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

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Introduction

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

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

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

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

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

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

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

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

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

Having looked at the research of others and my own, I argue that, as accommodationist Republican presidents appointed nine consecutive Supreme Court Justices, there was an

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

The Court's Establishment Clause jurisprudence, while relying largely (he)915.5 (o)10.9 (r)-4 (p7)5 (o)glme7EpJ/T

The attitudinal model asserts that Justices, rather than relying on legal arguments, make decisions based on their personal preferences and policy goals (Segal & Spaeth, 1993, 1). In this view, Justices use legal arguments to support their personal preferences (Segal & Spaeth, 1993, 1). Thus, this view considers precedent to be little more than a tool that the Justices utilize to support their attitudinal goals (Segal & Spaeth, 1993). This view is emphatically adopted by Richard Schragger, who, in analyzing the Court's Establishment Clause jurisprudence, argues that the central i5e

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

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

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

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

Strategic Model

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

Many scholars, analyzing the Court's decision-making under the assumptions of the strategic model, argue that the strength of the coalitions was a major factor in the decisions of Establishment Clause cases. Thomas Merrill, analyzing the early Rehnquist Court's coalitional dynamics, argues that the

Tudor, 1999; Schlosser, 1988). Other scholars, also viewing the importance of swing Justices, have examined the methods coalitions used to gain the support of the swing Justices. Daniel Ray, examining

the right and the most separationist Justices on the left. As Figure 1 shows, some Justices, such as Burger (CJ), Rehnquist (WHR), Scalia (AS), and Thomas (CT) were highly accommodationist and voted in favor of a lower wall of separation in every case that came before them (except for Burger, who did so in almost every case). However, other Justices, such as Stevens (JPS), Souter (DS), and Blackmun (HAB) were very separationist and rarely voted to allow religion to encroach into public education. Further, Justices Powell (LP), O'Connor (OC), and Kennedy (AMK) had the most moderate views, frequently voting with both coalitions. Thus, according to the voting records of the Justices, the ideologies of Burger, Rehnquist, Scalia, and Thomas aligned with the accommodationist presidents who appointed them. However, the moderate Justices (Powell, O'Connor, and Kennedy) only sometimes adopted acco

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

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

Public Opinion – Reactions from the Public

Blackmun's folders, containing the most letters and newspaper clippings, presented the most in-depth information about the specific cases that yielded larger public reactions. In certain cases, most often those that produced separationist decisions, there was a considerable negative public reaction, as evidenced by the countless angry letters sent by citizens which demanded the Justices change their decisions. This was most clear in *Lee*, *Lynch*, and *Texas v. Johnson*.

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

Further, Kennedy, while voting with the separationist coalition in *Lee*, continued to vote with both coalitions in future cases. While *Lee* was a notable shift for Kennedy, as it was his first instance of voting with the separationist coalition, his voting pattern didn't substantially shift after *Lee* (Figure 3). Kennedy's voting, while not perfectly consistent after *Lee*, maintained a similar pattern in future cases (Figure 3). However, Kd(is)9 ())-3.9 (e)11 (w)9.7013 g ())-3.9 (. H4.7 (a)-1.-4.6 (a7Dd-3.5en)Tg3 -.9 (t)-2.6 .9 (t)-21ashn

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

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

Public Opinion – Reactions from Legislatures and Lower Courts

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

The Justices, aware of how their decisions affected the rulings of lower courts, often acknowng1iomugrtt6 (9( )10.5r)-1.5ofd.5ri9( )1s and0.5r9( )1ehrd.83.3 (-4.6 (or)-4 ( )]TJ 0.002 T)2 076>BDC -18

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

While the Justices were responsive to the potential reactions of lower courts, they also were aware of the effects of their decisions on state legislatures. Justice Blackmun, in a conference memo for *Wo.6 (r)-3i.6 (a)n,*

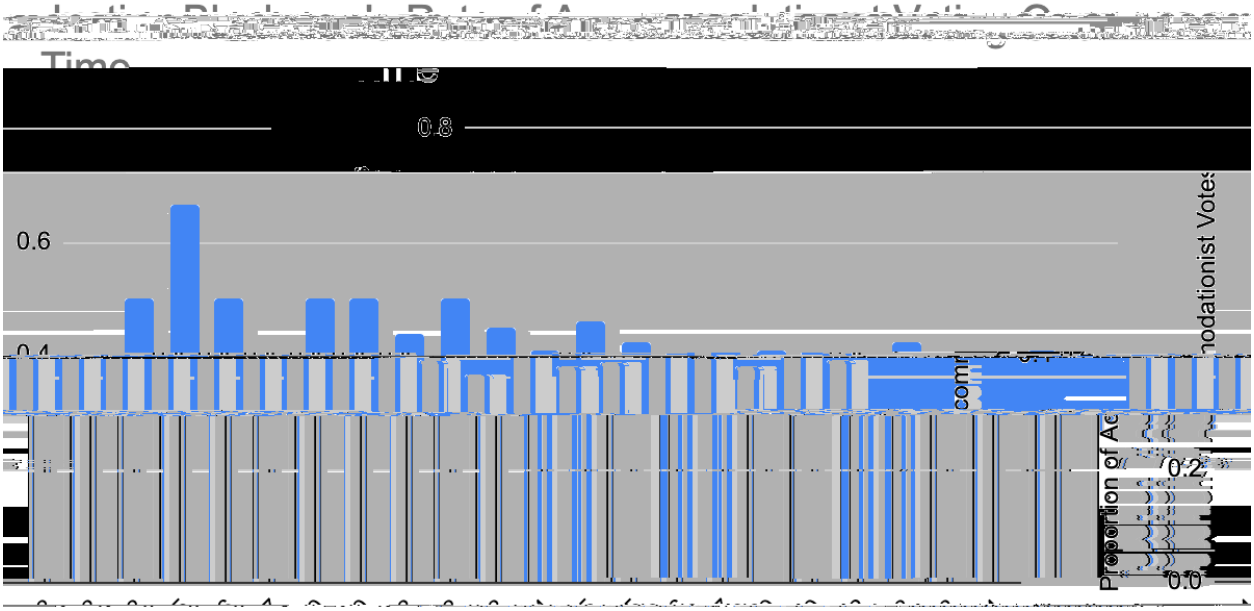

Figure 2: Blackmun's Voting Over Time

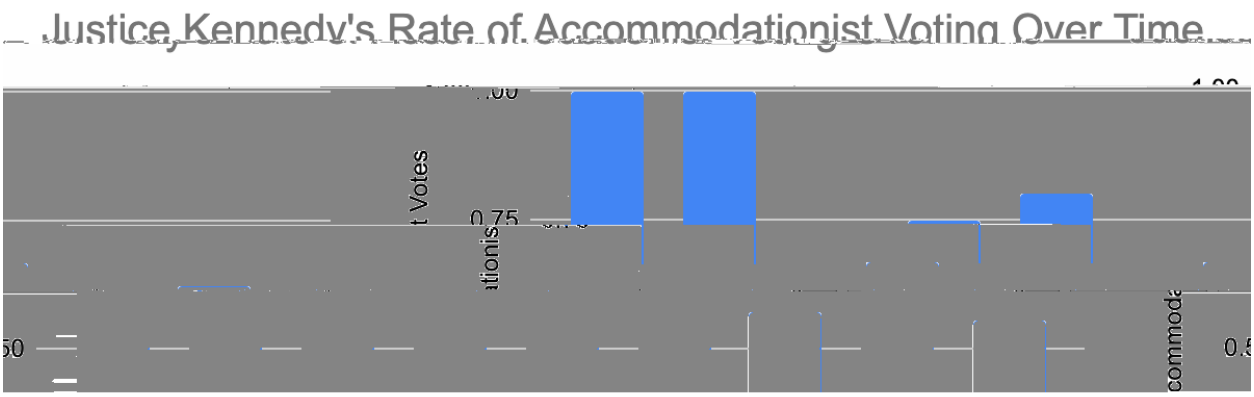

Figure 3: Kennedy's Voting Over Time

Figure 4: Powell's Voting Over Time

Establishment Clause that influenced how they decided on cases. These individual views shaped the way

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

Establishment Clause jurisprudence" (*Lamb's Chapel v. Moriches*, 1993, Scalia, J., dissenting, 398). Scalia notes that a majority of the Court rejects the *Lemon* test and thus argues that the Court should not use it to examine Establishment Clause cases (*Lamb's Chapel v. Moriches*, 1993, Scalia, J., dissenting, 398). Further, Scalia claims that the Court only continues to use *Lemon* as it is a useful tool to further individual preferences, acknowledging that the Court invokes *Lemon* when it wants to strike down a law but ignores *Lemon* when it wants to uphold a law (*Lamb's Chapel v. Moriches*, 1993, Scalia, J., dissenting, 399). However, Scalia and Thomas, much like Rehnquist, joined opinions that used *Lemon* in order to maintain accommodationist majorities. In *Zobrest*, despite Rehnquist's use of *Lemon*, Scalia and Thomas joined to ensure Rehnquistu -2.3 (, a)21h (R)14.9 (e)-1.6 (e)-1 ,t,ci6 0 TdzTw 13.9ed002 T9 maltll,ci6 0 Td17.2(t)

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

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

Role of the Swing Justices

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

While the separationist and accommodationist coalitions were largely solidified, with their members infrequently defecting, the swing Justices were open to being persuaded and often changed their minds during cases. Kennedy, in *Lee*, originally wrote for the accommodationist coalition (at the request of Chief Justice Burger, who assumed he had a majority) (Blackmun, Box 586). However, after declaring that his draft "looked quite wrong," Kennedy switched his vote and joined the separationist coalition (Blackmun, Box 586). Further, in many cases, Justice Blackmun left conferences with a "?" in his conference notes, as he couldn't predict which coalition certain swing Justices would join (Blackmun, Boxes 169, 415). The swing Justices, while more often siding with the accommodationist coalition, joined both coalitions and were willing to accept the arguments of either coalition. However, this consistent switching of sides occasionally resulted in the swing Justices joining the opinions of Justices who, in

interpreted in *Schempp*

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

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

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

held less accommodationist views than the presidents who appointed them (Filter, 1998; McFeatters, 2006). Further, these findings concur with the arguments made

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

Further, I conclude that my fourth hypothesis, while correct in its assumption of precedent preventing the Court from shifting towards a more accommodationist reading of the Establishment Clause, was not correct in its assumption that the Court held an 'attachment to precedent.' While some Justices (most notably Blackmun) respected precedent and tried more genuinely to follow it, most of the Justices used precedent to support their attitudinal arguments and relied on heavily biased interpretations of precedent to support their own attitudes about the appropriate relationship between religion and education. This conclusion opposes prior literature that favors the legal model, as precedent was far less influential in determining the outcome of Establishment Clause cases than scholars like Kritze

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

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