v. *Catalina Foothills School Dist.,* 509 U. S. 1 (1993)

Board of Ed. of Kiryas Joel Village School Dist. v. *Grumet,* 512 U. S. 687 (1994)

Santa Fe Independent School Dist. v. *Doe,* 530 U. S. 290 (2000)

Mitchell v. *Helms,* 530 U. S. 793 (2000)

Zelman v. *Simmons-Harris,* 536 U. S. 639 (2002)

Kennedy v. *Bremerton School Dist.,* 597 U. S. ___ (2022)

References

Caldeira, G. A., Wright, J. R., & Zorn, C. J. (1999). Sophisticated voting and gate-keeping in the Supreme Court. Journal of Law, Economics, and Organization 15(3), 549-572.

Colker, R., & Scott, K. M. (2002). Dissing states: invalidation of state action during the Rehnquist era. Virginia Law Review, 88(6), 1301-1386.

Cooley, A. (2022). The persistence of Lemon. University of Dayton Law Review, 47(3), 411-452.

Epstein, L., & Knight, J. (1998). The Choices Justices Make. Congressional Quarterly Press.

Failinger, M. A. (2006). In praise of contextuality Justice O'Connor and the Establishment Clause. Hamline Law Review, 29(1), 7-16.

Filter, J. A. (1998). Keeping the faith: Justice David Souter and the First Amendment religion clauses. Journal of Church and State, 40(2), 387-410.

Friedman et al. (2020). Judicial Decision-Making. West Academic Publishing.

Gordon, D. (2007). America's constitutional dad: Justice Kennedy and his intricate children Idaho Law Review, 44(1), 161-184.

Greenawalt, K. (2004). Religion and the Rehnquist Court. Northwestern University Law Review, 99(1), 145-176.

Grunes, R. A. (1991). Lobbying the Supreme Court: Reagan’s solicitor general and the Establishment Clause. American Review of Politics, 11, 31–55. https://doi.org/10.15763/issn.2374-7781.1990.11.0.31-55

Hensley, T. R., & Tudor, G. (1999). An analysis of the Rehnquist Court's Establishment Clause jurisprudence: new marriage of legal and social science approaches. Law Review of Michigan State University Detroit College of Law, 1999(4), 869-912.

King, J. B. (1996). Now turn to the left: the changing ideology of Justice Harry A. Blackmun. Houston Law Review, 33(1), 277-298.

Kritzer, H. M., & Richards, M. J. (2003). Jurisprudential regimes and Supreme Court decisionmaking: The Lemon regime and Establishment Clause cases. Law & Society Review, 37(4), 827–840. https://doi.org/10.1046/j.0023-9216.2003.03704005.x

McAndrews, L. J. (2003). 'Moral' Victories: Ronald Reagan and the Debate Over School Prayer. Religion & Education, 30(1), 92–107. https://doi.org/10.1080/15507394.2003.10012320

McDonald, B. P. (2016). Democracy's religion: religious liberty in the Rehnquist Court and into the Roberts Court. University of Illinois Law Review, 2016(5), 2179-2236.

McFeatters, A. C. (2006). Sandra Day O'Connor: Justice in the balance. University of New Mexico Press.

Merrill, T. W. (2003). The making of the second Rehnquist Court: preliminary analysis. Saint Louis University Law Journal, 47(3), 569-[ii].

Mortyn, R. M. (1992). The Rehnquist Court and The New Establishment Clause. Hastings Constitutional Law Quarterly, 19(2), 567-598.

O'Brien, D. M. (1991). The Politics of Professionalism: President Gerald R. Ford's Appointment of Justice John Paul Stevens. Presidential Studies Quarterly, 21(1), 103–126. http://www.jstor.org/stable/27550666

Ray, D. R. (2009). The Establishment Clause in 2009: baseline for measuring change. Thomas M. Cooley Law Review, 26(3), 493-554.

Roberts, N. C. (2015). The rising none: Marsh, Galloway, and the end of legislative prayer. Indiana Law Journal, 90(1), 407-440.

Rodriguez, R. M. (1992). God is dead: killed by fifty years of Establishment Clause jurisprudence. St. Mary's Law Journal, 23(4), 1155-1184.

Schlosser, J. (1988). Establishment Clause and Justice Scalia: What the Future Holds for Church and State. Notre Dame Law Review, 63(3), 380-392.

Schragger, R. C. (2011). The relative irrelevance of the Establishment Clause. Texas Law Review, 89(3), 583-652.

Segal, J.A., & Spaeth, H.J. (1993). The Supreme Court and the Attitudinal Model. Cambridge University Press.

Yalof, D. A. (2001). Pursuit of justices: Presidential politics and the selection of Supreme Court nominees. University of Chicago Press.

Zarrow, J. D. (1986). Of crosses and creches: the Establishment Clause and publicly sponsored displays of religious symbols. American University Law Review, 35(2), 477-516.