RELIGIOUS INFLUENCE IN SUPREME COURT DECISION-MAKING: A STUDY OF FREEDOM OF RELIGION CASES

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A Dissertation Submitted to the Department of Political Science
at the University of Missouri-St. Louis
in Partial Fulfillment of the Requirements for the Degree
Doctor of Philosophy

May 6, 2009

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ACKNOWLEDGEMENTS

I would like to thank my advisor Dr. Barbara Graham for all of her support, patience, and guidance necessary to make my tenure at UM-St. Louis and this project a success. I would like to also thank Dr. Nancy Kinney for all of her support, both professional and personal, over the past five years and for kindly consenting to be on my committee. Further, I would like to thank Dr. Dave Robertson and Dr. David Kimball for all of their help, advice, and support while at UM-St. Louis and especially for believing in my research enough to consent to serve on my committee.

I would like to thank my parents, Mary M. and Laurence R. Carver, for their unwavering love and support over the past 37 years, especially during the past five years. Thanks also go to my siblings for their constant interest in my education and progress. Special thanks goes to Louise Watson-Carver for her editorial skills and willingness to help. Additional thanks to Daisy, for 10 years of devotion, companionship, and constant "furry" therapy.

Special thanks also goes to Dr. James Hitchcock for his historical perspective of religion and law in America, and to Dr. Lawrence Baum for his critique of a shorter form of this study.

Finally, I would like to thank the following for reasons they know: Wendy and Bob, Vykky and Pat, Stefanie and Colleen, Jamie, Debora, Cassidy and Dan, Michele and Kone, Kathy and Tom, Bruce and Gina, Joe and Amanda, Bill, Dan, Lindsay, Leigh Ann, Kim, Joanna, Rochelle and Darrin, Cynthia, Sid, Sally, and the many, many more who are in this category.

ABSTRACT

In cases where freedom of religion is at the heart of the legal question before the U.S. Supreme Court, political ideology alone cannot explain the decisions' outcomes. Research reveals that other factors may explain the decisional behavior of Supreme Court Justices in freedom of religion cases. Although religion plays a large role in America's political landscape and elite decision-making, very little scholarship examines the role the faith traditions of the Justices play in the decisions of the Supreme Court. In my dissertation, I argue that the dominant policy-based models of Supreme Court decision-making provide an incomplete framework for understanding religious influence in Supreme Court decision-making. My dissertation research uses the social background model to investigate the influence of the Justices' faith traditions in the First Amendment's Free Exercise Clause and Establishment Clause cases decided by the Supreme Court. Freedom of religion cases are examined based upon the assumption that Justices hold very personal and perhaps strong religious beliefs that may invoke a religiously influenced response when deciding freedom of religion cases. The data for this research is based on all freedom of religion cases decided by the Supreme Court from 1946 to 2005. Unlike prior research, this study attempts to determine whether the faith traditions of the Justices, as the primary independent variable, influence Court outcomes during this timeframe. The findings reveal that some faith traditions are significantly correlated to the Justices' voting behavior in religion cases. This research reveals that the level of significance varies as to the type of case, whether the case concerns a Free Exercise or Establishment of religion, and the political ideology of the Justice.

Chapter 1

INTRODUCTION

Introduction To the Research Question

Political scientists have empirically studied Supreme Court decision-making since the 1940s. Policy-based models of Supreme Court decision-making dominate the judicial politics and behavior literature. The attitudinal model presupposes that each Justice of the U.S. Supreme Court has an ideological preference that informs his or her decision in a case (Segal and Spaeth 2002). The rational choice model or strategic account presupposes that Supreme Court Justices maximize their ideological preferences by acting strategically in making their choices (Epstein and Knight 1998). However, these dominant approaches do not address the more interesting, yet more complicated question of what informs a Justice's ideological and policy preferences. Social background theory argues that the socio-economic background of a Justice not only predicts how a Justice may vote, but also gives a narrower, more concrete reason as to why the Justice voted a particular way. For example, Stuart Nagel (1962) found that judges who were previously prosecuting attorneys were less likely to vote in favor of a defendant in a criminal case than judges who were formally businessmen.

This study uses the framework of social background theory to propose the question: To what extent, if any, does the faith tradition of a U.S. Supreme Court Justice influence his or her vote in Supreme Court cases? Focusing on freedom of religion cases from the Vinson Court era (1946-1953) through the Rehnquist Court era (1986-2005), this study analyzes each Justices' votes in freedom of religion cases to the teachings of their faith tradition regarding religious freedom. In short, this investigation attempts to

determine the extent to which Supreme Court Justices' votes are in accord with the teachings of their faith tradition. Working from the assumptions that may Justices hold very personal religious beliefs, and hence freedom of religion cases are more likely to evoke a religiously influenced response from a Justice not found in other areas of case law.

Since the mid-twentieth century, freedom of religion was viewed as a civil liberty; therefore, the Supreme Court approached freedom of religion not as a subsidiary of property or tax law, but a right in and of itself and conjoined with the freedom of speech (Davis 2004). While scholars have difficulty in determining what precisely the Framers intended with respect to the religion clauses in the First Amendment, religion has played a large role in America's political landscape. One of the most astute political observers of American politics, Alexis de Tocqueville (1900, 313), wrote in his classic work, *Democracy in America:*

> Upon my arrival in the United States, the religious aspect of the country was the first thing that struck my attention; and the longer I stayed there the more did I perceive the great political consequences resulting from this state of things, to which I was unaccustomed. In France, I had almost always seen the spirit of religion and the spirit of freedom pursuing courses diametrically opposed to each other; but in America I found that they were intimately united, and that they reigned in common over the same country.

In order to fully understanding religion's role in American politics and decision-making, political scientists must understand what each faith tradition says regarding the relationship between church and state. The religious faiths of Supreme Court Justices have been homogenous to Western faith traditions; and there are only subtle differences between these traditions. Faith traditions transplanted to America from Europe (Jewish, Roman Catholicism, e.g.) tend to tolerate an accommodationist view of church-state

relations. Faith traditions founded in America (Baptist, Unitarian, e.g.) are less tolerant of accommodation and advocate a stricter separation between church and state. In my dissertation, I argue that these nuances help explain Supreme Court decision-making that seems to defy ideological explanations of the Justices' behavior in freedom of religion cases.

This dissertation investigates empirically the influence of the Justices' faith tradition as an explanatory factor in freedom of religion cases from 1946-2005. The data for the analysis are taken from Harold Spaeth's Supreme Court Databases (Spaeth 2007). These databases contain individual datasets on the cases and votes of Justices for each of the Court eras examined in this study. The individual Justice's vote is the dependent variable in freedom of religion cases. The primary independent variable is the faith traditions of the Justices, while controlling for the Justices' political ideology. This study uses the Chow Test to determine if the Justices' faith tradition is a statistically significant explanatory variable for Supreme Court decision-making in freedom of religion cases. The Chow Test determines if the independent variables fit the model better before or after the critical point in time. This study will also use predicted probabilities to determine the possible influence of a Justices' faith tradition in the future based upon their ideological preferences.

The Theoretical and Policy Significance of the Research

This research is expected to make a major contribution to the Supreme Court decision-making scholarship for several reasons. While policy-based models such as the attitudinal model predict Supreme Court behavior, they do not, or cannot, explain certain anomalies in Supreme Court decision-making. The attitudinal model does not explain,

for example, why Justice Stephen Breyer, a moderate liberal Justice appointed by Democrat Bill Clinton, voted in opposite directions in two similar Ten Commandment cases. Justice Breyer voted against the posting of the Ten Commandments in *McCreary County v. ACLU,* 545 U.S. 844 (2005) and voted in favor of the posting of the Ten Commandments in *Van Orden v. Perry,* 545 U.S. 677 (2005). The attitudinal model cannot account for such anomalies, so scholars must look elsewhere for a more nuanced view of the influences operating in the decision-making process. The social background model takes a wider view of what may influence a Justice's decisional behavior, and can help fill in some of the gaps that exist in judicial behavior scholarship.

This study is also important in that it highlights the significance of the Supreme Court nomination and appointment process. As politics in America become more polarized, the judicial appointment process has become more contentious, regardless of party control of the White House or the Senate. For good or ill, as a result, Senators increasingly ask Supreme Court nominees how they would vote on various legal issues that might come before the Court. In response, Justices increasingly decline to answer these questions, claiming that it would be unethical to reveal, even hypothetically, how they would vote on a possible case. This deadlock leaves political elites, interest groups and the American citizenry in a quandary as to how to evaluate Supreme Court nominees' judicial philosophy, especially in the controversial area of freedom of religion. Preliminary analysis of this research question shows that the faith tradition of the nominee is a helpful, although unconstitutional, insight as to how a Justice may vote in religion cases.

This study utilizes an interdisciplinary approach, a significant approach which is generally missing from judicial politics literature. How experiences evolve into ideology or policy preferences is addressed in the disciplines of political science, sociology, and psychology. Worldview and values develop in childhood as parents teach their values to their children (Myer 1996). Such values are maintained into and during adulthood (Funk and Willits 1987; Myer 1996). It makes sense, therefore, that religious values would also extend into adulthood, whether or not the adult maintains a practice within that faith tradition (Myer 1996), and it is reasonable to assume that Justices' childhood or professed faith traditions could influence their views, and votes, in a case.

Social background theory argues that the past experiences of a Justice will influence current voting behavior. As the name suggests, the social-background model focuses on the socio-economic background of the Justices. This approach is a defensible one because the disciplines of psychology and sociology have demonstrated that childhood events and socio-economic backgrounds influence adult behavior (Funk and Willits 1987; Myer 1996; Searing, Schwartz and Lind 1973). Social-background models therefore examine such characteristics as the educational levels of the Justices' parents, the Justices' educational and work background, and other issues such as the Justices' religious beliefs. In this study, it is the role of the Justices' religious beliefs in judicial decisions that is the focus.

This research is also expected to contribute to our understanding of the Supreme Court as a national policymaking institution. Conventional wisdom suggests that, through judicial review, the U.S. Supreme Court is the final arbiter on the constitutionality of national and state laws. Although the legislature can pass a law to

overturn a statutory ruling by the Court, the Court has a further opportunity to review that law, if and when it is appealed to the Court. In determining if a law is constitutional, the Supreme Court either affirms the policy of the legislature or creates policy by overturning the law and thus creates new precedent, as the Court did in *Everson v. Board of Education* (1947).

In *Everson*, the Court reviewed a New Jersey law that allowed reimbursement of travel costs to parents who sent their children to private schools. Well over 90% of the private schools in the program were Catholic schools. The majority Court ruled that the law was constitutional. However, in this case the majority applied the Establishment Clause to the states via the Fourteenth Amendment and applied Thomas Jefferson's "wall of separation between church and state" metaphor to Establishment Clause jurisprudence. Thus not only did the Court review a state law regarding funding for private school costs, but established a new precedent in Establishment Clause jurisprudence.

Fifthly, a significant amount of literature examines the relationship between religion and American government. These studies include, for example, the influence of religion on members of Congress, the religious influence of the President, and religious influence on the voter. However, there is no systematic study of religious influence on members of the U.S. Supreme Court; therefore, this research is expected to fill this void in the literature.

Finally, throughout the history of America, interest groups that believe the legislature is ignoring their grievances have turned to the courts to obtain favorable policy outcomes, with arguable results (Bensel 2000; Rosenberg 1991). Interest groups frequently bring cases to the Supreme Court to address issues that the legislature cannot

or will not address. In this context, the Court makes policy decisions outside of the usual democratic channels of elected legislatures and executives. Even today, on some "hot button" issues such as gay rights and abortion, Congress has refused to act, instead leaving it to the judiciary to work out legal policy solutions, on the understanding that Supreme Court Justices are shielded by life tenure. As long as interest groups look to the federal judiciary to fill gaps in legislative policymaking, it is important to understand why Justices vote in a particular way.

The Role of Religion in Society

It is an important area of inquiry for political science to study the relationship between religion and government. In America, religion has played a significant role in its founding and history. The first European settlers came to America for reasons of religious freedom, albeit only for their particular brand to Christianity. Religious language and imagery have been used in American politics from the Puritan's view of "The City on the Hill" to Martin Luther King Jr.'s use of religion in his "I Have A Dream" speech. Religious imagery and language are used in politics because this approach works in its ability to sway the listener. Americans seem to be drawn to such words regardless of strength of religion or religiosity. Therefore, it is important for political scientists to study the relationship religion has with its people and its governmental institutions. It would be unwise for a scholar to assume that once a candidate is elected or appointed to office, important influences upon their policy preferences will cease to exist. These influences are expected to be carried into office by the candidate.

As great a role as religion has played in American history, America was the first to chart a bold new path of religious freedom. The first individual right addressed in the Bill of Rights is the right to/of religious freedom. In America, citizens are not only free to practice their faith, but also free from supporting a religion to which they do not adhere. This is an oversimplification of religious freedom in America, but, as always, the reality is much more complicated. What if the exercise of one citizen's religion put other citizens in danger? What constitutes "supporting a religion"? These tough questions are still being addressed today. The Supreme Court started playing a significant role in answering the difficult questions of religion and government in society only during the twentieth century. Before this period, cases involving religious freedom were rarely brought before the Supreme Court. Nineteenth century cases that were reviewed by the Court addressed conflicts between the new American Constitution and land grants made by England during the colonial era. For example, *Terrett v. Taylor* (1815) was more readily argued as a contract issue than a religious one.

Since its infancy, America has been a religious nation and has struggled to balance the religious and the secular in public life. "The portrait of religious America is one of enduring faith" (Fowler et al. 2004, 30). In June 2008, the Pew Forum on Religion and Public Life released a survey entitled *U.S. Religious Landscape Survey: Religious Beliefs and Practice.* In this survey, the Pew Forum found that 71% of the U.S. population had an "absolute certain" belief in God, with 56% stating religion is "very important" in their lives. Additionally, 92% stated they had a certainty of belief in God or a universal spirit, with 74% holding a belief in heaven and hell. Finally, the study found that 78.4% of the adult population claimed a Christian faith tradition, while 4.7%

claimed to believe in another religious faith tradition, such as Judaism, Buddhism, or Islam; 16% claimed to be unaffiliated. Given these numbers, it is obvious that religion still plays a role in American lives. While Christianity still dominates the religious landscape, America has also become more religiously diverse. Further, Americans are no longer dogmatic about religion, as 70% said that many religions can lead to eternal life and 68% claimed that there is more than one true way to interpret the teachings of their religion.

These numbers are impressive given the 300-year history of America's struggle for religious freedom. Although the Puritans first came to North America in the 1600s, America has never quite lost its Calvinist Roots. The Puritan faith saw its role as purifying their perceived corruption in the Christian faith. However, with very few inroads made in Europe, the Puritans saw America as a fresh start from which they could build a pure Christian society (Miller 1956). However, within a few generations, their fervent attitude towards faith was superseded by the hardship of surviving in the American wilderness, much to the dismay of the religious leaders, whose jeremiads continually warned against such laxity of faith (Miller 1953). This seems consistent with today's Americans, who have high professions of faith and religion, yet low attendance to religious services.

Although Puritanism as a religious tradition has all but faded from American society, its Calvinist legacy is still felt today. The idea of America as the "New Israel" and a "City on the Hill" gave America its early sense of a "providential destiny" that continued throughout history to present day (Fowler et al. 2004, 6). Fowler argues that this idea of "destiny" underwrote the idea of manifest destiny of the westward expansion,

Abraham Lincoln's need to preserve the Union, John Kennedy's establishment of the Peace Corps, to George W. Bush's war on terrorism (ibid). According to Fowler, et al., "Americans have continued the Puritan legacy by acting on a sense of special mission and destiny" (ibid).

Robert Fowler, Allen Hertizke, Laura Olson, and Kevin Den Dulk (91) also argue that the American idea (and ideal) of self-government without the rule of kings came from the Puritan idea of "covenant theology." Leaders derived their power from the "community's covenant with God" not from God directly (ibid). America's historical fear of centralized government and the idea that there is a need to "restrain individual sin for the good of the community" also came from the Puritans (ibid, 7). Thus the conflicting nature of America to both constrain and yet nurture the individual continues to this day (ibid, 8). This would seem to lead to the Supreme Court's overall First Amendment jurisprudence which allows for unlimited religious belief, yet limits religious actions.

America has been a religiously diverse country from its founding; however, this has not always translated into religious tolerance. Although this will be discussed in more detail in chapter four, religious conflict in America has driven the modern idea of the separation of church and state. Philip Hamburger (2002) traces the public idea of separation of church and state from the Constitution to today's current debates. Briefly, Hamburger argues that for most of American history, the Establishment Clause only required that the federal government did not recognize one specific faith over another. However, as America was de facto Protestant, Americans of that time openly included religion in public life and schools. When Catholics immigrated to American in greater

numbers in the mid-1800s, they began to set up their own schools and hospitals to protect themselves from the Protestant majority, and argued that if the government supported public schools that espoused Protestantism, then the government should also assist the Catholic schools. It was this argument that brought about the Blaine Amendment and began the fight to remove religion from public schools and government support from parochial ones, a fight that continues to this day (see also Eisenach 2000; Reichley 2002; Fowler et al. 2004).

In *Hellfire Nation* (2003), James Morone shows how the influence of religion has waxed and waned throughout American political development. According to Morone, American political development is influenced by both the moral code and social justice aspects of religion. Before the 1940s, it was the moral code aspect of religion that brought about the abolition movement, the temperance movement, and a variety of other movements set out to curb perceived sin and debauchery. Since the 1940s, it has been mainly the social justice aspect that has influenced America. The American intent to focus upon poverty, criminal rights, and health care for all has its roots in religion, but has been culturally transformed to view these issues as distinct from any possible sinful acts of the affected person - everyone was entitled to help regardless of how they came to be in their situation. This seems reasonable, as religion is being seen more and more as a civil rights issue. According to Derek H. Davis, the U.S. Supreme Court has changed from viewing religion through the lens of the Free Exercise and Establishment Clauses and has taken an "equal treatment" approach (Davis 2004, 719). In other words, religion is currently viewed primarily through the lens of free speech, "and only secondarily pursuant to a religion clause analysis" (ibid).

The Framers' intent has always been a basis of argument in constitutional law as it may shed light on America's historical view of religion in public policy. Unfortunately, the Framers' intent is extremely hard to discern. For example, with regard to Madison's view on the separation of church and state, both the "strict-separationists" and the "nonpreferentialists" use Madison to support their claims (Muzono 2003, 17). However, Vincent Muzono argues that Madison believed "religion is not part of the social compact and, therefore, that the state may not take religion within its cognizance" (ibid). So the state "may neither privilege nor penalize religious institutions, religious citizens, or religiously motivated conduct as such" (ibid).

Present in the midst of America's history of religious conflict has been the Supreme Court; although for most of American history it has tried to stayed out of religious controversy. One notable exception is *Reynolds v. United States* (1878). In *Reynolds*, the Court ruled for the first time that the First Amendment's Free Exercise Clause allowed Congress to circumscribe the Mormon's actions but not religious beliefs. According to the Court's interpretation of the Free Exercise Clause in *Reynolds*, Americans could believe whatever they wished; however, they could not act on their beliefs as they wished without interference from the state. According to this approach, Mormon polygamy could not be justified under the Free Exercise clause.

However, it was the 1940s that the Supreme Court became fully enmeshed in defining religious freedom. After *Everson*, the Court continued to determine what constituted establishment of religion, what actions were allowed under free exercise, and even tried to define religion itself. From *Everson* to date, there are two jurisprudential arguments made concerning religious freedom. The first argument is whether the

Constitution should be interpreted with an eye towards the Framer's intent or that it should be interpreted as a "living" document that is not bound to the past. The second jurisprudential argument is the extent to which Thomas Jefferson's "Letter to the Danbury Baptists" should be included in freedom of religion law.[1] The debate here centers on the question of whether a single letter by Jefferson is enough to base the entirety of Establishment Clause jurisprudence?

The Role of Religion In Government

The role of religion is very important in America; however, America's view of religion is a non-historical one in that it views religion and government as independent institutions in its citizens' lives. Historically around the world, and even today in some cultures, "religion and culture have been coterminous, with religion an integral part of the state and the function of serving the state and its rulers . . . from earliest history religion has been a matter for the community as a whole rather than the individual. Religion and culture are inextricably intertwined" (Wood 1967, 257). Historically, "man's church was his state; his state was his church." (Parker 1955, 1), but, after the Reformation, modern history saw a change in the ancient role of church and state as one and the same, with the development of "the supremacy of State over church" (Wood, 1967 267). Indeed, the

[1] On October 7, 1801, the Danbury Baptist Association sent a letter to Thomas Jefferson congratulating him on his presidential victory and to declare their support for him. In an effort to respond to the campaign accusations that he was an atheist, Jefferson used his reply to the Danbury Baptists "as an opportunity to explain" why he did not declare days of fasting and thanksgiving as president. "Jefferson's reply was a vehicle for communicating his views on a delicate and divisive political issue" (Dreisbach 2002, 27). In this letter Jefferson wrote, in part, "Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State. adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties" (as found in Dreisbach 2002, 48).

whole history of Europe since 1300 has largely been the story of the extension of the authority of temporal rulers, at the expense of religious ones. With the rise of modern nation states, the sense of nationality gradually replaced the old concept of "mundus Christianus" (ibid, 262).

Not surprisingly, this notion of state over church was brought to the New World. However, something different happened in America. The Reformation brought forth the concept of church as no more than "voluntaryism in religion"— or the idea that belonging to a religious faith was a private, voluntary activity— with more radical reformers of religion arguing for the total separation of church and state, or a secularized state (ibid, 269). The secular government was to be neutral between religion and non-religion, and to "neither promote nor to interfere with religion" (ibid, 270). Despite this idea of dominance of state over church and absolute separation of church and state, "the notion of the Christian state has clearly persisted in the United States, even without establishment and in spite of constitutional provisions and Supreme Court decisions expressly against" (Wood, 267; see generally Esbeck 2006).

Although the separation of church and state principle is inherent in the First Amendment, it is understood that there cannot be, in reality, an absolute separation of church and state. Most people have policy preferences when it comes to government actions, and it is not surprising that religious beliefs influence these policy preferences. Religious beliefs not only influence voter behavior but, also the voting behavior of elected officials.

Religion in Congress

Two major studies focus on the voting behavior of Congress. Benson and Williams (1986) focus specifically on the influence of religious beliefs and values of members of Congress on their votes. Burden (2007), in contrast, examines many sources of congressional values, including religion. Both studies come to the same conclusion—that while religion may not be the only or even the main reason why Congressional members vote as they do, religion does influence how Congressional members determine policy preferences, and how they vote.

Benson and Williams (1986) interviewed 112 members of the 96th Congress, which included members of both the House of Representatives and the Senate. The random sampling used to obtain the 112 names took into consideration the makeup of the 96th Congress, including "Republican/Democrat, region of the country, and religious affiliation as recorded in the 1980 edition of *The Almanac of American Politics*" (Benson and Williams, 18). They were able to interview 80 of the 112.

Eschewing the usual denominational categories used by most studies on religion (Protestant, Catholic, Jewish), Benson and Williams asked study members questions that explored their personal beliefs, views of the relationship between humans and higher powers, and relationships between humans. The authors found that members of Congress who had an Individualism-Preserving view of religion tended to be conservatives. Individualism-Preserving is a "theology" of "a pursuit of individuality balanced by an obligation for self-government" (ibid, 150). It is an idea of encouraged personal freedoms "within limits" and does not give "permission for unconstrained pursuits of individual ends . . . (and) puts boundaries on the pursuits of pleasure" (ibid). Conversely,

Congressional members who had a more Community-Building view of religion tended to be liberals (ibid, 150-151). Community-Building is a "theology" that believes that being "released from boundaries, from the way things are, is necessary to change the political liberal sees as imperative if social justice is to be done" (ibid, 151).

The most interesting aspect of this study is just how much religion appears as a factor in the voting patterns of Congress. This is not to say that religion is an explicit factor, but it is very much implicit in choices and preferences. One of Benson and William's most interesting statistics is what members of Congress say about the influence of religion on their voting: Twenty-four percent stated that religion was a "major influence" on their voting (ibid, 143); fifty-six percent of Congressional members claimed that religion was a "moderate influence," 19% stated that religion was a "minor influence," and only 1% claimed that religion had "no influence" on their voting (ibid).

Benson and Williams' study claims to disprove six "myths" of the prevalence and role of religion in Congress. First, the study argues that the U.S. Congress is *not* a hotbed of secular humanism, agnosticism, and atheism; the study also claims that the 96th Congress was a believing Congress and, whether conservative or liberal, most members are equally committed to their religious beliefs. The study also found that members of Congress are just as religious as the general American population. Third, the study argues that political liberals are just as religious as political conservatives. Political liberals tend to be less orthodox in their religious views than political conservatives are; however, they are just as committed to their faith as conservatives. Nominal religionists tend to be more moderate than liberal; and liberals and conservatives equally measure pro-church and pro-religion. Fourth, the main finding of this study demonstrates that

religion influences Congressional votes. Fifth, in 1982, Evangelical Christians were not a unified voting block. "It is a serious overgeneralization to say the evangelical Christians in Congress are conservative"; only about 60% were conservative (ibid, 175). Last, the authors found that Congressional members who "confirm basic Christian fundamentals" do not necessarily "adopt the politically conservative potion of the New Christian Right" (ibid, 168).

Burden's (2007) study did not interview Congressional members, but rather compared Congressional votes and comments on the floor on matters of religion and the professed religious beliefs of the Congressional members. Burden (2007) reviewed Congressional speeches and votes in two sets of bills: those concerning "protections for religious practices" and those concerning "bioethical issues including cloning, stem cell research, euthanasia, and abortion" (Burden, 114). Burden found that "religious affiliation began to have an influence at the co-sponsorship stage" (ibid, 124). Burden's study of the floor debates and vote on the Religious Freedom Restoration Act of 1993 ("RFRA"), found that "legislators from the smaller denominations were most likely to speak" in favor of RFRA on the Congressional floor over members of other denominations (ibid, 122). "Presumably it is the smallest denominations that feel the most need to defend their religious liberties with legislation" (ibid, 123). However, when the author reviewed the legislative process of the Community Solutions Act of 2001 ("CSA"), he found that the above was reversed. Burden did find that religion was an influence on Congressional votes; however, members of smaller denominations were less in favor of CSA than members of larger denominations. In religious freedom laws,

religion was a more important factor in the early cosponsorship stage, with "partisan cleavages dominated" in the final voting stage (ibid, 129).

When it came to the Human Cloning Prohibition Act of 2001 ("HCPA"), however, Burden found that religious affiliation was more important to Republican members than Democratic ones (ibid, 130). For both parties, the affects of religion were tempered by professional training (i.e. the Congressional members who were doctors), gender, and district ideology. Men were more likely to vote for the bill, as were Catholics and Evangelical Protestants. Women, Jews and mainline Protestants were less likely to support the bill (ibid, 133).

The findings of these studies are very interesting in relation to the current study. They show that political elites in America still hold onto their religious beliefs after taking office. They may not adhere to an orthodox view of religion, but they hold their religious beliefs strongly enough to credit its influence on their voting. Although this is a study of Congress, it is reasonable to assume that these findings are applicable to the U.S. Supreme Court. As being a lawyer is a de facto requirement to be a Justice on the U.S. Supreme Court, it cannot be disputed that the two branches are educationally similar.[2] In the 111th Congress, 204 Members (152 Representatives, 51 Senators) list law as their occupation (Amer and Manning 2008, 2). A systematic study of the relationship between Supreme Court Justices' vote and religious affiliation would expect to produce similar findings; that religion does play an implicit role in judicial votes. Additionally, it would be expected that more minority religious traditions would vote in a manner different from

[2] The Constitution is silent on the matter of the professional criteria to be federal judges, including Supreme Court Justices. However, over the past two hundred years, being a lawyer has become a universally accepted requirement for being a Justice.

the mainline traditions, especially on those cases that protect religious freedoms as compared to cases that might favor more traditional/orthodox religions.

Religion and the Presidency

Religion has played a significant role in the policies of the American presidency, regardless of the political party of the office holder. In the twentieth century, Cold War presidents from Harry Truman (Baptist) to Ronald Reagan (Disciple of Christ) have invoked God's aid for American capitalism and democracy, in its global contest against what Reagan called the "evil empire" (Millen-Penn 2006, 25). Additionally, Bush (41), Clinton, and Bush (43) have all openly expressed their personal faith in God throughout their presidencies (ibid). However, very little scholarship focuses upon the influence of a president's faith tradition on his policy preferences.[3] It seems that while presidents speak in religious terms and rhetoric, they say very little about personal faith tradition and its role in policy preferences. They may believe that they are ordained to be president (as Lincoln, Wilson and Bush (43) all seemed to believe) or to carry out a specific agenda (as Reagan did). However, very little seems to indicate that it is personal faith tradition that explicitly drives policy agenda (Millen-Penn 2006).

For the most part, presidents have used religion in a general manner to advance a *particular* policy agenda. President Ronald Reagan joined forces with Pope John Paul II to support the Solidarity movement in order to end communist rule in Poland; which then extended to the end of communist rule in all of Eastern Europe (Bernstein 1992). President Bill Clinton has been accused of having "his fervor for free exercise [was] not ... matched by any sincere effort to enforce the Establishment Clause" (Hamilton 2002,

[3] As every president to date has been male, masculine pronouns will be used in this section only.

361).[4] President Clinton openly discussed how much Stephen Carter's book, *The Culture of Disbelief,* influenced him, and "actively encourage[d] religious lobbyists to join together to increase their power in the political process and to raise their voices in the public square, including the international public square" (Hamilton, 361). Hamilton (2002) goes on to find that Clinton "integrated religious entities into administrative agenda-setting, which is consciously intended to serve religion. Many of these initiatives either ignore the Establishment Clause or violate it" (ibid, 363). Hamilton (2002) points to President Clinton's support of the Religious Freedom Restoration Act of 1993, his criticism of *City of Boerne v. Flores* (1997), and his support of the Religious Liberty Protection Act of 1999 as the anti-Madisonian checks on religion through factions President Clinton fostered by calling for unification of faiths for policy goals (ibid, 375). Further, the Clinton Administration took a strong pro-religion stance in *City of Boerne v. Flores* and *Agostini v. Felton* (1997), with a stance that was less strong, but still pro-religion; and in *Mitchell v. Helms* (1999) by filing amicus briefs in these cases. Interestingly, these accusations seem to indicate that Clinton actively worked against the strict separationist stance of his Baptist faith.

President George W. Bush, a Methodist, has openly stated that he identifies the most with Jesus as a political thinker or philosopher (Kengor 2004, 63-67). Bush has further stated that in his belief that God wishes for all peoples to be free, America has reasons for going into Afghanistan (McCollister 2005, 232-38). Additionally, Bush's domestic policies have included the Faith-Based Initiative, designed to grant government

[4] G. Randy Lee, in *When a King Speaks of God; When God Speaks to a King: Faith, Politics, Tax Exempt Status, and the Constitution in the Clinton Administration,* takes a very different view of the role of religion in the Clinton Administration, arguing that religion is political in the sense of being a social force that has a political effect.

aid to religious charities for provision of social services. However, despite these claims, there is nothing in the Methodist Creed to indicate that Bush's views come from his faith tradition. As discussed more fully in Chapter 5, the Methodist faith tradition states that the church, or religious faith, should inform government policy; however, it should be directed through the individual Methodist citizen but not by the Methodist Church. Bush seems to adhere to the idea of individual influence on government, but he is willing to push the boundaries of Methodist separation of church and state. While the influence of a specific faith tradition in the policy preferences of American presidents does not seem to exist, it is clear that faith and a belief in God in general does play a role in the policy agenda and activities of these men.

Religion in American Elections

There is adequate scholarship to indicate that faith traditions and religious beliefs greatly influence the election votes of the general American population. It has been argued that religious cleavages may be more important than class cleavages in the election cycle (Rose and Unwin 1969; Lijphart 1979; Dahl 1982). However, Manza and Brooks (1997) find that "religious political cleavages [have] experienced a decline in magnitude" (Manza and Brooks, 71). The authors find that "the decline in the religious cleavage is a function of a specific change in the voting behavior of liberal Protestants," and due to the socio/political equity between Catholics and Protestants in general (ibid). Liberal Protestants have simply stopped supporting the Republican Party.

Layman (1997) found that "although Catholics actually have been more likely than mainline Protestants to vote Republican over this time period [1980-1994] Jews are still considerably more likely than Christians to support Democratic presidential

candidates" (Layman, 306). While as a whole faith traditions have maintained their historic political party support (i.e.: Catholics and Jews voting Democratic and Protestants voting Republican), "a new religious cleavage" is appearing between orthodox and progressive members of the same faith tradition, with the more orthodox voting Republican and more progressive voting Democratic (ibid).

This new cleavage seemed to bear out in the 2008 presidential election. In the study *How the Faithful Voted*, Table 1.1 below, the Pew Forum found that all religious groups except Protestants voted in general for President-elect Barack Obama. The highest support for John McCain, the Republican candidate, was with Evangelical/Born Again voters at 78%. Judaism showed the highest support for Obama at 78%, with general Catholic support for Obama at 54%, other faiths at 73%, and unaffiliated at 78%. Those who attended church at least weekly supported McCain at 54%, while those who never attend religious services voted for Obama 67%. See Table 1.2 for these figures.

Insert Tables 1.1 and 1.2 About Here

The literature establishes that religion, the faith traditions of the electorate, and the faith traditions of national policymakers have influenced policies and policy implementation in American government. Previous research shows that the faith traditions of the members of Congress closely resemble that of the American population, with said faith traditions influencing how Congressional members view and vote on public policy. Although presidents have historically left their specific faith tradition out of their policy preferences, it is very clear that religion and Christian principles in general play a large role in policy preferences, both foreign and domestic. Further, faith traditions and religion play a large role in how Americans themselves vote and determine

which party they will support. Voting behavior trends tend to follow cleavages between orthodox and progressive members within faith traditions, and no longer follow the cleavages *between* faith traditions.

Overview of Remaining Chapters

The remaining chapters of this dissertation systematically investigate the role the faith traditions of the U.S. Supreme Court Justices play in deciding freedom of religion cases. In Chapter two, a review of the literature discussing four popular theories of judicial decision-making are presented—the legal model, the attitudinal model, the strategic account, and the neo-institutionalism. Chapter two points out that while these models play a role in understanding judicial decision-making, they cannot fully explain why Justices vote as they do in freedom of religion cases. Chapter three discusses the theoretical framework of this study: the social background model. Chapter three reviews the development of the social background model, its use in the study of religion and judicial decision-making, and the implications of the model for this study.

Chapter four discusses the U.S. Supreme Court's approach to Establishment Clause and Free Exercise Clause cases. The Supreme Court has encountered many difficulties in trying to establish a coherent jurisprudence in the area of religious freedom. The two main tests the Court previously established to decide religion cases, the *Lemon* Test and the *Sherbert* Test, are now disparaged and inconsistently applied by the Court. Chapter four plainly shows how the legal model is ineffective at explaining Supreme Court decision-making in religion cases.

Chapter five reviews the various faith traditions' views of religious freedom in American society. This chapter is not a comprehensive review of all faiths in America;

rather, it focuses upon the nine faith traditions that have been represented on the Court from 1943-2005: the Jewish, Roman Catholic, Presbyterian, Episcopalian, Baptist, Unitarian, Methodist, Lutheran, and General Protestant faith traditions.

Chapter six outlines the research design and statistical methods used for this study. This chapter provides a detailed explanation of the hypotheses, data, variables, methods, and expected findings of the study. Chapter seven presents a discussion of the findings and their significance for the research. Chapter eight concludes this investigation with an overview of the findings, the implications for the research and suggestions for future research on the subject of Supreme Court decision-making in freedom of religion cases.

Table 1.1 Presidential Votes by Religious Affiliation and Race

	2000		2004		2008		Dem Change 04-08
	Gore	Bush	Kerry	Bush	Obama	McCain	
	%	%	%	%	%	%	
Total	**48**	**48**	**48**	**51**	**53**	**46**	**+5**
Protestant/Other Christian	42	56	40	59	45	54	+5
White Prot/ Other Christian	35	63	32	67	34	65	+2
Evangelical/Born-Again	n/a	n/a	21	79	26	73	+5
Non Evangelical	n/a	n/a	44	56	44	55	0
Catholic	50	47	47	52	54	45	+7
White Catholics	45	52	43	56	47	52	+4
Jewish	79	19	74	25	78	21	+4
Other Faiths	62	28	74	23	73	22	-1
Unaffiliated	61	30	67	31	75	23	+8

Note: Throughout the report, "Protestant" refers to people who describe themselves as "Protestant," "Mormon" or "other Christian" in exit polls.

Throughout the report, figures may not add to 100, and nested figures may not add to the subtotal indicated, due to rounding. Source: 2008, 2004 and 2000 national exit polls. 2008 data from MSNBC.com, http://pewforum.org/docs/?DocID=367.

Table 1.2 Presidential Vote by Worship Attendance

	2000		2004		2008		Dem Change 04-08
	Gore	Bush	Kerry	Bush	Obama	McCain	
	%	%	%	%	%	%	
Total	**48**	**48**	**48**	**51**	**53**	**46**	**+5**
Attend worship services							
Weekly or more	39	59	39	61	43	55	+4
More than weekly	36	63	35	64	43	55	+8
Once a week	40	57	41	58	43	55	+2
Monthly/Yearly	53	43	53	47	57	42	+4
Few times a month	51	46	49	50	53	46	+4
Few times a year	54	42	54	45	59	39	+5
Never	61	32	62	36	67	30	+5

Source: 2008, 2004 and 2000 national exit polls. 2008 data from MSNBC.com. See http://pewforum.org/docs/?DocID=367.

Chapter 2

LITERATURE REVIEW: MODELS OF SUPREME COURT DECISION-MAKING

Introduction

Since the structure of the legal system in the United States ensures that the decisions of a few judges can affect the lives of many, judicial scholars have long found value in studying the decision-making process of the American court system. In fact, the decisions handed down by the Supreme Court of the United States are solid examples of how decisions made by nine people can affect 300 million others. The need to understand and predict Supreme Court decisions has guided judicial scholarship for most of the twentieth century to the present.

In the area of judicial decision-making, there are several theories and sub-theories of judicial behavior and analytical frameworks in which to study the voting behavior of American judges. This literature review is intended to acquaint the reader with the dominant theories of judicial behavior. These theories include the ubiquitous attitudinal model, which argues that the policy preference of the Justices is all that matters in their decisions, to the behavioralists, who argue that policy preferences are important but are tempered by strategic behavior and game theory, to the neo-institutionalists, who argue that the Constitution, precedent, and institutional limitations on the Supreme Court temper their policy preferences. Finally, legal scholars argue that Supreme Court decisions can be explained by the Justices' reliance on precedent, various tests and standards and the persuasiveness of their legal reasoning. Each of these theories advances

our understanding of judicial behavior and they make important contributions to the larger picture of U.S. Supreme Court behavior.

However, each of these models is limited in that they do not take into consideration other influences upon judicial behavior and are thus unable to explain the voting anomalies of the Justices. This literature review will consider the models and outline their strengths and weaknesses. Model weaknesses include narrow views of the *Justices as humans, as policymakers, and the complexity of law and judicial decision-*making. Because of these weaknesses, a fuller picture of the Justices' decision-making can be obtained by including their religious views, as applied by the social background theory, as a part of their judicial decision-making processes.

Conceptualizations of Law and Courts

Harry Stumpf and K. C. Paul (1998, 3) begin their discussion of American jurisprudence in this manner, "[T]o understand courts and their role in the political and social system, . . . , we may logically begin with a discussion of law and different ways philosophers over time have defined and conceptualized law." According to Stumpf and Paul (1998), three approaches to understanding law, courts, and judges dominate American jurisprudential thought: natural law, analytical jurisprudence and sociological analysis, with sociological analysis dominating the field.

The first, and oldest of these approaches, is natural law, tracing its roots as far back as Aristotle. According to Aristotle, natural law was "reason unaffected by human desires." For Cicero, and the other Stoic philosophers of ancient Rome, natural law was "right reason in agreement with nature" and the obligation to it was unbreakable by humans or human governments. It was the idea that humans had a "natural" relationship

with all other humans, as well with God. St. Thomas Aquinas later continued on this theme by arguing that natural law was made up of the laws of human behavior apart from manmade laws. These laws were universal, undeniable, and maintained human dignity by requiring that humans participate or not participate in certain behaviors that would undermine the dignity of other humans. Whether one adheres to the Ten Commandments or not, all humans can agree that murder and stealing are wrong and they destroy the dignity of others (Aquinas I-II Q. 90 – Q. 108, 993-1123).

Natural law, or modern natural law as it is known today, is grounded in the idea of human rights. According to Robert P. George, a modern adherent to natural law, "there are human rights if there are principals of practical reason directing us to act or abstain from acting in certain ways out of respect for the well-being and the dignity of persons whose legitimate interests may be affected by what we do" (ibid, 174). This new view of natural law was first argued by Hugo Grotius in 1625, who originally wrote to set out "the grounds for a just war" (Mautner 2000, 229). Grotius used the "concepts of basic, inherent natural rights" in setting this groundwork (Stumpf and Paul, 6). According to Stumpf and Paul, it was these concepts that influenced John Locke's doctrine of natural rights which in turn significantly influenced the founders of America. Therefore, it is reasonable to say that American constitutional law is founded upon natural law. Nevertheless, as George points out, there are several ideas of natural law, which have lead to its diminution in American jurisprudence.

The principle objection to the use of natural law in understanding legal jurisprudence is it is based on principles outside of the Constitution. It is predicated on the nature and reason of people; in other words, in natural law there are no clear answers.

Reasonable people applying their best, most concise reasoning may reach different conclusions. Natural law has been used as a justification that contributed to some behaviors in the past that modern society now deems reprehensible, such as slavery. In a common law system such as the one in the United States, a system of law based on solely judicial predilections is criticized because it allows judges and Justices to read their own policy preferences in the interpretation of laws and the Constitution.

The second approach to jurisprudence in America, according to Stumpf and Paul, is analytical jurisprudence. Analytical jurisprudence "characterized law as distinct from morals on the one hand and from social and historical forces on the other" (Stumpf and Paul 9). More fully, "[law] is conceived as a closed, self-sufficient system that is to be studied in its formal, logical content. Moral, social and historical factors are real but are not relevant to a logical conception of law" (ibid). Using this non-political view of the judiciary, judicial decision-making is viewed in a mechanistic, jurisprudential context. In other words, analytical or mechanical jurisprudences argues that judges only "find or discover the law." They do not make it. In *United States v. Butler* (1937, 62-63), Justice Owen J. Roberts (no relation to the current U.S. Supreme Court Chief Justice John Roberts) succinctly outlined the classic application of mechanical jurisprudence:

> There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment.

> This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

Analytical jurisprudence and natural law suffered their demise for the same reason. Both theories are unsatisfactory guides to interpreting the Constitution. From a social science perspective, neither theory lends itself easily to statistical analysis. As the study of judicial decision-making became more empirical in nature, judicial politics scholars abandoned analytical and natural law approaches for theories that more readily lent themselves to rigorous testing and quantitative analysis.

The third jurisprudence is sociological jurisprudence. According to Roscoe Pound, "law [was] a set of societal determined rules to resolve conflicts among competing interest" (ibid 12). Sociological jurisprudence's main argument is that judges are political actors by nature of their job. In deciding cases, judges determine who wins and loses and thus create policy. Sociological jurisprudence is an umbrella heading for three related but separate views of the judiciary: legal realism, political jurisprudence, and behavioral jurisprudence. Legal realists focus on practical legal reform; their view of the judicial process is more extreme, while realists view law not as a set of rules but as official behavior of the political elite. The second type of sociological jurisprudence, political jurisprudence, argues mainly that the courts create public policy. As such, as argued by Victor G. Rosenblum, Justices are political players and need to be understood as "sub-institutions in the larger political process" (ibid, 21). Related to political jurisprudence is behavioral jurisprudence, also known as the "policy-based" approach to understanding judicial behavior. Behavioralists hold that courts are political players and do create policy, but should be studied under the auspices of psychology.

The social scientific study of judicial decision-making has its origins in the Legal Realism movement during the Progressive Era (Baum 1998, Stumpf and Paul 1988, Segal and Spaeth 2002). Legal realists argued that the judges did not just interpret law, but as their decisions create winners and losers, they created law and policy (Oliver Wendell Holmes, Jr. 1881; Karl Llewellyn 1931; Jerome Frank 1930 and 1950; and Herman Oliphant 1928). To legal realists, the rules found in court opinions were not the basis of a Court decision, but the rationalization of a preferred decision based on policy preferences. Although there is a philosophical difference between policy-based and legal-based scholars, they seem to agree that judges are political actors and have policy preferences. What these scholars disagree about is the extent to which the judge's own ideology and preferences inform their decision.

Legal realism's roots are found in the greater Progressive Movement that was sweeping across America in the early to mid-20th century. Legal realists were not concerned with the way law should be but the way it operates in the real world. They were on the front lines of those rejecting the theories of legal formalism and mechanical jurisprudence. Legal realists believed the opposite of mechanical jurisprudence, arguing that Justices make law, they do not just find it. These ideas gained strength as views of law and what it could socially achieve were changing in America. Although legal realism has given way to new theories, it is still influential in contemporary approaches to the study of judicial behavior.

Contemporary Approaches to the Study of Judicial Behavior

In the classical tradition of judicial study, political scientists were more normative, historical, and placed an emphasis on political institutions. In the 1950s a

revolution in political science occurred that profoundly changed the direction of the discipline. The behavioralist movement, rooted in sociology and psychology, refocused the study of law and courts. In particular, the study of judicial behavior emerged as the dominant area of study. Behavioralists rejected normative approaches in favor of empirical analysis. Currently, four models of judicial decision-making dominate the judicial politics subfield: the legal model, the attitudinal model, the strategic choice model, and the neo-institutionalist model. These models of judicial behavior are explained and their importance to public law scholarship is highlighted in the next sections.

The Legal Model: Mechanical Jurisprudence. The legal model is the oldest in judicial decision-making scholarship. In general, despite some variances within the model, the legal model argues the importance of "the material facts of the case in light of the plain meaning of the statutes and constitutional provisions that relate to the matter, the intent of their Framers, and/or precedent" (Segal, Spaeth and Benesh 2005, 23; see generally Clayton and Gillman 1999; Smith 1988). The Justices' political ideology or policy preference is limited or nonexistent in the decision-making process, as legal scholars place an emphasis on "mechanical jurisprudence". The term mechanical jurisprudence was coined by Roscoe Pound, who ardently opposed it. In *Mechanical Jurisprudence* (1908), Pound claimed that the practice was nothing more than rote application of precedent to cases, with little thought to anything else. In other words, in mechanical jurisprudence judges found law, they did not create it.

Legal scholars who use the legal model focus their studies on the law itself and, therefore, put a great emphasis upon document review, such as the Constitution, legal

rules, and the decisions of the appellate courts. *Stare decisis* is an important tool for the understanding of judicial decision-making. These laws and opinions are subject to textual analysis and logical arguments for and against the decisions of the court; for example, did the judges apply the correct precedent?

The legal model fell out of favor with political scientists who studied courts, while behavioral approaches gained favor. The legal model left "no room for empirical exploration" (Stump and Paul, 17). For political scientists, there was no room for the process of actual judicial behavior under the legal model, which was of interest to them as scholars. Although the legal model has been replaced with the quantitative analysis of judicial behavior, it has not disappeared altogether. Law schools still use history and precedent, as well as textual and logical analysis of decisions to understand statutory and constitutional interpretation.

The Attitudinal Model. The attitudinal model has its roots in the legal realism movement during the Progressive Era (1920-1960). The attitudinal model argues that Justices are primarily policy makers and are concerned solely with pursuing their ideologically-based policy preferences, with little regard for *stare decisis* also called precedent, or rules of constitutional or statutory interpretation. Rules found in court opinions merely rationalize the decision, but are not the basis of the decision (Segal and Spaeth 2002, 88).

The attitudinal model evolved from the behavioralist revolution and is therefore an offshoot of the behavioralist idea that Justices make law. The first study that the attitudinal model draws from is Karl Llewellyn's 1931 study, *Some Realism about Realism – Responding to Dean Pound.* First to explore the impact of political attitudes of

the Justices on their decisions, Llewellyn theorized that because society was in flux, law could not be stagnant, and therefore judges could not always turn to the Constitution, but had to make law to address some issues. While Llewellyn's conclusion seems simplistic and obvious today, it was the first study to observe that the court system was as dynamic as society, and that Justices actually made law. However, Llewellyn's study, while important, was not scientifically reliable. In 1948, C. Herman Pritchett published the first systematic study of Supreme Court decisions. Reviewing non-unanimous decisions of the Supreme Court during the Roosevelt presidency (1937-1945), Pritchett also concluded that judges are "motivated by their own preferences" (Pritchett xiii). This study furthered judicial decision-making scholarship by reexamining Llewellyn's conclusions more rigorously, and concluding that Llewellyn was correct.

While it was increasingly clear to scholars that the judges rely on their policy preferences, a universal theory explaining how and why this occurred was still elusive. By applying principles of psychology, Glendon Schubert established a scale measuring case stimuli and judicial attitudes (Schubert, 1965). He found that based upon the facts of the case, Justices would have an "ideal point," or ideal outcome, for a decision, but would be willing to vote for any decision that is dominated by their "ideal point;" however, a Justice would not vote for any decision not dominated by their "ideal point."

In the 1970s, Harold Spaeth began to develop the attitudinal model. Searching for a model that would predict judicial decision-making in the future, Spaeth found in his first studies, conducted with David Rohde, that the political party of the appointing president was the best indicator of future decisions of a specific Justice (Rohde and Spaeth 1976). As the first to answer the question of "*Why* Justices were able to engage in

attitudinal behavior," Rohde and Harold Spaeth did the most to further the attitudinal model. Their research found that several factors allowed Justices to pursue their policy preferences, factors which included lifetime appointments, lack of accountability, a lack of ambition for other political offices, and the unrestricted and unreviewable nature of Supreme Court votes, since the Supreme Court is the court of last resort (Rohde and Spaeth 1976). Later, Spaeth, working with Jeffrey Segal, refined this approach by focusing upon the ideologies and policy preferences of the individual Justices themselves, to the exclusion of all other indicators (Segal and Spaeth 1993; see also Segal and Spaeth 2002).

The policy-based approach to judicial decision-making argues that Justices are political actors who seek to further their own policy preferences (Segal and Spaeth 2002). Attitudinal scholars claim that because the Supreme Court is not limited by institutional constraints (e.g. precedent, the Constitution), Justices do not have to respond to other political actors, and as the court of last resort, the Justices "may freely implement their personal policy preferences" (Segal and Spaeth 2002, 111). This means that the only influence upon the decisions of Supreme Court Justices is their own policy preferences; hence, only their vote on the merits, or the facts, of a case is important to the prediction of judicial voting.

Segal and Spaeth are the current torchbearers for the attitudinal model. They contend that the only factor which matters in predicting how a judge will vote, of those outlined by Rohde and Spaeth, is their political ideology. Segal and Spaeth also argue that the ideology of a Justice can predict how a Justice will vote on granting *certiorari*, on the effectiveness of an *amicus brief* on their decisions and reasoning, on the

assignment of an opinion, and the formation of voting coalitions (Segal and Spaeth 2002). The thesis of the attitudinal model is the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the Justices (Segal and Spaeth 2002, 86). Supreme Court Justices have license to vote their ideologies because they are "virtually immune from political accountability" (ibid, 94). They are appointed for life and are practically unimpeachable, with no Supreme Court or appellate court judge having been impeached in the history of the United States. Congress may pass laws to overturn a statutory decision; however, an amendment to the Constitution is required to overturn a constitutional ruling from the Court. For example, the 11th Amendment to the Constitution overturned *Chisholm v. Georgia* (1793). Finally, the Supreme Court is the court of last resort; its word is usually final in the judicial branch of the federal government. Lower courts, both federal and state, do not have the same luxury in that they may have political aspirations for appointment to a higher court and they continually run the risk of being overturned by a higher court. Therefore, judges on lower courts must be more cautious in their policy-making approach.

Segal and Spaeth discuss several aspects of the judicial system, including the nomination and confirmation process, case selection, decision of the case, the assigning of the opinion and the formation of opinion coalitions, analyzing throughout the extent to which the Justice's policy preferences affect those steps.[5] In the nomination and confirmation process, the Justices' policy preferences can affect the outcome; however, the Justice does not possess control of the situation. In the nomination process, there are several factors that the President must consider when nominating a Justice to the

[5] For their study Segal and Spaeth (316) "examined all Supreme Court decisions dealing with the reasonableness of a search or seizure from the beginning of the 1962 term through the end of the 1997 term (N=217)."

Supreme Court. The goal of the President is to place a Justice on the Court that is as close to the President's ideology as possible, and yet still acceptable for confirmation by the Senate (Moraski and Shipan, 1999; Lindquist, Yalof and Clark 2000). In addition to the ideology compatibility between the nominee and the President, other considerations include the mean, or average, ideology of the Senator and the prior legal and judicial experience of the nominee. Further, considerations include: the region or federal court district from which the nominee comes from, the religion, sex and race of the Justice, as well as patronage and the friendship between the President and the Justice. The confirmation of the nominee by the Senate is based upon the qualifications of the nominee in conjunction with the difference in political ideology between the nominee and a given Senator (Segal, Spaeth, and Benesh, 2005). Once appointed to the Court, the Justice is able to pursue his or her individual policy agenda. The Justice can now vote to accept or reject an appeal to the Court based upon whether the case can advance both their legal (e.g., jurisdiction and standing) and non-legal (e.g., "reverse errant lower court" decision and "likelihood of winning on merit") goals (ibid, 277).

When deciding the case on its merits, according to the attitudinal model the behavior of the Justice can be a function of his or her attitude towards the "object" and their attitude towards the context of the object in the case (Rokeach, 1968, 112-120). "Objects" are the "litigants before the court" and the situations "consist of the facts" (ibid.). Focusing upon search and seizure cases, the Segal and Spaeth found that Justices vote their ideology based upon when the seizure took place and whether the litigant had a property interest in what was searched. They show that, as the Supreme Court became

more conservative, there appeared to be more leniency towards searches than during the Warren Court (Segal and Spaeth 2002, 319).

During the opinion writing stage, the authors actually found that there was a balance in the bias when the Chief Justice assigned the responsibility for writing the decision. The Justices' ideology emerges in the concurrences and dissents. The authors point to the rise of concurring opinions and 5-4 split votes as the Court becomes increasingly ideological in their views. While Justices may be able to agree on a particular outcome, the fact that they cannot agree on how to structure the argument for the outcome demonstrates that Justices are more interested in pursuing policy goals than pursuing coherent legal results.

The attitudinal model dominated the judicial field for approximately 30 years due to its rigorous empirical approach and robust results. Despite its popularity, the model was not as complete as some claimed. Soon, other scholars began to question the simplicity of the theory and reject its conclusiveness (Epstein and Knight, 1998; Levinson, 1994; Clayton and Gillman, 1999; Keck, 2004; Songer and Tabrizi, 1999). These new models include the rational choice model, the neo-institutional model and, as discussed in Chapter 3, the revival of the social background model.

The Strategic Choice Model. The strategic choice model began as an economic policy model. This form of strategic choice argues that given all known outcomes, the decision-maker makes the most rational policy choice that maximizes outcome with minimum input. The first judicial politics scholar to apply the rational choice or strategic choice theory to the Supreme Court in a systematic framework was Walter Murphy in his classic book, *Elements of Judicial Strategy* (1964). The thesis of Murphy's book is,

"how can a Justice of the Supreme Court most efficiently utilize his resources, official and personal, to achieve a particular set of policy objectives" (Murphy 1964, 3-4). Murphy agreed with the legal realists that Supreme Court Justices did not just apply law, they found it as well.

For his data, Murphy reviewed the personal papers of several Supreme Court Justices, and, to a lesser extent, the personal papers of Presidents Roosevelt and Truman.[6] Murphy concluded that the Court's authority was its primary source of power because they had the authority of the Constitution, tradition, and charisma, as well as the authority of statutory interpretation and passive authority, and the power over their own dockets (ibid, 12-13). Despite this vast power of the Court, there were two limitations on the power of the Supreme Court; public opinion and constitutional checks and balances with the other two branches of government.

According to Murphy, it is within these two boundaries that the Court can freely apply their vast power in a strategic manner. Murphy studied the application of power in four parts: the Supreme Court Justices, the judicial bureaucracy, inter-institutional strategies to obtain a favorable outcome and inter-institutional strategies to limit unfavorable outcomes. In all areas the Justices must act in a strategic manner to obtain the results he or she desires; including changing their vote on the merits (ibid 48), charming the other Justices into changing their vote to a desirable one (ibid, 49), and finally bargaining for votes, with such tactics as threatening to change a vote if the opinion writer does not include a Justice's perspective of the law in the case. However, a Justice must not overuse any of the above out of risk of being alienated and isolated from

[6] The Justices reviewed were: Hughes, Lurton, McReynolds, Stone, Sutherland, Taft, Chase, and Frank Murphy.

the other Justices. When interacting with the other branches of government, the Justice must either appeal to reason and convince the Congress or President of the desired outcome, or put forth the desired policy without support and risk putting the Court into jeopardy or harm (ibid, 124).

Murphy's work was based upon three earlier works: Glendon Shubert's *The Study of Judicial Decision-Making as an Aspect of Political Behavior* (1959), C. Herman Pritchett's *Congress versus the Supreme Court* (1961), and Murphy's own study *Marshalling the Court: Leadership, Bargaining and Judicial Process* (1962). By applying a systematic framework to the judicial decision-making process, Murphy showed that the Justices of the Supreme Court were sophisticated political actors who were concerned with more than just the law when making their decisions. They were also interested in the outcomes of the cases and behaved in a manner that furthered those desired outcomes. This study was novel for its application of theory and results; showing that Justices were legal realists as well.

Strategic choice models have been popular for decades in law schools and other areas of political science scholarship; however, strategic choice models in public law scholarship have only become more popular since the late 1990s. In their book, *The Choices Justices Make* (1998), Lee Epstein and Jack Knight did not try to construct a new model. Instead, they updated the research of Murphy's (1964) work. The purpose in writing *The Choices Justices Make* was to counter Segal and Spaeth's assertions in the first edition of *The Supreme Court and the Attitudinal Model* (1993).

Murphy (1964) was the first to argue that while Justices are political players who seek to further their own policy preferences, they also must work within a political

context. These limits include the policy preferences of the other judges, Congress, the president, and current popular opinion; integrating the findings of C. Herman Pritchett and Glendon Schubert. Murphy's study did not have a lasting impact upon judicial decision-making. It was published only a few years before quantitative research swept through political science and therefore quickly lost favor due to its qualitative approach to judicial decision-making (Epstein and Knight 1998, xii).

By recasting Murphy's theory and applying quantitative measurement to it, Epstein and Knight established strategic choice models at the forefront of Supreme Court decision-making models. Epstein and Knight argued that Supreme Court Justices take an incremental and strategic approach in furthering their policy preferences. Their research found that Justices would rather vote for a decision that only partially furthers their policy preference, knowing that they will have a chance to further their policy preference in the next case, than not furthering or reversing their preferences (ibid, 12-13).

The thesis of the strategic account is that humans are complex creatures who continually act against self-interest in order to obtain a better goal result in the future; therefore, human behavior cannot be summed up in a few statistical analyses. Epstein and Knight argued that the attitudinal model rejects strategic behavior because the model is set up specifically to exclude any possibility of finding strategic behavior.[7] The strategic model argues that it does not "make sense to assume that policy is the *primary* goal justices pursue," suggesting that Justices are also interested in using the Court as a

[7] On page 57n in Epstein and Knight: "Therefore, according to October 25, 1996, correspondence from Segal, this model [the attitudinal model] (1) does not attempt to explain choices other than the vote on the merits of cases and (2) does not contemplate strategic interactions over votes."

"stepping-stone" in their career, have the desire for "'principled' decisions," and to "ensure the integrity of the institution" (ibid, 36).

Epstein and Knight outline four "activities in which Justices would engage if they were seeking to advance policy goals in a strategic fashion" including "bargaining, forward thinking, manipulating the agenda and engaging in sophisticated opinion writing" (ibid, 57). According to the authors, bargaining among the Justices can occur at every stage of the case.[8] In the *certiorari* stage, the greatest tool a Justice has in getting a case before the Court is to dissent "from a denial to cert" (ibid, 65). A Justice can manipulate the agenda of the Court by framing the question of the case in another policy dimension, thus splitting the votes of the other Justices and obtaining the preferred outcome, although not on the preferred policy grounds. This works best when a Justice knows that he or she will lose on merits, but he or she also knows that if the opposing coalition is split, the desired policy results are still achieved.

The strategic choice model works best when the Court is voting on the merits of the case and there is an even split in the decision with one Justice is the pivotal vote. The pivotal Justice holds the best chance of advancing his or her policy goals. The opinion writer must consider the pivotal Justice's goals, lest the pivotal Justice changes their

[8] There are three stages a case appealed to the Supreme Court must go through. The first is the "cert" stage or certiorari, in which the Justices meet to discuss the case and decide if they wish to grant an oral argument of the case before the full Court. The Court may vote to deny certiorari, in which the lower court's decision stands, enter an opinion en banc without oral arguments— in which the Court enters an opinion to the case as a whole and there is no identifiable author of the decision—or the Court may grant oral arguments and set a date for a hearing. The second stage is the merits stage. Once oral arguments have been heard, the Justices vote on the "merits" of the case, where the Court takes the first official vote as to how to decide the case. A vote can be changed at a later date by a Justice. Finally, the Justice assigned to write for the majority, writes and circulates the majority opinion, which Justices may then simply sign on with, or append a more personal concurring or dissenting opinion.

vote.[9] In addition, Justices may vote to hear a case they would rather not in order to gain votes for another case they do want to hear. In this way, a Justice is assured that the majority coalition is maintained, which furthers their personal policy preference as a member of that coalition. Closely related to the merit stage is the opinion-writing stage. A Justice writing an opinion is in a position to maximize his or her policy preference. However, he or she is also aware that the more "definitive" the ruling, e.g. the more Justices they have that sign their opinion, the more their policy preference will be implemented. Therefore, in order to minimize dissenting opinions, the writer will limit their full preference.

In his book *Storm Center: The Supreme Court in American Politics* (2005), David O'Brien outlined similar strategies used by the Court in the merits stage of the case. Specifically, O'Brien discussed the "freshman effect." In conference, when the Court discusses the case after oral arguments, senior Justices speak first while the most junior Justice will speak last. Freshman effect occurs when during the discussion of the more senior Justices; the junior Justices become more circumspect and change their vote in the case (O'Brien 2005, 257). Although the freshman effect is not a strategy per se, other strategies outlined by O'Brien include assuming task leadership (managing the workload), social leadership ("interpersonal relations among the Justices"), and policy leadership ("persuading Justices to vote in ways ... favorable to their policy goals") (ibid, 258). These strategies need not to be limited to the Chief Justice or senior Justices, but only to the personality type of the individual Justice, and can be utilized by any or all of

[9] Epstein and Knight give an example of this on pages 65-66 in their book in which Justice Powell, the opinion writer, sent a draft copy of his opinion to Justice O'Connor, the pivotal Justice, first, to obtain her approval before it was distributed to the other Justices.

the Justices. O'Brien also suggests that throughout the process, these three strategies, as well as appeals to ego, work at all stages of the decision-making process.

In addition to restraining the effects of the other eight Justices on the bench, an individual Justice has internal and external institutional constraints that limit their policy preferences. Internal restraints include the rule of four and the assigning of the opinion writer, as were discussed previously. External institutional constraints include the other two branches of government, especially Congress, and the American public. Although the President has very little direct power over the Supreme Court after the confirmation process, Congress has some constitutional authority over the Court. The Court is aware, and takes into account, that Congress can pass laws restricting the jurisdiction of the Court, and potentially overturn Supreme Court decisions by passing laws and constitutional amendments. While Congress has rarely engaged in these activities recently, these options are still available to them. In order to maintain the integrity of the Court, Justices act in a way that limits or minimizes confrontations with Congress. Further, to maintain its authority over the Constitution and prevent Constitutional amendments that will limit its power, the Court must maintain norms with the American people. These norms include *sua sponte*, or disfavoring the creation of issues, and *stare decisis*, or "the favoring respect for precedent" (ibid, 157-158).

Surprisingly, the strategic account model does not contradict the attitudinal model. The attitudinal model can be viewed as the "skeleton" of judicial decision-making, predicting Court decisions in various cases. The "muscles and skin" of judicial decision-making are added by using the strategic account model as a tool to explain the how and why of the decision. The attitudinal model and the strategic account assert that

ideology influences judicial decision-making.[10] Where they disagree is in the perceived extent of the influence. Strategic account scholars claim, "We can best explain the choices of the justices as strategic behavior and not merely as responses to ideological values" (ibid 10). Justices of the Supreme Court are political actors who seek to further their policy agenda; however, they are "sophisticated actors" who must work within institutional constraints (ibid xiii). These institutional constraints range from the judiciary's institutional rules, to the political atmosphere the judiciary and the executive, the legislative, the bureaucracy, and society.

Standing on the shoulders of Walter Murphy, public law scholars are continuing to research the importance of strategic choice in explaining Supreme Court decision-making. In their study of the opinion-writing stage of the decision-making process, Maltzman, Spriggs, and Wahlbeck (2001, 17) postulate that Justices prefer opinions that reflect their policy preferences and those Justices will try to secure an opinion that is the most closely related to their policy preferences. The authors found substantial statistical support for the theory that Justices would try manipulating colleagues— to the point of threatening to change their vote—in an effort to ensure a decision that closely reflects their preferences. What made this study important was not that it stated anything new, but that it used extremely detailed and sophisticated methods not previously found in the strategic account to date.

In *Crafting Law on the Supreme Court: The Collegial Game,* Maltzman, Spriggs, and Wahlbeck expanded upon one aspect of the strategic choice model. While the strategic choice model observes the interaction between the Justices and all political

[10] For a short outline of the rational choice model, see Elinor Ostrom's chapter, "Institutional Rational Choice: An Assessment of the Institutional Analysis" in Paul Sabatier's *Theories of the Policy Process* 1999.

players, Maltzman et al. focused specifically on the interactions between the Justices themselves. Specifically, the authors focused upon a "few stages of the judicial process that affect the contest of final opinions" (Maltzman et al., 28). The authors looked at the selection of the majority opinion author, the response to drafts of opinions, the communications between Justices when deciding whether to accommodate requested changes to a draft opinion and the politics involved in forming coalitions to support the majority opinion after it was written. Each of these steps influenced the scope and strength of the final opinion of the Court.

In reality, the attitudinal model and the rational choice models are essentially arguing two sides of the same coin. The attitudinal model is strictly empirical with little or no use for data beyond the final vote of the Justice. In this respect, the attitudinal model provides a workable framework for judicial decision-making scholarship. It demonstrates that Justices are political actors who have little use for strictly applying the law. However, this model does not have the power to describe all factors associated with appellate court decision-making; especially at the Supreme Court level. This is where the strategic model fits into the judicial decision-making literature.

The strategic model makes the same basic claim as the attitudinal model: Justices are political actors who wish to implement their policy preferences. The difference between the models is that strategic choice acknowledges the reality that a Justice must secure the support of four other Justices to obtain that preference, hence creating the need for strategy and actual compromise with other Justices. What the attitudinal model frames, strategic choice fleshes out and explains in detail. Further, while Ignagni (1994) focused upon precedent and historical cues to describe situations that limit judicial

choice, Epstein and Knight focus upon the interaction between the Justice and other political players as creating the situations that limit the maximization of judicial policy preferences in Court decisions.

The Neo-Institutional Model. Although the legal model ranges from mechanical jurisprudence, which most strictly adheres to the definition above, to the current "post-positivism" concept that states, "the only required influence of law is a subjective influence that resides within the judge's own mind," none of the models have been empirically tested (Segal, Spaeth and Benesh 22). This current dissertation does not advocate that all models must be empirically tested to be true and accurate; however, empirically proven models are the most acceptable in modern judicial decision-making scholarship. Epstein and Knight support this position to some degree. In their article "The Norm of Stare Decisis," (1996, 1032) Epstein and Knight argue that "justices might be motivated by their own preferences over what the law should be, but they are constrained in efforts to establish their preferences by a norm favoring respect for *stare decisis."* Epstein and Knight (1996, 1018) continue that this truth cannot be found by "conventional examination of the vote," but will be found by reviewing "attorney's attention to precedent and justices' appeal to and respect for precedent."

There are two types of institutionalism in judicial decision-making; the old institutionalism and the new or neo-institutionalism. The "old institutionalists believed that politics entered the judicial process in subtle and complex ways [although] they did not hold a positivist view about politics or the law" (Clayton 1999, 20). Old institutionalism, with proponents such as Edward Corwin (1934, 1940), Robert Cushman (1925), and Charles Grove Haines (1922, 1930, 1944), had its origins in the realist

movement of the 1920s and 1930s. Old institutionalists believe that law was made up of historical patterns and therefore joined the realists in their examination of law as it actually was and not "in idealized form" (Clayton, 1999, 22). In this respect, old institutionalists were realists; however, they did not go so far as to reject history or *stare decisis*. Corwin did argue that the Constitution should remain in pace with a progressive society since it was the historical purpose and goal of the Constitution that gave it meaning (Corwin 1934; Clayton 1999). Corwin also emphasized the "historical contingency of separation of powers" when he wrote *The President: Office and Powers* (1940) (Clayton 1999, 21).

According to Clayton (1999, 30), neo-institutionalists are challenging "the reductionist and instrumentalist conception of politics that characterized behavioralism and a renewed appreciation for constitutive and normative conceptions of politics and the role that institutions played in the latter;" however, they do not completely return to the constitutional law scholarship of the old constitutionalists. Neo-Institutionalists refocus the judicial decision-making debate back to it roots: the court system as a political institution that decides cases within the boundaries of its institutional rules and precedent. They direct their attention "to the institutional structure within which judicial decision making occurs" (Maveety 2003, 25; see also Clayton and Gillman 1999, 31; Gillman 1997). Neo-institutionalists believe that Justices make law as well as find law; however, when they make law, them must do so within the institutional frameworks of the judiciary and the Constitution. In other words, the neo-institutional approach emphasizes the influence of legal and constitutional variables on judicial decision-making. Additionally, new institutionalists "are inclined to deemphasize the distinction between

these formal structures, and informal norms, myths, habits of thought, or background structures and patterns of meaning" (Clayton and Gillman 1999, 31; see also Gillman 1997; Orren 1995; Skowronek 1995; Smith 1995). Today, neo-institutionalism encompasses two different camps: those who focus on "historical accounts of institutional development" and those who focus on the influence of social frameworks on the "individual conduct" of judges (Clayton and Gillman 1999, 5-7)

Robert McCloskey, in *The American Supreme Court* (2005) was among those Supreme Court scholars who sought to explain Supreme Court policymaking from an historical institutionalist perspective. By reviewing the dominant issues that reached the Supreme Court during three major periods of American history, McCloskey showed how the political, social and business conflicts of the day influenced the types of cases before the Court and how the Court decided those cases (McCloskey, 2005). The first era, 1787 to 1865, was dominated by cases that challenged the roles of the national and state government in the federalist system. The second Court era, 1865-1937, was dominated by cases challenging the role and identity of corporations in America's political and economic policies. The final era, 1937 to date, is dominated by cases demanding an increase in civil and individual rights.

What McCloskey found was that regardless of the time period and political era in which it finds itself, the Court is primarily a judicial institution and, because of this, it will have some impact on policy. Further, McCloskey argues that history, time, and precedent are all important factors in judicial decision-making:

> The Court's great successes in establishing jurisdiction have never been attained [by a series of leaps and bounds]. We need only to recall by way of example the slow and gingerly steps Marshall took from *Marbury* to *Cohens v. Virginia* to confirm the Court's supremacy over the states, or

> the almost painfully gradual accumulation of precedents that lead finally to substantive due process in the late nineteenth century. It is in the nature of courts to feel their way along and it must not be forgotten that this is a court we are speaking of, albeit a most unusual one (McCloskey, 248-249).

Thomas Keck (2004) also used a historical perspective when reviewing the judicial activism of the U.S. Supreme Court. While some scholars and society at large view judicial activism as performed by liberal Justices, Keck argued that conservative Justices, especially those on the Rehnquist Court, were just as "activist" as the liberal Justices, if not more so. Keck argued that judicial activism occurred because post-New Deal Justices had increasingly used their policy preferences, within the boundaries of law, in deciding cases. Keck is not an attitudinalist, insisting that any "patterns" found by behavioralist scholars "does not necessarily imply that that judicial decisions are unconstrained by law" (Keck 2004, 271).

Also, Keck (2004, 26-27) argued the post-New Deal Court seemed to "abandon the notion of constitutional limits on government power [and] therefore sought to construct a somewhat different vision of the new constitutional order," namely a focus on civil liberties. The Warren Court focused upon this rights-based view of the Constitution, safeguarding minority groups from the overreaching modern state. By the 1970s, this rights-based view had become deeply entrenched in society, making it difficult for any conservative judicial movement to reshape it. Keck (2004, 7) argued that the conservative Court had three options:

> First, they could have attempted to maintain a consistent commitment to judicial restraint, exercising substantial deference to the elected branches across the board. ... Second, the conservative justices could have chosen to abandon the protection of liberal constitutional rights associated with the Warren Court tradition, while articulating a new set of conservative rights claims that they were willing to defend. ... Third and finally, they

> could have preserved the liberal, rights-based activism of the Warren Court, while also endorsing the new conservative activism.

Keck argued that the Court took the latter option, by upholding criminal rights, abortion rights, and adding gay rights in the cases of *Romer v. Evans* (1996) and *Lawrence v. Texas* (2003). However, Keck added that the conservative Courts actively moved freedom of religion cases, Eleventh Amendment cases, and commerce cases in a conservative direction.

Keck's historical analysis suggests that judicial activism, liberal or conservative, could never have happened without the New Deal and the "switch in time that saved nine." Without the need for a new direction and purpose, the post-New Deal Court would not have focused upon civil liberties and rights; this would have prevented the changes of the Warren Court and thus ultimately the Burger and Rehnquist Courts as well. Clearly, Keck, as a neo-institutionalist, saw the role of separation of powers, precedent, and the Constitution as key factors that influenced the choices and policy preferences of Supreme Court Justices.

Also prominent in the historical, neo-institutionalist genre of judicial decision-making is Keith Whittington. Wittington advocates the use of a "new originalism" by the Justices when they make their decisions. "Old originalism" was the critique used by Conservatives during the 1980s to criticize the judicial activism of the Court during the Warren and Burger Courts. However, as the Court became more conservative, "new originalism" emerged which was supported by scholars as Wittington (1999 and 2002) and McConnell (1990b and 1995) (Whittington 2002, 599). New Originalism "is grounded more clearly and firmly in an argument about what judges are supposed to be interpreting and what that implies, rather than an argument about how best to limit

judicial discretion" (ibid, 609). Further, new originalism focus upon the "public meaning" of the Constitution at the time of its ratification, rather upon the arguments of the "individual drafters" (ibid). As such, this new generation of originalists scholars acknowledge that there is room for interpretation in judicial decision-making; however, this does not mean that Justices can vote solely to advance their policy preferences. As Whittington outlines in his article *The New Originalism* (2002), Justices must have fidelity to the Constitution as it was intended by society at its ratification, any interpretation of the Constitution must be done in this light – the Constitution is not a living document, unless the people agree to amend it. Whittington further claims, that if the Constitution is not clear on the policy direction the Justices are to take, then they must turn to the historical documents—such as the Constitutional Convention minutes—and the societal understanding of what the Constitution was to be and do at the time of its ratification. In this way, the Justices will maintain a fidelity to the Constitution with the understanding that interpretation will be inevitable.

Limitations of Policy-Based Models of Supreme Court Decision-Making

Despite the merits of the models of Supreme Court decision-making described in this chapter, each model has several limitations. The attitudinal model treats the Supreme Court Justice as an unsophisticated, one-track minded policy-maker pursuing only his or her policy preferences. The strategic choice model, although treating the Justice as a sophisticated human policy-maker, has all the standard issues and problems endemic to any rational choice theory. Finally, the neo-institutional model, although it now recognizes the importance of the Justices' policy preferences, still does not acknowledge the Justices as humans who are greatly influenced by their policy preferences. Each

model fails to discuss or acknowledge the reason why Justices have his or her specific policy preferences; a question, in the author's opinion, is much more interesting.

The main flaw of the legal model is that the mechanical formula ignores too many variables that may influence judicial decision-making, such as the policy preferences of the Justices and the political nature of the Court's judicial decision-making process. The emphasis on *stare decisis* fails to recognize that Justices have the power to change earlier decisions as they see fit, or as demanded by society. Justices may modify, ignore, limit, or even completely override precedent at will. In writing their opinions, Justices have the discretion to ignore or modify earlier standards, tests, and rules as they explain their decisions. Concurring and dissenting opinions give all Justices the opportunity to voice their opinions about the same standards, tests, and rules, although with a lesser weight of authority. For example, early in the history of the Constitution, the Court gave itself the power of judicial review over federal statues in *Marbury v. Madison* (1803). This power is not in the Constitution, nor was it expressly given to the Court by Congress after the Constitution's ratification. In such a case, the legal model would find it difficult to explain the rationale for judicial review or the reasoning behind the Court's adoption of that power.

The attitudinal model has dominated the judicial decision-making scholarship for many decades; however, cracks have begun to develop in the theory and new scholars are taking advantage of filling in the gaps. One argument against the attitudinal model is that it is too simplistic in its assertion that the only thing that matters to Justices' votes are his or her political ideologies. A strategic account argument against the attitudinal model's simplistic view of Justices is to show "the different ways judicial decision making is

constrained by the actions of others and by social and political institutions" (Epstein and Knight 1998, 184).

The attitudinal model claims that behavior is an indication of political or policy preferences. One complaint leveled against the model is that it rather puts the cart before the horse. Is it prudent to look at behavior only to determine attitude, or should attitude be established first and then applied to behavior (Gibson 1978; Nardulli, Flemming and Eisenstein 1984; Wicker 1969)? In 1989, Segal and Cover addressed this issue and found that there was a high correlation between attitude and behavior regardless of which was the dependent variable. However, the flaw in Segal and Cover's study is that it only seems to be accurate for only civil liberties cases and has not been applied to other areas of law, such as criminal, anti-trust, or interstate regulation (Segal, Epstein, Cameron and Spaeth 1995).

A second criticism of the attitudinal model is that it is an extremely one-dimensional view of Justices' decision-making. As discussed earlier, the attitudinal model portrays Justices as unsophisticated political players driven solely, almost blindly, by their policy preferences. This is a rather harsh statement of the criticism, but it makes the point nicely; is *anyone* so one-dimensional? There are many possible limitations on the advancement of pure political preferences; including institutional factors (Epstein and Knight 1998; see generally Clayton and Gillman1999), precedent-based (Knight and Epstein 1996), a consequence of small group dynamics (Maltzman, et al. 2001), strategic considerations (Murphy 1964; Epstein and Knight 1998), and the actions or attitudes of Congress (Pritchett 1961; Murphy 1962; Segal 1999). By not addressing—or entertaining—these very real limitations on judicial decision-making, the attitudinal

model does miss important factors that Justices must consider when casting a vote to accept a case for review or deciding a case on its merits.

The strategic account also has limitations. First, the strategic account, as outlined by Epstein and Knight (1998), uses the Justices' conference votes to determine the strategy used by the Justices. However, there is nothing, if the attitudinal model is at all correct, to bind a Justice to their conference vote, nor are they constrained in their final vote on the merits. Simply put, there is nothing to stop Justices from changing their vote, referred to as the fluidity of a vote, for any reason or no reason at all. The strategic account, while showing that the threat of a vote change can be used for strategic reasons, fails to address vote fluidity for causes or purposes other than strategic (Segal and Spaeth 2002, 285; Hagle and Spaeth 1991).

Strategic account scholars reject the attitudinal model, arguing, "[j]ustices may be primarily seekers of legal policy, but they are not unsophisticated characters who make choices based merely on their own political preferences" (Epstein and Knight 2002, xiii). Because the rational choice model attempts to explain why the Justices vote as they do, adherents include qualitative approaches in their research. While there are important differences between these two models, these do not render them mutually exclusive. There are, in fact, surprising similarities between the two models. Again, although there is a philosophical difference between policy-based and legal-based scholars, they seem to agree that judges are political actors and have policy preferences. What they disagree about is the extent to which the judge's ideology and preferences inform his or her decision.

The above argument may seem to present Justices as irrational, and that is the point. Humans are notoriously irrational beings who do many counter-intuitive deeds for illogical reasons or for no reason at all. For example, in 2000, 2004, and 2008 Ralph Nader has run for the presidency of the United States. Mr. Nader never had—and may never have—a real chance of winning. Therefore, it seems irrational for Mr. Nader to continue to run. It also seems irrational for thousands of people to vote for him, as they have in the past, and as they may continue to if he runs again in 2012. Many argue, correctly, that Mr. Nader knows that he has little chance to win the White House, but he continues to run as a protest against the government, and gives citizens who agree with his protest a candidate for whom to vote. Even if this is an accurate statement of Mr. Nader's objectives, it still seems irrational to spend millions of dollars pursuing an office you know you cannot win; or to vote for someone pursuing that office whom the voter knows cannot win, especially when running for such office may very well jeopardize the win of another candidate who may have similar, if not exact, policy preferences.[11]

Another problem with the strategic account is that of the rational choice theory itself. As Elinor Ostrom (1999, 44) points out, "the most well-established formal model of the individual used in institutional analysis is *Homo economicus*." She further states that by using the *Homo economicus* model, "one assumes that actors have complete and well-ordered preferences and complete information, and that they maximize the net value of expected returns to themselves" (ibid, 44-45). The obvious objection to this requirement is that no one ever has "complete and well-ordered preferences and complete information." One cannot read the minds of others to be sure that preferences are well

[11] This is not an argument for the irrationality of Mr. Nader and his supporters, but an illustration of the "irrationality" of his continual running for the presidency.

ordered, and absent omnipotence, no one can ever have complete information. The model cannot realistically represent real life in all its uncertainty; if a Justice threatens to change his or her vote to obtain a policy preference in a particular decision, that Justice cannot guarantee or positively know ahead of time that his or her bluff will not be called. Ostrom (1999, 45) continues, "game theory and neoclassical economic theory–involve extreme assumptions such as unlimited computational capability and full maximization of net benefits." Again, when this is applied to the real world, the problem with the strategic account is evident. There are very few people, inside or outside of Mensa, who have "unlimited computational capabilities." Ostrom's critique is moderated somewhat because the Supreme Court operates within a smaller sphere; there are limits on the possible outcomes that may be obtained because of a decision, and there are only nine Justices on the Court, and hence only a limited number of possible outcomes to a case. While Justices cannot know ahead of time of the full impact a decision will have upon society, the impact is generally limited to the area of law involved. Only rarely would a free exercise of religion case affect the area of corporate contract law.

In response to *The Choices Justices Make*, Segal and Spaeth published *The Attitudinal Model and the Supreme Court Revisited* (2002). In this update of their previous book, the authors claimed to "disprove" the strategic account as it relates to Supreme Court decision-making, but they did not completely succeed. Segal and Spaeth divided the strategic choice into two camps: the inter-institutional, which focuses upon the interaction between the Justices alone, and the intra-institutional, which focuses upon the interaction between the Court and other political actors and branches of the

government. Segal and Spaeth (102-103) dismissed the first camp by stating that there is very little proof for inter-institutional effects and that:

> To date, the top journals of political science have published less than a handful of studies that derive or examine equilibrium behavior [the basis of rational choice] of judges . . . Moreover, while there are some internal equilibrium models out there, these models have not been empirically tested."

This is a rather unfair assessment of inter-institutional strategic account. Until the 1990s, very few public law scholars would frame questions in the rational choice model because elite political science journals were completely dominated by quantitative modeling. If these scholars wished to be published with any regularity, they were forced to conduct research using quantitative methods, or publish in less elite journals. Only recently have elite political science journals have allowed a limited number of qualitative studies to be published in their pages. To cite the lack of publication, when comparing rational choice's approximately ten years of publication to the quantitative model's record of over 40 years is spurious (Epstein and Knight 2002, xi-xiv; see specifically footnotes "b" and "c").

Segal and Spaeth also addressed the intra-institutional camp of rational choice, sometimes called the separation-of-powers model. Here the authors systematically highlighted the weaknesses in both the qualitative and quantitative research in this area. While the authors succeeded in challenging the actual extent of the influence of Congress and the president on the Court, and vice versa, this area of study seems to represent only a small portion of strategic account scholarship, with most focusing on judicial decision-making. The differences between the attitudinal and institutional models lie in the approach to studying the Supreme Court decisions. The institutionalists' data are the various votes of the Justices within the life of a case, and the various institutional (formal

structures or informal norms) pressures upon the Court. The attitudinal model's data are the final votes of the Justices in the particular case and uses quantitative analysis exclusively. The latter approach only serves to predict outcomes of various cases before the Supreme Court. However, the role of the public law scholar is to explain why there are occasional counter-intuitive decisions, as well as conflicting decisions, from the Supreme Court even though the Justices have not changed. The strategic account, by comparison, uses preliminary votes on the merits, the final vote on merits, and the writings of the Justices, including opinions and inter-Court memorandums, as data. This approach then uses a qualitative approach in its analysis.[12]

In an interesting twist, the neo-institutional model may have succeeded in remedying its greatest flaw, that of focusing only on institutional constraints in judicial decision-making. In its first inception as the legal model, before the realist revolution, this model focused primarily upon legal precedent, original intent, plain meaning of statutes, and Constitutional institutional constraints. When it returned as the neo-institutionalist model, it now encompassed the real world influence of policy preferences upon a judge's vote. Additionally, the attitudinal model and the strategic account have examined their claims against such institutional constraints as Rule of Four, vote on the merits, the selection of the majority opinion writer, and the reaction of Congress and the public upon judicial votes (see generally Mishler and Sheehan 1996; Epstein and Knight 1998; Baum 1999; Davis 1999; Segal 1999; Segal and Spaeth 2002).

[12] In their study, Epstein and Knight used "data mined from the Court's public records and from the private papers of Justices William J. Brennan, Jr., William O. Douglas, Thurgood Marshall, and Lewis F. Powell, Jr. . . . strategic rationality seeks to explain all the choices justices make – from the initial decision to grant review to the policy enunciated in the final opinion, not just the vote to affirm or reverse" (ibid, xiv).

The neo-institutional model also has limitations. The strategic account suffers from the same limitations as general rational choice theory, as outlined above. Additionally, the neo-institutionalists still adhere to the use of the Framers' intent or legislative intent (Ackerman 1991; Gilliam 1993; Whittington 1999), history (McCloskey, 2005; Keck 2004), and institutional norms (Gillman, 1999) in explaining Supreme Court policymaking. These variables still provide challenges to the model. The intent of the Framers approach is one of the hardest to reconcile. Anderson (1954) pointed out several limitations associated with the intent of the Framers' approach; such as the records of the constitutional convention are incomplete, we cannot be sure that everyone agreed on the meaning of the words, nor can intentions be determined from a group.[13] These examples quickly illustrate the problems with an institutionalist approach to judicial decision-making (see generally Epstein and Knight 1998, Chapters 4 and 5; Segal and Spaeth 2002, 48-85). A problem with historical-institutionalist accounts is a difficulty in accounting systematically for change over time.

The main thesis of this discussion is that none of the above models fully explains judicial decision-making, yet they each contribute a portion of the overall picture of American jurisprudence and the complexity of judicial decision-making. These theories, when pulled together, offer a larger picture of what motivates Supreme Court Justices, and lower court judges in the decision-making process. However, there is still one aspect that these theories do not address: What influences the Justices' policy preferences and the views of jurisprudence that drives their voting behavior?

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[13] For an in-depth look at the Constitutional convention debate see David Brian Robertson's *The Constitution and America's Destiny* (2005).

To rephrase Segal and Spaeth, why is Chief Justice William Rehnquist a conservative and Justice Thurgood Marshall a liberal? If being a conservative or liberal is the driving force in judicial-decision making either alone (attitudinal model) or in conjunction with other political players (strategic account) or within the constraints of the Constitution and government (neo-institutionalist), then what drives the political ideology or decisions that have a decidedly ideological slant? By using the social background model, this paper explores a Justices' professed faith tradition as one possible explanation as to why they may vote as a conservative or liberal.

Conclusion

One of the most important questions addressed in public law scholarship is what explains Supreme Court decision-making. These are important areas of study because they may provide deeper understanding of how the Supreme Court makes its decisions—and the Court's perceived role as an institution in our political system. The rational choice model and the attitudinal model are the most popular models in current political science scholarship. The attitudinal model has dominated judicial scholarship in political science during the past 30 years, with judicial politics studies in political science have almost focused exclusively on quantitative analysis. Focusing upon the final vote of the Justice as the dependent variable, the attitudinal model concludes that decisions are rendered based on the facts of the case as applied to the policy or ideological preferences of the Justice. Further, the Justices have little or no regard for the Constitution, precedents, or the policy preferences of any other political player.

During the past decade, the rational choice model has grown in popularity in political science. Championed by Epstein and Knight, the strategic model argues that

while Supreme Court Justices do decide cases based upon their policy/ideological preferences, they are not enslaved by these preferences. Justices are sophisticated political players who do not make their decisions in political isolation; they must be aware of and take into account the actions and ideologies of other political players, whether other Justices or other institutions. These two models are not mutually exclusive to one another. Both seek to better understand the Supreme Court and make sense of the often-contradictory decisions that come from the highest bench. Indeed, these models seem to complement one another in that the attitudinal model predicts *how* a Justice may vote in a case, while the strategic choice model explains, in part, *why* a Justice votes as he or she does in a case. Scholars that use both models in their work will be able to present a better, more accurate understanding of Court decisions.

Chapter 3

THEORETICAL FRAMEWORK: SOCIAL BACKGROUND MODELS OF JUDICIAL BEHAVIOR

Introduction

Chapter 2 outlined four dominant models of Supreme Court decision-making: legal model, the attitudinal model, the strategic choice model and the neo-institutional model. Each of these models contributes to our understanding of *how* Justices make their decisions on the merits of a case. However, each of these models has its limitations, which make them unsuitable for this study; mainly, none of the models can explain *why* a Justice makes the decisions he or she makes. Three of the models' assumptions, attitudinal, strategic, and neo-institutionalism, agree that policy preferences are a driving force in judicial decision-making. The neo-institutional model states that a Justice has a policy preference that is tempered by institutional constraints, actual and theoretical. Realization of a Justice's policy preference is limited by balance of power or precedent; however, this model does not explain *why* a Justice would view precedent as important or not important.

The attitudinal model likewise states that a Justice has a policy preference that is only tempered by the facts of the case (Benesh 2003, 118). However, again once the question that remains unaddressed is why a Justice would have one particular policy preference over another. And while the strategic account broadens the scope of phenomena that temper the policy preferences of a Justice—including the actual or potential action of other political players; and by any applicable precedent—once again, the question remains; why would a Justice pick one particular kind of strategy over

another? For example, what would prompt one particular Justice to play hardball by switching, or threatening to switch, his or her vote? Consideration of a Justice's personal outlook may help identify possible strategic outcomes he or she considers necessary in the strategic choice model, while limiting the applicability of others.

These critiques are not meant to minimize the theoretical and substantive contributions of the three models. On the contrary, this study argues that they are important and their arguments collectively contribute to the whole picture of judicial decision-making. The major failing of these models is that they leave out the question of *why*. This chapter presents an alternative framework for understanding the "why" of Supreme Court decision-making: the social background model.

Unlike prior judicial decision-making research, the current study takes a multidisciplinary approach to understanding whether Justices' faith traditions influence decision-making in freedom of religion cases. Research for this study draws upon several disciplines to aid in the examination of the decisional behavior of Supreme Court Justices in freedom of religion cases; political science and theology, psychology and sociology. Each discipline makes its own unique contribution to my dissertation research. In political science, most literature regarding religion and law focuses upon two areas: the activities of religious interest groups or the effect of decisions upon religious practice in public. None of the studies to date focus on the role of the personal religious faith of the Justice in the decision-making process. Social background studies use religion as one of the many independent variables in explaining Supreme Court decision-making; however, none of the studies examine freedom of religion cases. Further, the Supreme Court decision-making literature focuses upon behavioralist models: the attitudinal (Segal and

Spaeth 2002) and the strategic choice models (Epstein and Knight 1998), with little attention given to alternative models. The dominance of the attitudinal and strategic choice models has hindered the continued study of the utility of the social-background theory, and has created gaps in the understanding of judicial behavior.

Social Background Theory

The social background theory, also called the personal attributes theory, argues

> [that] despite overall similarities in social background, professional training, and kinds of political experience, judges frequently differ among themselves both in their votes and in the reasons they give to justify those votes. Furthermore, those differences can have significant effects on the polity. Just how many of the differences in judicial behavior can be accounted for by social, professional, and political background characteristics is a question that has long fascinated scholars (Murphy and Tanenhaus 1972, 105).

As can be deduced from the above quote, social background theory is not limited to one type of background variable. Studies that use social background theory in studying judicial decision-making have inquired into a variety of factors such as father's occupation, ethnic origin, religion, region of childhood, prestige of law school, birth order of Justice and his or her siblings, education of parents, religion, previous careers (legal or otherwise), political affiliation, and numerous other background variables relating to childhood, education, political and philosophical ideologies, and heritage.

Although scholars have considered social background theory for decades, the main complaint against the theory is that the findings are not consistent or robust. While this was undeniably true in early social background studies, developments have occurred that have mostly solved this issue. The first of these occurred in 1983, when S. Sidney Ulmer posited that the social background model was most likely time-bound. Ulmer argued that background factors are not consistently influential over long periods of time;

therefore, any social background study must take time into consideration. The second development was the argument that social background models may not be describing direct influences, but indirect ones. This idea stems from the fact that even biographers and psychologists are hard pressed to define the cause of behaviors in a consistent and definite manner (ibid, 108). In other words, "from everyday experiences one would expect that very similar life histories would have very different effects on the attitudes and behaviors of different men, especially on the behavior of sophisticated men who take pride in their individuality" (ibid; see also Grossman 1967). Not every child with an abusive childhood becomes a drug addict, although that is a factor in the life of many drug addicts. Murphy and Tanenhaus' visual depiction of the social background model is presented in Figures 3.1, 3.2 and 3.3.[14] Figure 3.1 presents the social background model as a simple correlation between the Justices' background and voting behavior. Figure 3.2 presents a more complex correlation between backgrounds and judicial behavior. Figure 3.2 shows a more complex relationship between backgrounds and judicial behavior—it is based upon the argument that backgrounds are tempered by education and careers which would then in turn influence the Justice's values and perception of his or her role on the Court. Social background finally translates into judicial votes; however, this depiction treats values as "passive givens" (Murphy and Tanenhaus, 1972, 109).

Insert Figures 3.1 and 3.2 About Here

Figure 3.3 presents the "best" view of the social backgrounds model in which values are seen as more "active agents" in the decision-making process. The values of the Justices are traced back to their social background, while their votes are indirectly

[14] Figures 3.1, 3.2, and 3.3 presented in this chapter are exact copies of Figures 4.1, 4.2 and 4.3 in Murphy and Tanenhaus (1972, 109).

influenced by the Justices' values and role perceptions because of the decisional process (Murphy and Tanenhaus 1972, 109). This is a better model because it takes into account how the Justices' values may change as they move through their education and early career history.

Insert Figure 3.3 About Here

As a framework for understanding Supreme Court decision-making, I argue that the social background model is not a stand-alone model. Social background theory complements and enhances other judicial decision-making models. The social background model aids in the explanation of the findings, and especially the anomalies that occur in Supreme Court cases.[15] This study argues that while there is merit to the attitudinal model or the strategic account, those models are inadequate in explaining anomalies in case outcomes; therefore, scholars must look beyond strict attitudinal and/or institutional limitations to explore these anomalies. This study asserts that anomalies in Supreme Court case outcomes could best be examined by analyzing the Justices' decisional behavior through the lens of social background theory.

Social background theory was first explored in the early 1960s, and although never fully abandoned, it did fall out of favor with the arrival of the attitudinal model and its demand for more stringent statistical research designs within the discipline of political science. By 1966, users of the social background model had separated themselves into three categories: (1) those who work on "the systematic collection and organization of a

[15] An anomaly in decision-making is defined in this research as a Justice who seems to vote against his or her perceived policy preferences or in a manner that seems to be inconsistent with previous voting behavior. An example of this anomaly is Justice Steven Breyer's split vote in *McCreary County v. ACLU* (2005), in which he voted against the posting of the Ten Commandments on public grounds and his vote in *Van Orden v. Perry* (2005), in which he voted to allow the posting of the Ten Commandments on public grounds.

variety of background data," (2) those who "attempt to relate these background characteristics to actual decision patterns," and (3) those who try to discover "to what extent can these findings [statistically significant relationships] be said to account for the variance in judicial vote patterns" (Grossman 1966, 1554-1554, 1561). Grossman argues that the scholars in the second category "share certain basic theoretical assumptions"; namely, that (1) judges are humans subject to their personal views and prejudices, (2) that these scholars agree to the benefit of studying one isolated variable out of a complex issue, (3) that institutional factors are important to judicial decision-making, (4) that no "particular background variable 'accounts' for certain types of decisions," (5) that all social background scholars view statistical significance as correlation not causation, and (6) that methodologically, all studies use non-unanimous decisions and accept "a simplistic stimulus-response model of judicial behavior" (ibid, 1554-1556).

Early Studies

One of the earliest and most influential studies in social background theory is John Schmidhauser's *The Justices of the Supreme Court: A Collective Portrait* (1959), which was the most comprehensive study of judicial backgrounds at that time. Schmidhauser's study did not review judicial decision-making, but rather set out to establish "from what levels of American society have the ninety-one individuals who served on the Supreme Court been chosen" (Schmidhauser 1959, 5). Schmidhauser attempted to make an initial compendium of the U.S. Supreme Court. To do this, Schmidhauser (1959, 6) reviewed the paternal occupations, occupational heredity, career patterns, ethnic affiliations, religious affiliation, and the level and prestige of the non-legal and legal education for each of the ninety-one Justices. He broke the distribution of

the Justices into six historical eras: (a) 1789-1828, (b) 1829-1861, (c) 1862-1888, (d) 1889-1919, (e) 1920-1932, and (f) 1933-1957 (ibid, 6).[16] Since Schmidhauser's study is a compilation and not an analysis, the discussion will be limited to his findings regarding the religious backgrounds of the Justices. In the first era, 1789-1828, there were twenty Justices, all from high social status religious affiliations.[17] Twelve of the Justices were Episcopalian, while four were Presbyterian, two were Congregational, with one Justice each from French Calvinist and Unitarian affiliations (ibid, 22). During the second era, 1829-1861, there were fourteen Justices, with eleven from high social status religious affiliations: seven were Episcopalian, three were Presbyterian, and one was Unitarian. During this time, there was one Justice, a Roman Catholic, from the intermediate social status affiliations; and one Methodist Justice from the lower social status religious affiliation. Finally, one Justice was classified as a general Protestant.

During the third era, 1862-1888, there were 16 Justices, with 12 from the high social status religious affiliation: five Episcopalians, five Presbyterians and two Unitarians. One Justice was a Quaker, which was classified as an intermediate social status affiliation. Two Justices were from the lower social status affiliations: one a Methodist and one a Dutch Reformed. Again, one Justice was a general Protestant.

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[16] "The historical periods are (a) 1789-1828, a period in which government was largely by members of the gentry class; (b) 1829-1861, the era of the Jacksonian social and political revolution; (c) 1862-1888, a period in which wealth, particularly corporate, tended to merge with political power; (d) 1889-1919, a period in which corporate influence in government continued to grow, but also an era of rising demands for social justice; (e) 1920-1932, a period of conservative retrenchment and corporate ascendancy in government; and (f) 1933-1957, the era of the Rooseveltian social revolution and its aftermath" (Schmidhauser 1959, 6).

[17] "Religious diversity in America has at its root a social basis as well as a doctrinal rationale. To some denominations attach factors of prestige and social status while others are viewed socially as 'churches of the disinherited,' of unpopular immigrant groups, or of ethnic groups which, because of color, have not been fully accepted. In keeping with the fact that most of the justices were selected from among socially advantaged families is the heavy incidence of affiliation with high social status religious groups by the justices" (Schmidhauser 1959, 21).

During the fourth era, 1889-1919, there were 18 Justices, who formed the most diverse group in this study. Eight Justices were from the high status affiliations: four Episcopalians, one Presbyterian, two Congregationalists, and one Unitarian. There were two Catholics and one Jew from the intermediate status affiliations. Additionally, two Baptists, two Disciples of Christ, and one Lutheran, who represented the lower social status affiliations.[18] One general Protestant and one Justice, with no disclosed denominational affiliation, also served on the Court during this era.

The fifth era, 1920-1932, included seven Justices, five who were classified as part of the high social status affiliations, including four Episcopalians and one Unitarian. The other two Justices were from the intermediate status affiliations including one Catholic and one Jew. Finally, during the sixth era, 1933-1957, there were sixteen Justices. Eight Justices were classified in the high social status affiliations, including three Episcopalians, three Presbyterians and two Unitarians. Three Justices represented the intermediate social affiliations, two Catholics and one Jew. Three lower social status affiliation Justices were on the bench at this time, including one Methodist and two Baptists. Finally, two Justices were classified as general Protestant.

The purpose of presenting Schmidhauser's typology of religious affiliations is two-fold. First, it suggests that religious diversity waxes and wanes throughout history, with the least diverse Court appearing in the first part of America's history and the most diverse occurring late in the nineteenth century. Second, it shows that although mainline Protestant faith traditions have always had a place on the Court, religious minorities have

[18] It is unclear whom Schmidhauser is classifying as the Lutheran during this era as he does not identify the religious affiliation of each Justice. This classification is incorrect as it is universally accepted that Chief Justice William Rehnquist was the only Lutheran, of any of the Synods, to be appointed to the U.S. Supreme Court.

also made political strides and have increasingly become influential players in American politics. The current Court is composed mostly of these minority faiths, which includes five Justices that are Roman Catholic, two Justices that are Jewish, one Episcopalian Justice, and one Justice classified as a general Protestant. This increased representation has brought to judicial policy making and law the perspectives, attitudes and outlook of these minority faith traditions.

One of the earliest studies to utilized the idea that social backgrounds could influence judicial decision-making was Stuart S. Nagel's *Judicial Backgrounds and Criminal Cases* (1962). Nagel explained that he completed the study because scholars have "compiled data" on the backgrounds of judges, yet did not apply it to decisions (see generally Mott (1933), Ewing (1938), and Schmidhauser (1959)). Nagel also claimed that "various other scholars" have "compiled data on the different decisional tendencies" of judges, yet these same scholars have not tried to "correlate [them] with differences in the background of the judiciary," (Nagel 1962, 333; see generally Gaudet, et al. (1933), Everson (1919), and Pritchett (1948)). Nagel (1962) sent 313 questionnaires to state and federal supreme court judges asking for information on various social backgrounds indicators, including party affiliation, membership in business and civil organizations, former occupations, education, age, practicing geography, religion and liberal attitudes on general legal and criminal law issues. One hundred and nineteen of the questionnaires were returned. Nagel, analyzing criminal cases heard by full courts during the 1955 court session, then calculated the number of times a Justice voted for or against a criminal defendant, computing a "decisional score representing the proportion of times he voted in a criminal case" (ibid). Only cases in which the Court was not unanimous (no dissenting

opinions) or was not homogeneous (only Republicans or only Democrats) were included in the study.

Nagel found that there was a significant correlation between justices' vote in criminal cases and their party affiliation, membership in the American Bar Association, previous occupation, and liberal attitudes in general and specifically in criminal cases (ibid, 335). Additionally— and relevant to this research—Nagel found a significant correlation in the voting behavior of Catholics and Protestants. "Catholics had an average decision score for the defense of 52%, whereas the . . . Protestants had an average decision for the defense of only 28%" (ibid, 337). In addition, Nagel (1962, 337) divided the Protestant category and compared the "high income denominations" (Congregationalist, Episcopalian, Presbyterian and Unitarian) versus the "low income denominations" (Baptist, Lutheran and Methodist). Nagel found that although numerically low-income denominations tended to vote more in favor of the defense, there was no significant statistical difference between high income and low-income protestant denominations. Nagel indicated that there were too few Jewish justices on the various supreme courts to include that faith tradition in his study.

Also of interest, and supporting his findings based upon religion, Nagel's comparison of the voting decisions of compared justices with full English ancestry versus those justices who "has at least partially non-British" ancestry. Those justices who were partially non-British had a higher decisional score in favor of the criminal defendant than those judges of pure British ancestry (ibid). While there may be many reasons for this, it is interesting to note that for this dissertation research the Protestant denominations in Nagel's study tended to be of pure-British ancestry (defined by Nagel as English, Scots

and Welsh) while Catholics in America tended to be of Irish, German, or Italian, and more recently, Hispanic ancestry.

In summary, Nagel provided persuasive evidence that in the general population "persons holding certain positions (e.g., being a Democrat or a Catholic) with respect to background characteristics (e.g., party or religion) tend to have greater sympathy for lower economic and social groups than persons holding obverse positions" (Nagel 1962, 338; see also Campbell, Gurin and Miller (1954) and Tuner (1951)). Nagel claimed that judges with these characteristics also held a more a sympathetic view of the criminal defendant. Nagel's study is important because he established that social background factors, including religious affiliations, contribute to our understanding of judicial behavior. More specifically, Nagel's study showed that there is a correlation between religion—Catholic versus Protestant—and high-income Protestant versus low-income Protestant, and judicial voting behavior.

In 1970, S. Sydney Ulmer published a study using social background theory to determine the likelihood that a Justice would dissent in U.S. Supreme Court decisions. Ulmer justified the study of dissenting behavior by claiming, "that dissenting votes in collegial courts and the opinions that accompany them can heavily influence the allocation of values among relevant competing interests" (Ulmer 1970, 581). Additionally, Ulmer claimed that the more dissenters on an opinion the more "influence" the dissenting opinion will have in "the development of law" (ibid). Ulmer also claimed that the study of dissenting opinions was relevant by claiming a "psychological need" to dissent and that social background theory can identify those factors that influence the need to dissent (ibid, 588). Ulmer also identified several reasons why a Justice may need

to dissent, including the expression of hostility, sense of insecurity, the need to prove worth on the Court, punish those who may disagree with the judge, provoke emotional responses, or as an outlet for frustrations (ibid, 588-589).

Ulmer points to Harold Lasswell's 1960 study, *Psychopathology and Politics*, as the authoritative source of these reasons. Lasswell had found that parental rejection could lead to more extreme political beliefs and that sibling rivalry could lead to aggressive political ideas. Although the above psychological issues may be teased out by social background theory, Ulmer found that the theory may also be useful to understanding judges without such psychoses. Ulmer claimed that children are taught guidelines as to what is and is not "appropriate behavior;" therefore, as an adult, a judge uses these predetermined/learned guidelines to "define" and "type" case information from which a decision on the merit of a case is made (Ulmer 1970, 589).

Ulmer's (1970) independent variables are: (1) Catholic religious affiliation, (2) parental occupation political-state level, (3) place of birth rural, and (4) non-political (academic or corporate lawyer). These independent variables were picked because

> the cultural and psychological influences brought to bear on the judge with a predisposition to dissent differ from those of the judge with the opposite predisposition, and that these influences flow differently from the social backgrounds associated with dissent and non-dissent (ibid, 590).

His dependent variable is the number of times a Justice, with an above characteristic, dissented in a case for 92 Supreme Court Justices from John Jay (1789-1795) through Potter Stewart (1958-1981), inclusive.

In a simple cross tabulation, Ulmer found that being Catholic, having a rural birth and being a non-political lawyer were positively related to dissenting on the merits of the case. However, Ulmer pointed out that of the 92 Justices, only six were Catholic. Ulmer

then calculated the percent of Justices correctly classified finding that for all four independent variables 69.6% were correctly classified. The three positively related variables 68.5% were correctly classified. Finally, reviewing the first (being Catholic) and fourth (non-political lawyer) found that 62% were correctly classified. Ulmer (1970, 593) also pointed out that backgrounds are not "equally effective in contributing to the prediction of our dependent criterion." The removal of rural birth from the four independent variable equation dropped the predictability by only 1.1 percent. Therefore, while having a rural birth was a somewhat significant predictor, religion and type of lawyer were more significant. Finally, Ulmer found that there were 24 Justices mispredicted by all three positive variables. However, "only three justices were grossly mispredicted," with the others close enough not to be considered an "undermining of the prediction model" (ibid, 595-596).

Ulmer's study points to two important factors. First, the social background of a Justice creates the framework within which he or she will consistently respond to specific stimulation. Second, having a political parent socialized a Justice not to dissent, while being of rural birth, a non-political lawyer, or Catholic socialized a Justice to dissent. However, as Ulmer points out, the Catholic findings are tempered by the small number of Catholics in the study, only six Justices were Catholics within the time frame of this study; as such, "two-thirds of six Catholics were classified as frequent dissenters as against 1/3 of 81 Protestants" (ibid, 597). Regardless of this tempering, what is important to this study is the fact that religion, within the social background model, does play a role in Supreme Court decision-making.

In 1973, Ulmer followed up his 1970 study by using the social background model to review criminal cases before the Supreme Court from 1947-1956. Ulmer's study was different from Nagel's study in that Ulmer focused upon the U.S. Supreme Court and studied cases across ten years, whereas Nagel looked at state supreme courts as well as the U.S. Supreme Court for 1955 only. Defining the dependent variable as votes in support of the government in criminal cases, Ulmer (1973, 625) narrowed his considerations down to 12 independent variables, which he found to account for 91.8% of variance, and three variables "that appear to have some explanatory power:" "age at appointment, federal administrative experience, and religious affiliation." Age was defined in years, administrative experience was defined dichotomously as "present or absent," and religion was separated into "Protestants from non-Protestants" (ibid). Using a step-wise multiple regression method, Ulmer found that individually, age was the highest-correlated variable to support of the government in criminal cases. When administrative experience and religion were added to the stepwise regression, the correlation increased to 70% (ibid). In other words, age, administrative experience, and religion accounted for 70% of why the Justices voted the way they did in criminal cases. What is important to the current study is that Ulmer (1973, 626) found religion improved the "explained variance another 21 percentage points." When Ulmer controlled "for various combinations of two [independent] variables," religion became the least important of the variables (ibid).

While it may appear that Ulmer's finding may weaken the assumptions underlying this research, it is important to emphasize three points: (1) Ulmer's findings do reinforce Nagel's conclusions about the importance of religion in judicial decision-

making on the U.S. Supreme Court level, albeit in criminal cases, in that Protestants tend to vote for the government in criminal cases while Catholics tend to vote more in favor of the defendant, (2) religion is still a significant indicator of Supreme Court decision-making behavior, and (3) this dissertation does not claim that religion is the only or the primary social background influence on judicial behavior. The purpose of this study is to determine that in cases where faith traditions speak strongly towards the legal issues in the case, religion as an independent variable is expected to influence Supreme Court decision-making. An alternative appraisal of the significance of religion in criminal cases from the Nagel and Ulmer studies suggest that "the linkage between religious affiliation and voting in criminal cases may, therefore, be socio-economic, class, and the influences emanating from the disparate socialization patterns which characterize different classes" (Ulmer, 1973, 628). In an effort to sort out the difference between the socio-economic socialization and the theological socialization, this study focuses upon freedom of religion cases.

In 1988, Aliotta revisited Ulmer's studies. In her study, Aliotta used the "Justice's testimony before the Senate Judiciary Committee" coding for "power, achievement, and affiliation imagery" to determine if there is a "relationship between judges' psychological disposition and their decision making behavior" (Aliotta 1988, 267). Aliotta (1988, 268) uses motive imagery analysis which claims that words can indicate a psychological need for achievement, power, and affiliation to see if these needs influenced the likelihood that a Justice would write a majority opinion, a concurring opinion, or a dissenting opinion (see also McClelland et al. 1953; Winter 1973; and Heynes et al. 1958). In addition to the three needs, Aliotta added several background

characteristics in order to examine their influence as well, selecting those that had emerged as "predictors of participation" from earlier studies. These additional characteristics included religion (again an over simplified non-Protestant/Protestant dichotomy), parents' occupation (high/intermediate/low prestige), place of rearing (urban/non-urban), pre-legal education (average/prestigious), legal education (average/prestigious), political experience (elected non-judicial or high administrative/ not), judicial experience (yes/no), party identification (Democrat/other), and length of service on the Court (5+ years/under 5 years). She then applied motive imagery analysis to fifteen of the thirty-two Justices who testified before the Senate between 1925 and 1984, and where the testimony was recorded.[19]

Aliotta (1988, 277) found that Justices who tended to write majority opinions had past political experience and a high need for power, but did not have a high corresponding need for affiliation or achievement; none of the other independent variables were statistically significant. Justices who cast concurring or dissenting votes without writing an opinion tended to be raised in urban areas, had a low need for achievement, and graduated from an average law school, with all other variables not statistically significant (ibid). Finally, Justices who voted to concur or dissent *and* wrote an opinion tended to lack political and judicial experience, have a strong need for achievement, and little need for affiliation, with all other variables not statistically significant (ibid).

Aliotta's study is interesting because it shows that social background theory is applicable to other areas of judicial decision-making, not just decisions on the merits of

[19] These Justices include Blackman, Brennan, Fortas, Frankfurter, Goldberg, Harlan, Jackson, Marshall, O'Connor, Powell, Stevens, White, and Whittaker, and Chief Justices Burger and Rehnquist.

the case. Social characteristics can embolden a Justice to take a more active stance against the other members of the bench. Another interesting conclusion from Aliotta's study is that her findings do not support Ulmer's finding that religion may indicate concurrences or dissention in cases. In Aliotta's study, religion did not appear statistically significant for any of the dependent variables. Aliotta's finding is not worrisome for the current study for the following reason. *Why* a Justice may or may not write a concurring or dissenting opinion seems a little more esoteric and a little less important than *how* they would vote on the merits. Many reasons may compel a Justice to write or not write an opinion, anywhere from the need for power to a lack of time or interest. What can be taken from Aliotta's study is that the social backgrounds of U.S. Supreme Court Justices play a role in some of the decisions they make beyond the merits of the case.

In 1981, C. Neal Tate published a study showing that the social background model could provide "satisfactory explanations for variation in [judge's] decision-making behavior" (Tate 1981, 355). Tate picked variables for this study that were less esoteric and more definable than used in earlier studies to show that judicial backgrounds could be operationalized and "easily interpretable" in a statistical analysis (ibid). Tate's (1981, 356) data were based on the "justices' voting in all split decisions in civil rights and liberties and economics cases reported from October 1946 through September 1978 (N= 2327)." Tate excluded all cases that could not be classified as civil rights or economics, and cases whose outcomes could not be classified as liberal or conservative.

Tate's first calculation was to determine the percentage of times each Justice voted in a liberal manner in civil rights and economic cases. Tate's calculations for each

Justice was similar to those calculated by Glendon Schubert in his classic study *The Judicial Mind Revisited* (1974, 60). Tate then used his liberalism score as the dependent variable for his study. Tate's twenty-one independent variables were broken into four categories. The first category, which includes birth, upbringing, and education, encompassed year of birth, region of birth, religion, size of childhood town, and the prestige of the Justice's pre-law and legal education. The second category, career characteristics, measured the Justice's previous judicial experiences: holding elective office, service in the Department of Justice, office at appointment, and appointment region. The third category, age and tenure, includes age of Justice at appointment, appointment year, tenure on the Supreme Court, year tenure ended, age at mid-tenure, and age cohort. The final category, partisanship, encompassed Justice's party identification, party of appointing president, and the appointing president (Roosevelt through Ford).

In the second part of his study, Tate used a stepwise regression analysis in which he included "both forward inclusion and backward elimination procedures" (Tate 1981, 361). Tate's findings were impressive in that he could explain 72% of the variance in voting behavior for economic cases and 87% of the variance in civil rights cases (ibid, 362). He found that career experiences and partisan affiliation were the best indicators for a Justice's liberalism in civil rights and liberties cases (ibid, 362). Specifically, party identification, Truman appointee, Nixon appointee, appointment region and types of prosecutorial experiences were all statistically significant. Indicators for a Justices' liberalism in economics cases also included career experiences and partisan affiliation.

Specifically, party identification, appointed from elected office, and extent of judicial experience were all statistically significant indicators.

Tate's findings are relevant to this current study for two important reasons. First, Tate showed that the social background model can be an indicator of voting behavior. Statistically, Tate's findings show a strong association between social background theory and voting behavior, contrary to what social background detractors predicted (see below for a discussion of the limitations of the social background model). Although he found a strong correlation between certain background characteristics and voting behavior of Supreme Court Justices, Tate does state that until his model is tested on other courts—lower federal and state appellate courts—his findings are suggestive (ibid, 363). Tate's caveat is in line with every other scholar who used the social background model in explaining judicial behavior. By claiming that his findings using this model are suggestive and are correlative to judicial voting behavior, these scholars do not claiming causation.

Tate's second important finding concerned religion. In most studies using the social background model, religion seems to be a consistent, significant indicator of judicial voting behavior. However, Tate found that religion was not significant. Tate (1981, 362) claims that "this finding is surprising, since in the literature Protestantism was consistently associated with conservatism on civil liberties, and since religion had the highest zero-order correlation with %LIBCL [percent liberalism in civil liberties cases]." Tate concluded that when the impact of the significant variables "have been taken into account, religious affiliation adds little or nothing" to the Justices' liberalism in civil rights cases (ibid). While Tate's finding do not support the assumptions of my

research, several factors need to be considered. First, the majority of social background studies, even those with multi-variant regressions, show that religion is statistically significant in judicial votes. Second, Tate coded his religion variable as a dichotomy, where 0=Protestant and 1=Non-Protestant. The problem with Tate's coding of the religion variable is that Tate lumps Jews and Catholics into the same category. This measure of religion is arguably flawed as it is not logical to combine a Christian and a non-Christian faith tradition together. These faith traditions are unique and have their individual worldview and outlook on human behavior. Other scholars usually leave Judaism out entirely. Another issue with Tate's coding that is contrary to most social background studies is the grouping of all Protestant faith traditions together. Many Protestants would take exception to this grouping and quickly point out the different worldviews and outlooks on human behavior of the various Protestant faiths. In short, an Anglican is not a Methodist is not a Baptist.

The Use of the Social Background Model in Comparative Contexts

The social background model has been successfully used in explaining judicial behavior on constitutional courts in other nations. C. Neal Tate and Panu Sittiwong (1989) found that social-background theory was useful in explaining decisions by the Canadian Supreme Court. Tate and Sittiwong's study reviewed the non-unanimous civil rights and economic cases of the Canadian Supreme Court decided between 1949 and 1985. The 1949 date is significant as that was the year Canada abolished appeals to the Judicial Committee of Privy Council in England, which had the authority to review decisions of the Canadian Supreme Court. Also significant in Canadian judicial history was the passage of the Constitution Act of 1982 which effectively abolished the

supremacy of the Canadian Parliament. This allowed the Supreme Court of Canada to shed its narrow adjudicatory role and move towards a more policy-making role (Tate and Sittiwong 1989, 901).

Tate and Sittiwong (1989) first calculated the percentage of times each Canadian Justice voted in a liberal way. They then used this percentage as the dependent variable in their study. The independent variables for their study included region and language, which addressed the Quebec/non-Quebec regional dichotomy as well as language dichotomy that parallels the regional cleavages (western provinces/other provinces) (ibid, 906). Other independent variables included religion (Catholic/non-Catholic), professional background (engaged in private practice/others), judicial experience (number of years of experience as judge), political experience (some experience/other), political party of appointing prime minister (as Canadian Judges do not "openly profess party identifications," appointing prime minister party is Liberal/Conservative), and appointing prime minister (Prime Minister King/Prime Minister Trudeau; King/Others, Trudeau/Others) (ibid, 907-909). The only statistical issue that these characteristics raised was the collinearity between region and religion. As Quebec is closely associated with Catholicism, the authors needed to find a way to separate out the influence of region from the influence of religion. To that end, the authors created a "Non-Quebec/Catholic Index" and coded the groupings as follows: 1=Quebec Protestants, 2=Quebec Catholics, 3=Non-Quebec Protestants, 4=Non-Quebec Catholics (ibid, 909).

Tate and Sittiwong (1989) found that in civil rights, civil liberties, and economic cases, religion was a statistically significant factor in how the Canadian judges voted. In both areas of law, Catholics tended to vote in a liberal manner and non-Catholics tended

to vote in a more conservative direction, regardless of the region of the court. This finding is consistent with the idea that "Catholicism has been associated largely with liberal values and voting behavior in Canada, just as in the United States" (ibid, 906). Tate and Sittiwong's study shows that religion and political ideology can be closely linked, therefore, as my research will show, Justices are likely to vote in keeping with the tenets of their professed faith tradition (controlling for political ideology). In fact, faith traditions can be a possible influence a Justice's political ideology. These findings reinforce the use of religion as the main descriptive factor in the current study.

Tate and Sittiwong's (1989) findings are interesting for several reasons. First, they again show the utility and explanatory power of the social background model. Second, they show the utility and explanatory power of religion in explaining why judges vote in a certain way. Third, the characteristics for liberalism or conservatism in Canada are very similar to those characteristics in the United States. This point is significant because the United States uses a common-law legal system and Canada uses a mix of civil law system in Quebec and common-law system outside of Quebec. In addition, there is a requirement that at least three of the nine judges on the Canadian Supreme Court be from Quebec. Despite these differences, judicial decision-making behavior in both United States and Canada seem to be very similar in nature; that is, similar political and socio-economic characteristics influence judges regardless of the type of legal system.

Social Background Theory and State Supreme Court Behavior

Songer and Tabrizi's (1999) study showed the utility of the social background model in explaining state judicial behavior. Songer and Tabrizi's study is very similar to

the current research; with the exception that only it reviewed the votes of state supreme court justices, while my research reviews the votes of U.S. Supreme Court Justices. Songer and Tabrizi conducted their research because there were no pre-existing studies that examined the effects of religion on the behavior of state supreme court justices who were Evangelical Christians. In their study, Songer and Tabrizi used the vote of the state supreme court justices as the dependent variable, coding 1= liberal vote and 0 = conservative vote, in three areas of law: criminal law, gender discrimination, and obscenity. The timeframe of the study was 1970-1993, during which the authors used the universe of gender and obscenity cases, and a random sample of thirty death penalty cases per each year. The authors excluded any case that did not interpret policy or precedent and those that did not have complete data (Songer and Tabrizi 1999, 511).

There were numerous independent variables. For the religion variable, three dummy variables were created: Roman Catholic, Jewish, and Evangelical; wherein 1= the justice was a member of that faith and 0=otherwise (ibid, 513).[20] Additional independent variables were political party (Democrat/Republican), prosecutor (former prosecutor/no), Supreme Court policy, state citizen ideology (100=most liberal mass ideology/1=most conservative mass ideology), elected judges (justices from states with judicial elections/justices from states with merit appointments), party competition (complete competition/no), case facts death penalty (female victim, police officer victim, multiple

[20] "Evangelicals were defined as all those who claimed to be affiliated with the Southern Baptists, American Baptist, or the Baptist General Conference; any of the Holiness churches including the Christian and Missionary Alliance, Church of the Nazarene, Free Methodist Church, Wesleyan Church; the Missouri Synod or Wisconsin Synod Lutherans; Orthodox Presbyterians or the Presbyterian Church in America; Pentecostals such as the Assemblies of God, Church of God, or the Christian Reformed Church; or the Churches of Christ, Seventh-Day Adventists, or the Evangelical Free Church. The excluded category that serves as the reference group for these three dummy variables is the group of mainline Protestants, including members of the Episcopal Church, the United Church of Christ, the Evangelical Lutheran Church in America, the United Methodist Church, and the Presbyterian Church USA" (Songer and Tabrizi 1999, 513).

murders, rape, robbery, death-qualified jury, crime), case facts gender discrimination (facial, policy type, benign, real difference between genders defense, scrutiny of court), and case facts obscenity (film, text, pictoral, restricted to adult use, First Amendment defense, proof of "scienter" which is to prove that the defendant knowingly broke the law) (ibid, 514).

The findings of Songer and Tabrizi's (1999) research are compelling, for they show that religion influences the votes of justices on state supreme courts. In death penalty cases, Evangelical judges were more likely than Catholic, Jewish or Mainline Protestants, in descending order of conservatism, to vote to affirm the death penalty sentence, which is consistent with their overall conservative view of the death penalty. The only case facts that enhanced the conservatism of the decision-making outcome for all justices were the presence of multiple murders, that the defendant was not charged with rape, and that the defendant agreed that the trial had a death-qualified jury. In gender discrimination cases, Evangelical justices were more likely than Mainline Protestant, Catholic, and Jewish justices, again in descending order of conservatism, to vote in a conservative manner. The only case facts that enhanced the conservatism of the decision-making outcome for all the justices were that the discrimination was not facial and that the discrimination policy was criminal, not civil. Finally, in the obscenity cases, Evangelical justices again voted in a more conservative manner than Catholic, Jewish, and Mainline Protestant justices, in descending order of conservatism. More conservative outcomes in the overall decision-making were found in cases where adult material was not limited to adults and when defendants did not claim a lack of proof of scienter, although it must be pointed out that the more conservative outcome for underage

involvement in obscenity may stem from consistent precedent set by the U.S. Supreme Court that restricts the availability of adult materials to minors (ibid, 521-522). Additionally, in all three areas of law, Judaism was not a statistically significant indicator of the liberalness of judges' vote. Further, in the area of gender discrimination cases, Roman Catholicism was not a statistically significant indicator.

As stated earlier, Songer and Tabrizi's research is very important to the current study because it demonstrates on an empirical level that religion can and does influence the votes of justices. However, their study raises a number of issues and important contrasts with the current dissertation research. First, although Songer and Tabrizi take the important and rare step of breaking out the Protestant faith traditions, they do not go far enough and break out all of the traditions that have been represented on state courts. While many faith traditions seem to be similar enough that they can be lumped together, it is important to understand that there are important differences among them, or else the faiths would have long since united into one faith tradition or not have separated in the first place. As an example, Anglicans and Methodists are not members of the same faith, although they are both classified as Mainline Protestants and are lumped together in studies (Songer and Tabrizi 1999; Kettstedt and Green 1993). Methodism broke away from Anglicanism in the early 18th century. Further, Presbyterians cannot be lumped in with other Mainline Protestant or Evangelical Protestant faith traditions, or even with each other. Most classifications have the Presbyterian Church (USA) as a Mainline Protestant faith, while the Presbyterian Church of America and the Orthodox Presbyterian Church are listed as Evangelical (see above).

Second, state-level courts and federal-level courts are two very different types of courts. State supreme courts cases can still be appealed to the U.S. Supreme Court if a federal question is presented in the case. Further, state supreme courts and lower-level federal courts must adhere to the precedent set forth by the U.S. Supreme Court. Essentially, influences exist on judicial decision-making may be dependent upon the level and type of court. What may be influential to a state supreme court, or federal district court may not be similarly influential to the U.S. Supreme Court. In sum, what emerges from this literature review is an appreciation that although the social background model is not currently applied to questions of judicial decision-making, it is a powerful framework for determining the influence of socio-economic background factors on judicial decision-making on the U.S. Supreme Court, state high courts and the court systems of other countries. Additionally, these studies show that the faith traditions of the Justices can be an important indicator of why a judge would decide a criminal or civil rights case in a certain manner. However, the current study seeks to go a step further than the reviewed literature and clarify specifically the faith traditions that have the greatest influence on Supreme Court decision-making.

Critiques of the Social Background Model

Although prior research has revealed that the social background model is a useful analytical framework, the model does have its scholarly detractors. This study does not make the claim that the social background model is a complete explanatory framework for understanding judicial behavior. Of the criticisms lodged against the social background model by its critics, this study will address only the one which this author regards as the most significant—the claim that the social background model has not, and

cannot, established a solid link between the backgrounds of Justices and their voting behavior.

This criticism suggests that social background theory has failed to establish any real link between the backgrounds and votes of the Justices. These critics claim that judicial backgrounds are only indirect influences upon judicial decision-making because they are intermediate, and therefore more indirect influences upon behavior (Schubert 1964; Grossman 1967; Murphy and Tanenhaus 1972). Illustrative of these intermediate influences, Murphy and Tanenhaus argue that social background influences are subject to professional training, perception of the role as a judge, and the decision process (Murphy and Tanenhaus 1972, 109). Tate's 1981 study was conceived to respond to this specific criticism. Tate's study found that the backgrounds of the Justices could account for "70 to 90 percent of the variance in the Justices' liberalism in the two case areas, civil rights and liberties and economics, which have received paramount attention from the court" (Tate 1981, 355).

Tate (1981) then directly addressed the critics who claim that the social background model is too simplistic and that intermediate influences are a better predictor of behavior. First, Tate (1981, 363) correctly points out that the ability of the social background model to account for seventy to ninety percent of variance should put to rest "the supposedly inherent limitations on the explanatory potential of background models" that critics claim. Second, Tate argues that social background models do not reflect the simplistic "social background equals votes" logic that critics claim. Social background models can, and routinely do, include heredity factors, professional training, and associations as part of their statistical modeling (ibid, 364). Therefore, the social

background model does not simply look at the education or the size of a Justice's hometown, but also looks at heredity factors such as age, birth region, parental education, and intermediate factors such as prestige of law school, professional and social memberships, previous occupation, and judicial experience. In short, the social background model can be a very sophisticated and powerful explanatory framework for judicial decision-making.

Additionally, S. Sidney Ulmer argued that earlier studies of the social background model may have been weaker than necessary due to the way in which the variables were coded (Ulmer 1973, 629). Ulmer observed that critics such as Bowen (1965) have "dichotomized continuous variables when it was unnecessary to do so for any reasons of methodology" (ibid). This coding can result in a loss of information that can result in weaker relationships that may have been apparent with a more refined model (ibid). Finally, Ulmer argued that the lack of "imagination" on the part of scholars as to what may influence decision-making may limit the potential of the background model. Ulmer stated that for courts at different levels and in different countries, "it may be necessary to alter variables on both sides of the equation" (ibid). Overall, Ulmer argued that the model might be limited by the scholarly imagination of its users.

Finally, in 1986, Ulmer made a significant breakthrough in social background scholarship. In his article, "Are Social Background Models Time-Bound?" Ulmer established that time may affect the influence of social background variables on judicial votes. When Ulmer examined social background influences over a sixty-six year period, he found that they only accounted for thirty-five percent of variance. However, when the same model was used to explain votes between 1903-1935 and 1936-1968, Ulmer found

that "the model accounted for 72.3% of the variance in the second period, but only 18.4% of the variance in the first" (Ulmer 1986, 965). Essentially, this finding demonstrates that what may be influential in one court era may not be so in another. Ulmer's study actually addresses two issues that arise with the social background model. The first is that taking time into account makes the social background model a more sophisticated framework and may make weak associations more robust. The second observation presented by this author is that by not taking time into account could lead to inconsistencies of outcomes between social background studies as acknowledged above. Each of the above studies uses a different timeframe for the cases in their studies. Therefore, while not proven, it is not too great of a leap of logic to theorize that religion may have been more influential to one grouping of Justices than to another group of Justices.

Conclusion

Although the social background model is not widely used today in judicial decision-making scholarship, it is a useful tool for understanding why Justices vote as they do in certain cases. In looking at background factors such as religion, region of birth and parental occupation, as well as the intermediate factors such as prestige of law school, former occupation, and judicial experience, scholars obtain a richer and more detailed view as to the factors that influence judicial decision-making. Additionally, the model can be used to examine a variety of courts, including state, federal, and international ones.

Since its beginning, the social background model has steadily grown into a more sophisticated framework for analysis. Nagel's (1962) research demonstrated that the social background model was statistically sound and could be more complex than simple

lists of characteristics and contingency tables. In 1970, Ulmer's findings indicated that the social background model did not force all factors to be equally influential. Ulmer demonstrated that it was possible to determine whether certain factors were more influential than others in the decision-making process. Additionally, Tate (1981) determined that the social background model was not a simplistic "social background equals votes" model. Taking into consideration background and intermediate factors, Tate showed that sometimes background factors overcame intermediate factors in influencing judicial decisions. Tate's study was an answer to the critics who perennially argue that direct links between social background and votes could not be determined since intermediate factors minimized the influence of a Justice's background (Schubert 1964; Grossman 1967; Murphy and Tanenhaus 1972).

Arguably, the most groundbreaking development in the social background model was Ulmer's 1986 study that the social background model was time-bound. Simply stated, what may be influential in one judicial era may not be influential in another. While Ulmer also argued that more research was needed to strengthen this claim, his finding that time as a factor should be considered in social background model research went far to explain some of the weak correlations found in past studies. As this author argues, it could also explain some of the anomalies in Justices' voting outcomes.

The prior work examined in this chapter also shows some important similarities. These studies tend to focus on civil liberties, civil rights, criminal, and economic cases. This is understandable as these areas of law command most of the Court's attention and therefore have the largest number of observations. Second, previous works use a short timeframe for study. Nagel used cases from 1955, while most other studies used cases

from various 10-year time spans. Ulmer was the notable exception when he used a 66-year time frame to show that the model was time-bound. Third, these studies tend to use the same background factors for their studies. This is again understandable as most studies build on previous work and therefore variables are repeated. Replication of prior work is useful for the current study as it shows repeatedly that religion is an important variable to judicial decision-making. However, as Ulmer (1973) warns, this lack of imagination may limit the social background model as different factors may influence different courts; therefore, scholars must use their imagination to be sure new, unstudied factors are not ignored. Finally, these studies do not breakout the various faith traditions, preferring to code religion in mostly dichotomous Protestant/Catholic designations, with Judaism occasionally tossed in for good measure. Very rarely is Protestantism broken out into Mainline/Evangelical or High Influence/Low Influence. As Ulmer (1973) again warns, sometimes there is no methodological reason to use dichotomous coding, and doing so could lead to weaker results of analysis.

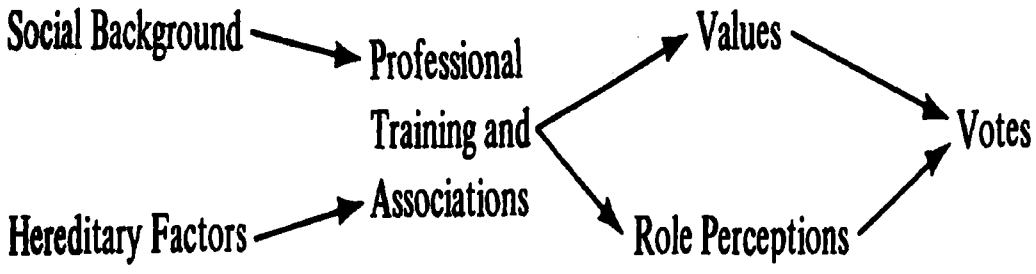
This dissertation research addresses some of these concerns raised in previous studies. First, it narrowly focuses on a subset of civil liberties—freedom of religion cases. No previous study has focused exclusively on freedom of religion cases. Turning attention to freedom of religion is worthy of systematic study and examination as an ever-more pressing legal issue in the 20th century and a probably increasingly significant issue in the 21st century. Second, the current study seeks to examine the Justices' behavior in cases over a longer time frame than has been the norm. Using cases from the Vinson Court era to the Rehnquist Court era, this study encompasses 64 years, just two shy of Ulmer's 1983 study. By expanding the time frame from the usual 10 years to 64 years,

this study will try to capture voting behavior in several court eras during the 20th and 21st centuries. And third, this study will mainly use the faith traditions of the Justices as its independent variable. This research effort does not revert the social background model into a simplistic equation; to the contrary, by using statistical calculations beyond linear and logistic regression, this study addresses the sophisticated interaction between religious faith traditions and judicial voting behavior. The next chapter presents an analysis of the Supreme Court's approach to freedom of religion cases, the Establishment Clause and Free Exercise Clause—the first liberties enumerated in the First Amendment of the Bill of Rights.

FIGURE 3.1. Simple View of Social Background Model

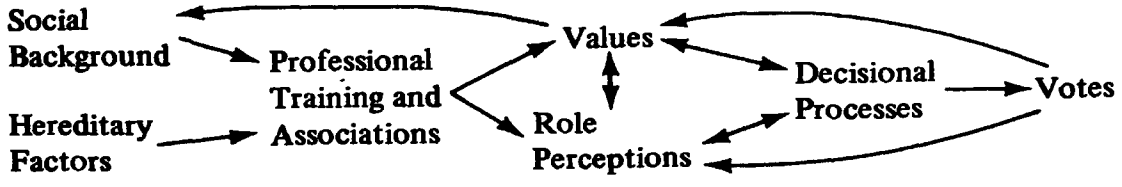
Source: Walter F. Murphy and Joseph Tanenhaus. 1972. *The Study of Public Law.* New York: Random House, Figure 1, p. 109.

FIGURE 3.2. Better View of Social Background Model



Source: Walter F. Murphy and Joseph Tanenhaus. 1972. *The Study of Public Law.* New York: Random House, Figure 2, p. 109.

FIGURE 3.3. Best View of Social Background Model



Source: Walter F. Murphy and Joseph Tanenhaus. 1972. *The Study of Public Law.* New York: Random House, Figure 3, p. 109.

Chapter 4

THE SUPREME COURT'S APPROACH TO FREEDOM OF RELIGION

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" . . . (U.S. Constitution, Amendment I)

Introduction

Although the relationship between religion and politics has been debated throughout American history (Curry 1986, Hamburger 2002, Miller 1953, Morone 2003), a study of religious freedom cases shows that the U.S. Supreme Court has been unable to clarify or even assist in settling the debate. Since the 1940s, when the Court began to address freedom of religion, it has been unable to create a uniform, evenly applied jurisprudence or legal reasoning to the area of religious freedom. The Justices have created and discarded several legal theories and tests, and currently they are unable to adhere to a specific definition of what religious freedom may mean in America. This lack of consensus among the Justices clearly shows that purely legal explanations of Supreme Court decision-making are not helpful in advancing our understanding of Supreme Court outcomes in freedom of religion cases.

Placed first in the First Amendment of the Bill of Rights, the two religious clauses were the final product of the Founders' attempt to break with the European model of the church-state relationship. The first colonies were established in America by minority religious groups from Europe in order to obtain religious freedom and to establish the "City on the Hill" for all the world to see and emulate; but, that freedom was for themselves and not for members of other faiths. The New England colonies showed little tolerance to non-adherents, and established public taxes to support the minister of the

colony (Curry 1986, 209). Dissenters were forced out of the colony, either into the wilderness (as with Anne Hutchinson) or back to England (as in the Browne Brothers) (ibid, 10-11). However, in a short time most European faith traditions were to be found in the American colonies; however, it took longer for religious freedom to take root. By the time America won the Revolutionary War, most of the colonies were willing to allow religious freedom to Protestant denominations and extend tolerance to Catholics and non-Christians. With this uniformity of religious law the Bill of Rights, including the First Amendment, were a "consensus of Congress and [the] nation" (ibid, 193).

Many of the Framers had strong ideas regarding religious freedom in America, including George Washington (Munoz 2003; Boller 1963), John Adams (Witte 2000), Ben Franklin (Lubert 2004), and James Wilson (Hall, 1997), to name the better known ones. However, as religious jurisprudence in America has focused upon the writings of James Madison and Thomas Jefferson, this study will share a similar focus. Two writings most often cited and quoted in religious jurisprudence are James Madison's *A Memorial and Remonstrance Against Religious Assessment* and Thomas Jefferson's *Letters to the Danbury Baptists.* Both of these documents argue for the separation of church and state, with Jefferson's letter being the source of the phrase "a wall of separation" between church and state.

As this chapter will show, for the first 150 years of America's religious history, cases involving religious freedom rarely appeared on the Supreme Court's agenda. However, beginning in the 1940s the Supreme Court began to consistently hear cases involving the religion clauses of the First Amendment. The Warren Court did the most to expand free exercise of religion and limit the establishment of religion. It was in *Everson*

v. Board of Education (1947) that Justice Black introduced the political thought of Madison and Jefferson into Establishment Clause jurisprudence, claiming that, "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'" (*Everson,* 15-16). (This case is discussed in detail below.) Although this statement has been greatly criticized, it has remained the cornerstone of Establishment Clause jurisprudence ever since.

The debate over the constitutional boundaries of church and state and minority religious freedom is a perennial problem before the Court. In the middle of this conflict stands the U.S. Supreme Court. Charged with the interpretation of the U.S. Constitution, the Court's function is to define the boundaries between church and state. "Over the past 50 years, the signals from the United States Supreme Court regarding the proper relationship between religion and government have been ambiguous at best" (Homan 2002, 1). Freedom of religion cases pose jurisprudential problems for the Court as it tries to devise tests and standards to resolve societal conflicts over the proper role of church and state under our Constitution.

Although this study uses the social background model, it is necessary to describe the history of Supreme Court's jurisprudence in the area of freedom of religion—thus addressing the legal and neo-institutional models of judicial decision-making. First, when discussing any area of law it is important to understand the substantive issues of past cases and how the Court decided them. Second, by reviewing religious freedom cases in the context of the law, this study shows that the legal model does not adequately explain the Supreme Court's religious jurisprudence since the Vinson Court.[21] Third, a

[21] The legal model emphasizes the role of *stare decisis* (Knight and Epstein 1996), originalism (Whittington 1999), legal tests (Kritzer and Richards 2003) , and institutional standards (Graber 1993) in

careful comparison between the findings of this chapter and the statistical findings in Chapter 7 will determine whether this legal analysis comports with the statistical results of this study. The next sections discuss the Supreme Court's approach to deciding cases raising the Establishment Clause and the Free Exercise Clause of the First Amendment.

Establishment Clause Jurisprudence

It is commonly accepted that the Establishment Clause, at minimum, means that the government could not set up a "Church of America," so to speak, and force all citizens to worship according to its canons. However, what is not clear is what the Clause means beyond this basic understanding. Does it mean that there is a solid wall of separation between church and state and neither shall have anything to do with the other? Does it mean that one can inform or require considerations from the other? These are the sorts of questions that the Supreme Court has addressed since the 1940s. Further blurring the meaning of the Establishment Clause is the Court's quest to define "religion" itself—as it is hard to separate from the operations of the state something that is not defined (Choper 2000; Davis 2005). The Supreme Court has created, reformulated and rejected several tests to determine what activities violate the First Amendment's Establishment Clause.

The Court rarely heard cases involving the Establishment Clause before the 1940s.[22] The first major Establishment Clause case was *Everson v. Board of Education* (1947). In this case, the Court found that the Establishment Clause was not violated

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explaining Supreme Court outcomes. Articles published in law reviews by law professors provide the best examples of the legal model in operation; although some political scientists incorporate the legal approach in their analysis of Supreme Court decision-making in a particular area of the law.

[22] The two main cases before *Everson* were *Bradfield v. Roberts* (1899) and *Quick Bear v. Leupp* (1908), in which the Court upheld government payments to a Catholic hospital and Catholic school for Sioux Indians, respectively, for services rendered.

when the state reimbursed travel costs to parents who sent their children to parochial schools. *Everson* is significant because it was the first time the Supreme Court applied the Establishment Clause to the states through the due process clause of the Fourteenth Amendment.[23] In the majority opinion, written by Justice Hugo Black, the Court first articulated the metaphor of the "wall of separation between church and state" in Establishment Clause jurisprudence. In *Everson*, Justice Black explored the history of the Establishment Clause and concluded that the "people . . . reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group." In his opinion, Justice Black outlined that establishment protection, at a minimum, meant:

> Neither a state nor the Federal government can set up a church. Neither can pass laws that aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from a church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, nor whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between Church and State (*Everson* at 15-16).

While Justice Black's statements are sweeping about the meaning of the Establishment Clause, "its precise meaning is not readily discernible from its text. What,

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[23] This process is called incorporation. The Bill of Rights originally applied to the national government only; over time, the Court began to selectively incorporate provisions of the Bill of Rights into the 14th Amendment so that they could be applied to the states. Incorporating provisions of the Bill of Rights into the Fourteenth Amendment basically means that states cannot infringe upon liberties provided for in the Bill of Rights.

for example, constitutes impermissible 'aid' to or 'support' of religion" (Choper 2000, 1717)? However, the cases of *McCollum v. Board of Education* (1948) and *Zorach v. Clauson* (1952), in which the Court struck down and upheld, respectively, the allowance of religious instruction at public schools during the school day, showed "how the Court has hesitated to enforce the starkly separationist vision of *Everson* – even relatively soon after it was articulated" (Choper 2000, 1719).

School Prayer and Religious Instruction Cases. Questions about the constitutionality of prayer in the public schools first appeared on the Warren Court's docket in the 1960s. The first of the school prayer cases was *Engel v. Vitale* (1962) in which the Court ruled that it was unconstitutional for the Board of Regents of the State of New York to write and require the daily recitation of a non-denominational prayer by students. In the second case, *School District of Abington Township v. Schempp* (1963), the Court found that compulsory Bible reading and the recitation of the Lord's Prayer in public schools violated the Establishment Clause because the purpose of the activities was to advance religion. *Murray v. Curllet* (1963) was the companion case to *Schempp.* In this case, the renowned atheist Madeline Murray-O'Hair challenged on behalf of her son a Baltimore public school policy that called for the reading, with comment, of a chapter from the Bible or the reciting the Lord's Prayer. Murray-O'Hair challenged this policy claiming that it violated the Establishment Clause by violating the conscience of the students. Additionally, Murray-O'Hair argued that conscience was violated whether the student left the room or was compelled to stay. In *Schempp*, the Supreme Court established for the first time that neutrality was the principle underlying the

Establishment Clause. The Court devised a test, what are the purpose and primary effect of the statute, to determine whether a violation of the Establishment Clause has occurred.

Another case that involved prayer within the classroom is *Wallace v. Jaffree* (1985). Jaffree filed suit challenging an Alabama "moment of silence" law claiming that it violated the Establishment Clause by compelling prayer. The Burger Court agreed, and in a 6-3 decision, stated that the moment of silence was not neutral towards religion and lacked a secular purpose under the first part of the *Lemon* 3-part test used in Establishment Clause cases.

The Court has also heard cases that do not involve prayer in the classroom, but prayer as part of a school-sponsored activity. In *Lee v. Weisman* (1992), the Rehnquist Court majority found that prayers at high school graduation invocations and benedictions violated the Establishment Clause. Justice Kennedy, writing for the majority, found that by including a public prayer at the ceremony, the students were compelled to participate in that prayer, and even standing silently forced students to give consent to an activity that violated their conscience. What is significant about *Lee* is that the Court majority abandoned the previously used *Lemon* test in the case and instead, Justice Kennedy formulated a new test based on coercion in an effort to determine whether a violation of the Establishment Clause has occurred. Eight years later in *Santa Fe Independent School District v. Doe* (2000), the Court again found that prayers before school sports games violated the Establishment Clause under the same test used in *Lee v. Weisman.* According to Justice Stevens' opinion in *Santa Fe*, the fact that students voted on the presenter and that high school football games are not compulsory did not diminish the

fact that the school owned the playing fields and the speaker system, giving the air of state sponsorship of the prayer.

Finally, the Supreme Court has heard two cases involving the teaching of religious theory in the classroom. In *Epperson v. Arkansas* (1968), a public school teacher challenged a 1928 state law that criminally penalized any teacher who discussed evolution in class. In a challenge to the law, the Warren Court found that it violated the Establishment Clause by requiring state teachers to teach a theory of human history that was theologically based. The fact that the law was never enforced did not satisfy the Justices. The Court indicated that the vagueness of the law made it impossible for anyone to determine when it was violated. Finally, in *Edwards v. Aguillard* (1987), the Rehnquist Court overturned a Louisiana state law that required the teaching of both Darwinian evolution and Creationism in science classes. The law did not require the teaching of either one per se, but that if one theory were to be discussed, then the other must be as well. The majority Court, in one of the rare instances of using the *Lemon* Test, found that the law failed the test on all three prongs.[24]

The cases reviewed in this section are not inclusive, but they present a good overview of the more important cases that have come before the Supreme Court regarding prayer and religious instruction in public schools. There are two key findings here; the first is that the area of prayer and religious instruction is legally complex and that states have worked hard to circumvent earlier Court rulings. Second, among the Establishment cases, the school prayer and religious instruction cases represent the only cases where the Justices consistently take a strict separationist approach, meaning that the Court will strike down the laws on constitutional grounds. One reason for this

[24] Chapter Four contains a detailed discussion of this case and the findings of the Court.

consistency in approach can be found in the location of the conflict, primary and secondary public schools. The Court has always been sensitive to the fact that children need more protection from religious coercion than adults do. In each of these decisions, and particularly in *Lee v. Weisman*, the Court touches on the impressionability of children and the coerciveness of peer pressure and feelings of obligation. In *Marsh v. Chambers* (1983), Chief Justice Burger reiterated this concern. In finding that it did not violate the Establishment Clause to have a legislative chaplain open each Nebraska legislative session with a prayer, Burger distinguished between legislatures and schoolchildren. He argued that since legislatures were made up of adults, they were better able to resist coercion and peer pressure to participate if they did not choose to do so.

State Aid to Parochial School Cases. State aid to parochial schools is one of the most contested and confusing areas of Establishment Clause jurisprudence. The main reason for this complexity and confusion is that the Court has been inconsistent in its rulings regarding this area of Establishment Clause litigation. The Justices have tried several different tests in an effort to create a legal standard in determining the constitutionality of state aid to parochial school laws; however, results have been mixed at best and hopelessly muddled at worst. The best known of these tests is the *Lemon* Test. Although it has not been abandoned by the Court, the *Lemon* Test has not been consistently applied in Establishment Clause cases.

The *Lemon* Test was fully articulated for the first time in *Lemon v. Kurtzman* (1971). *Lemon v. Kurtzman* challenged Pennsylvania and Rhode Island state laws that allowed state funds to go to non-public (including parochial) schools for use as teachers' salaries, and textbooks and materials for secular subjects. The Burger Court agreed that

these laws did violate the Establishment Clause, and in his opinion, Chief Justice Burger outlined the three prongs of the *Lemon* Test. The first prong of the *Lemon* Test states that the law in question must have "a secular legislative purpose" (*Lemon*, 612). Any support or aid to religion must be coincidental. The second prong states that the main purpose of the law in question must not be to advance or inhibit religion (ibid). Finally, the third prong states that there must not be an excessive entanglement between church and state in the execution of the law in question (ibid). The law is deemed unconstitutional if it fails any one of these three prongs. In *Lemon*, the Court found that the statutes did violate the Establishment Clause for two reasons. First, the aid to parochial schools had the purpose of assisting in religious instruction that is an advancement of religion, and thus violated the second prong. Second, to ensure that the state aid did not go to religious instruction, the state would become entangled in religious matters, and thus the violate the third prong.

In *Mueller v. Allen* (1983), the Burger Court was confronted with another case that involved the costs of non-public school attendance. In this case, Mueller challenged a Minnesota law that allowed parents to deduct from their state income taxes certain expenses incurred by sending their children to school. These expenses included transportation, tuition and textbook costs. Parents of children who attended parochial schools were allowed to take the deductions as well as parents of children attending public schools. The Supreme Court, in a 5-4 decision, found that the law did not violate the Establishment Clause. Writing for the majority, Justice Rehnquist found that the law passed all three prongs of the *Lemon* Test. Rehnquist argued that the secular purpose of the law was to aid parents in sending their children to school, any school, which was a

"secular and understandable" purpose (*Mueller*, 395). Rehnquist also argued that since this was one of many deductions allowed by the state and all parents were allowed to take the deduction, it did not advance or inhibit religion. This was an important point, as Rehnquist further argued that because this was a tax deduction, the aid was going to parents and not to the religious institution. Finally, the law did not excessively entangle the state in matters of religion, as it was up to the parents to make the deductions without further action on the part of the state.

In *School District of Grand Rapids v. Ball* (1985) and in *Aguilar v. Felton* (1985), heard separately, the Court took up a challenge to Michigan and New York laws that allowed the state to pay the salaries of teachers who taught in parochial schools. In each case, the majority Court found that the laws violated the Establishment Clause because the state would be entangled in religious policy in its attempt to ensure that the teachers did not engage in religious instruction. Both of these cases were 5-4 decisions, although in *Grand Rapids*, Chief Justice Burger and Justice O'Connor both concurred and dissented in part. Clearly the Court was becoming dissatisfied with the *Lemon* Test. In her opinion in *Grand Rapids,* Justice O'Connor stated that there was no evidence of the majority Court's fear that teachers who offer supplemental instruction on religious school grounds are engaging in proselytization. Justice White took the opportunity to reiterate his dissent in *Lemon v. Kurtzman* and argued that the Court in general was on the wrong track in Establishment Clause jurisprudence.

In their dissents in *Aguilar,* Chief Justice Burger, Rehnquist and O'Connor each declared that the real losers in this case were the schoolchildren. Chief Justice Burger and Justice Rehnquist both argued that the *Lemon* Test is too inflexible to be used in

Establishment Case. Chief Justice Burger found that the human cost of not allowing public teachers into parochial schools to assist in the aid of teaching dyslexic and remedial secular subjects too great. Burger argued that the Court has always recognized that "some interaction between church and state is unavoidable and that an attempt to eliminate all contact between the two would be both futile and undesirable" (ibid, 420). Additionally, "[t]he Court today fails to demonstrate how the interaction occasioned by the program at issue presents any threat to the values underlying the Establishment Clause" (ibid). Rehnquist argued that the *Lemon* Test is flawed because it has created a "catch-22" in that any attempt to ensure that aid does not become sectarian immediately is labeled as excessive entanglement by the Court (ibid).

The Court also reviewed two cases that involved the use of a state-provided interpreter at parochial schools, in *Witters v. Washington Department of Services for the Blind* (1986) and *Zobrest v. Catalina Foothills School District* (1993). In *Witters*, Witters who was in the process of going blind, applied to the state for assistance as allowed by state law. His claim however was denied because he was attending a Christian school in order to become a minister or youth director. In a 9-0 decision, the Court found that it would not violate the Establishment Clause if the state provided Witters with assistance in his studies. Justice Marshall wrote for the Court stating that the state funds went directly to Witters, who had discretion as to how to spend it, and not directly to the Christian school. Further, that Witters used the aid to attend a Christian college cannot be construed as the state supporting or advancing religion.

In *Zobrest*, James Zobrest was a deaf student who received the aid of a state paid sign language interpreter when he attended public schools. In eighth grade, his parents

sent him to a Roman Catholic school. Zobrest requested that he continue to receive the assistance of an interpreter, but his request was denied by the state. In a 5-4 decision, the Rehnquist Court found that it would not violate the Establishment Clause if the state continued to provide a sign-language interpreter to Zobrest, even though he now attends a parochial school. Chief Justice Rehnquist, writing for the majority, did not use the *Lemon* Test in his argument, but instead he relied on the precedents set in *Mueller* and *Witters*. He argued that,

> The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "disabled" under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decision making (*Zobrest* at 10).

Two of the four dissenters in this case, Justices O'Connor and Stevens, dissented on the grounds that the case should have been remanded back to the state for clarification and not decided on the merits by the Court (ibid, 24). The other two, Justices Blackmun and Souter, dissented on the grounds that the law was unconstitutional. These Justices did not rely on the *Lemon* Test, but rather they argued that *Grand Rapids* and *Aguilar* forbad this type of activity.

The Court continued to hear cases that involved public school teachers teaching at religious schools. In *Agostini v. Felton* (1997), the Court overturned its decision in *Aguilar v. Felton* (1985). Writing for the majority, Justice O'Connor argued, as she had done in her *Aguilar* dissent, that the Court's earlier decision was wrong because there

was no evidence that because a public school teacher entered a parochial school that religious instruction would occur or that the state was sponsoring religion. Only policies that created excessive entanglement between church and state would be a violation of the Establishment Clause. According to Justice O'Connor, "not all entanglements, of course, have the effect of advancing or inhibiting religion" (*Agostini,* 233).

In *Mitchell v. Helms* (2000), the Court heard a case that challenged the use of Louisiana state aid by both public and non-public schools to purchase computer equipment, library books, and other educational materials and equipment. In a 6-3 decision, the Court found that the program did not violate the Establishment Clause. Justice Thomas, writing for the majority, found that the law was neutral in nature and that it was equally applied to all schools; therefore, "[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government" (*Mitchell*, 10).

Finally, in *Zelman v. Simmons-Harris* (2002), the Supreme Court heard its first school voucher case. In *Zelman*, an Ohio law that allowed state funded school vouchers to be used at public or non-public schools was challenged on the grounds that the program violated the Establishment Clause. In a 5-4 decision, Chief Justice Rehnquist argued for the majority that the law was generally applicable to all schools and it was a program of true private choice which was consistent with the rulings in *Mueller*, *Witters* and *Zobrest*. Additionally, because the money is given to the parents, who then in turn applied it to the school of their choice, it could not be construed that the state was establishing religion or advancing or inhibiting religion. Dissenting Justices Souter,

Breyer, Ginsburg, and Stevens all argued that state money going to any religious school, regardless of its path, violated the Establishment Clause.

These cases show that when the legal issue involves state aid to parochial schools, the Supreme Court is not as united as they are in school prayer decisions. After the establishment of the *Lemon* Test, the Court did use it to establish that certain programs violated the Establishment Clause. However, many of the Justices quickly found fault with the *Lemon* Test, finding that it was too rigid in its application and not flexible enough when society would benefit. Over the years, a majority of the Justices stopped relying on the *Lemon* Test as a tool in determining the constitutionality of state aid to parochial school cases; but a majority often cited particular prongs of the test in a manner that would "fit" the opinion. State aid to parochial school decisions more recently have depended upon the facts of the cases and the Justices' views of the role of religion plays in society. Many of the Burger and Rehnquist Justices found that parochial schools offered a great benefit to society, regardless of their religious nature, and that it was prudent for states to aid them equally with public schools.

There are a few themes that arise in the Court's Establishment Clause decisions between 1946 and 2005. First, if the aid is given to the parents or students first, the Court's majority has found that the law passes constitutional muster. However, if the aid goes directly to the non-public schools or directly involved religious instruction, the Court strikes down the program. A majority of the Justices are sensitive to what they see as religious indoctrination. As attendance at public schools is free, and most children do, in fact, attend them, the Court seems cognizant of the possibility of religious coercion if teachers and school officials engage in religious activity. However, if parents have

already chosen a religious school for their children, the Court seems only to concern itself with equal applicability of the program to ensure that religion is not being neither unduly aided nor prohibited.

The second theme underlying Establishment Clause cases is the principle of neutrality, which some Justices seems to favor. There are two types of neutrality that highlights the Justices' concerns. "Formal neutrality" means that the "government cannot utilize religion as a standard for action or inaction" (Laycock 1992, 848). "Substantive neutrality" means that the Court must make a judgment about "the relative significance of various encouragements and discouragements to religion" (ibid). The Court has yet to find a common ground on which neutrality it is to follow, or even decide if either should be followed at all.

Religious Display Cases. Religious display cases are as controversial as school prayer cases. Religious display cases usually, but not always, involve legal conflicts over religious symbols being displayed on public property during the Christmas holiday season. Other cases involve the display of religious monuments, such as the Ten Commandments, on public property. The Supreme Court's response to these cases has been mixed – allowing some displays but not others, based less upon the constitutional questions presented in the cases and more upon the number of other secular symbols that surround the religious ones.

One of the first cases to challenge the display of a crèche, or a Christian nativity scene, is *Lynch v. Donnelly* (1984). In this case, the City of Pawtucket, Rhode Island, set up a Christmas display that included a Nativity Scene, a Santa Claus house and sled with reindeer, a Christmas tree, a banner reading "Seasons Greetings," and clowns. All of the

items were owned by the City of Pawtucket. Daniel Lynch, a citizen of Pawtucket, with the support of the American Civil Liberties Union (ACLU), sued the city claiming that the scene violated the Establishment Clause. The Court did not agree. Writing for the majority, Chief Justice Burger used the *Lemon* Test to determine the constitutionality of the nativity scene, but use of this test was less than robust and the decision ultimately hung on the presence of the other symbols and history. Burger claimed that while the nativity scene itself may be religious in nature, because it is placed with other symbols of the holiday season reduces the religious nature of the nativity scene and circumvents the appearance of state sponsorship of religion. Additionally, Burger wrote that a secular purpose of the scene was to show the historical origins of the Christmas holiday.

Chief Justice Burger further used a historical analysis of Christmas to refute the challenge presented in *Lynch*:

> It would be ironic if the inclusion of the crèche in the display, as part of a celebration of an event acknowledged in the Western World for 20 centuries, and in this country by the people, the Executive Branch, Congress, and the courts for 2 centuries, would so "taint" the exhibition as to render it violative of the Establishment Clause. To forbid the use of this one passive symbol while hymns and carols are sung and played in public places including schools, and while Congress and state legislatures open public sessions with prayers, would be an overreaction contrary to this Nation's history and this Court's holdings *(Lynch*, 685-686).

The dissenting Justices, Brennan, Marshall, Blackmun and Stevens, applied the *Lemon* Test in a more robust fashion and reached the conclusion that the display was a state preference of one faith over another; and was therefore, unconstitutional because it violated the Establishment Clause's wall of separation between church and state.

Five years later in *Alleghany County v. ACLU of the Greater Pittsburgh Area* (1989), the Court was again faced with a challenge to the display of religious symbols on

public property. In Alleghany County, the ACLU challenged two Pittsburgh, Pennsylvania displays. The first was a crèche placed prominently inside the county courthouse along the main stair case of the courthouse which featured a banner reading "Gloria in Excelsis Deo," which in Latin means "Glory to God in the Highest." The second display was an eighteen-foot menorah, or candelabrum, displayed outside on the grounds of the City-County Building. Both displays were owned by private religious groups who incurred the cost of setting up, taking down, and maintaining the displays. The displays were challenged on the grounds that they violated the Establishment Clause.

In distinguishing this case from *Lynch*, the Court's majority found that the crèche violated the Establishment Clause; however, the menorah was not. Justice Blackmun wrote the majority opinion, arguing that given the wording of the crèche's banner and its prominent display within the courthouse, there was a clear message of state preference of Christianity. However, given that the menorah was outside with other symbols of the season, it was more in line with the crèche approved in *Lynch* and passed constitutional muster.

Writing for the dissenters, Justice Kennedy began by saying that he would use the *Lemon* Test for his reasoning, as it was used by the majority; however, he did "not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area" (*Alleghany County*, 655). Kennedy argued for an accommodationist view of the display, as there can never be a strict wall of separation in America and the Court has always allowed some comingling of church and state. Kennedy also argued that as the government expands more and more into the citizens' lives, the Court cannot demand that religion retreat by an equal amount (ibid, 657-658).

Crèches and menorahs are not the only religious displays with which the Court has had to grapple. The display of the Ten Commandments in public areas has become an area of considerable controversy for the Supreme Court. In *Stone v. Graham* (1980), the Court issued a per curium opinion which was signed by Justices Marshall, Powell, Stevens, and White. Chief Justice Burger and Justice Blackmun dissented, while Justice Rehnquist filed a dissenting opinion. Justice Stewart voted to not take part in the case and, therefore, did not sign onto an opinion. The opinion of the Court found that the display of the Ten Commandments in public school classrooms violated the Establishment Clause. The Court was not convinced that the secular purpose of the display as advanced by the state was to educate children that the Ten Commandments were the basis of western law, including the common law values of the United States. Justice Rehnquist dissented in the per curium, arguing that the Court cannot sweepingly reject the legislative intent in passing the law which required the posting of the Ten Commandments. According to Justice Rehnquist, just because the secular purpose of the law overlapped with a religious one does not automatically create a constitutional conflict. If the Court was to use the first prong of the *Lemon* Test, then the Court must acknowledge that the stated legislative intent was important and should be considered by the Court.

Two other Ten Commandment cases were recently decided by the Supreme Court on the same day. More in line with the Christmas display cases, *McCreary County v. ACLU* (2005) presented a challenge to the display of the Ten Commandments inside public schools and state courthouses. McCreary County first displayed the Ten Commandments alone, then with other religious passages, and then finally with other

legal documents in a presentation named "The Foundations of American Law and Government Display." Justice Souter, writing for the majority in *McCreary County*, claimed that the legislative purpose of the display was to advance religion. Justice Souter took into consideration the evolution of the display and argued that the original intent was religious advancement, even if the Ten Commandments displayed is now only one of many historical legal documents in the display. In the dissenting opinion written by Justices Scalia, Chief Justice Rehnquist and Justices Thomas and Kennedy, in part, argued that the Court has never completely forbidden the presence of religion in public and they found no evidence that the legislative purpose was to further religious practice.

In the second case, *Van Orden v. Perry* (2005), Thomas Van Orden sued the Governor of Texas, Rick Perry, claiming that a monument on the grounds of the statehouse, which was inscribed with the Ten Commandments was unconstitutional because it was state sponsorship of religion. However, in this case the Court reached the opposite conclusion than in *McCreary County*. Each case had a 5-4 vote; the deciding vote in these cases was that of Justice Breyer. Writing for the majority in *Van Orden*, Chief Justice Rehnquist argued that the display was constitutional because it was part of a larger display of historical legal documents. Rehnquist further wrote, reiterating *Lynch*, that "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the establishment clause" (*Van Orden*, 688).

The deciding vote cast by Justice Breyer was based upon the history of the display, the length of time it had been on display, and the surrounding documents. Breyer, invoking Justices Goldberg and Harlan, argued that in borderline cases, a Justice must use legal judgment—which is not the same as personal judgment—of the

underlying purpose of the law. Distinguishing between *McCreary County* and *Van Orden*, Breyer claimed that the change in his vote is due to the fact that the *McCreary County* display being a more recent display, approximately five years old, while the *Van Orden* Ten Commandments have been displayed for about forty years. Additionally, Breyer noted that Van Orden's complaint has been the first complaint against the monument in its 40-year history. The *Van Orden* display was paid for by a private organization and not by the state, as in *McCreary County*. Further, the *Van Orden* display has always been a part of a larger display of thirty-eight other historical markers and monuments, while in *McCreary County* the display was originally alone with other items added after complaints.

It is clear that in religious display cases that the *Lemon* Test is likely to be cast aside as a legal test in determining the outcomes in these cases by a majority of the Justices. More often than not, the decisions are decided on other grounds, such as history, culture, location, and other secular symbols near the religious symbol in question. This lack of doctrinal consistency contributes to a confusing and inconsistent jurisprudence regarding religious displays on public property. It also begs the question of how many secular symbols are enough to guarantee constitutionality. Further, the recent Ten Commandment cases raised the question how long does a monument have to be displayed before it becomes constitutional? Capriciously, the Court has indicated that the necessary length of time is between five and forty years. In religious display cases, it is clear that the Court wishes to maintain a connection to the *Lemon* Test, but does not have a majority of Justices on the Court who are fully committing to abandoning the test.

The Equal Treatment Cases. The final area of establishment clause cases addressed in this chapter deals with the idea of "equal treatment" of religion (Davis 2004). Under the equal treatment standard, the Court began to "equate religious speech or activity with other forms of secular speech or activity" (Davis 2004, 717). As a result, the Court began to approach religious freedom cases not as jurisprudence based upon the establishment or free exercise clause, but as a matter of freedom of expression. The idea of equal treatment of religion was first articulated in *Widmar v. Vincent* (1981), a case in which the Court found that if a post-secondary institution opened its facilities for group activities, it could not bar the use of those facilities by a Bible study group. The Court found that it was unconstitutional to discriminate against the Bible-study group based upon their free speech rights.

In *Board of Education of Westside Community Schools v. Mergens* (1990), the Court, using the *Lemon* Test, upheld the constitutionality of the Equal Access Act "which grants 'equal access' to school facilities to students of religious and nonreligious clubs for their pre- or after-hours meetings" (Davis 2004, 718). Writing for the majority, Justice O'Connor made the distinction between "government speech endorsing religion" and "private speech endorsing religion," stating that the first was unconstitutional, while the latter was constitutional (*Westside,* 251). Justice O'Connor specifically stated that barring the religious group on campus, the school would create an "excessive entanglement" as the school would have to constantly monitor all of its groups to enforce its ban on religious speech and disallowing religious groups to meet was hostility towards religion (*Westside*, 247 and 253). The idea of equal access was reaffirmed most notably in the case, *Rosenberger v. University of Virginia* (1995), in which the Rehnquist Court

stated that the university must pay to print *Wide Awake,* a religious newspaper by a religious student group, because the university pays to print the private speech of other, secular student groups. The fact that *Wide Awake* was religious in nature did not concern the Court as they focused upon the free speech rights of the religious student group.

Other Establishment Clause Issues. The Supreme Court has addressed Establishment Clause issues in a variety of contexts. Among the more important issues include tax exemptions for religions institutions. For example, in *Walz v. Tax Commission of New York* (1970), Walz sued the Tax Commission of New York claiming that the tax-exempt status of churches and other religious organizations violated the Establishment Clause. The Court rejected this argument and found for the Tax Commission. Chief Justice Burger, writing for the majority, stated that the law did not favor one religion over another, did not have the effect of advancing religion, and, he cautioned, that the Court "must also be sure that the end result–the effect–is not an excessive government entanglement with religion" (*Walz*, 674). Further, Chief Justice Burger claimed that this entanglement would be excessive with the state's "valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes" (ibid).

Analysis of Establishment Clause Jurisprudence. The Supreme Court's doctrinal approach to Establishment Clause cases has been quite uneven. After practically ignoring the clause for 150 years, the Court established a strict separation of church and state in *Everson,* its first major grappling with the Establishment Clause yet the outcome of *Everson* was clearly one of accommodating religion. The *Lemon* Test, fully outlined in *Lemon v. Kurtzman* (1971), stated that the statute must have a secular

purpose, must neither advance nor hinder religion, and must not cause excessive entanglement between church and state. The requirement of each prong must be met for a statute to be considered constitutional and failure on any one prong would render the statute unconstitutional. Subsequent Establishment Clause cases revealed that some Justices were not committed to the *Lemon* Test as the standard for deciding a full range of establishment cases. Some Justices argued that the *Lemon* test was too rigid, while other Justices expressed concerns that it was too malleable to have any real jurisprudential value. The main argument against the *Lemon* Test, as outlined by Justices and legal scholars alike, was the test's lack of definition where its actual meaning was concerned. What was the line between advancement and non-advancement of religion? What was considered too much entanglement or acceptable entanglement of religion? In the 40-year history of the *Lemon* Test, the Supreme Court still has yet to adequately answer these questions. The alternative approaches used by the majority in several cases were not satisfactory either. Justices such as Burger, Rehnquist, Scalia and Thomas often resorted to the use of history and tradition in deciding Establishment Clause cases which brought about strong dissents from the Justices in the minority.

Some Justices have tried to add direction to the *Lemon t*est. Justice O'Connor introduced the idea that if a statute was perceived as endorsing religion, then it violated the Establishment Clause. Justice Kennedy suggested that as long as the law did not coerce someone into a particular belief or creed then the Establishment Clause was not violated. Justice Souter, is apparently working towards a pre-*Lemon* Test unitary standard of the Establishment Clause, is moving "away from the impact analysis of the second prong of the *Lemon* test (which requires an effect that does not inhibit or advance

religion) towards a more nuanced analysis of the motivational aspects of the test (where Free Exercise accommodation provides the only legitimate religion-based criteria for legislative action)" (Hanks 1996, 923). Justice Souter is a strong proponent of the neutrality principle as the guidepost to deciding Establishment Clause cases. The neutrality principle, as outlined by Justice Souter in his majority opinion in *McCreary County,* means that the government cannot favor one religion over another or religion over irreligion.

Justice Breyer approaches the Establishment Clause with a consequential analytical model, in that he views Establishment Clause cases as "exercises in legal judgment based not only on the social conflict avoidance purpose of the Establishment and Free Exercise Clauses, but also on consequences measured in light of that social conflict avoidance purpose" (Gordon 2008,144). Justice Ginsburg does not seem to be independently working on a test to replace *Lemon.* However, it could be argued that she has a similar view of the Establishment Clause as that of Justice Breyer, as she seems to sign frequently onto his opinions (except for the *Van Orden* case).

Toward the end of Chief Justice Rehnquist's tenure, the majority of Justices seemed to be content with the idea of equal treatment between the religious and the secular. This new doctrine also seems to have gathered mixed results. Some scholars see the doctrine as the end of "discrimination against religion and necessarily equates with greater religious liberty," while others see the application of this doctrine a "serious concern for Americans who view the separation of church and state as the surest guarantor of religious liberty" (Davis 2004, 718). The argument of the critics of this doctrine is that religious speech is not the same as secular speech, arguing that Framer's

emphasized this difference by outlining religion in its own two clauses, but did not outline other forms of speech into special clauses (ibid, 721). Religious speech should been seen as different from regular speech, and should therefore be protected as the special speech it was meant to be in the United States.

This analysis suggests that the Supreme Court is fractured on the question of the proper approach to deciding Establishment Clause cases. The overview of the cases indicates that purely legal explanations of case outcomes offer no insights into the Supreme Court's decision-making in establishment cases. A list of Establishment Clause cases examined in this research is presented in Table 4.1.

Insert Table 4.1 About Here

Free Exercise Jurisprudence

The jurisprudential history of the Free Exercise Clause closely parallels that of the Establishment Clause. For the first 150 years, very few Free Exercise clause cases came before the Supreme Court. When they appeared on the Court's agenda, the Court was less than sympathetic to the petitioner's claims.[25] In the 1940s, the Court began to view the Free Exercise claims, like Establishment claims, as unique rights to be determined on their own merit. While the Court's elusive quest in Establishment Clause cases was for the bright line between church and state, the elusive quest in free exercise cases is grounded in the very definition of religion and to what extent religious minorities can practice their faith without interference from the government.

Unlike his opinion in *Everson* where Justice Black thoroughly explored the meaning of the Establishment Clause, the Supreme Court has never fully articulated the

[25] Until this time, the Supreme Court "had never upheld a claim of free exercise of religion, had never found any governmental practice to be an establishment of religion, and had never applied the religion clauses of the First Amendment to the States" (Noonan 1987, xiii).

meaning of the Free Exercise Clause. This comparable lack of history behind the meaning of the Free Exercise clause is important. The intent of the Framers on the meaning of the Free Exercise clause is nonexistent. Without an established meaning of the Free Exercise Clause, the Court has not been able to create a clear and coherent Free Exercise jurisprudence. This is not to say that Establishment Clause jurisprudence has been clear and coherent; however, because of Justice Black's opinion there is a framework and a context in which to debate the Establishment Clause. There is no such framework or context for Free Exercise. The difficulty in establishing a definition of religion can be seen from the types of Free Exercise cases that come before the Court. In America, there are over 3,000 types of religious faiths, some mainstream, many are not (Milton 1988). Most Free Exercise cases involve adherents to nonmainstream religions seeking the right to practice their faith without interference from the state. With so many different belief systems, it is difficult to determine many commonalities.

Adherents of minority religions resort to the Court to claim rights that may be denied to them by legislative bodies. Most of these laws are of general applicability in that that they are not written in such a way as to blatantly discriminate against a particular minority religion, but are laws that are created to maintain public safety. While this apparent neutrality on part of the law may make a Free Exercise claim harder to prove in court, it is rare in these modern times that a law is so burdensome that Free Exercise is prohibited. Additionally, the Establishment Clause has helped to maintain a separation of church and state which leaves room for a more open religious practice. As a result of these factors, there are fewer Free Exercise Clause cases when compared to Establishment Clause cases.

The first major Free Exercise case decided by the Court was *Reynolds v. United States* (1878). In this case, the Court rejected a Mormon's claim of free exercise involving religiously-motivated polygamy. Chief Justice Waite, writing for the Court, stated, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices" (*Reynolds*, 166). In other words, individuals have the right to believe what they want, but they do not necessarily have the right to act upon that belief. This stark finding in *Reynolds* guided free exercise jurisprudence until the 1940s when the Court began to reconsider its stance on the Free Exercise Clause and began to advocate that in certain circumstances Free Exercise rights do take precedence over the interests of the state.

This belief versus action distinction underlying the Free Exercise Clause was sparked in a non-religious freedom case, in *Palko v. Connecticut* (1937), a criminal rights case. In *Palko*, the Court, through Justice Cardozo's opinion, ruled that the Bill of Rights contained rights that were so fundamental that justice and freedom were impossible without them (Ignagni 2001, 512). Counted among these fundamental rights were speech, press, free exercise of religion, peaceful assembly, and the right to criminal counsel (*Palko*, 324).

> In these and other situations, immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states (*Palko* at 324-325).

This foundation led to the incorporation of the Free Exercise Clause to the states in *Cantwell v. Connecticut* (1940). In *Cantwell*, the Court found in favor of the plaintiff's free exercise right, which was based mostly on his free speech rights. In *Cantwell*, the

Court began to argue that free exercise "embraced two concepts–the freedom to believe and the freedom to act. The first is absolute, but in the nature of things, the second cannot be" (*Cantwell*, 303). Therefore, according to the Court, religious behavior could find some protection in the Constitution.

The Jehovah's Witnesses Cases. The maximization of free exercise rights by the Court began in earnest during the 1940s with what is currently referred to as the Jehovah's Witnesses cases. The Jehovah's Witnesses is a small religious sect in America, but over a seventeen-year period they brought numerous free exercise cases before the Supreme Court. The first case brought by the Witnesses was *Minersville School District v. Gobitis* (1940). In this case, Lillian and William Gobitis were dismissed from school because of their refusal to salute the flag, as was prohibited by their faith. The family sued, claiming that the children's free exercise rights had been violated by the mandatory flag salute. The Supreme Court decided in favor of the school district. Ignoring the free exercise claims, Justice Frankfurter, writing for the majority, favored local control over these types of issues, stating that the Justices were not going to become school boards to determine local educational requirements. Additionally, Frankfurter, argued that a mandatory daily flag salute was proper as it encouraged national unity and security, as it promoted a love of country in children. It must be remembered that this case was decided in 1940 at a time Europe was already embroiled in World War II, and America was on the cusp of entering the war.

The first important win for the Witnesses was *West Virginia State Board of Education v. Barnette* (1943), the second flag salute case. In *Barnette*, Barnette filed suit stating that mandatory flag saluting violated the Free Exercise clause in that it forced the

Barnette children to participate in an activity that was expressly forbidden by their faith, the prohibition against the worship of any graven images, i.e. the flag. The Supreme Court, in a impassioned majority opinion written by Justice Jackson, ruled that as schoolchildren were compelled by the state to attend schools, they therefore should not be forced by the state to say or confess things in which they did not believe. In this case, the Court that recognized the freedom of conscience was violated whether the state forced the confession of a belief or forced silence on confessions of belief.

The Witnesses, although ultimately losing several cases, won many more and expanded free exercise rights into such areas as tax abatement (*Martin v. City of Struthers* (1943) and *Follett v. Town of McCormick* (1944)), the right to distribute handbills on the street (*Jamison v. Texas* (1943)), the right to proselytize on private property (*Tucker v. Texas* (1946) and *Marsh v. Alabama* (1946)), and the right to preach in public parks (*Niemotko v. Maryland* (1951) and *Fowler v. Rhode Island* (1953)). Additionally, it was the Jehovah's Witnesses who brought before the Court the issue of conscientious objection to the war and to military service during World War II and afterwards (*Falbo v. United States* (1944), *Gibson v. United States* (1946), *Dickinson v. United States* (1953)).

Defining Religion and Conscientious Objectors. The conscientious objector cases eventually led the Supreme Court to address the broader question of what constitutes a religion in the context of Free Exercise rights. Starting in 1944, with *United States v. Ballard*, the Court found that "the credibility of one's beliefs was less important than the sincerity with which those beliefs where held" (Davis 2005, 710). Although the Court did not attempt to define religion in this case, it did make clear that the Free

Exercise Clause would be used to protect "a broad spectrum of religious beliefs" only subject to "the legitimate concerns of the state" (ibid).

The Court was again confronted with the issue of defining the sincerity of religious beliefs during the Vietnam War, in cases involving the conscientious objector status of members of established faith traditions, and in those cases where objectors did not adhere to a concrete, established religion. The most prominent of these cases was *United States v. Seeger* (1965), in which Seeger claimed that although he objected to war on moral grounds, he did not believe in a Supreme Being per se, but did not rule out the possibility that one existed. The Universal Military Training and Service Act (Selective Service Act) at that time, "exempts from combatant service in the armed forces those who are conscientiously opposed to participation in war by reason of their "religious training and belief," i.e., belief in an individual's relation to a Supreme Being involving duties beyond a human relationship but not essentially political, sociological, or philosophical views or a merely personal moral code" (Selective Service Act as quoted in *Seeger,* 163). In this case, the Court outlined its first test as to whether a practice or belief met the definition of religion. Writing for the majority, Justice Thomas Clark stated that the question to be asked was, "does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?" (*Seeger*, 184). The Court defined religion as beliefs regarding "ultimate concerns" of life (Paul Tillich, *Shaking the Foundation* as cited in *Seeger*, 187).

This definition of religion was further expanded in *Welsh v. United States* (1968). Unlike Seeger, who made a conscientious objector claim based upon religious belief; Welsh did not make a religious claim. Welsh stated that his convictions came from a

study of history and philosophy, and he crossed out or put question marks around the word "religion" on his objector application (*Welsh*, 341). The Court found in favor of Welsh stating, "If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content, but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons (*Welsh*, 340).[26]

Free Exercise Rights Versus Neutral Laws of General Applicability. What happens when neutral laws of general applicability infringe on the Free Exercise rights of individuals? The Sunday Closing Laws cases raised the broader question of whether the interests of the state should give way to the Free Exercise rights of Orthodox Jews. The first, and most influential, case was *Braunfeld v. Brown* (1961), in which the Court upheld Sunday closing laws. The case was brought by an Orthodox Jew who claimed that his faith required that he close his shop on Saturday. By being forced to be closed on Sunday, Orthodox Jews argued that they were at a disadvantage to other shop owners who were open on Saturday, and that this situation violated their free exercise of religion. In *Braunfeld*, the Court decided that while the freedom to hold beliefs was absolute, the freedom to act upon those beliefs was subject to possible limitations by the government. Further, despite any burden the law may create on a religious group, it was not

[26] Expanding upon these decisions, the Court, in *Torcaso v. Watkins* (1961) an Establishment Clause case, stated for the first time "its belief that religion embraces nontheism" (Davis 2005, 713).

unconstitutional because, as the Court argued, the law was created for a secular reason and did not prohibit religious belief.[27]

In *Sherbert v. Verner* (1963), Adell Sherbert was fired from her job because she refused to work on Saturdays when her employer expanded to a six-day work week. As a Seventh-day Adventist, Saturday was Sherbert's Sabbath. Unable to find work, Sherbert applied for unemployment benefits. These benefits were denied by South Carolina, who claimed that Sherbert's refusal to work on Saturday was not justified on Free Exercise grounds. The Court decided in favor of Sherbert, arguing that the state had placed a substantial burden on Sherbert's Free Exercise rights. Additionally, the Court fashioned a new test to be used in Free Exercise cases – the compelling state interest test (*Sherbert*, 406). This test ensures that any burden placed upon religious free exercise is done so for a reason compelling enough to override the fundamental right of religious exercise.

The importance of *Sherbert* was in the establishment of the *Sherbert* Test. This test, like the *Lemon* Test for the Establishment Clause, was to provide a framework for the Court to use when determining the constitutionality of laws in light of the Free Exercise of religion. Like *Lemon*, the *Sherbert* Test has three prongs. The first prong asks if the state law placed a substantial burden of persons to practice their sincerely held faith. The second prong asks if there is a compelling state interest in limiting the Free Exercise of religion. Finally, the third prong asks if the state law is the least restrictive means of accomplishing the expressed state interest. These three prongs were created to establish protections for minority religions against capricious state action limiting their

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[27] Other Sunday closing law cases include *McGowan v. Maryland* (1961), *Two Guys from Harrison-Allentown, Inc. v. McGinley* (1961), *Thornton v. Caldor, Inc.* (1985) and *Arlan's Dept. Store v. Kentucky* (1962). Only *Gallagher v. Crown Kosher Super Market of Massachusetts* (1961) involved the free exercise rights of Orthodox Jews.

free exercise. However, the Court did not use the *Sherbert* Test in a consistent manner and a majority of Justices ultimately rejected its use.

In 1987, the Court again took up the issue of unemployment benefits and Free Exercise rights. In *Hobbie v. Unemployment Appeals Commission of Florida* (1987), upon her conversion to the Seventh-day Adventist faith, Paula Hobbie informed her employer that she would no longer be able to work on Saturdays, the Sabbath for Seventh-day Adventists. Upon being terminated from her employment for refusing to work on Saturdays, Hobbie applied for state unemployment compensation which was denied. In an 8-1 decision, Justice Brennan wrote for the Court's majority. Basing his argument on *Sherbert*, Brennan argued that since Hobbie was fired in violation of her free exercise rights, the state of Florida must pay the benefits.

In 1972, the Court took another step in expanding religious free exercise. In *Wisconsin v. Yoder* (1972), Jonas Yoder was one of three people prosecuted by the state of Wisconsin for not sending their children to the school beyond the age of sixteen. Yoder, a member of the Old Order Amish faith, claimed that the state violated his and his children's right of religious Free Exercise. The Old Order Amish faith allows children to attend state public schools until high school when the children are withdrawn from school so as to avoid the influence of secular society, which teaches values contrary to Yoder's faith. Chief Justice Burger, writing for the majority, decided in favor of Yoder, claiming that while the state may have a compelling interest in making education compulsory to the age of sixteen, the state must balance it with other fundamental rights, such as the free exercise of religion. Writing for the majority Court, Chief Justice Burger argued that mainstream society was in sharp contrast to the Amish way of life and that forgoing two

years of education would not make any difference in the Amish children's lives (*Yoder*, 217). Although Burger applied the *Sherbert* test, he examined the history and life style of the Amish to the issue. Citing the 300-year history of the Amish and their social cohesion as a religious and social unit, Burger claimed that the state should not fix what is not broken.

In another Old Order Amish case, the Court again took up the question of unemployment benefits. In *United States v. Lee* (1982), Lee, a member of the Old Order Amish, believed that it is a sin to not assist the elderly and other Amish, and therefore he opposed paying into the Social Security system. Over a period of seven years, Lee employed other Amish men to work in his carpentry shop. Lee did not withhold Social Security from their pay, nor did he pay the employer's contribution. The Internal Revenue Service assessed Lee a fine for $27,000. Lee sued, claiming the law violated his free exercise rights. The Court rejected Lee's arguments. In a 9-0 decision, Chief Justice Burger writing for the Court recognized that because a law may be religiously objectionable without it necessarily being unconstitutional. The Court argued that the payment of the tax does not limit or impinge upon Lee's right to practice his faith or integrity of that practice. If the law had forced Lee to refrain from worshiping as he saw fit, then the law would be unconstitutional.

In 1988, the Supreme Court addressed the issue of religious apparel and the Free Exercise Clause. In *Goldman v. Weinberger* (1986), Simcha Goldman, an Orthodox Jewish rabbi and a member of the Air Force, was forced to stop wearing his yarmulke while in military uniform. Goldman sued, claiming that his Free Exercise rights were violated by the law since his religion required that he wear his yarmulke at all times. The

Court did not agree. In a 5-4 decision, Chief Justice Rehnquist wrote in the majority opinion that in questions of military regulations, the Court was inclined to give deference to the military. Rehnquist argued that the military must "foster instinctive obedience, unity, commitment, and esprit de corps," and, therefore, are allowed greater latitude in limiting rights normally held by civilian society (Goldman, 507). In this case, the majority Court did not focus upon any particular precedent, history or belief system. Instead, the Court relied upon the interests of the military in maintaining a greater degree of order than the rest of society.

In a different type of Free Exercise case, the Court took up the question of the sanctity of Indian worship sites versus the dominant groups' needs. In *Lyng v. Northwest Indian Cemetery Protection Association* ("NICPA") (1988), the U.S. Forest Service considered creating a paved road through Six Rivers National Forest in California in addition to the commencement of foresting, or timber harvesting the land as well. The NICPA, an organization of interested parties, sued to stop the activity claiming that it would violate the Free Exercise rights of Native Americans who use the area for worship. Such worship required silence, isolation and a natural environment. The Supreme Court, in a 5-3 decision, with Justice Kennedy taking no part, found for the Forest Service. Justice O'Connor, writing for the majority, argued that the while the harvesting of trees would severely impact the practice of worship by the Native Americans, it did not coerce them into believing or practicing a faith that is contrary to their consciences.

The cases above illustrate a lack of consistency in deciding Free Exercise cases. The Court focuses upon not the ability to practice one's faith, but whether the law coerces the believer into a belief or action that is contrary to his or her faith. This position is a

much narrower understanding of the *Sherbert* Test's compelling state interest standard and it usually operates to the benefit of the state.

Although the *Sherbert* Test dominated Free Exercise jurisprudence for many decades, it has only really been consistently effective in unemployment claims cases and even then not in every case (*Smith* 1990). On the state level, the compelling interest test is influential; however, "the Supreme Court itself has been markedly less hospitable to subsequent free exercise clams" (Chopper 2000, 1724). Now the legitimacy of this test is "under attack" and its survival "is very much in doubt" (McConnell 1990b, 1417). "Since 1972, the Court has rejected every claim for a free exercise exemption to come before it, outside the narrow context of unemployment benefits governed strictly by Sherbert" (ibid). What was initially set out as a protection for religious minorities has become a burden of proof that is very difficult to meet.

In 1990, the Supreme Court abruptly discarded the compelling governmental interest test in favor of one that made it easier for the government to infringe upon the Free Exercise rights of religious minorities. In *Employment Division v. Smith* (1990), two members of the Native American Church, Alfred Smith and Galen Black were denied unemployment benefits because they had been fired from their jobs for drug use. As members of the Native American Church, the men ingested peyote as a part of various religious ceremonies. The men sued, claiming that under the *Sherbert* precedent they could not be denied unemployment benefits because of their right to free exercise of religion. Justice Scalia, writing for the majority, found, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate" (*Smith*, 878-879). In this case,

Justice Scalia applied a "general applicability" standard to free exercise claims. In other words, if the law or statute is generally applicable to society and does not single out a particular religion or religious activity, then it passes constitutional muster. Justice Scalia acknowledge how the *Smith* ruling subjects the free exercise rights of minority faiths to the will of majority rule; however, that "must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs" (ibid, 890).

The *Smith* decision generated a considerable amount of criticism. Groups from both the right and the left of the political spectrum and "over a hundred constitutional law scholars" petitioned the Court for a review of its *Smith* decision, and attempt "which proved futile" (McConnell 1990a, 1111). In 1993, Congress passed the Religious Freedom Restoration Act (RFRA), which legislatively reasserted the compelling state interest test and mandated that any statute restricting free exercise must be formulated in the least restrictive manner possible. RFRA was ruled unconstitutional by the Supreme Court in *City of Boerne v. Flores* (1997) on separation of powers grounds.[28] Congress tried again to reassert the compelling state interest test in the Religious Land Use and Institutionalized Persons Act (RLUIPA). In the *Cutter v. Wilkinson* (2005), the Court did uphold RLUIPA although the ruling was applicable to the federal government only.[29]

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[28] The Supreme Court overturned *City of Boerne v. Flores* because the Court felt that Congress overstepped its constitutional boundaries. The Court claimed that Congress tried to tell the states how to enforce the law; in other words, Congress had interpreted the law as well as created it. The Court took umbrage at this claiming that interpreting law was the domain of the Courts, not of Congress.

[29] This case challenged The Religious Land Use and Institutionalized Persons Act (2000, RLUIPA). Prison officials in Ohio argued that it violated the Establishment Clause by advancing religion. The Court, in a 9-0 decision, found that the law was constitutional as it was an accommodation of religious free exercise and a protection of non-mainstream faiths.

Although the Court has rejected every Free Exercise exemption claim that has come before it, with the exception to employment benefits, it has not rejected the Free Exercise rights of every minority faith. In *Church of the Lukumi Babalu Aye, Inc., et al. v. City of Hialeah* (1992), the Supreme Court struck down a law that targeted the religious practices of a minority religion, claiming that laws cannot be written to implicitly or explicitly target a religious faith or practice. The Church of the Lukumi Babalu Aye ("the Church") practiced Santeria, an Afro-Caribbean religion that practices animal sacrifices during religious ceremonies. In all ceremonies, except those for healing and for the dead, the animals are eaten after they are sacrificed. The Church leased land in the city of Hialeah ("the City"), Florida, for the purposes of establishing a worship center. After the property was leased, the City then passed several ordinances that targeted the animal sacrifice practices of the Church.[30]

In a 9-0 decision, the Supreme struck down these ordinances finding that they were not neutral or generally applicable to the entire city population, in that the ordinances had as their object the suppression of religion (*Church of the Lukumi Babalu Aye,* 542). Further, the Court stated that even if there were a compelling state interest involved in this case, "the ordinances are not drawn in narrow terms to accomplish those

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[30] "[T]he city council held an emergency public session and passed, among other enactments Resolution 87-66, which noted city residents' "concern" over religious practices inconsistent with public morals, peace, or safety, and declared the city's "commitment" to prohibiting such practices; Ordinance 87-40, which incorporates the Florida animal cruelty laws and broadly punishes "[w]hoever . . . unnecessarily or cruelly . . . kills any animal," and has been interpreted to reach killings for religious reasons; Ordinance 87-52, which defines "sacrifice" as "to unnecessarily kill . . . an animal in a . . . ritual . . . not for the primary purpose of food consumption," and prohibits the "possess[ion], sacrifice, or slaughter" of an animal if it is killed in "any type of ritual" and there is an intent to use it for food, but exempts "any licensed [food] establishment" if the killing is otherwise permitted by law; Ordinance 87-71, which prohibits the sacrifice of animals, and defines "sacrifice" in the same manner as Ordinance 87-52; and Ordinance 87-72 which defines "slaughter" as "the killing of animals for food" and prohibits slaughter outside of areas zoned for slaughterhouses, but includes an exemption for "small numbers of hogs and/or cattle" when exempted by state law" (*Church of the Lukumi Babalu Aye,* 520).

interests" (ibid, 547). This indicates that in the face of blatant discrimination against minority religions by the government, the Court is found to be expansionist in their decisions.

Analysis of Free Exercise Jurisprudence. Free Exercise jurisprudence has taken a parallel jurisprudential path similar to that of the Establishment Clause. After 150 years of near dormancy, the Supreme Court established a belief-action distinction which asserted that under the First Amendment of the Constitution, individuals have absolute freedom to believe as they wish, but no parallel freedom to act as they wish, since actions are subject to governmental regulations. This distinction gave way to the *Sherbert* test which made the practicing of their faiths without governmental interference easier for religious minorities. In 1990, the Court abandoned the compelling state interest test in favor of a neutral law of general applicability standard; the Free Exercise equivalent to the Establishment Clause's equal access standard. To date, the *Smith* test still stands, a test which is less than favorable to religious minorities. Table 4.2 lists the Free Exercise cases examined in this research.

Insert Table 4.2 About Here

Conclusion

Since its infancy, America has struggled to find and maintain a balance between the religious and the secular in public life. For the first 150 years, the Supreme Court gave little notice to the freedom of religion clauses of the Constitution with very few cases ever coming before the Justices. Beginning in the 1940s, the Supreme Court became more receptive to hearing claims based on the Free Exercise and Establishment Clause. The Court responded by making the religion clauses of the Constitution

applicable to the states. During the next several decades, the Court followed a tortuous path in determining the contours of the religion clauses in a variety of contexts.

In each area of religious freedom, the Court attempted to set up a legal test to aid in the resolution of such cases. For the Establishment Clause, the Court devised the *Lemon* Test, and for the Free Exercise Clause the Court devised the *Sherbert* Test. Through this maze of Establishment Clause and Free Exercise precedents, it is not surprising that the Court has been inconsistent in their decisions in the area of freedom of religion. The only area of Establishment Clause jurisprudence the Court has maintained any consistent standard involves the school prayer and religious instruction cases. The Court has created and maintained a strict separationist stance on school prayer. Repeatedly, the Justices cite the impressionability of schoolchildren and the coerciveness of peer-pressure to participate in activities that violate their conscience.

The *Sherbert* Test has not fared much better than the *Lemon* Test. Once established, the *Sherbert* test was quickly abandoned, save for the area of employment compensation because of religious conviction. The Court does seem to apply certain aspects of *Sherbert*, using the compelling state interest test most often in determining constitutionality of statutes and activities. Despite that *Sherbert* was created to protect adherents of minority religions from hostile state actions; but since *Yoder*, the Court has rarely found in favor of adherents of minority religions in free exercise cases. The Court has again seized upon the *Reynolds* dichotomy that free exercise protects ideas and beliefs; however, it does not protect the practices of one's faith.

What is clear from freedom of religion jurisprudence is that the Court does not decide cases in a manner consistent with the tenets of the legal model of judicial

decision-making. The legal model explains Supreme Court outcomes in terms of the use of precedents, tests and persuasive legal reasoning; however, it cannot be asserted that the legal model "explains" decision-making in freedom of religion cases. The Court purported to establish tests and standards in deciding freedom of religion cases, but the Court never hesitated to quickly disregard them or revised the meaning and criteria of the tests and standards. Further, while the Court does seem to employ a variety of tests and standards other than *Lemon* and *Sherbert*, these tests are still not consistently applied as each Justice continues to formulate their own test or standard for the Court to use.

This discussion has revealed that there is a lack of consensus among the Justices about how to approach freedom of religion cases. As such, clearly any purely legal explanation of Supreme Court decision-making is not helpful in advancing our understanding of Supreme Court outcomes in freedom of religion cases. This study argues that the legal model, with its adherence to the role of precedent and tests in deciding case outcomes, fails in advancing our understanding of Supreme Court decision-making in freedom of religion cases. The Court relies on precedent, historical documents, and established standards; but as applied to freedom of religion cases, the legal model breaks down. It fails to take into account the complexities of freedom of religion jurisprudence and the varied approaches of the Justices to religion cases. What this study does claim is that due to the complexity of religious freedom cases, something more than just law, ideology, or strategy are at work. Justice Breyer's "consequential analytical model" clearly indicates that Justices use their best judgment in light of the facts of the case. It is here that the influence of a Justice's faith tradition can come into play and influence the outcome of cases in the area of freedom of religion.

TABLE 4.1. The Establishment Cases Heard by The Supreme Court

Court Heard By *Case Name*	**Case Citation**	**Year**
Vinson Court		
Everson v. Board Of Edu. Of Township Of Ewing	330 U.S. 1	1947
McCollum v. Board Education	333 U.S. 203	1948
McGowan v. Maryland	366 U.S. 420	1961
Gallagher v. Crown Kosher Super Market of Massachusetts	366 U.S. 617	1961
Zorach v. Clauson	343 U.S. 306	1952
Warren Court		
Two Guys from Harrison-Allentown, Inc. v. McGinley	366 U.S. 582	1961
Braunfeld v. Brown	366 U.S. 599	1961
Engel v. Vitale	370 U.S. 421	1962
School District of Abington Township v. Schempp	374 U.S. 203	1963
Sherbert v. Verner	374 U.S. 398	1963
Board of Education v. Allen	392 U.S. 236	1968
Epperson v. Arkansas	393 U.S. 97	1968
Burger Court		
Walz v. Tax Commissioner of New York	397 U.S. 664	1970
Welsh v. United States	398 U.S. 333	1970
Gillette v. United States	401 U.S. 437	1971
Lemon v. Kurtzman	403 U.S. 602	1971
Tilton v. Richardson	403 U.S. 672	1971
Lemon v. Kurtzman	411 U.S. 192	1973
Levitt v. Committee for Public Ed.	413 U.S. 472	1973
Hunt v. McNair	413 U.S. 734	1973
Sloan v. Lemon	413 U.S. 825	1973
Commission for Public Education v. Nyquist	413 U.S. 756	1973
Meek v. Pittenger	421U.S. 349	1975
Roemer v. Board of Public Works of Maryland	426 U.S. 736	1976
Wolman v. Walters	433 U.S. 229	1977
New York v. Cathedral Academy	434 U.S. 125	1977
Committee for Pub. Educ. v. Regan	444 U.S. 646	1980
Widmar v. Vincent	454 U.S. 263	1981
Larson v. Valente	456 U.S. 228	1982
Larkin v. Grendel's Den, Inc.	459 U.S. 116	1982
Mueller v. Allen	463 U.S. 388	1983
Marsh v. Chambers	463 U.S. 783	1983
Lynch v. Donnelly	465 U.S. 668	1984
Wallace v. Jaffree	472 U.S. 38	1985
Thornton v. Caldor, Inc.	472 U.S. 703	1985
School District of the City of Grand Rapids v. Ball	473 U.S. 373	1985
Aguilar v. Felton	473 U.S. 402	1985
Witters v. Services for the Blind	474 U.S. 481	1986
Bender v. Williamsport Area Sch. Dist	475 U.S. 534	1986

TABLE 4.1. The Establishment Cases Heard by The Supreme Court Continued

Court Heard By *Case Name*	**Case Citation**	**Year**
Rehnquist Court		
Edwards v. Aguillard	482 U.S. 578	1987
Corp. of Presiding Bishop v. Amos	483 U.S. 327	1987
Bowen v. Kendrick	487 U.S. 589	1988
Texas Monthly, Inc. v. Bullock	489 U.S. 1	1989
County of Allegheny v. ACLU	492 U.S. 573	1989
Jimmy Swaggart Ministries v. Board of Equalization of Cal.	493 U.S. 378	1990
Board of Education of Westside Community Schools v. Mergens	496 U.S. 226	1990
Lee v. Weisman	505 U.S. 577	1992
Lamb's Chapel v. Center Moriches School District	508 U.S. 384	1993
Zobrest v. Catalina Foothills School Dist	509 U.S. 1	1993
Board of Edu. of Kiryas Joel Village School District v. Grumet	512 U.S. 687	1994
Capital Square Review and Advisory Board v. Pinette	515 U.S. 753	1995
Rosenberger v. University of Virginia	515 U.S. 819	1995
Agostini v. Felton	521 U.S. 203	1996
City of Boerne v. Flores	521 U.S. 507	1997
Santa Fe Independent School District v. Doe	530 U.S. 290	2000
Mitchell v. Helms	530 U.S. 793	2000

TABLE 4.2. The Free Exercise Cases Heard by The Supreme Court

Court Heard By *Case Name*	**Case Citation**	**Year**
Vinson Court		
Eagles v. U.S. ex rel. Samuels	329 U.S. 304	1946
Eagles v. U.S. ex rel. Horowitz	329 U.S. 317	1946
Gibson v. U.S.	329 U.S. 338	1946
Dodez v. U.S.	329 U.S. 338	1946
Sunal v. Large	332 U.S. 174	1947
Alexander v. U.S. ex rel. Kulick	332 U.S. 174	1947
Cox v. U.S.	332 U.S. 442	1947
Niemotko v. Maryland	340 U.S. 268	1951
Kunz v. New York	340 U.S. 290	1951
Zorach v. Clauson	343 U.S. 306	1952
Kedroff v. Saint Nicholas Cathedral	344 U.S. 94	1952
Fowler v. Rhode Island	345 U.S. 67	1953
Poulos v. New Hampshire	345 U.S. 395	1953
Dickinson v. United States	346 U.S. 389	1953
Warren Court		
Witmer v. United States	348 U.S. 375	1955
Sicurella v. United States	348 U.S. 385	1955
Gallagher v. Crown Kosher Super Market of Massachusetts	366 U.S. 617	1961
Two Guys from Harrison-Allentown, Inc. v. McGinley	366 U.S. 582	1961
Braunfeld v. Brown	366 U.S. 599	1961
Torcaso v. Watkins	367 U.S. 488	1961
Sherbert v. Verner	374 U.S. 398	1963
United States v. Seeger	380 U.S. 163	1961
Board of Education v. Allen	392 U.S. 236	1968
Presbyterian Church v. Hull Church	393 U.S. 440	1969
Burger Court		
Welsh v. United States	398 U.S. 333	1970
Gillette v. United States	401 U.S. 437	1971
Tilton v. Richardson	403 U.S. 672	1971
Rosengart v. Laird	405 U.S. 908	1972
Wisconsin v. Yoder	406 U.S. 205	1972
Serbian Orthodox Diocese v. Milivojevich	426 U.S. 696	1976
McDaniel v. Paty	435 U.S. 618	1978
Jones v. Wolf	443 U.S. 595	1979
Thomas v. Review Bd., Ind. Employment Security Division	450 U.S. 707	1981
Heffron v. International Society for Krishna Consciousness	452 U.S. 640	1981
United States v. Lee	455 U.S. 252	1982
Goldman v. Weinberger	475 U.S. 503	1986
Bowen v. Roy	476 U.S. 693	1986

TABLE 4.2. The Free Exercise Cases Heard by The Supreme Court Continued

Court Heard By *Case Name*	**Case Citation**	**Year**
Rehnquist Court		
Hobbie v. Unemployment Appeals Commission of Florida	480 U.S. 136	1987
O'Lone v. Estate of Shabazz	482 U.S. 342	1987
Lyng v. Northwest Indian Cemetery	485 U.S. 439	1988
Employment Division of Oregon v. Smith	485 U.S. 660	1988
Frazee v. Illinois Department of Employment Security	489 U.S. 829	1989
Swaggart Ministries v. Board of Equalization	493 U.S. 378	1990
Employment Division of Oregon v. Smith	494 U.S. 872	1990
Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah	508 U.S. 520	1992
Watchtower Society v. Village of Stratton	536 U.S. 150	2002

Chapter 5

THE SUPREME COURT, FAITH TRADITIONS AND FREEDOM OF RELIGION

Introduction

Throughout the history of western civilization, the conflicts between church and state have been persistent. In pre-Christian times, religious authority often comingled with civil, or state, authority. Judaism, and later Christianity, separated religion and state into two independent spheres with powers granted to each exclusively. The United States was the first western nation to address church-state relations in its Constitution (Wood, 1967). The previous chapter demonstrated that a range of constitutional conflicts have arisen before the Supreme Court in Establishment clause and Free Exercise cases. Chapter Four clearly showed that strictly legal explanations of Supreme Court decision-making are not helpful in advancing our understanding of Supreme Court outcomes in freedom of religion cases. If the legal model fails to shed light on how individual Supreme Court Justices decide cases, then we must turn our attention to external, or environmental, factors; namely, the social backgrounds of the Justices. The faith traditions of the Justices are examined as the primary social background factor expected to advance our understanding of how Justices view church-state relations. This chapter identifies the Justices' faith traditions and explores whether or not they vote in a manner that is consistent with their professed faith traditions. The Justices' decision-making in the Establishment Clause' school prayer and religious instruction cases provides the data for this attempt to determine whether the Justices' faith traditions are consistent with their voting behavior.

The Supreme Court has heard approximately 130 Establishment Clause and Free Exercise Clause cases. Fifty-one of these cases involved Free Exercise issues and seventy-nine cases involved the establishment clause issues. Thirty-three of the 130 cases focused on religion in the public schools. Since the 1960s, the Supreme Court has heard seven major cases that directly raise questions of the constitutionality of prayer and religious instruction in public schools: *Engel v. Vitale* (1962), *Abington School District v. Schempp* (1963), *Wallace v. Jaffree* (1985), *Lee v. Weisman* (1992), and *Santa Fe School District v. Doe* (2000), *Epperson v. Arkansas* (1968) and *Edwards v. Aguillard* (1987). Twenty-two Justices have participated in hearing and deciding these seven cases. Of these twenty-two Justices one was Baptist (Justice Black), five were Presbyterian (Justices Douglas, Clark, Harlan, Powell, and Chief Justice Burger), four were Catholic (Justices Brennan, Kennedy, Scalia, and Thomas), five were Episcopalian (Justices Stewart, White, O'Connor, Marshall, and Souter), three were Jewish (Justices Goldberg, Ginsberg, and Breyer), one was Methodist (Justice Blackmun), one was Lutheran (Chief Justice Rehnquist), and two listed their faiths only as Protestant (Chief Justice Warren and Justice Stevens). While politics plays a significant role in influencing Supreme Court decisions (Segal and Spaeth 2002; Epstein and Knight,1998), this chapter argues that in cases involving prayer and religious instruction in public schools, Justices also vote in a manner that is consistent with the views of the relationship between church and state as outlined in the creed of their faith traditions.[31]

[31]Although most Protestant denominations eschew the use of the word "creed" it is used in this study for reasons of consistency and clarity. Most Protestant denominations have governing bodies which establish "position statements" that outline the faiths position on various religious, political, and/or social issues.

Faith Traditions and their Differing Views of Religious Rights

In order to understand the degree to which the faith traditions of the individual Justices may affect the formulation of public school prayer policy, it is important to establish what these faith traditions teach concerning the relationship between church and state. Since the 1950s, eight faith traditions have been represented on the Supreme Court: Judaism, Catholicism, Lutheran, Episcopalian, Methodist, Presbyterian, Baptist, and general Protestant, meaning that the Justice claimed to be Protestant but did not identify a particular denomination. Each of these faith traditions addresses the relationship between the faith and the civil governments in their creeds; however, none addresses prayer in school directly.

Judaism. It is difficult to determine Judaism's official stance on church-state relations, as "Judaism is generally reviewed as a religion of deed rather than creed...only rarely have there been attempts to summarize the faith in a creed-like statement" (Melton, 767). One such statement was created in 1897 when the German Rabbinical Association wrote *The Fundamental Beliefs of Judaism.* This creed states, in part:

> Judaism commands the conscientious observance of the laws of the state, respect for obedience to the government. It therefore, forbids rebellion against government. It therefore, forbids rebellion against governmental ordinances and evasion of the law. . . . Judaism [also] commands that its adherents shall love the state, and willingly sacrifice property and life for its honor, welfare and liberty." (*ibid*, 768)

Historically, Judaism was one of the earliest religions to separate religious and secular spheres of governance. From the time of Moses, or the Mosaic Period, "[j]udges and Kings generally functioned in the profane sphere, while priests and prophets served in the sacred sphere" (Wood, 258). The king was bound to the laws of Moses; therefore,

the profane sphere was informed by the sacred. Indeed, the Jewish Torah is replete with stories of prophets warning the kings to mend their ways.

Roman Catholicism. Catholicism continued the Jewish concept of the two spheres in two important documents relating to its stance on church-state relations. The first was the Gelasian Thesis. The Gelasian Thesis, based upon a letter written by Pope Gelasius I to a Byzantine emperor in the fifth century, outlined the concept of the two spheres that rule the lives of men, the secular sphere and the sectarian sphere. Each sphere has its authority that the other cannot usurp; however, since the church governs over the spiritual, which deals with the afterlife, it has the greater responsibility for the people. Therefore, the state should look to the church for guidance in laws and policy (Ferguson 1976, 2).[32] The second important document was Pope John XXIII's encyclical *Pacem in Terris* (Peace on Earth), from the Second Vatican Counsel (1963). In this encyclical, the Catholic Church states that "every man by right of nature (*jure naturae*) has the right to the free exercise of religion in society according to the dictates of his personal conscience" and "an obligation falls on other men in society, and upon the state in particular, to acknowledge this personal right, to respect it in practice, and to promote its free exercise" (Murray, 1963).

Protestant Faiths Derived from Roman Catholicism. The Lutheran Church and the Anglican Church adhere to a variation of the Gelasian Thesis, with the significant difference that the Church does not have the duty to inform the state. The Lutheran document, *The Augsburg Confession* of 1530, states "that lawful civil ordinances are good works of God . . . Therefore, Christians are necessarily bound to obey their own

[32] In the eastern Roman empire, medieval Europe, and some early modern nations after the Reformation (such as France), Catholicism was a religion very closely tied to the state.

magistrates and laws, save only when commanded to sin, for then they ought to obey God rather than men" (Melton, 41-42). The five Lutheran synods in America adhere to a variation of the Gelasian Thesis. These synods find that there are two spheres of power, the state and the church; however, "they must not be commingled" (ibid, 152). Specifically, the Lutheran Church holds that the church exists to save men, while the state exists to maintain order and peace.

More recently, the Evangelical Lutheran Church—the Lutheran synod to which Chief Justice Rehnquist belonged—issued the statement *The Nature of the Church and its Relationship with Government, A Statement of The American Lutheran Church (1980)*, clarifying that the synod adhered to a doctrine of separation of church and state:

> In affirming the principle of separation of church and state, Lutherans in the United States respectfully acknowledge and support the tradition that the churches and the government are to be separate in structure. As the U.S. Constitution provides, government neither establishes nor favors any religion. It also safeguards the rights of all persons and groups in society to the free exercise of their religious beliefs, worship, practices, and organizational arrangements within the laws of morality, human rights, and property. The government is to make no decisions regarding the validity or orthodoxy of any doctrine, recognizing that it is the province of religious groups to state their doctrines, determine their polities, train their leaders, conduct worship, and carry on their mission and ministries without undue interference from or entanglement with government (*Tenth General Convention of The American Lutheran Church, B. Institutional Separation).*

This statement is similar to *The Augsburg Confession,* as it continues to define the "functional interaction" that can and should occur between church and state. Specifically,

> In this functional interaction, the government may conclude that efforts and programs of the churches provide services of broad social benefit. In such instances and within the limits of the law, the government may offer and the churches may accept various forms of assistance to furnish the services. Functional interaction also includes the role of the churches in

> informing persons about, advocating for, and speaking publicly on issues and proposals related to social justice and human rights. From the Lutheran perspective, the church has the task of addressing God's Word to its own activities and to government. The U.S. Constitution guarantees the right of the churches to communicate concerns to the public and to the government (ibid, *C. Functional Interaction*).

The Protestant Reformation in England led to the establishment of an autonomous Anglican Church, the predecessor of the Episcopal Church. Although the Anglican Church still enjoys state support in England, the Episcopal Church in America does not. Written in 1563 after the Protestant Reformation, and well before the founding of the Episcopal Church, the *Thirty-Nine Articles of Religion* outlines the Church's adherence to a separation of power between the church and state. In the *Thirty-Nine Articles of Religion,* there are two articles that address the authority of the church and the role of the state. Article Twenty explicitly states that the church has authority over "Rites or Ceremonies" and "Controversies of Faith" (ibid, 24). Article Twenty goes on to say that the Church should "enforce" what is required for salvation and not "decree anything against" salvation. Article Twenty-Seven, a later development from the Tudor or "founding" of the Anglican Church, states that the state has authority over all, including clergy, "in all things temporal; but hath no authority in things purely spiritual." It is the "duty" of all to obey the state (ibid, 26).

In 1801, the Episcopal Church in America revised the *Thirty-Nine Articles of Religion.* Of interest to this study is Articles Twenty, which addresses the authority of the church, and Thirty-Seven, which addresses the authority of the state.

> XX. Of the Authority of the Church. The Church hath power to decree Rites or Ceremonies, and authority in Controversies of Faith: and yet it is not lawful for the Church to ordain any thing that is contrary to God's

> Word written, neither may it so expound one place of Scripture, that it be repugnant to another. Wherefore, although the Church be a witness and a keeper of Holy Writ, yet, as it ought not to decree any thing against the same, so besides the same ought it not to enforce any thing to be believed for necessity of Salvation.
>
> XXXVII. Of the Power of the Civil Magistrates. The Power of the Civil Magistrate extendeth to all men, as well Clergy as Laity, in all things temporal; but hath no authority in things purely spiritual. And we hold it to be the duty of all men who are professors of the Gospel, to pay respectful obedience to the Civil Authority, regularly and legitimately constituted (*Protestant Episcopal Church in the United States of America* 1801, Articles of Religion).

This is similar to the Lutheran creed which claims that the two spheres, the temporal and the spiritual, are separate. While the Lutheran faith specifically states that there is, and should be, a functional interaction between religion and civil authority, the Episcopal Church does not make any claim regarding the role religious faith should play in the formulation of secular public policy. These differing stances create the divergence between the Lutheran and Episcopal Churches and the Catholic Church.

Other Protestant Outgrowths from Lutheran and Anglican Doctrine

The Methodists outline in their *Twenty-Five Articles of Religion* the belief that it is a Christian's duty "to observe and obey the laws and commands of the governing or supreme authority of the country of which they are citizens or subjects or in which they reside" (ibid, 263). The Methodists add that they "believe it is the duty of Christian citizens to give moral strength and purpose to their respective governments through sober, righteous and godly living" (ibid, 265). This implies that the Methodists believe that the church should inform the state; however, it should occur through the individual members of the church, not through the church as an institution. This stance differs from that of the other three churches in that while it rejects the Catholic idea of the church

directly informing the state, it also rejects the Lutheran idea of the church not informing the state at all.

In more modern times, the Methodist Church has established that:

> The United Methodist Church believes that the church has the moral imperative to act for the common good. For people of faith, therefore, *there are no political or spiritual spheres where their participation can be denied.* The attempt to influence the formation and execution of public policy at all levels of government is often the most effective means available to churches to keep before humanity the ideal of a society in which power and order are made to serve the ends of justice and freedom for all people. ...This task of the Church is in no way in contradiction with our commitment to a vital separation of Church and State. We believe that the integrity of both institutions is best served when both institutions do not try to control the other. Thus, we sustain with the first amendment to the Constitution... We live in a pluralistic society. In such a society, churches should not seek to use the authority of government to make the whole community conform to their particular moral codes. Rather, churches should seek to enlarge and clarify the ethical grounds of public discourse and to identify and define the foreseeable consequences of available choices of public policy (*United Methodist Church,* Church and Politics: Overview; emphasis added).

This statement clearly marks out an accommodationist stance by the Methodist denomination.

The *Westminster Confession* (1644-49) guides the United Presbyterian Church (ibid, 238). Chapter Twenty-Three of the Confession reiterates the theme that civil government cannot "assume" the role of the church in matters of "the Word and Sacraments, or the power of the keys of the kingdom of heaven" (ibid, 226). However, the civil government has the "duty" to ensure "order" in the church, that the "truth . . . be kept pure and entire," to "suppress" all "blasphemies and heresies," to "prevent or reform" abuse of worship," and to ensure that "all the ordinances of God duly settled, administered, and observed" (ibid). The Presbyterian Creed is unique among Protestant Creeds in that it calls upon the civil authorities to "suppress" "blasphemies and heresies."

In other words, the state is submissive to the church; to be called upon to be used by the church upon the population as a whole. Most Protestant faith traditions specifically state that the civil government and church authority should remain separate; and more specifically that the state should stay out of all church business. However, these ideas were quickly dropped in America after the American Revolution.

Since the revision of the *Westminster Confession* in 1789, the Presbyterian Church has held a stance that is more of a strict separationist approach to the relationship between church and state. Typical of the Presbyterian stance on church and state is in its 2000 Constitution:

> God alone is the Lord of the Conscience, and hath left it free from the doctrines and commandments of men, which are in anything contrary to his Word, or beside it, in matters of faith and worship. Therefore, we consider the rights of private judgment, in all matters that respect religion, as universal and unalienable: *We do not even wish to see any religious constitution aided by the civil power, further than may be necessary for protection and security, and at the same time, be equal and common to all others* (*Constitution of the PC (USA)* 2000, Part II, Book of Order, Section G-1.0301; emphasis added).

Although Baptists can trace their origins to the Anti-Baptists of Europe, the Baptist Church was not established in America until after the ratification of the Constitution. The Southern Baptists, of which faith Justice Black was a member, comprise the largest Protestant faith in America, as well as the most active in the school prayer cases, claim on their website, under *Position Statements*, that:

> We stand for a free church in a free state. Neither one should control the affairs of the other. We support the First Amendment to the United States Constitution, with its "establishment" and "free exercise" clauses. We do, of course, acknowledge the legitimate interplay of these two spheres. For example, it is appropriate for the state to enact and enforce fire codes for the church nurseries. It is also appropriate for ministers to offer prayer at civic functions. Neither the Constitution nor Baptist tradition would build

> a wall of separation against such practices as these (*Southern Baptist Convention* 1999, Position Statements: Church and State).

Of all the denominations reviewed, this is the only one to offer a clear cut statement in support of absolute separation of church and state. The Baptist creed also outlines similar Protestant views of church and state; namely, that the state has the authority of civil law and should be obeyed by members of the church.

The Unitarian Church in America does not hold to a specific creed or a dogma of beliefs. Rooted in the Congregationalist movements in Europe and New England, Unitarianism is a religion and not a philosophy, even though they lack a specific dogma of faith and worship.

> The AUA [American Unitarian Association] —for most of its life—was an organization dedicated to promoting a tolerant religious faith that saw reason and a belief in God as congruent rather than hostile. It saw the Unitarian faith as squarely within the Western religious tradition. Modern thought, knowledge, and other faith traditions were not automatically rejected, as other religions insisted be done. Rather those modern ideas and the beliefs they challenged were to be tested through reason and debate, allowing the truth to come forth as a faith that could embrace both the wisdom of the past and new knowledge. Thus illuminated, religious faith would shine steadily and brightly in even the strongest storm (*American Unitarian Conference* 2007, About the American Unitarian Conference).

Despite not having a set creed, the Unitarian Church does have what it calls "Our Religious Principles" which are seven statements that set out the basic outline of Unitarian belief. Principle number four states: "Conscious of the complexity of creation, of the limits of human understanding and of humanity's capacity for evil in the name of religion, we hold that humility, religious tolerance and freedom of conscience should be a central part of any religious experience" (*American Unitarian Conference* 2007, Our Religious Principles). These two statements make it clear that in order to adhere to their

faith tradition, Supreme Court Justices who claim to be Unitarian should vote in a separationist manner in Establishment cases and to expand religious worship in Free Exercise cases.

General Protestants. The final faith tradition examined in this study is the General Protestant. Needless to say, there is no organization that calls itself or relates itself to the name of "General Protestant." It is assumed that these Justices so identifying their faith tradition adhere to a Protestant perspective, as opposed to a Jewish or Roman Catholic one; however, it is also clear that they also do not claim membership in any particular Protestant denomination. Therefore, this study assumes that Justices who self-identify as General Protestant will adhere to a more Protestant view of church-state relations. As such, it is assumed that those Justices identifying themselves as "General Protestant," in complying with their religious beliefs, would vote in a separationist manner in Establishment Cases, and to expand religious practice in Free Exercise cases.

The nine faith traditions reviewed for this study all address the relationship between the faith and the civil governments, although none address prayer in school directly. The Jewish faith, a faith of deed rather than creed, is the oldest faith tradition to establish the idea that there are two spheres of governance, the secular and the sacred. In spite of the lack of a unifying creed, the Jewish faith seems to teach an absolute adherence to and respect for the civil law. The Christian denominations have a less absolutist view of the separation of church and state. This analysis of the church-state stances of the faith traditions begins to create a picture of how faith traditions would view prayer in public schools and indicate how a Justice should vote on that issue. A review of how the denominations reacted to the Supreme Court's decisions regarding prayer in

school will further clarify the positions of these faith traditions, and give insight into how these traditions put creed into action. Table 5.1 summarizes the faith traditions' views on church-state relations.

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Religious Groups' Reaction to School Prayer and Religious Instruction Cases

The creeds of the faith traditions do not provide a complete insight into the faith's stances on school prayer and their reaction to Supreme Court decisions regarding prayer in public schools. The public debate over prayer in public schools is not recent. Reviewing the history of the school prayer debate will clarify the concerns of society regarding religion in the public schools and how the Supreme Court addressed these concerns.

As described by Ravitch, in *School Prayer and Discrimination,* in the 1840s Catholic immigrants swelled the ranks of the Catholic Church in America. Other American minority denominations, such as the Mormons, also grew (Ravitch 1999, 5). Simultaneously with this growth, America "was in the midst" of the Second Great Awakening, an evangelical revival movement (ibid). Since the rise of the Catholic population came from an influx of poor immigrants, economic fears were added to the tension between the immigrants and the nationalists. A combination of these factors led to fierce nationalism and overt anti-Catholicism. As an example, there was a national effort to enforcement the "requirement" to read the King James Bible in public schools, which the Catholic Church forbade Catholics to read. Catholics were discriminated against and Catholic children physically attacked for not participating in Bible readings in the public schools. This created an impasse within the public schools which eventually

led to the Catholic Church setting up its own school system. Catholics argued that the public schools that were supported by public tax dollars were essentially Protestant, it was only fair that tax dollars also support the Catholic School system (Morgan 1972, 48-52, Ravitch 1999, 3-18).

In the 1940s, there was an increase in the push for separation of church and state from various Protestant denominations. Most of this pressure did not come from the nativist attitudes of the 1880s but from an anti-Catholic attitude that was triggered by Catholic assimilation from the Catholic ghettos into mainstream America (Morgan 1972). On May 7, 1946, the Counsel of Bishops of the Methodist Church issued an anti-Catholic statement accusing the Catholic Church of "anti-libertarian practices" including continued Catholic demand for public support of Catholic schools (ibid, 82). The Southern Baptist Convention was also spurred into separation of church and state stances by anti-Catholic sentiment, with their link to separationist policy formalized by co-founding Americans United for the Separation of Church and State, an organization with the goal of promoting and defending the separation of church and state principle.[33] The Southern Baptist Convention president in 1947, the Reverend Louie D. Newton, later became the president of Americans United (ibid). Finally,

> the Presbyterian Church in the United States (Southern) met in Atlanta, and its Committee on Christian Relations announced that it would ask the denomination to reemphasize Presbyterian commitment to the separation of church and state (ibid, 83).

Three issues dominated the debate about religion in public schools. Directly relating to religion in public schools were several other issues which also played a role in the debate. First was the issue of conflict between the European and American views of

[33] See, Americans United for Separation of Church and State, http://www.au.org/about.

religion in public schools. In most western European countries, such as England, France and Germany, "religious instruction has been to give state support to an established church and to delegate educational responsibility to it" (Nielsen 1966, 127). In America, religion is more a personal matter than a community matter. The Methodists and the Baptists reflect this in their support of "non-confessional state schools." Lutherans and Episcopalians have created parochial schools, "reflecting the experience of community responsibility in Germany and England respectively" (ibid).[34]

Second was the issue of "the growing pluralism of religious life in the United States" (ibid, 14), which presented another reason for the conflict over religion in public schools. Catholics and Jews were beginning to assimilate into American society, and their new status brought new political power and a new religious identity to America. Catholics were continuing to demand public support of Catholic schools to counter the Protestant bent of the tax supported public schools. The Jewish community, on the other hand, was opposed to any religious influence in the schools, as the influence would be exclusively Christian (ibid). This two-pronged resistance to Protestantism in the public schools threatened the dominance of the Protestant majority in America.

The third and final issue of the secularists signals their ability to exert political influence upon public school policy. Finding strength in their growing numbers, secularists pushed to remove "any acknowledgment of belief in God in the public schools" (ibid). This activity by the secularists established strange, new bedfellows the

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[34] "In 1900, an estimated 3,500 parochial schools existed in the United States. Within 20 years, the number of elementary schools had reached 6,551, enrolling 1,759, 673 pupils taught by 41, 581 teachers. Secondary education likewise boomed. In 1900, Catholics could boast of approximately 100 Catholic high schools, but by 1920 more than 1,500 existed. For more than two generations, enrollment continued to climb. By the mid-1960's, it had reached an all-time high of 4.5 million elementary school pupils, with about 1 million students in Catholic high schools. Four decades later, total elementary and secondary enrollment is 2.6 million" (National Catholic Education Association 2009).

Catholic Church and some Protestant denominations. These groups were laying aside centuries of conflict and mistrust to fight their new common enemy—the secularists:

> To be sure, the Roman Catholic and Jewish minorities have opposed what they have regarded as the remnants of Protestant religious practice in public education. For Roman Catholicism, at least, other issues are now at stake. The problem is no longer that of a predominately-Protestant ethos but that of a positive role for religion in education under a variety of circumstances (ibid, 16).

It was against this social and religious backdrop that the Supreme Court began to hear the first of seven school prayer decisions, spanning forty years. The first case, *Engel v. Vitale* (1962) elicited both outrage and accolades from religious communities for its removal of state-written prayers from public schools (Alley 1994, Bedsole 1964, Bezanson 2006, Morgan 1972). Quick on the heels of *Engel*, the Court handed down decisions in *Abington School District v. Schempp* (1963) and *Chamberlain v. Public Instruction Board* (1964), finishing what *Engel* had begun by finding unconstitutional the reciting of the Lord's Prayer and Bible readings in the public schools. Later in *Wallace v. Jaffree* (1985) and *Lee v. Weisman* (1992), the Court focused on prayers that were allowed by public school officials but not proscribed by them.

Engel v. Vitale (1962)

In *Engel v. Vitale* (1962), the Warren Court ruled that State of New York violated the Establishment Clause by requiring that the students of the public schools recite the Regent's Prayer at the start of each school day. The Regent Board of New York State, who wrote the prayer, was "a body exercising general supervisory power over education in the State of New York" (Morgan 1972, 132). The Court's decision did not necessarily ban all prayer in public schools; it only stated that government officials were not allowed to use written prayers, whether composed by themselves or others.

The plaintiffs were Unitarian and Jewish parents (ibid, 132). The filing of *amicus* briefs in support of the parents by Leo Pfeffer, a progressive Jew, and Edwin Lukas, of the American Jewish Committee, also support the assertion that Jewish groups were in opposition to prayer in school (ibid, 127). This is not to conclude that all Jews are against prayer in schools; these Jewish groups were specifically taking a more protective stance since all of the prayers at issue were Christian, specifically Protestant. By the 1960s, most Catholic leaders had moderated their stance against Protestantism in public schools. Formalized by Vatican II in 1963, Catholics viewed Protestants in an ecumenical light, as separated brothers rather than enemies. Catholics opposed the *Engel* decision, arguing that some religion was better than no religion; they regarded "secularism more than Protestantism as a primary threat" (Nielson 1966, 6; see also Morgan 1972, 125). In this decision, Justice Black and Douglas, a Southern Baptist and Presbyterian respectively, outlined in their concurring opinion that the state of New York was crossing the line of the Establishment Clause by having the prayer written and led by state officials (Morgan 1972, 133). Justice Stewart, an Episcopalian and the lone dissenter, took an accommodationist approach and read the First Amendment to prohibit the establishment of a state religion, not to keep prayers from the public school system.

The reaction from the religious community was a mix of shock and relief. The more conservative faith traditions abhorred the decision, although none of them filed *amicus* briefs in the case. The House and Senate reacted by holding hearings in their respective judiciary committees, in which they eventually called for a constitutional amendment overturning *Engel v. Vitale* and reintroducing prayer back into public schools (Alley 1994, Bedsole 1964, Bezanson 2006). Additionally, several leading Catholic and

Protestant scholars and journals spoke out against the decision (Alley 1994). For example, Catholic Cardinal Cushing of Boston called the Court's decision "fuel for Communist propaganda" and Episcopal Bishop James A. Pike stated "that the Court had 'just deconsecrated the nation'"(ibid, 109-110).

In contrast, other faith traditions applauded the Court's decision. While some Jewish parents supported the recital of the Regent's Prayer in New York public schools, "the Jewish Community as a whole continues to be suspicious of any common religious affirmation in the public schools" (Nielsen 1966, 175). A few Jewish groups filed *amicus* briefs on behalf of religious presence in public schools, but for the most part, these suspicions continue to this day, unresolved. In their 1963 General Assembly, the United Presbyterians "voted support for the Court's decision" (Bedsole 1964, 19) in response to *Engel*. Additionally, the Assembly "request[ed] that, 'Religious observances never be held in a public school or introduced into the public school as a part of its program'" (as quoted by Bedsole, 19).

The Methodist General Conference passed a statement, by a slight margin, which urged members "to refrain from encouraging or supporting, in their local communities, devotional exercises as a part of the educational program of the public schools" (ibid). This recommendation was approved in the General Conference by a small margin of votes. The narrowness of the vote shows that while the Methodist Church took a stance against prayer in public schools, it was not a stance universally agreed upon by all members of the Church. Further, in March, 1964, "the Baptist Joint Committee on Public Affairs in semi-annual session here reaffirmed 'its conviction that laws and regulations prescribing prayers or devotional exercises do not contribute to a free exercise of

religion'" (as quoted by Bedsole, 19). In all cases of religious support of the *Engel* decision, the faith tradition maintained strict adherence to its creed. Although it is debatable whether *Engel v. Vitale* banned all school prayer or just prayers written by school administrators, the following year the Court ended all debate. One year after *Engel*, in *Abington School District v. Schempp*, the Court revisited prayer in public schools and determined that the requirement to recite any prayer violated the Establishment Clause.

Abington School District v. Schempp (1963)

The debate over the Court's decision in *Engel* had barely started when the Court handed down its decision in *Abington School District v. Schempp* and the companion case, *Murray v. Curllet*.[35] The plaintiffs in *Schempp* challenged the recital of the Lord's Prayer and Bible passages at the start of the school day. This case took the decision in *Engel* a step further, when the Court ruled that prayer activities were in violation of the Establishment Clause. In *Engel*, the Court stated that school districts could not write the prayers children recited at the start of the school day; *Schempp* stated that school districts could not open the school day with any prayers or Bible readings.

This *Schempp* opinion is important for three reasons. First, it was a landmark decision that state-sponsored prayer in public schools violated the Establishment Clause. Second, Justice Clark acknowledged the hallowed place of religion but at the same time he established that the primary principle underlying the Establishment Clause is neutrality. According to Justice Clark, "The breach of neutrality that is today a trickling

[35] *Murray v. Curllet* (1963) was the school prayer case brought by the renowned atheist Madeline Murray O'Hair on behalf of her son.

stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'"

The third important point raised in *Schempp* is that the majority dismissed the Free Exercise claim raised in the case; that is, the Court found that the majority has a right to Free Exercise of religion and that its wishes may thereby overrule claims of minorities' rights. Justice Clark responded by stating that, "While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs" (*Abington School District v. Schempp,* 226).

In his opinion, Justice Clark was quick to dismiss the concerns of the American religious population regarding the decision, and ensured that their Free Exercise rights were not being violated. Justices Brennan and Stewart were more hesitant and felt the need to also address the public's concerns. Justice Brennan, in his concurring opinion, clearly pointed out that this decision was not meant to completely erase cooperation between religion and government (Marnell 1964, 231-232). Justice Stewart, an Episcopalian and again the lone dissenter, argued that the record in the case was not clear as to whether coercion was present. He thought it was possible for a school board to administer a system of religious exercises in such a way as to make it constitutional.

Wallace v. Jaffree (1985)

After *Schempp*, the Supreme Court did not hear another school prayer case until 1985, twenty years later. During those twenty years, compliance with the Supreme Court's rulings on prayer in public schools was "spotty to say the least" (Morgan 1972,135; see also Dolbeare and Hammond, 1971; Muir, 1967; Laubauch, 1969; Reich,

1968; and Alley 1996). A popular means of avoiding the prayer in school issue was the moment of silence that began school days. In and of itself, there is nothing unconstitutional about observing a moment of silence as long as it is private; the constitutional trigger occurs when the state mandates prayer or moments of silence. However, the Alabama state legislature, when passing a "moment of silence" bill, decided to amend the law and add the words "or prayer" after "meditation" (*Wallace v. Jaffree*, 40). In a decision written by Justice Stevens, the Court again used the secular purpose test established in *Engel* and *Schempp* to determine that the law was unconstitutional on the grounds of the "or prayer" amendment. Alabama argued that the policy meant that each day would open with a moment of silence to be used as the students saw fit. The Court, however, seized upon the phrase "or prayer" added later by the legislature, determining that this phrase was religious in nature and thus made the law unconstitutional. Stating that the phrase proved that the purpose of the legislation was to allow prayer (ibid, 59), the Court found that the addition of "or voluntary prayer" indicates that the state intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion" (ibid, 60).

The *Wallace* case is significant for two reasons: first, it was a jurisprudential landmark in its claim that state sponsored moments of silence violated the Establishment Clause, thus reinforcing the purpose test of constitutionality, and second, this was the first decision in which Justice O'Connor, an Episcopalian, in her concurring opinion, stated that Alabama's law did "more than permit prayer to occur during a moment of silence 'without interference.' It endorses the decision to pray during a moment of silence, and

accordingly sponsors a religious exercise" (ibid, 78-9). Specifically, Justice O'Connor changed the application of *Engel* from a question of the purpose of the state's actions to a question of "how outsiders who witness the state's action interpret it" (Bezanson, 142). The problem with this point is that Justice O'Connor in her concurring opinion did in fact call for an endorsement test; however, a majority of the Justices neither agreed with it nor adopted it. While Justice O'Connor's endorsement test may be interesting as a footnote, it does not add much to advance our analysis unless one argues that faith traditions are more in line with Justice O'Connor's analysis.

Interestingly, the literature does not discuss the reaction of faith communities to this decision. While there are many papers and commentaries that discuss the response of Congress and of President Reagan, there is little said about the response of religious groups. It can be assumed that most of the faith traditions that outlined their positions at the time of *Engel v. Vitale* and *School District v. Schempp* maintained their stances on prayer in schools. The American Jewish Congress was the only faith group that filed an *amicus* brief in *Wallace*, which was on behalf of the respondents, who were challenging the moment of silence. No Christian group or other Jewish group filed any *amicus* brief on behalf of the school district (*Wallace v. Jaffree* 38).

Lee v. Weisman (1992)

Lee v. Weisman originated in Rhode Island. In this case the practice of having local clergy recite prayers at high school graduation exercises was challenged and ruled unconstitutional. The Court stated that although graduation attendance is not mandatory, peer pressure is experienced by students when attending and therefore the practice of having prayer at a high school graduation is coercive (*Lee v. Weisman*, 593). This case is

significant because here the divisions of opinion regarding prayer in public schools that had appeared among the Justices in *Wallace* became more evident. While it is clear that a majority of the Justices believed graduation prayer violated the Establishment Clause, there is no clear unifying opinion as to why this was so. Justice Kennedy, writing for the majority, found that the prayers were coercive in nature and therefore unconstitutional. Justices Blackmun and Stevens looked to *Engel*'s "purpose" test as a basis for their decision, and Justices O'Connor and Souter saw the issue as a matter of government endorsement of religion.

The Justices who dissented—Chief Justice Rehnquist and Justices Scalia, White and Thomas—offered more cohesive reasoning. They did not agree with Justice Kennedy's claim of coercion, stating that in a free society one should be tolerant. Additionally, they argued that the decision in *Lee* was incorrect because it did not depend upon the Constitution, the Founders'intent, tradition, or history, but upon a "psychojourney " (*Lee* 643) that treats students "old enough to vote" as "first-graders" (ibid, 639). "A few citations of '[r]esearch in psychology' that have no particular bearing upon the precise issue here, *ante* at 593, cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing" (ibid, 636).

This case also reveals a split within the religious denominations. Jewish groups were split in *Lee,* with the American Jewish Congress filing an *amicus* brief in support of Weisman, who sought the injunction against prayer at graduation ceremonies, while the National Jewish Commission on Public Affairs, in contrast, filed a brief in support of Lee, the school principal who allowed the prayers. Additionally, the Southern Baptist Convention, the United States Catholic Conference, and Focus on the Family, an

evangelical policy group, filed a brief on behalf of the Petitioner, middle school principal Robert E. Lee.[36] Despite the twelve *amicus* briefs filed by religious and conservative groups on behalf of the Respondent, Daniel Weismann, on behalf of his daughter Deborah (to the total filed on behalf of Lee), the decision surprised the faith traditions that were opposed to *Engel*. Most assumed that after twelve years of Republican appointments to the Supreme Court, the time was ripe to challenge *Engel*; and *Lee v. Weisman* was that case. While the decision in *Lee v. Weisman* was a blow to the agenda of conservative faith groups, their determination to see *Engel* overturned did not diminish.

Santa Fe Independent School District v. Doe (2000)

After their defeat in *Lee v. Weisman,* faith traditions that opposed the *Engel* decision revised their legal argument in *Doe.* In *Santa Fe Independent School District v. Doe,* this new strategy was tested before the Supreme Court. The activity challenged in *Doe* was the reading of a prayer by a student over the speaker system before high school football games. The school district did not argue the case in the context of the Establishment Clause; instead, they argued that it would be in violation of the students' free speech if the prayer was not allowed.[37] The Court did not agree with this argument, finding that the prayer was attributable to the state because the prayer was offered "on school property, at school-sponsored events, over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer" (*Doe,*

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[36] Retrieved on April 1, 2007 from The First Amendment Center, http://www.firstamendmentcenter.org/faclibrary/case. aspx?case=*Lee v.Weisman*

[37] Retrieved April 1, 2007 from the First Amendment Center, http://www.firstamendmentcenter.org/faclibrary/casesummary. aspx?case =Santa _Fe_School_v_*Doe*.

290). The Court argued that the invocations at the beginning of the games had been decidedly religious; therefore their only purpose must have been a religious one. Further, a student leader is a representative of the school, thus establishing government sponsorship of a religious activity. At the heart of the Court's decision was the finding that the district did not separate itself from the religious content of the invocations, resulting in both perceived and actual endorsement of religion as defined in *Lee*. Justices Rehnquist, Scalia and Thomas dissented in the case, accusing the majority of "bristl[ing] with hostility to all things religious in public life" (*Doe*, 318).

The only organization to file an *amicus* briefs in this case was the Rutherford Institute on behalf of Doe. The decision was supported by the American Civil Liberties Union and the American Jewish Congress. While it did not file *amicus* briefs, the American Center for Law and Justice, a conservative legal think tank, supported the school district in this case as did the Family Research Council (Mauro 1999, 2000).

Teaching Religious Principles in Public School

The main focus of most cases involving religion in public schools centers around overt religious activity involving public school children. However, some Establishment Clause cases that came before the Supreme Court involved religious activity which was not directly related to specific religious activity; but directed towards the teaching of Creationism as an alternative to evolutionary theory in science classes.

***Epperson v. Arkansas* (1968)**

Susan Epperson, a public school teacher in Little Rock, Arkansas, challenged the "anti-evolution" statute then on Arkansas' books. The statute, adopted in 1928, made it unlawful for an Arkansas public school teacher "to teach the theory or doctrine that

mankind ascended or descended from a lower order of animals," or "to adopt or use in any such institution a textbook that teaches" evolution (Ark. Stat. Ann. §§ 80-1627, 80-1628 (1960 Repl. Vol.)). Dismissing the state's assertion that the law had never been enforced, the Supreme Court found that the law was unconstitutional on the grounds that it violated the First Amendment. The Court ruled that "the overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group" (*Epperson*, 103). Justice Fortas, writing for the majority, asserted that the Constitution requires that the state not be hostile towards religion or non-religion. He argued that the law, in requiring that only creationism be taught in public schools, was a clear violation of the Establishment Clause as it preferred religion to non-religion when "tailored" teaching to the "principles or prohibitions" of religious teachings (*Epperson*, 106).

There were three concurring opinions in this case. Justice Black argued that the case should have struck down the law as a violation of the Fourteenth Amendment's Due Process Clause as the law was too vague to determine if and when it had been violated; or as Justice Black argued, the case should be remanded, or sent back, to Arkansas to clarify the actual meaning of the law before a decision by the Supreme Court could be entered. Justice Harlan wrote a short concurrence taking the Arkansas Supreme Court to task for not fixing the problem; in essence, "passing the buck" to the U.S. Supreme Court (ibid, 115). Finally, Justice Stewart argued to overturn the law on free speech grounds. He found that the law which made it a criminal offense to teach evolution to be the flaw,

stating that states are free to set up any curriculum that they choose. However, they are not free to criminalize the dissemination of knowledge that violates free speech. "Since I believe that no State could constitutionally forbid a teacher "to mention Darwin's theory at all," and since Arkansas may, or may not, have done just that, I conclude that the statute before us is so vague as to be invalid under the Fourteenth Amendment" (ibid, 116).

It is interesting that this case was a 9-0 decision; however, three Justices were compelled to write opinions that did not find for Epperson on religious grounds. Another interesting point is that this is one of the rare occasions on which the party bringing the action is not a student, but an adult teacher. The Court responded in kind by not discussing the coercion aspect of religion in schools, even though if only creationism is taught to the students there is a coercion factor to the law. Otherwise, this case made clear that the Court was ready to step in and ensure that the religious freedoms were not being violated by the core curriculum inside the classroom.

Edwards v. Aguillard (1987)

Much like *Epperson*, *Edwards v. Aguillard* involved the teaching of creation science in biology classes. Creationism or creation science is the theory that a supreme being created mankind, generally as outlined in the Book of Genesis of the Jewish Torah and Christian Bible. The appellants in this case were a group of parents, teachers and religious leaders who challenged the Louisiana "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act" La.Rev.Stat.Ann. §§ 17:286.1-17:286.7 (West 1982), on the grounds that it violated the Establishment Clause. Unlike *Epperson*, the Louisiana Law in question in *Edwards* did not require the

teaching of creationism or even evolution. What it did require was that whenever one concept was mentioned or taught, there was an obligation to discuss the other as well.

The Supreme Court agreed with the appellants, finding that the law violated all three prongs of the *Lemon* Test. Writing for the majority, Justice Brennan argued that the first prong, is the purpose of the law to advance or prohibit religion, was clearly violated as the purpose of the law was to promote a religious view (*Edwards*, 585). Citing *Epperson*, Justice Brennan found that the state had "identified no clear secular purpose for the Louisiana Act" (ibid). The second prong was violated because the primary effect of the law was clearly to introduce creationism into the classroom. This is unconstitutional, as creationism, according to the Court, is a religious viewpoint. Finally, the third prong was also violated because of the entanglement resulting where the law sought "the symbolic and financial support of government to achieve a religious purpose" (ibid, 597).

In his dissent, Justice Scalia argued that whether the Court used the *Lemon* Test, or preferably not, the Louisiana law was constitutional. First, he explained that it passed the first prong of the *Lemon* Test, because the law itself "*defines* 'creation science' as "the *scientific evidences* for creation and inferences from those s*cientific evidences*" (ibid, 611-612). This definition, according to Justice Scalia, does not advance or prohibit a religious idea, but an academic one. Further he argues that

> we will not presume that a law's purpose is to advance religion merely because it "'happens to coincide or harmonize with the tenets of some or all religions,'" . . . or because it benefits religion, even substantially. We have, for example, turned back Establishment Clause challenges to restrictions on abortion funding, *Harris v. McRae, supra,* and to Sunday closing laws, *McGowan v. Maryland, supra,* despite the fact that both "agre[e] with the dictates of [some] Judaeo-Christian religions," *id.* at 442 (615).

Justice Scalia also argued that the law passed the second prong because the law states that its intent is to advance academic freedom and that freedom includes the "*students'* freedom from *indoctrination.* The legislature wanted to ensure that students would be free to decide for themselves how life began, based upon a fair and balanced presentation of the scientific evidence" (ibid, 627). Scalia further claimed that it is impossible for the Court to determine legislative intent beyond that written in the law because each legislature may have a different reason to vote for or against the law. Whose intent, he asked, is to be used by the Court (ibid, 637)? For the third prong, Scalia claimed that there was no entanglement because there is no legal penalty for discussing or not discussing either theory in the classroom. The state does not involve itself any further into the classroom or educational considerations.

Despite Justice Scalia's strong objection, seven of the Justices sided with Justice Brennan in this case. *Everson,* in conjunction with *Epperson,* clearly indicated that the Court would be vigilant against a state in its attempt to reintroduce religion into the public classroom by the back door. The Court would not tolerate the renaming of religious views as something mainstream in an attempt to coerce students into accepting religious beliefs.

In reviewing these cases, it is clear that, for the most part, faith traditions follow the stance of their religious creed on the relationship between church and state in school prayer cases. Faith traditions that most stringently separate church and state—Presbyterian and Baptist—have voiced the greatest support for the decisions of *Engel* and *Schempp.* However, the faith traditions that advocate more of a working relationship between church and state have not supported these decisions. These findings are not

absolute because more recently, the Southern Baptist Convention, adamant separatists in their creed, have filed *amicus* briefs in support of school prayer.

By exploring the reactions of the faith traditions to the school prayer and religious instruction cases, what is presented in this chapter is a better understanding of these faiths in action. It is one thing to claim a belief regarding the relationship between church and state; it is quite another thing to view how the belief is acted upon in real life situations. In the early cases, the reaction of the various faith traditions to these decisions followed the beliefs outlined in the faiths' creed; however, in the more recent cases, some faith traditions—most notably certain Baptist groups—have supported a position inconsistent with their faiths' creeds. Those who changed their views seem to be the more conservative side within the faith tradition. This leads to the conclusion that school prayer and religious instruction cases are no longer perceived a religion versus religion issue, but a religion versus secular issue.

The Creeds and Justices' Voting Behavior

In the school prayer cases, the reactions of the faith traditions are fairly consistent with their respective creeds. However, do Justices of the Supreme Court similarly adhere to a pattern of decision-making based upon their own acknowledged faith tradition? The answer is "no, not really." Supreme Court Justices have much more to consider than their faith traditions, the Constitution, *stare decisis*, political opinions and societal trends (Epstein and Knight, 1998). Additionally, it can be argued that the Court would be exhibiting a certain amount of hypocrisy if the Justices handed down decisions that limited public expressions of religion, while relying on their religious creeds to determine those findings. This analysis does not argue that because a Justice voted as their creed

would direct that the religious creed was the only factor the Justice considered. The purpose of this analysis is to seek patterns and similarities in judicial voting that may shed light on the empirical analysis that will be presented in Chapters 6 and 7. The votes of the Justices will be reviewed from two directions, first by case and then by faith tradition.

It is clear from Tables 5.2, which outlines the Justices by faith tradition, and 5.3, which outlines the judicial voting behavior by case, that in the early school prayer cases, the Justices voted in a manner consistent their professed creeds. In any given case, only Justices Brennan, a Catholic, and Stewart, an Episcopalian, routinely voted in a manner inconsistent with their faith traditions. Twenty years later, in *Wallace v. Jaffree*, a trend away from voting consistently with faith traditions appears. These later cases show an average of three Justices, with up to four Justices in *Wallace,* voting in a manner inconsistent with their faith tradition's creed. Chief Justice Rehnquist, a Lutheran, voted in line with the *Asbury Confessional* in each prayer case.

Insert Tables 5.2 and 5.3 About Here

Overall, there are three faith traditions that had complete compliance from the Justices professing those faiths: Baptist, Methodist, and general Protestant. The Presbyterian Justices were the fourth most consistent in voting with their faith tradition when prayer in public schools was in question. Of the four Presbyterian Justices, Chief Justice Burger's vote in *Wallace v. Jaffree* was out of line with his faith tradition. The Jewish Justices were the next most consistent group among the faith traditions. Of the five Episcopalian Justices, Justices Stewart and White consistently voted contrary to the Episcopal position regarding church and state. In cases involving public school prayer,

Catholic Justices were split. Of the four Catholic Justices, Justices Brennan and Kennedy systematically voted in a manner inconsistent with the Catholic Church's stance on matters of church and state.

Although it gives insight into the relationship between religious creeds and Court decisions, a breakdown of the analysis by creed can be somewhat misleading for several reasons. First, it can be misleading when there is only one Justice that represents a faith tradition. Chief Justice Rehnquist is the only Lutheran to serve on the Supreme Court, while Justice Blackmun is the only Methodist and Justice Black the only Baptist in this study. Therefore it is not surprising that these three faiths are at the extremes of consistent and inconsistent voting with regards to the creed of the tradition. A larger number of representatives for each denomination could well change the conclusions from this study. For example, Justice Brennan, a Catholic, voted in a manner inconsistent with the stance of the Catholic Church numerous times. However, as he was not the only Catholic to vote on school prayer issues, the votes of the other Catholic Justices counterbalanced Justice Brennan's votes. This drives the conclusion that Catholic Justices vote with higher consistency in accordance with their creed than do Lutherans.

Second, these seven school prayer cases are only a sample of religious freedom cases heard by the Supreme Court. This could lead to an overstatement of the relationship between faith traditions and voting in all religion cases. However, there is insight to be gained here, as a number of the Justices are acknowledged members of faith traditions (Catholicism, Episcopalianism, and Presbyterianism) with more pronounced positions on religious rights.

Conclusion

Since the ratification of the Constitution in 1789, America has struggled to find the balance between church and state. In the first century of its religious rights history, this issue was directly addressed by the Supreme Court in only a few cases. However, in the 1960s the Court began to hand down decisions that limited prayer in public schools. These seven school prayer and religious instruction cases provide an important background to our understanding of how the various faith traditions view church-state relations, and whether Supreme Court Justices vote in a manner that is consistent with their professed faith traditions.

A survey of faith traditions finds that the traditions that originated and flourished in Europe tend to have the most accommodationist view of the relationship between church and state. Historically, the Jewish faith was the first to view religious and secular authority as two separate spheres, with the religious sphere informing the sphere of the state. Various attempts have been made to outline basic Jewish beliefs, and they are consistently silent on church-state relations, but admonish Jews to support the civil state and to not rebel against it. The Catholic and Methodist traditions maintain that the religious sphere should inform the state, either directly or indirectly, through votes, but the state should stay out of religion. Lutherans advocate a functional interaction between religion and civil authorities.

The Baptists, Unitarians, and, by extension, the Generally Protestant also state specifically that there should be a separation between church and state. Presbyterians have a similar sentiment in their creed; however, they also aver that the government should protect religion. What all these creeds, Protestant, Catholic or Jewish, tend to

have in common is their belief that the government should not have any right of intervention into church matters.

When it comes to the votes of the Justices on cases that relate to school prayer, most Justices consistently vote in agreement with their creeds. This analysis does not assume that a vote in line with a creed is based upon that creed. The Justices belonging to faith traditions that separate church and state in absolute terms tend to be more liberal in general; while the Justices who are members of more accommodationist creeds tend to be more conservative. These observations would make the votes of these Justices just as political as they are religious, if the votes are not entirely political from the start (Segal and Spaeth, 2002). To bring greater clarity to the analysis of the adherence of Justices to the church/state stance of their faith tradition, the next chapter will explore this study's assumptions in greater detail in the presentation of the hypotheses, research design and data and methods used in this research.

TABLE 5.1. Faith Tradition's Views of Church-State Relations

The Accommodationists	The Separationists
Judaism	Baptist (Southern Baptist Convention)
Lutheran (Evangelical Synod)	Episcopalian
Methodist	General Protestant
Roman Catholic	Presbyterian
	Unitarian

TABLE 5.2. The Faith Traditions of the Justices

Jewish	**Episcopalian**
Frankfurter	Jackson
Goldberg	Marshall
Fortas	White
Ginsberg	Stewart
Breyer	Stevens
	O'Connor
Roman Catholic	Souter
Murphy	
Brennan	**General Protestant**
Scalia	Minton
Kennedy	Reed
Thomas	Warren
Presbyterian	**Baptist**
Clark	Black
Douglas	
Harlan	**Methodist**
Powell	Vincent
Burger	Whittaker
	Blackmun
Unitarian	
Burton	**Lutheran**
Rutledge	Rehnquist

TABLE 5.3. The Votes of the Justices in Public School Prayer Cases, 1962-2000

Case Name (Year)	Justice Who Voted with Their Faith Tradition	Justices Who Voted Against Their Faith Tradition
Engel v. Vitale (1962): Eliminated school sponsored prayers as a violation of the Establishment Clause.	Warren (Pt) Black (B) Douglas (P) Clark (P) Harlan (P)	Brennan (C) White (E)
Abington School District v. Schempp (1963): Eliminated Lord's Prayer and Bible readings in public schools as a violation of the Establishment Clause	Warren (Pt) Douglas (P) Clark (P) Harlan (P) Goldberg (J) Black (B)	Brennan (C) Stewart (E)
Epperson v. Arkansas (1968): Eliminated anti-evolution laws under the Establishment Clause.	Warren (Pt) Black (B) Douglas (P) Harlan (P) Fortas (J)	Brennan (C) Stewart (E) White (E) Marshall (E)
Wallace v. Jaffree (1985): Moment of silence defined to include prayer and is unconstitutional.	Stevens (Pt) Powell (P) O'Connor (E) Marshall (E) Blackmun (M)	Burger (P) Brennan (C) Rehnquist (L) White (E)
Edwards v. Aguillard (1987): Teaching creationism in the classroom is unconstitutional.	White (E) Marshall (E) Blackmun (M) Powell (P) Stevens (Pt) Scalia (C) O'Connor (E)	Brennan (C) Rehnquist (L)
Lee v. Weisman (1992): Prayers given at middle/high school graduation invocations and benedictions are unconstitutional.	Blackmun (M) Stevens (Pt) O'Connor (E) Souter (E) Scalia (C) Thomas (C)	Rehnquist (L) Kennedy (C) White (E)
Santa Fe Independent School District v. Doe (2000): Prayers at high school sponsored events are unconstitutional.	Stevens (Pt) O'Connor (E) Souter (E) Ginsberg (J) Breyer (J) Scalia (C) Thomas (C)	Rehnquist (L) Kennedy (C)

Legend: J= Jewish, C= Catholic, P=Presbyterian, E=Episcopal, B= Baptist, Pt=General Protestant, M= Methodist, L= Lutheran.

Chapter 6

RESEARCH DESIGN AND METHODS

Introduction

This study uses the framework of social background theory in asking to what extent, if any, do the faith traditions of a U.S. Supreme Court Justice influence his or her votes in freedom of religion cases? Focusing on the Establishment Clause and Free Exercise Clause cases from the Vinson Court era (1946-1953) through the Rehnquist Court era (1986-2005), this study analyzes the Justices' votes in religion cases relative to the teachings of their faith tradition regarding religious freedom. In short, this investigation attempts to determine the extent to which Supreme Court Justices' votes are in accordance with the teachings of their faith tradition. Based on the assumption that religion is a very personal belief, and that freedom of religion cases may be more likely to evoke a religiously-influenced response from a Justice, this study focuses on freedom of religion cases. The Supreme Court decides cases in a broad array of legal policy areas and students of Supreme Court behavior would not expect a Justice's faith tradition to influence his or her behavior in cases involving separation of powers, federalism, or economic issues.

As outlined in Chapter 3, this study is different from previous studies in several significant ways. First, in earlier studies, faith traditions were not broken out. Protestant categories were lumped together and, if divided at all, the faiths were still grouped together into two broad categories (e.g., High Income/High Standing versus Low Income/Low Standing, or Evangelical versus Mainline). Catholicism usually maintained its own category, or was sometimes lumped together with Judaism in a Protestant versus

some other type of coding scheme. Whether Judaism was included at all tended to be a haphazard matter in previous research. It is important that each faith tradition that has been represented on the Court be represented in scholarship that purports to study the influence of religion on judicial decision-making. Judaism has a world view unique from other faith traditions and scholarship should take that into consideration by giving a voice to the Justices on the Supreme Court from the Jewish faith tradition. Therefore, this study includes Judaism as its own separate and unique category. Further, this study also breaks out the different individual Protestant faith traditions that were represented on the bench during the timeframe of the study.

Unlike prior research, this study compares and analyzes the Supreme Court Justices' voting behavior to the teachings of their faith tradition. The purpose of this strategy is to determine whether statistically significant relationships exist between the Justices' votes in religion cases and the teachings of the Justices' faith traditions. For example, this study will examine whether Roman Catholic Justices vote in a manner that accommodates religion in Establishment Clause cases. However, a question that is also of scholarly interest is if these Roman Catholic Justices vote to accommodate religion, are they also voting in a manner that is consistent with the accommodationist teachings of the Roman Catholic Church? If such a finding holds, then it would highlight a possibility that the teachings of the Roman Catholic Church could inform the Roman Catholic Justices' accommodationist views. This association between religion and the informing of a viewpoint is not overstated. Songer and Tabrizi (1999) found that state supreme court evangelical justices voted in a manner consistent with the teachings and worldview of evangelical faith traditions. In another study related to Songer and Tabrizi's (1999)

findings, Whitehead (2008) interviewed twenty-four federal and state appellate judges. Although his study focused on judicial attitudes towards the "rule of law" in their decision-making, Whitehead (2008) found that the judges were very open about the influence of their religious faith on their judicial decision-making. Unfortunately, Whitehead's (2008) study did not include type of religion as a variable; however, his study quoted an important observation from a federal judge:

> One federal judge provides a vivid example of this process [rogue attitudes in judicial decision-making] at work in a major Establishment Clause case. When I asked him about his decision-making process in this case, he begins by talking about how he has 'always been a firm believer' in a particular 'separationist' view of the Establishment Clause because of his personal background as a 'protestant free-thinker'. He also recalls his own antipathy to some common examples of civic religion, including the words 'In God We Trust' on coins. 'So,' he says, 'I came to that case with . . . that in my . . . cultural inventory." As a result, in characterizing his decision in this one particular case, he concedes that 'I probably did let my "ingrained" beliefs dictate the result.' Not that he didn't research the relevant legal authorities. To the contrary, he recalls that he 'read every case in the country on the subject,' including those that decided the issue the other way. However, as he recalls he 'couldn't buy' their logic because of his own upbringing and personal beliefs (Whitehead 2008, 42-43).

Second, earlier studies focused almost exclusively upon civil rights and liberties cases, criminal and death penalty cases or economics cases. Only once were other areas of the law used, when pornography and gender discrimination cases were included in the analysis (Songer and Tabrizi 1999). This research breaks with this pattern by reviewing an important issue in American democracy, the freedom of religion. No study to date has examined freedom of religion cases in this manner, and in doing so, the present study will address the utility of the social background model in explaining Supreme Court behavior.

Third, this study takes into consideration Ulmer's (1986) finding that the social

background model is time-bound. This study looks at Supreme Court voting data to determine whether the influence of faith tradition on Supreme Court decision-making has been consistent over time or, as is more likely, has waxed and waned during the past six decades. By examining the data over time, this study uses a much larger timeframe for investigation when compared to most other studies. This study encompasses a period of 64 years—which is only two years shy of Ulmer's (1986) study and about twice as long as the next nearest time-frame (Tate and Sittiwong 1989).

Hypotheses

The research questions for this study stem from earlier social background studies with the intention of expanding upon what earlier scholars have found regarding the influence of individual social backgrounds on the voting behavior of Justices. This study addresses seven research questions based on earlier studies which focus specifically on the individual faith traditions of the Justices, the political ideology of the Justices, and the specific Court on which the Justice served.

Hypothesis 1. Chapter 2 discussed models of Supreme Court behavior other than the social background model. These models included the legal model, the attitudinal model, the strategic account and neo-institutionalist models of judicial behavior. With varying levels of intensity, three of these models assert that political ideology and policy preferences influence Supreme Court decision-making. The social background model does not dispute the influence of policy preferences, and neither does this study. As outlined in Chapter 3, the social background model tries to determine what past experiences are likely to influence the policy preference of the Justice, with many of the studies finding that religion can be a significant indicator in judicial decisions (Nagel

1963; Tate and Sittiwong 1989; Songer and Tabrizi 1999). To that end, the first hypothesis of this study addresses the influence of specific faith traditions upon political ideology.

> **H1**: *The faith tradition of a Justice will influence the political ideology of that Justice.*

Hypotheses 2 and 3. As outlined in Chapter 3, religion is a consistent influence on judicial votes (Nagel 1962; Ulmer 1970; Tate 1981; Tate and Sittiwong 1989; Songer and Tabrizi 1999). However, these studies did not look at religion with sufficient specificity by observing the many Protestant faith traditions. To determine the influence of a specific faith tradition on judicial votes, this study puts forth two main hypotheses:

> **H2:** *The faith tradition of a Justice will influence how a Justice will vote in Establishment Clause cases.*

> **H3:** *The faith tradition of a Justice will influence how a Justice will vote in Free Exercise Clause cases.*

The definition of establishment of religion has been one of the most controversial constitutional questions. Drawing from such sources as Thomas Jefferson's *Letter to the Danbury Baptists* (1802), modern scholars generally accept that the Establishment Clause erects a wall of separation between church and state wherein there is little to no accommodation of religion in the public square. For this study, an Establishment Clause case is defined as a case that arises from a conflict regarding the relationship between church and state, which includes laws in general and economic/social programs. The Establishment Clause cases examined in this study cover the broad areas of prayer and religious instruction in the public schools, state aid to parochial schools, religious displays on governmental property, equal treatment cases, and Establishment Clause cases that arise in other contexts.

Constitutionally, the right of free exercise of religion is the right to practice one's religious faith, as he or she see fit, without interference from the government. The Supreme Court, throughout history, has limited free exercise of religion where it conflicts with civil order or an overriding social good. For this study, cases invoking the Free Exercise clause involve the definition of religion, conscientious objectors and religious exemptions from laws. Free Exercise cases typically involve conflict with the practices of religious minorities.

Hypotheses 4 and 5. As stated earlier, this study does not counter the argument that political ideology influences Supreme Court decision-making; rather, this study presents a competing argument that the attitudinal model is too simplistic and ignores the complexity of Supreme Court policy-making. However, the Justices' policy preferences are an important part of the decision-making equation; therefore, it is an important part of this study's framework and research design. The fourth and fifth hypotheses take into consideration the influence of political ideology in case outcomes relating to the freedom of religion.

> **H4:** *The political ideology of a Justice will influence how a Justice will vote in Establishment Clause cases.*
>
> **H5:** *The political ideology of a Justice will influence how a Justice will vote in Free Exercise cases.*

Hypotheses 6 and 7. Again, this study has pointed out the limitations of the legal model, attitudinal model, strategic account and neo-institutionalism. However, the legal model is the weakest explanatory approach because it completely ignores the issue of judicial discretion, the complexity of human nature and interactions, and the multiple external factors that affect constitutional and statutory interpretation. Additionally,

Supreme Court decision-making appears capricious when the Justices attempt to decide cases based on so-called established legal tests and standards. For example, although the Court reached initial consensus in the use of the *Lemon* and *Sherbert* Tests in deciding Establishment Clause and Free Exercise Clause cases respectively, neither test withstood subsequent scrutiny by a majority of the Justices. The sixth and seventh hypotheses take into consideration the effect of jurisprudence, or the legal model, on the influence of a Justice's faith tradition in freedom of religion cases.

> **H6:** *The Lemon Test will influence how a Justice will vote in Establishment Clause cases.*
>
> **H7:** *The Sherbert Test will influence how a Justice will vote in Free Exercise Clause cases.*

If neo-institutionalists are correct, it is expected that the influence of a Justice's faith tradition will diminish after the establishment of the *Lemon* Test and *Sherbert* Test. It is also expected that the influence of faith traditions will increase again after *Oregon v. Smith* (1990), when the Supreme Court officially ended the use of the *Sherbert* Test. Based on substantive analysis of the Establishment and Free Exercise Clause cases presented in the earlier chapters, however, the results are expected to be insignificant because these tests were never fully accepted by the Court, leaving ample room for the influence of religious beliefs to guide their decision-making.

Hypotheses 8 and 9. Ulmer's 1983 study, "Are Social Background Models Time-Bound?" gives strong support to common-sense idea that what is important in one era of history may not be important in another. Therefore, this study takes into consideration that what issues were important to the Vinson Court may be very different from those that were important to the Rehnquist Court. Therefore, each Court era examined in this

study— namely, the Vinson Court, Warren Court, Burger Court and Rehnquist Court—is considered individually. It is common in public law scholarship to analyze and divide the Supreme Court eras by the leadership of the Chief Justice, as the Chief Justice is the administrative head of the Supreme Court. The Chief Justice has certain powers that other Justices do not have when deciding cases: they lead the discussions in the conference and have the first vote when the Court is making its final decision on the merits of cases. The Chief Justice exerts a certain amount of influence over the ideological and jurisprudential direction of the Court during their tenure (Murphy 1964, 83). However, that influence can be tempered by the context of the influence sought (Danelski 1962) and by the Chief Justice's "desire" and "capacity" to exert such influence (Carp and Stidham 1985, 187). The Chief Justice determines who will write the majority opinion when the Chief Justice is in the majority. Each of the four Courts studied in this paper seems to have its own unique characteristics, which distinguish it from the other Courts.

The Vinson Court was the first Court to view the religion clauses in the First Amendment as clauses in its own right. They were not extensions of contract law or free speech law. Therefore, as a transitional Court addressing religious freedom cases, it would be assumed that the Vinson Court would have a mixed record regarding its direction as an accommodationist or separationist Court. Additionally, the Vinson Court's views on Free Exercise of religion are assumed to be equally mixed, as the prevailing view in America during that time period was that mainline faiths enjoyed more acceptance than non-mainline beliefs. The Vinson Court also ruled in favor of free exercise rights in the many Jehovah's Witness cases they heard. The Warren Court was quite liberal in its civil liberties views. For this reason, one would expect to find that the

Warren Court maintained an overall separationist stance in establishment cases and an expansionist view of free exercise of religion (Kauper 1968). When the Burger Court began, the expectation was that most of the Warren Court rulings would be overturned; however, that was never realized (Keck 2004; Kobylka 1989, 546). Finally, the Rehnquist Court is mainly viewed as a conservative Court with a consistent sympathy towards the accommodationist view of church and state relations; as well as having a limiting stance on free exercise. Therefore, the eighth and ninth hypotheses are:

> **H8:** *The different Court eras will influence Justices' votes in Establishment Clause cases.*
>
> **H9:** *The different Court eras will influence Justices' votes in Free Exercise Cases.*

Data and Operationalization of Variables

The data for the analysis in this study is based on the dataset, *The Judicial Research Initiative: U.S. Supreme Court Databases,* established by Harold Spaeth, unless otherwise noted.[38] There are individual datasets for the Warren Court, Burger Court and Rehnquist Court. Further, each of these three Courts has a "flipped" dataset provided for researchers. These are case-based datasets which have been manipulated "or flipped" to become Justice-based datasets. This is important to note, as the non-flipped database is a case-centered database wherein the votes of the individual Justices are coded as separate independent variables. This study uses the vote of the individual Justices as its dependent variable; therefore, this study requires that the main database be flipped from a case-centered database to a justice-centered database, wherein each case will have 9 observations, or votes, one from each Justice. The Vinson Court database is not a pre-

[38] Although there is a universal dataset that includes all cases from 1953 (the Warren Court) through 2007 (the Roberts Court to date), this dataset is based upon the cases heard in this time period and is not based upon the individual Justices.

flipped database and, therefore, must be flipped using the procedure outlined by Collins (2006). All databases are flipped and extraneous variables were removed and combined into one database. In this final form, each religious freedom case heard by the Supreme Court from 1946 to 2005 have nine observations, once for each Justice's vote on the case.

Dependent Variables. Hypothesis 1 states that the faith tradition of a Justice will be influenced by political ideology. The dependent variable for Hypothesis 1 is "Political Ideology" of the Justice. Political ideology is measured by an ideological score devised by Segal and Epstein (2005). Their ideological score is based on the voting behavior of Supreme Court Justices in economic and civil liberty cases during the Justices' tenure on the Court. The ideology score is a continuous value variable that falls between 0 (most conservative) and 1 (most liberal). If it is determined that faith traditions influence political ideology, as is expected, the political ideology variable becomes the independent variable for the other remaining hypotheses. It is important to note that Segal and Epstein did not include religion cases when calculating their ideology index.

The dependent variable for the other six hypotheses will be the "Vote" of the Justice in religion cases. The original Spaeth dataset codes the Justices' votes as to whether they voted in the majority Court or dissented in a case. However, this coding is not useful for this study, as it does not indicate if the Justice voted to expand or narrow religious freedom. The Vote variable was recoded to address this concern. Therefore, in an Establishment Clause case, a separationist vote is viewed as a vote in favor of the party challenging the religious entity, practice or opinion. An accommodationist vote is viewed as a vote in favor of the religious entity, practice, or opinion. The "Vote" variable is coded as 1 (separationist outcome) and 0 (accommodationist outcome). A vote to

narrow the free exercise of religion is to vote against the party representing the religious entity, practice or opinion (Vote = 1); and, for the non-religious entity (Vote=0). Voting data were obtained and cross-referenced from four sources: the First Amendment Center, FindLaw, Oyez Project and the U.S. Reports, which reports the full opinions of all U.S. Supreme Court cases.[39]

Independent Variables. There are four independent variables in this study, including faith traditions, the individual Courts, political ideology, and a cross calculation of the Court and faith traditions. The first variable is the faith traditions of the Justices. Nine faith traditions have been represented on the Supreme Court since 1946. They are (with the number of Justices from each faith tradition during the study's time period in parentheses): Jewish (5), Roman Catholic (5), Presbyterian (5), Unitarian (2), Episcopalian (7), general Protestant (3), Baptist (1), Methodist (3), and Lutheran (1). The faith traditions variable is not strictly speaking a single variable. To determine the possible influences of each faith tradition on a Justice's vote in freedom of religion cases, this study sets up nine dummy variables with the following coding: 1 (member of faith tradition) and 0 (not a member of faith tradition). The data for these independent variables were obtained from *The Supreme Court Compendium: Data, Decisions & Developments* (Epstein, et al. 2007).

In order to determine if different Courts voted differently in freedom of religion cases, the second independent variable for the four Court eras was created. Again, as with the faith traditions, dummy variables were created for each Court: Vinson Court, Warren Court, Burger Court and Rehnquist Court. Each Court variable was coded as

[39] See the following websites, www.thefirstamendmentcenter.com, www.findlaw.com, and www.oyez.org.

1=case heard by specific Court, 0=case not heard by that specific Court. For example the Warren Court is coded 1 if the specific case was heard by the Warren Court. Coding the court eras in this manner ensures that the Justices who served on more than one Court are included in the analysis for each Court they were apart. The Vinson Court will be used as the comparison variable as it contains the smallest number of cases, or smallest "N" for each type of religion case. The third independent variable is the ideology score of the Justice.

Based on Ulmer's 1983 study, it is argued in this study that religion has a separate effect on each of the different Courts. In an effort to take into consideration the element of time in these regressions, the first instinct would be to run separate regressions for each Court. In this way, the era of each Court is isolated from all other variables and observations over time can be obtained. However, this could not be done because, for the Vinson Court, free exercise of religion has only 36 observations in the dataset. The Vinson Court heard only four free exercise cases, which is far too few observations to provide any statistical reliability. Instead, this study will use a combination of Chow Test and cross-tabulations to determine the influence of religious faith traditions upon the votes of the Justices. The Chow Test will determine if religious influence is a better indicator of voting direction in one Court more than another. By doing a cross-tabulation, a vote count for each faith tradition in the individual Courts will assist in determining how Justices of each faith tradition voted in religion cases.

Establishment Clause and Free Exercise Clause Cases

This study examines the influence of faith traditions on cases that involve the Establishment Clause and the Free Exercise Clause of the First Amendment. The Spaeth

database codes the "Issue" variable using numeric values; therefore, Establishment cases are coded as either "462" for parochial school aid or religion in public school cases, or "461" for all other Establishment cases. The database codes Free Exercise cases as either "441" for conscientious objector cases or "455" for all other Free Exercise cases.

First, unlike earlier social background studies, this study does includes cases that are unanimous. It is important to use these votes in the study as a Justice may vote with the majority, but against the teaching of his or her faith tradition, while another Justice, who also votes in the majority, is voting in a manner consistent with his or her faith traditions. Earlier social background studies tended to eliminate unanimous decisions on the grounds that they might be an indication that the area of law or facts of the case are so well defined that the Justices cannot dissent regardless of policy preferences (Nagel 1962, Ulmer 1970, Tate 1981). This argument does not apply here, as the Court is usually made up of disparate ideologies and theologies; that is to say, that even when Justices vote in a unanimous manner, at least one Justice is voting against his or her preferences. The argument that the law may hinder a preferential outcome is not convincing in light of the fact that the Supreme Court has never let precedent prevent it from deciding as it wished.

Second, this study excludes some freedom of religion cases. Eliminated are selective service cases that do not have freedom of religion as their main legal question. Selective service cases were maintained in the free exercise variable if the Court was addressing the religious claim of the original plaintiff. However, if the Court addressed a legal issue of the selective service case that was based upon an administrative or legal problem then the case was excluded from the dataset. For example, in the case *Parisi v.*

Davidson (1972) the legal issue before the Supreme Court was whether a federal district court could hear Parisi's habeas corpus claim while Parisi's court marshal was still pending. Since the *Parisi* case was a question of habeas corpus rights, and not religious rights, this case was removed from the dataset.

Third, some cases were listed as raising both Establishment and Free Exercise Clause issues. If the Court addressed both issues in the majority opinion then the case was listed twice, once coded as a Free Exercise case and once coded as an Establishment case. Fourth, if the Court combined two or more cases into one hearing, each case was listed separately in the dataset as long as the main legal question dealt with freedom of religion. Fifth, all cases where the Supreme Court refused to hear a case or the Court delivered a per curium opinion were eliminated from the dataset.[40] Only cases that received a full hearing and had an individual vote count were included in the dataset. Finally, all cases that raised legal questions other than freedom of religion were also eliminated from the dataset; for example, labor and free speech cases. Cases involving other legal questions, where a party happened to be religious, will not be considered.[41]

Methods

As stated earlier, the analytical model used in this study is social background theory; however, some methodological issues must be addressed, given the nature of the variable coding. For Hypothesis I, the dependent variable is Political Ideology; therefore, a standard linear regression technique will be used to determine the influence of the

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[40] Per Curium means "by the court as a whole" (*Black's Law Dictionary* 2004, 1172). A per curium opinion is "an opinion handed down by an appellate court without identifying the individual judge who write the opinion—Sometimes shorted to per curium" (ibid, 1125).

[41] For example, *Taylor v. Mississippi,* 319 U.S. 58 (1943), speech; *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221 (1987), press; *Bender v. Williamsport Area School District,* 475 U.S. 534 (1986) standing.

specific faith traditions upon a Justice's political ideology. Hypothesis I will not be affected by the challenges of the dataset as it will use the universal dataset with 1,217 observations.

For Hypotheses 2 through 7, the dependent variable "Vote" is a dichotomous one, which renders linear regression inappropriate. The dataset will be divided by area of law (Establishment and Free Exercise) and by Court (Vinson Court, Warren Court, Burger Court, Rehnquist Court). The main challenge of the dataset is that breaking out the two areas of law and the nine faith traditions creates variables that contain very small Ns. Small observation numbers lead to multicollinarity issues as well as questionable statistical regression results. Therefore, standard logit or probit regression analysis will not be appropriate.

As an alternative, this study will use a mixed qualitative analysis approach to the dataset. Hypotheses 2 and 3, which theorize the influence of a Justice's faith tradition in voting behavior, will be determined by using the Chow test. The Chow test determines the goodness of fit of a model before and after the occurrence of an event (Richards and Kritzer 2002; Kritzer and Richards, 2003). For example, does the faith tradition of a Justice exert more influence before the establishment of the *Lemon* test or after the establishment of the *Lemon* Test, or does the faith tradition exert more influence during the Vinson Court than the Warren Court. In this study, the Chow test will be used to determine the influence of faith traditions on judicial decision-making before and after the *Lemon* Test, before and after the *Sherbert* test, and for each of the four Courts in this study. In each of these tests, the multiple faith traditions are independent variables thus giving multiple views of any religious influence on judicial decision-making.

Acceptance or rejection of these two hypotheses will be based upon any patterns that emerge, or do not emerge, from the Chow tests. The acceptance of Hypotheses 4 through 7 will be determined in a similar manner to Hypotheses 2 and 3. In the Chow test the political ideology of the Justice will be included as an independent variable.

Finally, again due to the small Ns found in this study, Hypotheses 8 and 9 will be analyzed using cross-tabulations. Although cross-tabulation is not a sophisticated analysis for these hypotheses, it will provide a clearer, more accurate, view of the influence each Court had on judicial votes. The use of logistic analysis or the Chow Test in this instance would yield misleading results.

The relationship between the vote of the Justice and the independent variables, will be tested by the significance values calculated by STATA statistical software. The program SPost will be used to aid in the post-estimation analysis of the regression models. The Chow Test method used in this study is outlined in Appendix C of Richards and Kritzer (2002, 319). This method calculates the chi-squared by running the logit regression for all cases, for cases before the break (e.g., *Lemon* Test) and for cases after the break. The -2log likelihood of the before and after regression is subtracted from the -2log likelihood of all cases. Once calculated, the chi-square value aids in determining the goodness of fit of the model and the determination of the influence of faith traditions for each Court and in conjunction with the *Lemon* Test and the *Sherbert* Test.

The predictive probabilities analysis will also be used, but, again, small Ns are an issue. The *estsimp* command in Stata cannot be used because when the parameters are expanded, the small-N cannot create a positive definite matrix. Therefore, this study will use the command *prvalue* and calculate the predicted probability for each type of Justice.

For example, individual calculations will be performed on a conservative, moderate, and liberal Justice from each faith tradition and in each area of law. This analysis gives the probability that the Justice will vote to expand freedom of religion, given specific restrictions to the independent variables in the categories of all freedom of religion cases, free exercise cases and establishment cases, separately.

Expectations of Findings

Based upon past scholarship, several findings are expected from this study. First, the Justices' faith traditions are expected to have a statistically significant influence upon their political ideology. Second, political ideology is expected to be a significant indicator of judicial votes in both the areas of free exercise of religion and the establishment of religion. Most scholars today agree that political ideology is a strong indicator of judicial voting, with variations in votes being caused by the social backgrounds of the Justices, rational choice behavior, or small group dynamics. Third, based upon the findings of earlier social background studies, it is expected that the faith traditions of the Justices will also be a significant indicator of judicial voting in both types of freedom of religion cases. As the Protestant faith traditions are defined into their own variables, it would not be surprising to find that some faith traditions will have greater influence than others. Further, it is expected that Justices of some faith traditions will adhere to their faith's teachings more closely than Justices of other traditions.

It is expected that jurisprudence will have a dampening effect on the influence of faith traditions. The significance of the faith tradition variables will decrease on cases that occur after the establishment of the *Lemon* Test and the *Sherbert* Test. However, the change is expected to be minimal. Although the Court established these tests to aid in the

freedom of religion decisions, from their inception the tests were unpopular with the Justices and were not consistently applied to freedom of religion cases. Therefore, while these tests established a framework for religious freedom cases and outlined constitutional arguments in church-state relations, they did not dampen religious influence as much as might be expected. The inconsistency of the application of the tests and the outright opposition to their existence left sufficient room for personal religious beliefs to influence decision-making. If the tests had been consistently applied to religious freedom cases, there would have been very little room for personal beliefs and a more profound alteration in the degree of religious influence would be found.

Finally, it is expected that the identity of the Court which heard the case, as designated by the Chief Justice, will be a statistically significant factor in judicial decision-making. It is clear that the Warren Court viewed questions raised by the Establishment Clause and the Free Exercise Clause in a different light than did the Rehnquist Court. Therefore, it is to be expected that the Warren Court would vote in a more separationist and pro-minority faith manner than the Rehnquist Court. Similarly, faith traditions may have more influence on one Court than on another, thought it is not clear if faith traditions would have less influence on the Warren Court than the Rehnquist Court. Faith traditions have various stances on the question of religion and politics, and it may be more of a matter of which faiths are represented on the Bench than the political persuasion of the Court. However, the strategic choice model may offer another politically motivated reason for judicial voting behavior. Justices from a minority faith tradition may find a kindred spirit with the legal claims of other minority faiths and vote

in a supportive manner. These important questions will be systematically addressed in the next chapter.

Chapter 7

FINDINGS AND ANALYSIS

Introduction

This dissertation seeks to assess the influence of a Justice's faith tradition on the decision-making process in freedom of religion cases. To accomplish this research objective, the social background model and a statistical analysis of individual faith traditions are applied to judicial votes in freedom of religion cases. This study makes an original contribution to the understanding of Supreme Court decision-making on two levels: (1) it uses social background theory as the framework for understanding Supreme Court decision-making in freedom of religion cases, and (2) it uses the research to investigate the influence specific faith traditions exert on Supreme Court decision-making in freedom of religion cases. The main hypothesis of this study is that the faith traditions of the Justices are likely to influence their votes in freedom of religion cases, even when controlling for the Justices' political ideology. This hypothesis does not exclude the possibility that individual faith traditions will vary in their influence on the voting behavior of Justices. Further, this hypothesis recognizes that some faith traditions are likely to influence the vote in Establishment Clause cases, while others are likely to influence Free Exercise Clause cases.

In this chapter, the analysis begins with an explanation of the methodological techniques used to test the hypotheses outlined in Chapter 6. Next, given the dominance of the attitudinal model in the judicial decision-making literature, linear regression is used to test whether the political ideology of the Justices is correlated with the Justices' faith traditions. Two sets of logistic regression analyses are used to test the hypotheses

presented in Chapter 6 for Establishment Clause and Free Exercise Clause cases. These tests used logistic regression to determine whether the political ideology and the faith traditions of the Justices are correlated with their votes in freedom of religion cases. The effects of political ideology and faith tradition on the *Lemon* Test and the *Sherbert* Test are examined by studying the logistic regression results and by using the Chow Test to determine if the independent variables had a greater impact upon votes before or after the creation of each legal test.

A logistic regression and a Chow Test were run on each of the four Courts in this study. The research relied upon logistic regression tests to determine the impact of the Justices' political ideology and faith traditions upon their vote in freedom of religion cases. Further, the Chow Test was used to determine if the independent variables had a greater impact during each Court era compared to the other Courts in the study.

Methods and Procedures

The data are drawn from the universe of freedom of religion cases from the Vinson Court to the end of the Rehnquist Court (1946-2005). This study uses Harold Spaeth's *The Judicial Research Initiative: U.S. Supreme Court Database* (2005), modified in part by adding the political ideology of the Justices from *The Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2005* (Segal and Epstein 2005). The Justices' faith traditions were then obtained form *The Supreme Court Compendium: Data, Decisions & Developments* (Epstein et al. 2007) and added to the dataset. Finally, the variable "Vote" was added and coded according to the vote of the individual Justices for each case in the study. The data were analyzed using a combination of statistical techniques, including linear regression, logistic regression,

contingency table analysis and the Chow Test. One limitation of the data is the small number of observations (Ns) that were generated when the faith traditions were categorized into individual independent variables. Nine faith traditions were reviewed in this study; however, due to the small Ns that resulted, multicollinearity became a problem in data analysis.[42] In an effort to address this effect, the independent variable "General Protestant" was recoded to include the Baptist, Protestant, and Unitarian faith traditions for all of the regression analyses. These faith traditions were combined because of their similar separationist outlook on church-state relations.

Faith Traditions' Influence on Political Ideology

The dominant models of judicial behavior acknowledge that the political ideology of the Supreme Court Justices' will influence judicial votes and the social background model is no exception. A bivariate linear regression was used to test the correlation between the political ideology of the Justices and their faith traditions. The Justices' ideology was measured using the Segal and Cover scores, as updated by Epstein and Segal (2005). The ideological scores for the Justices from 1937 to 2005 are presented in Appendix A. Table 7.1 contains the results of the linear bivariate regression analysis. According to Table 7.1, religion does seem to influence the political ideology of Supreme Court Justices, although the statistical significance varies by faith tradition.

Insert Table 7.1 About Here

[42] Multicollinearity occurs when two or more variables are highly intercorrelated and it becomes difficult to separate out their effects on the dependent variable. "If perfect multicollinearity (linear relationship) exists among the predictors, regression equations become unsolvable." Stata, the statistical program used in this study, solves multicollinarity by dropping the offending variable. "High but not perfect multicollinearity causes more subtle problems" such as higher standard errors, changes in coefficients, and "nonsignificant coefficients despite a high R^2" (Hamilton 2004, 210).

Many of the faith traditions represented on the Supreme Court since the 1940s did, in fact, seem to exert some influence upon the political ideologies of the Justices. Of the five traditions which exert a statistically significant influence on political ideology—Roman Catholic, Presbyterian, Episcopal, Methodist, and Lutheran—each influences ideology in a conservative direction. This is an interesting finding as, when considered collectively during the time period of this study, the Jewish, Roman Catholic, and General Protestant Justices tend to be more liberal than the other Justices. The constant's coefficient indicates influences upon political ideology other than religion and it is statistically significant in a liberal direction. That religion is not the only influence upon a Justice's political ideology is expected, as does the finding that it is statistically significant. Subsequent statistical analyses will determine whether and to what extent these bivariate relationships hold.

Establishment Clause Results

This study now turns its attention to the influence of religion on Supreme Court decision-making in freedom of religion cases by first analyzing the Establishment Clause cases. In Table 7.2, several significant influences upon judicial votes are reported for Establishment cases. Table 7.2 shows the logistic regression coefficients for the three legal tests examined in this study, the *Lemon* Test, the *Sherbert* Test, and the Post-*Sherbert* Test. The "All Cases" column shows the statistical results for all Establishment cases before and after the *Lemon* Test and all Free Exercise cases before and after the *Sherbert* and Post-*Sherbert* Tests. The "Before the Legal Test" column shows the statistical results for all cases before the creation of the specific legal test, while the "After the Legal Test" column includes all cases heard after the creation of the specific

legal test. Table 7.3 shows the logistic regression coefficients for the Establishment Clause cases heard by the Supreme Court. The "All Cases" column shows the statistical results for all Establishment Clause cases. The "Outside Court Era" column shows the statistical results of all cases heard before or after the tenure of the specific Court. The column "During Court Era" lists the statistical results of all cases heard during the tenure of the specific Court.

Insert Tables 7.2 and 7.3 About Here

Not surprisingly, Political Ideology is statistically significant in all of the Establishment Clause groupings as would be expected from earlier studies. For "All Cases" in Tables 7.2 and 7.3, Political Ideology has an effect on judicial decision-making. In Establishment cases, liberal Justices tend to vote in a separationist direction, and conservatives in a more accommodationist direction. However, even when controlling for Political Ideology, some faith traditions also show an impact on judicial decision-making; although, the *Lemon* Test, as an independent variable, is not a significant indicator of judicial decision-making, therefore, it does not seem to matter in "All Cases" if the case was heard before or after the *Lemon* Test. For the *Lemon* Test, the Jewish, Presbyterian and Methodist Justices voted in a separationist manner, while the Lutheran Justice voted in an accommodationist manner. Further, for each of the three Courts, the Jewish, Presbyterian and Methodist Justices continued to vote in a separationist manner, while the lone Lutheran, Chief Justice Rehnquist, continued to vote in an accommodationist manner. The results reported in Table 7.2 indicate that for Jewish, Presbyterian, Methodist, and Lutheran Justices, faith tradition exerted a

statistically significant influence on voting behavior even when controlling for political behavior.

The results reported in Tables 7.2 and 7.3 indicate that Political Ideology is not statistically significant when studied in cases heard before the *Lemon* Test or during the Warren and Rehnquist Court eras. Additionally, the specific Court eras, as an independent variable, are not significant indicators of judicial voting behavior. The Chow Test then checks whether the effects of the independent variables are different between the two sets of observations. Before the creation of the *Lemon* Test, not a single faith tradition seems to have influenced voting behavior; however, after the *Lemon* Test, the Jewish, Presbyterian, and Methodist faith traditions are influential in a separationist manner, while the Lutheran faith is significant in influencing voting behavior in an accommodationist manner, even when controlling for Political Ideology. This voting pattern is consistent with the teachings of the Jewish, Presbyterian, and Lutheran faith traditions, although the Methodist Justices appear to have been voting in a manner inconsistent with the accommodationist teachings of the Methodist faith. The Chow Test is statistically significant at 99%, indicating that faith traditions and ideology became a more influential indicator of judicial voting behavior *after* the *Lemon* Test than before it.[43] This result seems to counter the claims of the legal model that precedents and legal tests are indicators of judicial voting behavior. If the legal model held true, the possible influence of faith traditions upon judicial votes would be expected to diminish after the

[43] Calculating the significance of a Chow Test is fairly easy, if not a little convoluted. First, in the logistic regression for each model – All Cases, before point of interest, and after point of interest – multiply the log likelihood by -2. This is the "Model Chi^2." The degrees freedom (df) is found in the parentheses of the LR measure when "fitstat" is ran in Stata. Applying the -2loglikihood and the df to a Chi^2 distribution table, the statistical significance can be determined. The "Before/After Difference" is calculated by subtracting the -2loglikihoods of the "before the point of interest" and the "after point of interest" from the -2log liklihood of the "all cases". The df is the largest of the dfs of the "before" or "after point of interest". This new loglikihood and df are then applied to the Chi^2 Chart to determine its significance.

creation of the *Lemon* Test. The findings presented in Tables 7.2 and 7.3 indicate otherwise.

Next, this study turns its attention to an examination of the data over time. According to the findings reported in Tables 7.2 and 7.3, the Chow Test indicates for each Court that religious faith is a significant indicator of Supreme Court decision-making. For the Warren and Rehnquist Courts, Political Ideology is not statistically significant during the tenure of these Courts; however, it remains statistically significant during the tenure of the Burger Court. The Vinson Court only heard four Establishment Clause cases, resulting in only 36 observations. Therefore, when logistic regression was applied to the Vinson Court data, the Jewish, Episcopalian, and General Protestant faiths were dropped, resulting in only 22 observations. This number of observations is too limited to allow the drawing of definitive conclusions regarding the findings, and therefore the Vinson Court cases were dropped from the Establishment Clause analysis.

The other three Courts have much larger Ns and therefore certain inferences can be drawn. For each Court, the Chow Test finds that the difference in the before and after calculations are statistically significant at 99% in a one-tailed test. As Table 7.2 indicates, for each Court the faith traditions' coefficients are statistically significant. It can be concluded that the faith traditions of the Justices have been influential from 1946 to date in Establishment Clause cases, while controlling for Political Ideology. It must be emphasized, however, that these results are for the Court as a whole; each logistic regression indicates that some faith traditions seem to exert influence on judicial votes but only during the tenure of certain Courts, such as the Jewish faith during the Rehnquist Court and the Catholic faith during all the Courts except the Burger Court. Other faiths,

such as the Presbyterian and Methodist faiths, seem to exert an influence on judicial votes throughout the different Courts.

Each faith tradition holds to the idea of separation of church and state in matters concerning the establishment of a state religion. However, the Jewish, Catholic, Methodist and Lutheran faiths all promote a degree of influence of faith on public policy which can be described as accommodationist in nature. The statistical results are interesting when compared to the teachings of the faith traditions. For each Court, Chief Justice Rehnquist consistently voted in an accommodationist manner which is consistent with the teachings of the Evangelical Lutheran Church of America. In addition, in each of the "All Cases" regressions, the results for the members of the Jewish and Presbyterian faiths were statistically significant and they seemed to vote in a separationist manner in clear compliance to the teachings of their faith traditions. In contrast, the Methodist outcome is in the separationist direction; which is in opposition to the Methodist denomination.

In comparing each Court model to the other Courts, Table 7.5 indicates that only the Rehnquist Court voted in an accommodationist manner overall. Outside of the Rehnquist Court, the Warren and Burger Courts exhibited strong, separationist voting behavior. The Vinson Court, being the first Court to address Establishment Clause issues, is evenly split between being an accommodationist and separationist Court. These findings are not surprising when examined in light of the place in history occupied by these Courts. The Vinson Court results, despite that Court's position on what was then the cutting edge of Establishment Clause jurisprudence, are mixed. The Warren Court's active expansion of civil liberties and the Burger Court's inability to overturn the Warren

Court precedents are shown by their clear separationist voting patterns, while the Rehnquist Court's conservative activism is displayed in its accommodationist bent.

Insert Table 7.5 About Here

Overall, for the Establishment Clause cases, faith traditions do seem to have influenced the voting behavior of the Supreme Court Justices. This is consistent even when controlling for Political Ideology, a finding which helps to "flesh out" the attitudinal model, since faith traditions may be an important source of attitudes. The legal model is challenged in light of the results for the *Lemon* Test, where faith traditions seem to have a greater influence after the creation of the *Lemon* Test than before it. If the legal model had held, then it would be expected that religious faiths would lose their influence as the Justices applied a legal test or regulation to Establishment cases under the *Lemon* precedent. However, since the *Lemon* Test was contested by members of the Supreme Court, and has been applied inconsistently, eventually all but abandoning it in favor of pursuing other tests, the apparently odd results reported in this chapter are not actually surprising.

Free Exercise Results

The findings reported in Tables 7.2 and 7.4 indicate that some Justices adhere to their faiths' teachings on the separation of church and state while others do not. In Table 7.2, there are two Chow Tests for the *Sherbert* Test. Generally, in Free Exercise cases, liberal Justices tend to vote for the expansionist side while conservative Justices tend to vote for the narrowing of free exercise of religion. The first test is to determine the degree of influence exerted by faith traditions on Free Exercise cases after the creation of the *Sherbert* Test in *Sherbert v. Verner* (1963) and after it was seemingly abandoned in

Employment Division of Oregon v. Smith (1990). The statistical results presented in Table 7.2 are what would be predicted by the Free Exercise legal models—*Sherbert* Test and Post-*Sherbert* Test. In "All Cases" the *Sherbert* Test and Post-*Sherbert* Tests are statistically significant indicators of judicial voting behavior; indicating significant influence after the creation of the *Sherbert* Test and even more significance before *Oregon v. Smith*. After the creation of the *Sherbert* Test, only ideology and the Roman Catholic, Methodist, and Lutheran faiths exerted a statistically significant influence on voting behavior, with liberals, Catholics and Methodists alike voting in a manner that expanded the free exercise of religion; and Chief Justice Rehnquist voting in a manner that limited it. After *Smith*, only the Episcopal faith tradition had a statistically significant influence on judicial voting that expanded the rights of free exercise. From the results presented in Table 7.2, it can be seen that the Chow Test does not indicate much change in the logit coefficients before the *Sherbert* Test compared to the coefficients after the creation of the *Sherbert* Test. The same holds true for before and after *Oregon v. Smith* (1990). This indicates that the impact of faith traditions do not seem to change after *Sherbert* or after *Smith* in Free Exercise cases; which is counter to what Hypothesis 3 states.

Insert Table 7.4 About Here

Table 7.4 presents the logistic regression coefficients for the four Courts in Free Exercise cases. What is immediately apparent in Table 7.4 is that the results for the Courts in Free Exercise cases are not as impressive as those in Establishment cases. Political Ideology was, for the most part, a significant influence on judicial votes, and again, this is not surprising. What is surprising is the lack of influence of faith tradition

on Free Exercise cases. For the Warren, Burger, and Rehnquist Courts, the Chow Test was not significant, which indicates that the political ideology and faith traditions of the Justices explain the outcomes equally well during and outside the tenure of these Courts. For the Vinson Court the Chow Test was significant at 95%, indicating that when the Vinson Court is compared to the other Courts, faith traditions exerted a greater influence in the other three Courts than during the Vinson Court. In the logistic regression of "All Cases," not a single faith tradition was found to be statistically significant, with the exception of the Lutheran faith during the Rehnquist Court. Interestingly, though this coefficient indicates a narrowing of religious free exercise, it is inconsistent with the teachings of the Lutheran faith.

Based on the outcome of the logistic regressions for the cases decided during the four individual Courts, religious faith traditions become more influential. During the Vinson Court, the Jewish, Episcopalian, and Methodist faiths voted in a manner that limited the free exercise of religion. This is inconsistent with the teachings of the Jewish and Methodist faith traditions but consistent with the teachings of the Episcopal faith. During the Warren Court, the Roman Catholic and Episcopal faiths voted in an expansionist manner, which is consistent with the teachings of the Catholic faith but not with the Episcopal faith tradition. During the Burger Court, only the Methodist and Lutheran faiths were significant influencers on voting behavior; however, only the Lutheran Justice voted in a manner inconsistent with their faith traditions. Of the four Courts in this study, religion seems to have exerted the most influence upon the voting behavior of the Rehnquist Court. The Roman Catholic, Presbyterian, Episcopal, Methodist, and Lutheran faiths were all significant indicators of Supreme Court voting

behavior during the Rehnquist Court. During this same time, only the Justices of the Episcopalian and Lutheran faiths voted in a manner inconsistent with those faiths.

In the comparison of each of the Courts to the others, only the Burger Court results stand out in Table 7.5. The Burger Court is the only Court in which the Justices voted to narrow free exercise of religion; the Burger Court era is also the only era which was a significant influence on Free Exercise cases. This is interesting in that if the Courts were analyzed within each historical era, one would expect the Burger Court to vote consistently with the Warren Court, as it did in Establishment cases. The Burger Court was expected to reverse many Warren Court decisions and Table 7.5 indicates that the Burger Court did in matters of free exercise of religion. The Rehnquist Court, being more conservative than the Burger Court, was expected to narrow free exercise rights more than the Burger Court; yet the Justices tended to vote in a more expansionist direction overall, a result very different from the one expected. A further surprise, the Justices of the Vinson Court, despite their mixed voting behavior in Establishment Clause cases, are clearly shown to be expansionists.

Predicted Probabilities of Judicial Votes

Another methodological technique is to calculate the probability that a Justice with specific attributes would vote in a certain way. The probability is based upon how Justices with the same attributes voted in the past. For example, based upon how conservative Presbyterian Justices voted in the past, it is possible to calculate a prediction as to how conservative Presbyterian Justices will vote in the future. Since small Ns continue to be a problem, the *prvalue* command in Stata is used to formulate the

predicted voting probabilities of the Justices with certain political ideologies and faith traditions.

Insert Table 7.6 About Here

Table 7.6 shows that across every denomination, the more conservative the Justice, the less likely it is that he or she will vote to separate church and state. The faith tradition with the lowest likelihood of voting to separate church and state is the Lutheran faith. However, as discussed earlier, very little can be generalized to the Lutheran faith as a whole as Chief Justice Rehnquist was the only representative of the Lutheran faith to sit on the bench to date. Interestingly, Catholic and General Protestant Justices are statistically identical in their probable voting in Establishment cases. Conservative Justices from these two faiths with the second-lowest probability of voting in a separationist manner would vote in a separationist manner approximately 44% of the time, while liberal Justices from these faiths would do so 55% of the time. This finding is a provocative one for two reasons; first, the Catholic faith teaches an accommodationist view of church/state relations and the three faiths of the General Protestant category tend to adhere to a strict separationist view, making rather strange bedfellows of these members of the disparate faiths; and second, it seems that Catholic Justices vote in a manner consistent with the teachings of their faith tradition slightly more often than do General Protestant Justices.

The Justices with the highest probability of voting in a separationist manner are the Methodist Justices. They have the highest probability rate, ranging from conservative Justices voting in a separationist manner 62% of the time to liberal Methodists voting in a similar manner 72% of the time. Justices from the Jewish, Presbyterian, and Episcopal

faiths are shown to be the most likely to vote in a separationist manner. The more conservative members of these faiths would probably vote in a separationist manner one-half of the time, with the more liberal members voting separationist 61%-66% of the time.

In reviewing the predicted probabilities for cases that address Free Exercise of religion, as outlined in Table 7.7, conservative Justices in all faith traditions are more likely vote to expand the Free Exercise of religion than their liberal counterparts. While this pattern is similar to the one in Table 7.4 involving Establishment cases, it demonstrates that Justices of all political persuasions are more willing to vote to expand Free Exercise of religion. There are several other similarities between the predicted probabilities for Establishment cases and Free Exercise cases: first, the Lutheran faith has the lowest probability of voting to limit free exercise of religion; second, Catholic and General Protestant Justices continue to track each other closely; and third, Methodist Justices have the highest probability of voting to limit religious freedom.

Insert Table 7.7 About Here

The Justice with the highest probability of voting to expand Free Exercise are Lutheran, regardless of their political persuasion; however, all previous cautions about generalization of this finding also apply here. With this caveat in mind, the appointment of a moderate or liberal Lutheran Justice will most likely modify these numbers and definitely make them more accurate. Catholic and General Protestant Justices again have very similar, almost identical, outcomes. Conservative Justices from these faith traditions would probably limit free exercise approximately 32% of the time, while their liberal counterparts would vote similarly 42% of the time.

Methodists are, again, the faith tradition that seems more likely to vote to limit religious freedom. Conservative Methodist Justices are an split evenly between voting to expand free exercise of religion and voting to limiting it. Their liberal brethren would most likely vote to limit free exercise 60% of the time. Jewish, Presbyterian, and Episcopal Justices again make up the center, favoring religious free exercise, with conservative Presbyterian Justices voting 37% of the time to expand free exercise to 54.6% for liberal Jewish Justices.

While it would seem counterintuitive that conservative Justices would vote to expand religious free exercise more than liberal Justices, the overall findings are unsurprising. Freedom of conscience is part of the fabric of American social and political thought and it is more readily accepted by Americans, elite or otherwise, that every citizen should be allowed to adhere to his or her own personal belief system. Additionally, all of the faith traditions examined in this study teach a theory of free conscience and voluntary conversion.

There are two possible explanations for the outcome of voting differences in light of the political differences among the Justices. First, conservative Justices may simply adhere to their faith's teachings on Establishment and Free Exercise more closely, and this in turn translates into their voting behavior. Liberal Justices may not necessarily see these cases in terms of religious freedom but in terms of Jefferson's "Strict Wall of Separation" or concerns over forced/involuntary indoctrination or freedom from religion.

A second possible explanation for this outcome is the timing of religious freedom cases. Many early religious freedom cases involved minority faith traditions, such as the Jehovah's Witnesses and the Seventh Day Adventists who sought more religious freedom

in a country dominated by mainline faiths. These types of cases traditionally found liberal Justices voting in favor of free exercise, especially in contrast to the General Protestant Justices, who adhered to a separationist religious view. Table 7.4 indicates that each Court voted in a conservative manner in religious Free Exercise cases. The only change was the degree of conservativeness of each Court. As the Courts became more conservative throughout the tenure of the Burger Court and during the Rehnquist Courts, the Court's view of religious free exercise changed. The more conservative the Court the less minority faith traditions won in cases where the minority religion was requesting an exemption from laws. However, in employment compensation cases and in other types of Free Exercise cases minority faith traditions won. This seems consistent with Davis' (2004) conclusion that the Court is beginning to see religious freedom in terms of equal treatment; where in religious faith can be accommodated in laws by being equally treated (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1992)), but also prevented from gaining religious exemptions from other laws (*Employment Division of Oregon v. Smith* (1990) and *Goldman v. Weinberger* (1986)) (Chopper 2000; McConnell 1990a).

Analysis of the Hypotheses

The findings in this study support most of the hypotheses outlined in Chapter 6, with surprising and less surprising results. Hypothesis 1 stated that the faith tradition of a Justice will influence the political ideology of that Justice. The findings reported in Table 7.1 support Hypothesis 1 for some faith traditions. All faith traditions that had statistically significant results were Protestant; however, not all Protestant faiths were statistically significant. Those faith traditions that influenced political ideology were the

General Protestant, Baptist, Methodist, and Lutheran. The Jewish, Catholic, Presbyterian, Unitarian, and Episcopal faiths did not show any statistical influence upon the political ideology of the Justices who claimed to be members of these faith traditions. Consistent with Hypothesis 1, Table 7.1 results show strong support for this hypothesis. Hypothesis 1 did not assert that all faith traditions were expected to be influential.

Hypotheses 2 and 3 theorized that the faith tradition of the Justices would influence their votes in cases where the establishment of religion and the free exercise of religion were at issue, respectively. The analysis of both hypotheses outlined in Tables 7.2 through 7.4 indicates that there is strong support for Hypothesis 2 but not for Hypothesis 3. Table 7.2 shows that result for the *Lemon* and *Sherbert* Tests, while Table 7.3 outlines results for three of the four Courts used in this study; in each table, religious faith tradition is a strong indicator of judicial voting behavior. As predicted, some faith traditions are more influential than others. Therefore, not only does religion appear to influence judicial decision-making in Establishment Clause cases, it also seems to influence Justices' votes on limiting the accommodation of religion. As in Hypothesis 1, it was theorized that Hypothesis 2 was not defined, as all faith traditions were influential.

Table 7.4 shows that for Free Exercise of religion cases, very few faith traditions were statistically significant in their influence on Supreme Court decision-making by any of the statistical measurements used in this study; and therefore, Hypothesis 3 is not supported. What is interesting about this finding is that each significant faith tradition influences judicial decision-making towards the limitation of free exercise. Earlier, it was theorized that Hypothesis 3 was not defined, as all faith traditions were influential;

therefore, it can be argued that Table 7.4 shows strong support that Hypothesis 3 is supported by the data.

Supreme Court decision-making scholarship posits that political ideology influences the votes of Supreme Court Justices. This study does not argue against the claim and in fact this research relies on the attitudinal model in proposing Hypotheses 4 and 5, which argued that the political ideology of a Justice will influence how that Justice votes in Establishment and Free Exercise cases. Again, Tables 7.2 through 7.4 give strong evidence in support of these two hypotheses. Table 7.3 shows that political ideology is statistically significant in cases involving the establishment of religion in a separationist direction. This means that the more liberal the Justice, the more likely he or she will be to vote in a manner that does not accommodate religion in government policy. This finding is straightforward; therefore, it can be concluded that strong support exists for Hypothesis 4.

The findings in Table 7.4 are quite similar to those of Table 7.3. The influence of Political Ideology on Free Exercise cases is clear; in fact, Political Ideology is the only independent variable that is consistently a significant influence on judicial votes in Free Exercise cases. Further, the results indicate that the more liberal the Justice, the more likely he or she will be to vote in a manner that expands the rights to free exercise of religion. This is consistent with the overwhelming force of scholarship, which holds that political ideology is significant in Supreme Court decision-making. It can therefore be concluded that Table 7.4 shows strong support for Hypothesis 5.

Significant to the social background model is the theory that it is time-bound. What may be significant in one era of Supreme Court decision-making may not be

significant in another. Hypotheses 6 and 7 are designed to test this assumption, to wit, that serving on the different incarnations of the U.S. Supreme Court will influence how Justices vote in Establishment and Free Exercise cases. Again, Tables 7.2 through 7.4 analyze these hypotheses. Table 7.2 indicates that the *Lemon* Test has very little influence upon Supreme Court decision-making in Establishment Clause cases. In fact, faith traditions have a greater influence on votes after the *Lemon* Test was created than before the *Lemon* Test. The findings reported in Table 7.2 do not indicate the same degree of influence from religious faith in the Free Exercise Clause cases. After the creation of the *Sherbert* Test, religious faith does seem to increase its influence on judicial voting; however, after the *Smith* decision, religious influence wanes. Therefore, it can be concluded that there is support for Hypotheses 6 and 7.

As previously discussed, the Chow Test indicates that for Establishment Clause cases, religious faith traditions are a statistically significant indicator of judicial voting behavior for each Court. Therefore, the findings presented in Table 7.3 supports Hypothesis 8. In Free Exercise Clause cases however, there does not seem to be a consistent influence by faith traditions on judicial voting for three of the four Courts examined. Only during the Rehnquist Court does religious faith seem to have a significant impact on the voting behavior of Catholic, Presbyterian, Episcopal, Methodist and Lutheran Justices. This finding does lend some strong support to Hypothesis 9. However, as the evidence of religious influence is inconsistent in all other Courts, Hypothesis 9 is only partially supported by the findings.

Conclusion

The research objective of this dissertation is to determine what influence, if any, the faith traditions of the Supreme Court Justices have on their voting behavior in freedom of religion cases. Controlling for the Justices' ideologies, this study set out to challenge the claims of the attitudinal and neo-institutional models of judicial decision-making that social background factors are irrelevant in explaining Supreme Court voting behavior. The findings of this study are compelling in their demonstration of the success of the social background model and offer support for the analytical usefulness of that framework in understanding Supreme Court voting behavior. This study's findings offer strong evidence that the faith traditions of the Justices seem to exert a statistically significant influence in religious freedom cases. This study finds that even controlling for the Justice's political ideology, his or her faith tradition does exert some influence upon the Justice's decision-making in freedom of religion cases.

The study's findings are compelling in Establishment Clause cases. Religious faith traditions seem to influence the decision-making process of the Justices throughout the tenure of each successive incarnation of the Supreme Court. Most interestingly, this influence increases after the creation of the *Lemon* Test. However, while the findings are compelling, it must be established whether the voting behavior of the Justice is also in line with the teachings of his or her faith tradition. Justices who adhered to the Roman Catholic, Presbyterian, and Lutheran faiths consistently voted in a manner that was in line with the teachings of their faith traditions with regards to the relationship between church and state. Justices who adhered to the Episcopal and General Protestant faiths were a little more mixed in their voting but for the most part voted in a manner consistent with

the teachings of their faith traditions. However, Jewish and Methodist Justices did not vote in a manner that was in line with their faith traditions. Therefore, it can be concluded that in Establishment Clause cases, Justices of these two faith traditions were not influenced by them. However, the Justices voted in opposition to the teachings of their faith traditions consistently enough that their votes were statistically significant.

In Free Exercise Clause cases, the results are not as robust as those found in Establishment Clause cases. One of the most compelling findings was that the creation of the *Sherbert* Test did not appear to affect the degree of religious influence exerted by faith traditions on judicial voting. Indeed, religious faith traditions exerted more influence after the creation of the *Sherbert* Test. Even more interesting is the observation that after the *Smith* decision, only the Episcopal faith maintained any influence on the decision-making process, although it did not exert influence during the tenure of the *Sherbert* Test. There is little consistency of religious influence shown in the decisions of the four Courts examined in this study. Only during the Rehnquist Court did religious influence seem to occur in a robust manner for Free Exercise cases.

In the few instances when religious faith traditions did exert some influence on decision-making, the Jewish, Roman Catholic, and Methodist Justices voted in a manner that could be considered in line with the teachings of their faith traditions. However, the Presbyterian, Episcopal and Lutheran Justices did not vote in a manner that was in line with their faith traditions. Similar conclusions to those discussed above can be drawn for the Episcopal and Lutheran Justices in Free Exercise cases.

There are two possible reasons why there is a discrepancy in the findings when comparing the Establishment and Free Exercise cases. The first is that there are

approximately 200 more observations for the Establishment cases than for the Free Exercise cases, and generally speaking, the more observations the better the results. Substantively, the Establishment Clause and the Free Exercise Clause ask different questions. Free Exercise cases involve minority religions seeking a greater degree of religious freedom from the Court. Establishment Clause cases ask the Court to draw a line between the spheres of religion and the state in a range of public policy issues. As discussed above, as the Court evolved over the years, it has become more accommodationist in Establishment cases, yet less expansionist in Free Exercise cases. This is what would be expected based on the political ideology scores in Table 7.4 and from a more conservative Court, as this has been the direction of the Court's evolution from the Warren Court to the Rehnquist Court. Further, Table 7.4 also shows that as the Court has become more conservative, religious faith traditions have become more influential. The Roman Catholic and Episcopal faiths are the only faiths that show any influence on the Free Exercise cases decided by the Warren Court, arguably the most liberal Court in this study, whereas the Roman Catholic, Presbyterian, Episcopal, Methodist and Lutheran faiths all demonstrate an influence on the Rehnquist Court, arguably the most conservative Court in this study.

A second reason for the observed discrepancy is that there is little difference between the teachings of the faith traditions as regards the free exercise of religion. Every faith tradition in this study holds that people have the right to their conscience; therefore, there is little room for disagreement about the right to the free exercise of religion. In addition, the Court has consistently voted against religious parties, especially those of minority religions. Despite the *Sherbert* Test and newer legal test put forth by

the Court, minority religions have not won exemptions from state laws since *Wisconsin v. Yoder* (1972) with the exception of the Santeria in *Church of the Lukumi Babalu Aye v. City of Hialeah* (1992). A different pattern emerges, however, in the Establishment cases. In Establishment Clause jurisprudence, the major question that comes before the Court is how much co-mingling should be allowed between the spheres of church and state. The main task of the Supreme Court in such cases is to draw the line between what is and is not constitutionally permissible under the Establishment Clause; making these cases more contested in "culture war" terms. Justices who view the Establishment Clause in an accommodationist manner view the Establishment Clause as operating only to prevent the establishment of an official state sponsored religion. The Justices who adhere to a strict separation of church and state tolerate little inclusion of religion in the public sphere. In the middle are the Justices who call for governmental neutrality as the guiding principle in Establishment Clause jurisprudence; they aver that the government cannot do anything that would promote or restrict religious activity in the public sphere. Some faiths, such as Roman Catholic, Lutheran, and Methodist, believe that religion has a role in public policy. Other faiths, such as General Protestant (Baptist, Unitarian, and Protestant) and Presbyterian, argue for a more separationist view of church state relations. These differences of opinion in church-state relations can create a more diverse outcome in judicial voting behavior, thereby producing a more robust result in Establishment cases. The broader implications of these findings for judicial decision-making scholarship and public policy are discussed in Chapter 8.

TABLE 7.1. The Influence of Religion on Judicial Political Ideology

Independent Variable	Linear Coefficient (Robust Standard Error)
Jewish	-.0539386 (.048)
Roman Catholic	-.0795584* (.036)
Presbyterian	-.2691009** (.035)
Episcopalian	-.1135913** (.033)
General Protestant‡	.0138948 (.049)
Methodist	-.4721323** (.041)
Lutheran	-.6751053** (.044)
Constant	.7201053** (.030)

N=1217 R^2=0.2875 Mean VIF = 2.22
*significant at p<0.05 (one-tail)
**significant at p<0.01(one-tail)
‡ Combination of Baptist, Protestant, and Unitarian faith traditions.

TABLE 7.2. The Influence of Religion on the Legal Tests, Chow Test Results

Independent Variables	All Cases Logit Coefficients (Robust Standard Error)	Before Legal Test Logit Coefficients (Robust Standard Error)	After Legal Test Logit Coefficients (Robust Standard Error)	Before/After Difference
Lemon Test				
Political Ideology	3.096*** (0.788)	0.015 (0.800)	3.506** (1.042)	
Jewish	1.462* (0.679)	0.568 (0.746)	1.929‡‡ (0.977)	
Roman Catholic	-0.228 (0.577)	-0.506 (0.332)	0.146 (0.671)	
Presbyterian	1.023* (0.492)	-0.047 (0.418)	1.535** (0.527)	
Episcopalian	0.406 (0.750)	-0.256 (0.576)	0.752 (1.072)	
General Protestant‡	-0.155 (0.951)	-0.887 (0.908)	†	
Methodist	2.186*** (0.552)	-0.227 (0.857)	2.851*** (0.282)	
Constant (Lutheran)	-2.388*** (0.685)	0.624 (0.753)	-2.289 (0.314)	
Lemon Test	0.659 (0.546)			
N Model Chi² df	710 829.290*** 8	154 201.682*** 7	556 607.15*** 5	 20.458** 7
Sherbert Test				
Political Ideology	-1.308*** (0.318)	-1.158 (0.776)	-1.474*** (0.276)	
Jewish	-0.200 (0.410)	0.301 (0.347)	-0.769 (0.662)	
Roman Catholic	-0.076 (0.333)	-0.187 (0.465)	-0.536** (0.178)	
Presbyterian	-0.102 (0.425)	0.507 (0.693)	-0.737 (0.401)	
Episcopalian	0.344 (0.352)	1.317** (0.557)	-0.288 (0.189)	
General Protestant‡	0.176 (0.437)	0.596 (0.526)	-0.267 (0.922)	
Methodist	-0.519 (0.286)	1.028* (0.450)	-1.535*** (0.127)	
Constant (Lutheran)	0.822* (0.378)	0.246 (0.492)	0.951*** (0.144)	
Sherbert Test	0.822* (0.378)			
N Model Chi² df	507 675.678*** 8	163 216.256*** 7	344 445.562*** 6	 13.860* 7

*p< 0.05 one-tail
**p<0.01one-tail
***p<0.001 one-tail

‡ Combination of Baptist, Protestant, and Unitarian faith traditions.
‡‡ z-score over 1.95 but under 2.00.
† Independent variable dropped by Stata due to Multicollinarity.
†† Stata predicts success/failure perfectly, observations dropped

TABLE 7.2. The Influence of Religion on the Legal Tests, The Chow Tests, Continued

Independent Variables	All Cases Logit Coefficients (Robust Standard Error)	Before Legal Test Logit Coefficients (Robust Standard Error)	After Legal Test Logit Coefficients (Robust Standard Error)	Before/After Difference
Post-Sherbert Test				
Political Ideology	-1.474*** (0.370)	-1.518*** (0.381)	0.528 (1.376)	
Jewish	0.004 (0.428)	-0.335 (0.374)	-0.281 (1.124)	
Roman Catholic	-0.010 (0.267)	0.009 (0.275)	-0.761 (0.524)	
Presbyterian	-0.328 (0.367)	-0.282 (0.370)	†	
Episcopalian	0.216 (0.267)	0.381 (0.290)	-2.245** (0.893)	
General Protestant‡	0.155 (0.406)	0.210 (0.410)	†	
Methodist	-0.422 (0.668)	-0.333 (0.673)	††	
Constant (Lutheran)	0.769** (0.325)	-1.761* (0.746)	-0.024 (0.495)	
Post-Sherbert	-1.329*** (0.359)			
N	507	455	50	
Model Chi^2	665.932***	600.264***	54.846***	10.822
df	8	7	4	7

*p< 0.05 one-tail
**p<0.01one-tail
***p<0.001 one-tail

‡ Combination of Baptist, Protestant, and Unitarian faith traditions
† Independent variable dropped by Stata due to Multicollinarity.
†† Stata predicts success/failure perfectly, observations dropped

TABLE 7.3. The Influence of Religion on Establishment Cases, The Chow Tests

Independent Variables	All Cases Logit Coefficients (Robust Standard Error)	Outside Court Era Logit Coefficients (Robust Standard Error)	During Court Era Logit Coefficients (Robust Standard Error)	Before/After Difference
Warren Court				
Political Ideology	2.746*** (0.719)	2.778*** (0.754)	-0.488 (1.77)	
Jewish	1.520* (0.669)	2.338* (0.938)	-0.745 (0.585)	
Roman Catholic	0.027 (0.523)	0.248 (0.542)	-1.102*** (0.221)	
Presbyterian	1.094* (0.471)	1.232** (0.469)	-0.259 (0.305)	
Episcopalian	0.618 (0.727)	0.847 (0.803)	-1.722** (0.626)	
General Protestant‡	-0.335 (0.991)	††	-0.600** (0.221)	
Methodist	2.272*** (0.518)	2.481*** (0.473)	-0.471 (0.664)	
Constant (Lutheran)	-1.822*** (0.459)	-2.010*** (0.402)	1.813 (1.550)	
Warren Court	-0.203 (0.495)			
N Model Chi² df	710 835.572*** 8	620 713.934*** 6	84 100.510*** 3	 21.128*** 6
Burger Court				
Political Ideology	2.663*** (0.661)	2.200** (0.807)	2.852** (1.065)	
Jewish	1.561* (0.708)	1.621* (0.805)	†	
Roman Catholic	0.074 (0.534)	-0.468 (0.668)	1.031 (0.800)	
Presbyterian	1.055* (0.460)	0.887 (0.658)	1.131** (0.404)	
Episcopalian	0.638 (0.736)	1.008 (0.825)	0.313 (0.883)	
General Protestant‡	-0.350 (0.936)	-0.247 (1.005)	†	
Methodist	2.255*** (0.524)	2.034 (1.068)	2.337*** (0.224)	
Constant (Lutheran)	1.873*** (0.515)	-1.632* (0.770)	-1.829*** (0.322)	
Burger Court	0.107 (0.318)			
N Model Chi² df	710 835.722*** 8	319 368.554*** 7	391 448.760*** 3	 18.408** 7

*p< 0.05 one-tail
**p<0.01one-tail
***p<0.001 one-tail

‡ Combination of Baptist, Protestant, and Unitarian faith traditions.
† Independent variable dropped by Stata due to Multicollinarity.
†† Stata predicts success/failure perfectly, observations dropped

TABLE 7.3. The Influence of Religion on Establishment Cases, The Chow Test, Continued

Independent Variables	All Cases Logit Coefficients (Robust Standard Error)	Outside Court Era Logit Coefficients (Robust Standard Error)	During Court Era Logit Coefficients (Robust Standard Error)	Before/After Difference
Rehnquist Court				
Political Ideology	2.799*** (0.655)	2.465** (0.747)	2.245 (1.204)	
Jewish	1.409* (0.693)	0.866 (0.749)	18.688*** (1.043)	
Roman Catholic	-0.314 (0.580)	0.493 (0.516)	16.170*** (0.539)	
Presbyterian	1.136* (0.443)	0.800 (0.417)	17.251*** .	
Episcopalian	0.603 (0.730)	0.128 (0.610)	17.873*** (0.805)	
General Protestant‡	-0.404 (0.920)	-0.621 (0.902)	†	
Methodist	2.301*** (0.247)	1.711** (0.526)	19.597*** (0.060)	
Constant (Lutheran)	-1.919*** (0.423)	-1.454** (0.436)	-18.315*** (0.199)	
Rehnquist Court	0.206 (0.247)			
N	710	511	199	
Model Chi^2	835.340***	616.548***	192.206***	26.586***
df	8	7	3	7

*p< 0.05 one-tail
**p<0.01one-tail
***p<0.001 one-tail

‡ Combination of Baptist, Protestant, and Unitarian faith traditions.
† Independent variable dropped by Stata due to Multicollinarity.
†† Stata predicts success/failure perfectly, observations dropped

TABLE 7.4. The Influence of Religion on Free Exercise Cases, The Chow Tests

Independent Variables	All Cases Logit Coefficients (Robust Standard Error)	Outside Court Era Logit Coefficients (Robust Standard Error)	During Court Era Logit Coefficients (Robust Standard Error)	Before/After Difference
Vinson Court				
Political Ideology	-0.986** (0.287)	-1.127*** (0.257)	-1.723*** (0.401)	
Jewish	-0.251 (0.353)	-0.779 (0.545)	0.354* (0.160)	
Roman Catholic	-0.320 (0.261)	-0.745*** (0.124)	0.084 (0.124)	
Presbyterian	-0.253 (0.359)	-0.646 (0.343)	-0.140 (0.144)	
Episcopalian	0.073 (0.318)	-0.530*** (0.151)	2.030*** (0.124)	
General Protestant‡	0.146 (0.402)	-0.151 (0.577)	0.573 (0.479)	
Methodist	-0.312 (0.594)	-1.247** (0.475)	1.040*** (0.140)	
Constant (Lutheran)	0.442 (0.301)	0.985*** (0.125)	0.386 (0.386)	
Vinson Court	-0.037 (0.285)			
N Model Chi² df	507 680.568*** 8	372 494.612*** 7	135 170.310*** 2	 15.646* 7
Warren Court				
Political Ideology	-0.876** (0.324)	-0.831* (0.341)	-1.562 (1.15)	
Jewish	-0.191 (0.377)	-0.135 (0.420)	-0.416 (0.808)	
Roman Catholic	-0.338 (0.270)	-0.259 (0.323)	-1.082** (0.333)	
Presbyterian	-0.154 (0.381)	-0.169 (0.434)	-0.226 (0.444)	
Episcopalian	0.062 (0.288)	0.185 (0.352)	-1.091* (0.509)	
General Protestant‡	0.266 (0.404)	-0.086 (0.539)	0.593 (0.604)	
Methodist	-0.327 (0.596)	-0.519 (0.567)	††	
Constant (Lutheran)	0.439 (0.285)	0.400 (0.321)	0.565 (0.900)	
Warren Court	-0.478 (0.273)			
N Model Chi² df	507 676.852*** 8	403 549.678*** 7	101 116.504*** 5	 10.670 7

*p< 0.05 one-tail
**p<0.01one-tail
***p<0.001 one-tail

‡ Combination of Baptist, Protestant, and Unitarian faith traditions.
† Independent variable dropped by Stata due to Multicollinarity.
†† Stata predicts success/failure perfectly, observations dropped

TABLE 7.4. The Influence of Religion on Free Exercise Cases , The Chow Tests Continued

Independent Variables	All Cases Logit Coefficients (Robust Standard Error)	Outside Court Era Logit Coefficients (Robust Standard Error)	During Court Era Logit Coefficients (Robust Standard Error)	Before/After Difference
Burger Court				
Political Ideology	-0.960** (0.327)	-1.105* (0.447)	-0.868 (0.645)	
Jewish	-0.157 (0.348)	-0.011 (0.348)	†	
Roman Catholic	-0.344 (0.236)	-0.263 (0.274)	-1.066 (0.555)	
Presbyterian	-0.430 (0.328)	-0.301 (0.295)	-1.207‡ (0.617)	
Episcopalian	-0.056 (0.273)	0.108 (0.341)	-0.923 (0.492)	
General Protestant‡	0.233 (0.392)	0.390 (0.393)	†	
Methodist	-0.410 (0.700)	0.057 (0.740)	-1.871*** (0.513)	
Constant (Lutheran)	0.315 (0.252)	0.265 (0.328)	1.684** (0.552)	
Burger Court	0.606*** (0.177)			
N Model Chi² df	507 672.852*** 8	369 484.610*** 7	138 183.466*** 3	4.776 7
Rehnquist Court				
Political Ideology	-1.200*** (0.320)	-1.041* (0.448)	-1.299*** (0.286)	
Jewish	-1.988 (0.371)	-0.254 (0.368)	-0.320 (0.854)	
Roman Catholic	-0.168 (0.271)	-0.170 (0.301)	-0.851*** (0.233)	
Presbyterian	-0.282 (0.368)	-0.124 (0.375)	-0.856*** (0.137)	
Episcopalian	0.175 (0.277)	0.378 (0.295)	-0.679** (0.307)	
General Protestant‡	0.139 (0.406)	0.271 (0.403)	†	
Methodist	-0.299 (0.591)	0.260 (0.458)	-2.425*** (0.134)	
Constant (Lutheran)	0.585* (0.290)	0.337 (0.334)	1.070*** (0.133)	
Rehnquist Court	-0.299 (0.219)			
N Model Chi² df	507 679.324*** 8	377 503.096*** 7	130 167.384*** 4	8.844 7

*p< 0.05 one-tail
**p<0.01one-tail
***p<0.001 one-tail

‡ Combination of Baptist, Protestant, and Unitarian faith traditions.
† Independent variable dropped by Stata due to Multicollinarity.
†† Stata predicts success/failure perfectly, observations dropped

TABLE 7.5. Vote On Religion Cases by Court (Cross-Tabulations)

Faith Tradition	Voted Accommodationist/ Expand Free Exercise	Voted Separationist / Narrow Free Exercise
Establishment Cases		
Vinson Court	18 (50%)	18 (50%)
Warren Court	28(33%)	56 (67%)
Burger Court	168(43%)	223(57%)
Rehnquist Court	108 (54%)	91(46%)
Free Exercise Cases		
Vinson Court	81(60%)	54(40%)
Warren Court	70(67%)	34(33%)
Burger Court	63(46%)	75(54%)
Rehnquist Court	70(54%)	60(46%)

TABLE 7.6. Predictions of Vote in Establishment Cases

Independent Variable	Mean Probability Justice will Vote to Separate Church and State	95% Conf. Interval
Conservative Jewish	56.6%	[0.4055, 0.7272]
Moderate Jewish	61.8%	[0.4671, 0.7695]
Liberal Jewish	66.8%	[0.5212, 0.8143]
Conservative Catholic	44.4%	[0.3307, 0.5570]
Moderate Catholic	49.8%	[0.3882, 0.6068]
Liberal Catholic	55.1%	[0.4361, 0.6663]
Conservative Presbyterian	50.4%	[0.3984, 0.6095]
Moderate Presbyterian	55.8%	[0.4552, 0.6599]
Liberal Presbyterian	61.0%	[0.5009, 0.7188]
Conservative Episcopalian	51.9%	[0.4300, 0.6076]
Moderate Episcopalian	57.2%	[0.4908, 0.6536]
Liberal Episcopalian	62.4%	[0.5365, 0.7113]
Conservative Protestant	44.3%	[0.2707, 0.6147]
Moderate Protestant	49.6%	[0.3302, 0.6624]
Liberal Protestant	55.0%	[0.3857, 0.7144]
Conservative Methodist	62.2%	[0.4985, 0.7447]
Moderate Methodist	67.1%	[0.5514, 0.7903]
Liberal Methodist	71.7%	[0.5955, 0.8376]
Conservative Lutheran	30.9%	[0.1783, 0.4398]
Moderate Lutheran	35.7%	[0.2100, 0.5037]
Liberal Lutheran	40.8%	[0.2389, 0.5764]

Note: To simplify the findings in this table, Segal's Political Ideology scale has been modified to the following definitions: Conservative = Political Ideology from "0" to "0.33", Moderate = Political Ideology "0.33" to "0.67", Liberal = Political Ideology "0.67" to "1". The dependent variable is the likelihood that the Justice voted to accommodate religion. The entries are predicted probabilities of voting to accommodate religion based on the coefficient in the logit model presented earlier for Establishment Cases. Cell entries are clarified logit means (standard deviation of mean probability in brackets).

TABLE 7.7. Predictions of Vote in Free Exercise Cases

Independent Variable	Mean Probability Justice will Vote to Limit the Free Exercise of Religion	95% Conf. Interval
Conservative Jewish	43.9%	[0.2721, 0.6052]
Moderate Jewish	49.2%	[0.3281, 0.6563]
Liberal Jewish	54.6%	[0.3799, 0.7120]
Conservative Catholic	32.3%	[0.2120, 0.4344]
Moderate Catholic	37.2%	[0.2595, 0.4845]
Liberal Catholic	42.4%	[0.3017, 0.5454]
Conservative Presbyterian	37.8%	[0.2671, 0.4890]
Moderate Presbyterian	43.0%	[0.3180, 0.5418]
Liberal Presbyterian	48.3%	[0.3614, 0.6052]
Conservative Episcopalian	39.2%	[0.2943, 0.4900]
Moderate Episcopalian	44.5%	[0.3505, 0.5385]
Liberal Episcopalian	49.8%	[0.3966, 0.5997]
Conservative Protestant	32.2%	[0.1668, 0.4776]
Moderate Protestant	37.1%	[0.2137, 0.5281]
Liberal Protestant	42.2%	[0.2596, 0.5853]
Conservative Methodist	49.6%	[0.3555, 0.6359]
Moderate Methodist	54.9%	[0.4082, 0.6906]
Liberal Methodist	60.2%	[0.4543, 0.7497]
Conservative Lutheran	21.1%	[0.1016, 0.3206]
Moderate Lutheran	24.9%	[0.1225, 0.3760]
Liberal Lutheran	29.2%	[0.1413, 0.4420]

Note: To simplify the findings in this table, Segal's Political Ideology scale has been modified to the following definitions: Conservative = Political Ideology from "0" to "0.33", Moderate = Political Ideology "0.33" to "0.67", Liberal = Political Ideology "0.67" to "1". The dependent variable is the likelihood that the Justice voted to expand the free exercise of religion. The entries are predicted probabilities of voting to accommodate religion based on the coefficient in the logit model presented earlier for Establishment Cases. Cell entries are clarified logit means (standard deviation of mean probability in brackets).

Chapter 8

CONCLUSION

Introduction

Political scientists have empirically studied Supreme Court decision-making since the 1940s. Policy-based models of Supreme Court decision-making dominate the judicial politics and behavior literature. The attitudinal model presupposes that each Justice of the U.S. Supreme Court has an ideological preference that informs his or her decision in a case (Segal and Spaeth 2002). The rational choice or strategic account presupposes that Supreme Court Justices maximize their ideological preferences by acting strategically in making their choices (Epstein and Knight 1998). However, these empirically based approaches do not address the more interesting, yet more complicated, question of what informs a Justice's ideological and policy preferences. The legal model, which highlights the role of precedents, legal tests, and formal rules of constitutional and statutory interpretation, fails to take into account any external influences on Supreme Court decision-making. Social background theory argues that the socio-economic background of a Justice not only predicts how a Justice may vote, but also gives a narrower, more concrete reason why the Justice voted a particular way.

This study uses the framework of social background theory to pose the question: To what extent, if any, does the faith tradition of a U.S. Supreme Court Justice influence his or her vote in Supreme Court cases? Focusing on freedom of religion cases from the Vinson Court (1946-1953) through the Rehnquist Court (1986-2005), this study compares the Justices' votes in freedom of religion cases to the teachings of their faith tradition regarding religious freedom. In short, this investigation attempts to determine

the extent to which a U.S. Supreme Court Justice's vote is in accord with the teachings of his or her faith tradition. Working from the assumption that religion is a very personal belief, hence freedom of religion cases are more likely to evoke a religiously influenced response from a Justice, this study focuses on freedom of religion cases. Since the Supreme Court decides cases in a broad array of legal policy areas, students of Supreme Court behavior would hardly expect a Justice's faith tradition to influence his or her behavior in cases involving separation of powers, federalism, or economic issues.

This study attempts to determine what influence, if any, the faith traditions of the Justices had on their voting behavior in freedom of religion cases. Controlling for the ideology of the individual Justice, this study set out to challenge the claims of the attitudinal and neo-institutional models of judicial decision-making. The dependent variable in this study is the "Vote" of the Justice in freedom of religion cases. A vote that limits the Free Exercise of religion or is separationist in Establishment Clause cases is coded as a "1," while a vote that expands the free exercise of religion and is accommodationist in Establishment Clause cases is coded as a "0." The independent variables are the political ideology of the Justice, which is continuous from "0" to "1," and the faith tradition of the Justice. The faith traditions are coded as dummy variables where "1" = member of the faith and "0" = not member of the faith. The findings presented in Chapter 7 make a compelling argument for the utility of the social background model in explaining Supreme Court voting behavior. These findings demonstrate that there is a statistically significant relationship between the Justices' faith traditions and their voting behavior in freedom of religion cases; even when controlling for the Justices' political ideology. The findings of this study are more nuanced than

most in the scholarship in that the statistical significance of the independent variable is dependent not only upon the Justices' specific faith traditions, but also on the era of the Court deciding the case and whether the case raises questions under the Establishment Clause or the Free Exercise Clause of the U.S. Constitution.

Summary of Findings

This section summarizes the major findings of the research and the next section will present the implications thereof. The findings reported in this dissertation contribute to a body of political science scholarship which systematically examines the Supreme Court's role in deciding important and controversial cases in the policy area of freedom of religion.

Public law scholars have yet to settle on a universal theory of why Justices decide cases as they do. Several important models have been put forth, yet there remains a lack of consensus about which ones best explain Supreme Court decision-making. Conventional wisdom suggests that the Supreme Court Justices are political actors who will vote to advance their policy preferences in a case. One of the most important points of contention among scholars of judicial behavior is therefore whether Justices decide cases based solely on those policy preferences. Scholars who adhere to the attitudinal model argue that policy preferences are the only driving force in judicial decision-making, while scholars who support the strategic choice model agree that policy preferences are a driving force, but add that, the Justices are politically sophisticated actors who will give and take to work towards the final success of a policy preference. Neo-institutionalists argue that while Justices are political actors with policy preferences, they also decide cases within the boundaries of external institutional forces and

constraints, such as the Constitution, laws and precedent. The social background model agrees with the view that Justices are political actors; however, it endeavors to develop a better understanding of the mechanism that drives these policy preferences in explaining the Justice's decisions. The social background model asks what personal background factors shape the ideological orientations that make Justices conservative, liberal, separationist, or accommodationist when deciding freedom of religion cases. The primary argument of this research is that the religious faith traditions of the Justices shed important insights into their decision-making behavior in religious freedom cases.

Several important findings emerge from this empirical examination of the influence of religious faith traditions in understanding Supreme Court behavior. The nine faith traditions examined in this study address the relationship between each of these faiths and the civil government in their central tenets. Each faith tradition holds the view that humans have a free conscience and should be allowed to worship, or not, as the individual sees fit. Each faith tradition also adheres to a philosophy of separation of church and state, but to varying degrees. None of the faiths examined in this dissertation argue for a complete abandonment of the principle of separation of church and state; none of the faith traditions, for example, explicitly calls for a national church in America. Some faith traditions, such as Roman Catholic, Methodist, and Lutheran, claim that religion should have a say in the activities of government and help shape public policy. Other faiths, such as the Baptist, Presbyterian, and Unitarian, argue that religion should play little to no role in government. Overall, religious faiths studied in this dissertation agree with the First Amendment to the U.S. Constitution that, at the very least, there should be no national church established by the government and that all Americans

should be allowed the free exercise of their religious faiths. Beyond the established church example, the various faith traditions diverge widely in their positions about the permissible role of religion in governmental affairs.

The findings presented in this study shed important insights regarding the role of the Supreme Court in advancing religious freedom in the United States and the development of a body of jurisprudence under the Establishment and Free Exercise Clauses. Since its infancy, America has struggled to find its balance between the religious and the secular in public life. For the first 150 years, the Supreme Court gave little attention to the religion clauses of the Constitution, with very few cases ever coming before it. Beginning in the 1940s, however, the Supreme Court became more receptive to hearing claims of religious freedom in particular and civil liberties and civil rights in general. The Court responded to calls for religious liberty by making the religion clauses applicable to the states through the selective incorporation process. During the next several decades, the Court took a tortuous path in determining the constitutional contours of the religion clauses in a variety of contexts.

The Court devised legal tests to aid it in determining the constitutionality of governmental infringement of religious liberty under the Free Exercise and Establishment clauses. For Establishment Clause issues, the Court devised the *Lemon* Test in the 1970s, and for cases involving Free Exercise Clause, the Court set up the *Sherbert* Test during the Warren Court era. However, the Court has waivered in its commitment to the use of these tests since their initial application. The Court used the *Lemon* test in deciding a few cases, but gradually Justices began voicing concerns about the test's utility, and subsequently, several Justices explicitly called for the abandonment of *Lemon* in deciding

Establishment cases. At the same time, several Justices began to urge the Court to assert a more conservative, accommodationist view of church-state relations. These Justices, such as Chief Justice Rehnquist, Scalia, Thomas, and Breyer, in a more limited capacity, called for the use of history, tradition, and other mitigating factors in deciding Establishment cases. In contrast, the more liberal Justices, although not officially calling for the abandonment of *Lemon*, began to interpret the *Lemon* Test as requiring government neutrality. To date, the Justices are still in disagreement about how to properly approach Establishment Clause cases.

It is therefore unsurprising that the Court has been inconsistent in its Establishment decisions, with the exception of those cases raising the issue of prayer and religious instruction in public schools. The Justices have repeatedly cited the impressionability of schoolchildren and the coerciveness of peer-pressure as factors making children more likely to participate in activities that violated their beliefs, and continue to construe this as grounds for rejecting school prayer.

In the area of Free Exercise of religion, the application of the *Sherbert* Test has not fared much better. Once established, the *Sherbert* Test was applied in a narrow set of circumstances. The Court did seem to like aspects of *Sherbert*, using the compelling state interest prong of the test most often in determining the constitutionality of statutes and activities. Although the *Sherbert* Test was created to protect minority religions from hostile state actions, since *Yoder* the Court has rarely found for minority religions in free exercise cases. The Court has again seized upon the *Reynolds* conclusion that though the Free Exercise clause protects ideas and beliefs, it does not extend to all conduct necessary to practicing one's faith.

What emerges from this discussion is that the legal model of Supreme Court decision-making is the least satisfactory model in explaining Supreme Court behavior. The legal model explains Supreme Court outcomes in terms of precedents, tests, and elements of legal reasoning. What a discussion of the Court's jurisprudence in freedom of religion cases shows is that the legal model sheds little insight on scholars' attempts at explaining outcomes in freedom of religion cases.

The findings reported in this study are compelling for Establishment Clause cases. Religious faith traditions influence the judicial decision-making process during the tenure of each Court. Most interestingly, this influence increased after the creation of the *Lemon* Test. Justices who adhere to the Roman Catholic and Lutheran faiths consistently voted in a manner that was in line with the teachings of these faith traditions regarding Establishment Clause cases. Justices who adhere to the Episcopal and General Protestant faiths were more mixed in their voting behavior but, for the most part, they voted in a manner consistent with the teachings of their faith traditions. However, Jewish, Presbyterian, and Methodist Justices did not vote in a manner that is in line with their faith traditions. Therefore, it can be stated that in Establishment Clause cases, the Jewish, Presbyterian and Methodist Justices were not influenced by their faith traditions. However, they voted in opposition to their faith traditions consistently enough that their votes were statistically significant in Establishment Clause cases.

In Free Exercise cases, the results are not as robust as those found in Establishment Clause cases. One of the most compelling findings was that the *Sherbert* Test did not seem to matter to the influence of religion in Free Exercise cases. Indeed, religious faith traditions exerted more influence after the creation of the *Sherbert* Test.

Even more interesting is that after the *Smith* decision, only the Episcopal faith maintained any influence in the decision-making process in Free Exercise cases, although it did not exert influence during the tenure of the *Sherbert* Test. During the tenure of the four Courts, there is little overall consistency of religious influence. Only during the Rehnquist Court did religious influence seem to occur in a robust manner.

On the few occasions when religious faith traditions exerted some influence on decision-making in free exercise cases, the Jewish, Roman Catholic, Presbyterian and Methodist Justices voted in a manner that can be considered in line with the teachings of their faith traditions. However, the Episcopal and Lutheran Justices did not. Similar conclusions, as discussed above, can be drawn for the decision-making of Episcopal and Lutheran Justices in Free Exercise cases.

One possible explanation for these findings is that there is little difference between the faith traditions on the meaning of the Free Exercise Clause. Every faith tradition in this study holds that people have the right to their conscience; therefore, there is little room for disagreement about the value or important free exercise. Additionally, as outlined in Chapter 4, the Supreme Court has consistently decided against the Free Exercise rights of minority religions. Despite the *Sherbert* Test, members of such minority religions seeking protection of their free exercise rights often lose before the Supreme Court. The record for Establishment cases is mixed, depending on the type of case. To further contribute to the muddled appearance of jurisprudence in this area, various faith traditions have widely divergent views on the appropriate roles of church and state. Some faiths, such as the Roman Catholic and Presbyterian faiths, believe that religion has a role in public policy. While other faiths, such as General Protestant,

Baptist, and Unitarian, believe in a more separationist view of church state relations. These differences of opinion on the proper scope of church-state relations among the Justices can lead only to further and more diverse outcomes in judicial voting behavior.

Implications of Research

In this section, I will present the implications of the research's findings from two perspectives: this study's contributions to public law scholarship on judicial decision-making and policy-based implications of the research. The results of this study strongly imply that the social background model is a useful explanatory tool in understanding Supreme Court decision-making. This is not to suggest that attitudinal and strategic theories are not useful, but rather that as they ignore the very real impact of past background experiences on human behavior, they limit their effectiveness and utility. The fields of psychology and biographical literature have clearly established the significance of personal background experiences in decision-making. Consequently, the social background model can be useful in explaining changes in voting patterns, judicial attitudes towards religious freedom, and why some Justices act in a strategic manner while others do not.

The second implication of this research is that during the seventy years of Supreme Court decision-making, the Justices have yet to develop a coherent and acceptable approach in deciding freedom of religion cases. Studies that focus on doctrinal approaches to understanding Supreme Court behavior will not be able to capture the nuanced and important external forces that help shape Court decision-making in freedom of religion cases.

It is difficult to assess Supreme Court decision-making in terms of freedom of religion. There are two clauses that address religious freedom in America from two different directions—the right not to support a religion to which one does not belong, and the right to belong to the religion of one's choice, or to belong to no religion. Justices may see one set of facts from the two different perspectives in that what one Justice may see as an Establishment Clause issue, another Justice may see as a Free Exercise Clause issue. For example, in *Engle v. Vitale* (1962), the majority Court decided the case as an Establishment Clause issue; the State of New York violated the Establishment Clause by requiring public school students to read passages of scripture and recite a prayer aloud. Justice Stewart, however, saw the case as a Free Exercise issue and argued that by not allowing the prayers, the Court was violating the majority students' Free Exercise rights. Due to these kinds of conflicts over the meaning of religious freedom, Supreme Court scholars must differentiate between the two clauses when analyzing this area of law. The free exercise and establishment of religion are two separate principles, and this study indicates that scholars should be specific about what is meant by freedom of religion.

The final implication of this research is that the faith traditions of the Justices do matter in Supreme Court decision-making. Some Justices adhere to the teachings of their faith traditions regarding religion and government. This is not universal, and it would be unrealistic to expect that every Justice would adhere to every teaching of his or her faith when deciding freedom of religion cases. Justices are human beings, and we should therefore expect to see that human complexity exhibited in their voting behavior. These qualifications do not diminish the significance of the findings that religion does play some role in the voting behavior of Justices in religious freedom cases.

The Supreme Court is a policy making branch of government and its response to issues of religious freedom are no exception. Although Court decisions can be wildly unpopular with the public at the time (*Abington School District v. Schempp* (1963)), or they result in to attempts to overturn rulings by Congress (as in *Employment Division v. Oregon v. Smith* (1990)), over time society has usually come to accept the Court's rulings. This stems in part from the fundamental principle underlying the American legal system that is based on the rule of law; and that even "losers" in Court cases are expected to obey the rulings.

However, in religious freedom cases, the loss may result in an infringement on First Amendment rights—rights considered so fundamental that justice and freedom are impossible without them (*Palko v. Connecticut* (1937)). This study shows that over the years the Court has maintained a few patterns in religious freedom cases. First, the Court is consistent in cases of school prayer, its behavior is separationist in nature regardless of the era Court. In addition, the Court seems to agree that in employment compensation cases, the religious minority should be given special consideration, unless it relates to a request for an exemption from laws of equal applicability. In those cases, the religious minority tends to end up the loser. While the jurisprudential approach toward religious freedom has changed over time, this study shows that each Court has had its own style in religious freedom cases which is determined by who is on the Bench. The Vinson Court, being the first to address religious freedom, produced a mixed voting pattern as it tried to address such issues as school prayer and evangelization with no precedent to guide it. The Warren Court was more liberal than the Vinson Court, and experienced less influence from their religious faith traditions. The Warren Court was marked by

expanded Free Exercise and strict separation of church and state. Although the *Sherbert* Test was unpopular and did not endure in any coherent form, the Warren Court was able to create a mostly uniform philosophy of religious jurisprudence.

The Burger Court, being a transition Court between the liberal Warren Court and the conservative Rehnquist Court, also displayed a mixed voting behavior. Religious faith traditions were more influential on judicial voting behavior, as well as a more conservative political ideology. The Burger Court was unable to completely shed the Warren Court precedents or to create its own unique philosophy of religious jurisprudence. It created the *Lemon* Test; however, that test was quickly marginalized by the Court as too inflexible for Establishment cases outside the context of state funding. But, as the Court moved into the Rehnquist Era, a more coherent philosophy emerged. A practice of accommodating religion in public policy and limiting religious exercise claims was dominant for over twenty years. One legacy of the Rehnquist Court has been more openness to the implementation of public policy by religious groups, usually of the more mainline faith traditions.

Minority faiths, finding less sympathy from the Supreme Court may increasingly look to the state courts for protection of their religious freedom. The incorporation of the religious clauses through the Fourteenth Amendment guarantees a minimum amount of religious freedom; state courts cannot give less freedom than what is found in the Bill of Rights in the U.S. Constitution. However, state courts can grant *more* freedom than what is guaranteed by the U.S. Constitution under interpretations of state constitutions. As such, religious minority groups that cannot find satisfaction before the U.S. Supreme Court, where the interpretation of the laws would be applicable to the entire nation; may

find satisfaction before state high courts. Since the Burger Court, the Supreme Court has given deference to this "new judicial federalism" wherein state courts are able to develop and apply expansive civil liberties policies under their own constitutions; thus giving state courts more autonomy over their specific bill of rights' provisions, including freedom of religion (Keck, 2004; Shafritz, 1988).

These considerations lead inevitably to the policy considerations of the appointment process; although the Constitution explicitly forbids the use of a religious test when appointments are made in government. Depending upon the policy preferences of an appointing president, the religious faith of the nominee may give some indication of the types of decisions he or she will render in religious freedom cases. The more liberal the president, the more likely he or she will appoint a liberal Justices; and vice versa for a conservative president. This practice would seem likely to minimize the role that religious faith might end up playing in a Justice's decision-making, as compared to the role played by the Justice's political ideology. Further, this study implies that if the direction of Court's political ideology changes, as it could if President Obama is elected to a second term, the Court's decisions regarding religious freedom would change as well. It would be expected that this "new" Court would be more separationist in its Establishment Clause decisions and more willing to exempt religious minorities from state and national laws.

Directions of Future Research

Although this study contributes to the Supreme Court decision-making literature, additional insights can be obtained into the research questions raised here. Future research could expand upon this study by including additional control variables in the

model. These may include the geographical region in which the Justice was raised or the region on a lower bench, or the voting behavior of the Justice when he or she sat on a lower court.

Future research could compare and contrast the voting behavior of the Justice when he or she sat on a lower bench to his or her voting behavior after rising to the Supreme Court. The neo-institutional model argues that while on a lower court a Justice will be more constrained by precedent. However, Whitehead (2008) found that religion might play a bigger role in lower court decisions than on Supreme Court decisions. This may be because Supreme Court decisions are more widely reported and analyzed, and the Justices may feel they cannot completely and honestly express their reasons for a decision; whereas a lower court judge may not be subject to such scrutiny and actually be freer to pursue policy preferences knowing that these decisions will unlikely be overturned.[44]

In addition, research could examine the role played by religious interest groups—at the cert stage and on the merits, in influencing court behavior. Such a study could determine which religious faiths are more likely to gain access to the Supreme Court, and for what issues are religious group sponsored litigation granted certiorari. Is there a correlation between the religious faiths that are granted access to the Court or between the Petitioner's issues and the religious faiths of the Justices? Are Justices of a certain faith tradition more likely to vote to grant certiorari to parties that represent their faith tradition? In addition, the influence of amicus briefs from religious organizations can be

[44] The likelihood of being overturned by the Supreme Court is very low. Only 8,000 cases are appealed to the Supreme Court each year; of these 8,000, the Supreme Court may hear only 75-85 cases. That is about 1% of the cases appealed to the Court. These numbers do not include the thousands of cases each year that are not appealed to the Supreme Court.

explored at the cert stage. Are Justices of a certain faith tradition more sympathetic to amicus briefs filed by groups that represent their religious faith? Are they less sympathetic to parties or amicus briefs that are from religious or secular organizations perceived to be hostile to the faith tradition of the Justice?

This study indicates that religion is more influential during conservative courts than liberal courts, regardless of the faith tradition. For example, during the Warren Court, the Presbyterian and Methodist faiths did not exert any influence; however, these faiths did exert influence during the Rehnquist Court. Another study could examine why this occurs. Is it because of the individual Justices themselves or is there a particular difference, outside of the general political ideology of the Court that could account for this discrepancy?

Finally, the data set should be expanded upon to include other areas of law—such as worker rights, criminal rights, moral issues (abortion, gay marriage), or pornography. Religion cases constitute only a small portion of the total number of cases heard by the Supreme Court. Scholarship would be furthered if the factors used in this study, ideology, political party and religious denomination, were applied to other areas of law in order to determine if results similar to those found in freedom of religion cases occur.

This study contributes to the wider body of knowledge regarding judicial decision-making and to the utility of the social background model. Judicial decision-making scholarship is currently fractured between four models—the attitudinal, strategic choice, neo-institutional, and social background. This study directly addresses the attitudinal and the neo-institutional models; to address the strategic choice model would require more information than the scope of this study can provide. The attitudinal model

argues that judicial decisions are based upon only the political ideologies of the Justices (Segal and Spaeth 2002). What is lacking in the attitudinal model is any insight into what informs the political ideologies and legal attitudes of the Justices. The current study finds that the religious faith traditions are influential in two respects. First, Table 7.1 shows that some faith traditions influence the political ideology of the Justices. Second, when controlling for political ideology, the religious faith traditions of the Justices also influence judicial decision-making in freedom of religion cases. Therefore, it can be concluded that this study adds to our understanding of the attitudes and ideologies that influence judicial votes. This study also adds to the understanding of what may cause the voting anomalies that occur when a Justice casts a vote in a manner that is inconsistent with his or her past voting record.

Although this study fleshes out the attitudinal model, it seems to cast some doubt upon the neo-institutional model. The neo-institutional model argues that while judicial attitudes do matter, their effects are confined to legal boundaries and norms, such as the Constitution, legal tests, and precedents (Clayton 1999; Clayton and Gilliam 1999). The current study finds that the *Lemon* Test and the *Sherbert* Test seem to make no difference in judicial decision-making in religious freedom cases. Certainly, the Court did not seem to adhere to these tests for any length of time, and appeared to have nothing but complaints about the tests since their creation. Although the Court continues to address aspects of the tests in its decisions, rarely are the tests employed as the three-pronged guidelines they were set up to be. Further, Table 7.2 shows that religious faith traditions are a better explanation of judicial decisions after the creation of the *Lemon* Test than before it. The neo-institutional model would predict that religious influence would

decrease after the creation of the *Lemon* Test, since the test set a guideline for Establishment cases would limit the influence of the Justices' personal preferences. The findings are similar for the *Sherbert* Test.

Finally, this study has distinguished certain patterns of voting behavior by the Court in freedom of religion cases. The more liberal the Court the less influence religious faith traditions seem to exert upon judicial decision-making. Further, the more liberal the Court, the more likely it will vote in a manner that is strict separationist, and more open to the expansion of religious free exercise. However, the more conservative the Court, the more influence religious faith traditions seem to exert. These Courts tend to be more accommodationist in the relationship between church and state, but also more likely to narrow religious free exercise. However, there are still patterns that defy the political preferences of the Court. First, each Court in this study seems to agree that school prayer is a violation of the Establishment Clause. Second, in employment compensation cases, religious free exercise is protected. Third, since the Burger Court, the Court has not been open to religious exemptions from generally applicable laws, such as drug laws. Nevertheless, any law that overtly or covertly targets a religious practice is considered unconstitutional.

In addition to adding to the general knowledge of judicial decision-making, the current study also adds to the knowledge of the social background model. The social background model argues that the socio-political attributes of the Justices influences their judicial decision-making (Bowen 1965; Graber 1993; Grossman 1966 and 1967; Tate 1981; Ulmer 1970 and 1973). This study contributes to this model by demonstrating that religious faith traditions do indeed seem to influence judicial decision-making, even

when controlling for political ideology. This study is different from earlier studies in that it is the first to focus on freedom of religion cases and cases over the four Courts that have directly contributed to religious freedom jurisprudence.

Finally, this study aids in the utility of the social background model by adding to Ulmer's study "Are Social Background Models Time-Bound?" (1983). In this study, Ulmer contends that the reason the social background model had not produced robust findings is that the model is sensitive to time; what is important in one era will not necessarily be important in another. The results of the current study reveal the same pattern that Ulmer found. In this study, religious faith traditions exert some influence in each of the four Courts of this study. However, religious faith does not exert an equal influence over the entire timeframe of the study. During the Vinson Court, some faith traditions exerted influence, especially in Establishment Clause cases, but, this influence declined during the Warren Court. Religious influence in Establishment cases began to increase during the Burger Court; exerting the most influence during the Rehnquist Court, wherein the faith traditions represented by each of the Justices on the Court during the timeframe of this study exerted a statistically significant influence. The pattern of religious influence in Free Exercise Clause cases is similar to that found in Establishment Clause cases. Therefore, the influence of religious faith traditions change with each Court era in this study.

This study shows that Supreme Court Justices are influenced by their faith tradition, as is Congress, the president, and society in general. It should not be surprising, given our awareness of religious influence in other areas of government that this influence also applies to the American court system. Judges are human and are subject to

the same influences as all others in a society. Judicial and legal scholars should take note of this fact. It is important that in the future, scholars take into consideration the influence of faith traditions upon the American judiciary when trying to explain judicial behavior.

Appendix A

Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2005

Nominee	Votes in Favor	Votes Opposed	Qualifications Score	Ideology Score
Hugo O. Black	67	18	.160	.875
Stanley F. Reed	*		.875	.725
Felix Frankfurter	*		.965	.665
William O. Douglas	76	4	.820	.730
Frank Murphy	*		.650	1.000
Harlan F. Stone (CJ)	*		1.000	.300
James F. Byrnes	*		.800	.330
Robert H. Jackson	*		.915	1.000
Wiley B. Rutledge	*		1.000	1.000
Harold H. Burton	*		.930	.280
Fred M. Vinson(CJ)	*		.785	.750
Tom C. Clark	78	8	.125	.500
Sherman Minton	58	19	.355	.720
Earl Warren (CJ)	*		.855	.750
John M. Harlan	71	11	.750	.875
William J. Brennan, Jr.	*		1.000	1.000
Charles E. Whittaker	*		1.000	.500
Potter Stewart	70	17	1.000	.750
Byron White	*		.500	.500
Arthur J. Goldberg	*		.915	.750
Abe Fortas	*		1.000	1.000
Thurgood Marshall	69	11	.835	1.000
Abe Fortas (CJ)[a]	45	43	.635	.845
Warren E. Burger (CJ)	74	3	.960	.115
Clement Haynsworth, Jr.	45	55	.335	.160
G. Harrold Carsell	45	51	.111	.040
Harry A. Blackmun	94	0	.970	.115
Lewis F. Powell, Jr.	89	1	1.000	.165
William H. Rehnquist	68	26	.885	.045
John Paul Stevens	98	0	.960	.250
Sandra Day O'Connor	99	0	1.000	.415
William Rehnquist (CJ)	65	33	.400	.045
Antonin Scalia	98	0	1.000	.000
Robert H. Bork	42	58	.790	.095
Douglas Ginsburg[b]			.320	.000
Anthony Kennedy	97	0	.890	.365
David Souter	90	9	.765	.325
Clarence Thomas	52	48	.415	.160
Ruth Bader Ginsburg	96	3	1.000	.680
Stephen G. Breyer	87	9	.545	.475
John G. Roberts	78	22	.970	.120
Harriet E. Miers[c]			.360	.270
Samuel Alito	58	42	.810	.100

CJ= nominated for Chief Justice. *=voice vote. a. The vote on Fortas for the Chief Justice position was on cloture and failed to receive the necessary two-thirds majority. b. The Reagan Administration withdrew the nomination of Douglas Ginsburg. c. Harriet Miers withdrew her nomination. The Qualifications Score ranges from 0 (least qualified) to 1 (most qualified); the Ideology Score ranges from 0 (most conservative) to 1 (most liberal).

Source: Data drawn from Jeffrey Segal and Albert Cover, "Ideological Values and the Votes of Supreme Court Justices," *American Political Science Review* 83:557-565 (1989). Updated in Lee Epstein and Jeffrey A. Segal. 2005. *Advice and Consent: The Politics of Judicial Appointments*. Oxford University Press.

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