Supreme Court and the Establishment Clause

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In light of President Bush's faith-based initiative and support for private school vouchers, the relationship between religion and government is again in the national spotlight. The Supreme Court has not established clear jurisprudence to predict how it will address these issues. Over the past 50 years, Supreme Court justices' personal characteristics and preferences have influenced jurisprudence more than the political climate and most legal factors have. Without a clear, workable legal precedent, justices tend to develop jurisprudence more pragmatically, which has made it easier for justices to favor some religions over others.

In February 2002, President Bush told the Chamber of Commerce he intends to make it easier for faith-based organizations to help the government overhaul the welfare program without compromising tenets of their faith. Bush intends to make federal dollars more accessible to these religious groups and to minimize the restrictions these groups face when accepting public funds. "Someone hooked on alcohol, for example, might need a change of heart, and people of faith could tackle such a problem better than government," Bush said (Bush, February 2002).

A lawsuit filed in Louisville, Kentucky, the previous fall, however, raises the question of whether state money can go to these religious organizations without violating the Establishment Clause of the United States Constitution. The religious organization in this case is the Kentucky Baptist Homes for Children. This case is expected to signal how the courts will respond to Bush's faith-based initiative, which some civil libertarians are criticizing already (Lawsuit, September 2001).

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. This study addresses the question of ***what factors determine how Supreme Court justices vote in Establishment Clause cases***. This study will briefly review the history of this country's inconsistent Establishment Clause jurisprudence, introduce some ways to study how the Supreme Court votes, use these methods to develop a quantitative analysis as well as qualitative examples of how Supreme Court justices vote in Establishment Clause cases, and finally consider the steps that must be taken in order to provide consistent Establishment Clause jurisprudence in the future.

Historical overview

In 1947, the United States Supreme Court used the Establishment Clause to decide if New Jersey could use public funds to pay bus fares for parochial school children. This First Amendment clause reads, "Congress shall make no law respecting an establishment of religion." The *Everson* precedent made the

Establishment Clause applicable to states: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a ***state*** nor the Federal Government can set up a church…." (*Everson v. Board of Education* 330 U.S. 1).

Applying the Establishment Clause to state statutes and ordinances caused a surge in the number of cases that the Supreme Court heard concerning religious liberties. This surge rekindled the debate regarding the proper relationship between church and state that arose with the proposal of the First Amendment in the summer of 1789: Is the Establishment Clause to be interpreted to restrict all aid to religion, require equal aid to all religions, or only ban an official church? Congressional records indicate the amendments' framers disagreed on this question. Madison and Jefferson called for a high "wall of separation" between church and state. Other framers, such as Peter Sylvester of New York, John Vining of Delaware, and Elbridge Gerry of Massachusetts, supported assisting religion (Malbin, 1978).

The Supreme Court has had dozens of opportunities over the past five decades to resolve this dispute but has failed to do so. In *Agostini v. Felton* (1997), the Court overturned the decision it handed down just 12 years earlier prohibiting the distribution of tax dollars to public teachers who provide remedial services in private schools (*Aguilar v. Felton*). The 1997 decision highlighted the Court's inability to provide clear jurisprudence and resolve the 50-year-old debate regarding the interpretation of the Establishment Clause (Deshano, 1999; Elizondo, 1999).

Several factors contribute to the Court's inconsistency. *Everson* interpreted the Establishment Clause to mean neither the state nor the federal government can aid any religion or prefer any religion over another. The Court allowed exceptions to this interpretation for the free exercise of religion and for laws that address a secular purpose. These exceptions made the *Everson* interpretation somewhat ambiguous and have contributed to inconsistency in the Court's later decisions (Carroll, 1967).

The Court has not provided an applicable definition for religion. Limiting religion to subjects referring to God and the after-life is different than defining religion as any set of answers to questions regarding human origin, life after death, etc. The former definition, which has been more common in Supreme Court opinions, has been criticized for distinguishing between forms of religious belief and non-belief. This distinction has resulted in both greater protection for religious groups in some cases (*Welsh vs. United States*) and greater scrutiny of religious groups in others (*Good News Club vs. Milford Central School*) (Deshano, 1999; Carroll, 1967).

The Court has not clearly defined the state's "secular" responsibilities. Numerous Supreme Court justices have excluded religious training from secular responsibilities. This sentiment was noted one year after *Everson* in *McCollum v. Board of Education* (333 U.S. 203). The Court declared it unconstitutional for public schools to set aside time for voluntary religious instruction. The Court has also, however, supported "secularized" religious traditions in public displays of the baby Jesus on Christmas, Sunday-work laws, chaplains for Congress and the military, and time-release programs similar to the one declared unconstitutional in *McCollum* (Furth, 1998; *Zorach v. Clauson* 343 U.S. 306).

Finally, the Court has not determined the proper relationship between religion and secular responsibilities. Alstyne argued the Court clearly established a precedent of not just neutrality, but detachment from religion (1963, 867). In *Zorach v. Clauson*, however, the Court backed away from such a separationist precedent as that set in *McCollum v. Board of Education* and said, "We cannot read into the Bill of Rights such a philosophy of hostility to religion" (343 U.S. 306).

Four interpretations of the Establishment clause persist. (1) The Lemon test, established in 1971 in *Lemon v. Kurtzman* (403 U.S. 602), requires a secular legislative purpose, a primary effect that neither advances nor inhibits religion, and avoidance of excessive government entanglement with religion. Burger introduced this in his majority opinion. (2) The non-preferentialism standard suggests the framers intended the Establishment Clause to prohibit the designation of a national church and to prohibit the Federal Government from asserting a preference for one religious denomination or sect over others. Rehnquist introduced this in his dissent in *Wallace v. Jaffree* (472 U.S. 38). (3) The endorsement approach to Lemon prohibits government from making a person's adherence to any religious belief relevant to his/her standing in the political community. The focus is on whether the government's purpose is to endorse religion and if the statute conveys a message of endorsement. O'Connor introduced this standard when concurring in *Lynch v. Donnelly* (465 U.S. 668) and in *Wallace v. Jaffree* (472 U.S. 38). (4) The coercion standard prohibits government from coercing adherence to any religion either directly or through excessive benefits. Justice Kennedy introduced this standard in 1989 in *County of Allegheny v. American Civil Liberties Union* (492 U.S. 573). (Epstein and Walker, 1998).

These interpretations have received substantial criticism. The Lemon test has been declared impossible to apply. Six of the nine current Supreme Court justices have expressed dissatisfaction with the test (Marks, 1998). The coercion test has also been criticized for ambiguity (Smith, 1993; Kahn, 1993).

Methods of studying Supreme Court jurisprudence

One explanation for the Court's inconsistent Establishment Clause jurisprudence is that extra-legal factors (i.e. justices' ideologies and personal preferences, and outside forces such as Congress and interest groups) influence justices' decisions more than legal factors (i.e. precedent) do. (Pritchett, 1941; Nagel, 1961; Wasby, 1988; Woodford, 1968; Kobylka, 1995; Segal, 1997; Segal, Spaeth, 1993). For example, justices might agree that a statute must have a "secular legislative purpose" and an effect that "neither advances nor inhibits religion" (403 U.S. 602). But determining how much aid government can indirectly provide religion without "advancing or inhibiting it" is still a subjective judgment dependent on the justices' beliefs regarding the proper relationship between religion and government.

Pritchett's 1941 study introducing the attitudinal model suggested that extra-legal factors do influence justices. Pritchett focused on patterns from justices' dissenting and

concurring opinions in cases addressing the role of government in the economy. He concluded that "biases and philosophies of government" influence judicial behavior. Pritchett quoted New York Governor and later Supreme Court Chief Justice Charles Evan Hughes: "We are under a Constitution, but the Constitution is what the judges say it is" (890). Pritchett concluded: "It is the private attitudes of the majority of the Court which becomes public law" (890).

The majority opinion in *Zorach v. Clauson* (343 U.S. 306) rejected this claim: "Our individual preferences … are not the constitutional standard," Justice Douglas wrote. Nevertheless, the research of Pritchett and others suggests that extra-legal factors specific to justices do influence the way they vote.

Nagel looked at 15 areas of law, including free speech and other civil liberty cases, and found a correlation between judges' party identification and how they voted. (Nagel, 1961). Research has also shown that pressure from other forces (i.e. experience of lawyers, other justices, the Solicitor General, Congress, and interest groups) substantially influences judicial behavior (Wasby, 1988; Woodford, 1968; Kobylka, 1995; Segal, 1997).

Other scholars have argued that personal attributes such as region of birth, socioeconomic status, and occupational history substantially influence judicial behavior. (Tate, 1981; Tate and Handberg, 1991). In his 1981 study, Tate pointed to seven attributes, including the appointment region, extensiveness of judicial experience, and prestige of pre-law education, that accounted for 70%-90% of the variance in Supreme Court justices' voting in cases concerning civil rights and liberties.

The background-behavior model has drawn substantial criticism, however, from other scholars who argue that personal attributes and backgrounds only influence decisions indirectly by providing experiences that foster certain attitudes. "In reality, each of the background or attribute variables tested … is not easily linked to just one set of attitudes and values" (Goldman and Sarat, 1978). Goldman and Sarat concluded that personal attribute models are excessively crude and unworkable.

Scholars have more readily accepted research suggesting that pressure from other forces (i.e. familiarity of lawyers, other justices, the Solicitor General, Congress, and interest groups) substantially influences judicial behavior (Wasby, 1988; Woodford,

1968; Kobylka, 1995; Segal, 1997). In his 1997 study, Segal found evidence suggesting that congressional pressure influences judges, but he concluded that judges' attitudes have greater influence on judicial behavior.

More than 40 years after Pritchett introduced his attitudinal model, Segal and Spaeth supported his thesis in a study tracing the influence of justices' attitudes throughout the judicial process and on policy-making. They concluded: "Assertions that judicial decisions are objective, dispassionate, and impartial are obviously belied by the fact that different courts and different judges do not decide the same question or issue the same way" (Segal and Spaeth, 1993).

Political scholars point out, however, that the influence of extra-legal factors does not exclude the influence of legal factors (Wasby, 1988). "Attitudes and values are among the central elements in justices' voting. The justices' ideologies … are another," Wasby said. "That these elements are central does not, however, mean they are the exclusive causes of justices' voting. The particular fact situations in cases may affect the outcome and recurrent fact situations may allow us to predict the court's actions" (246).

This reliance on fact points to the legal model, identified in Levi's 1948 study. "The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation" (501).

Wasby explained: "Courts are expected to make their decision on the basis of material submitted by the parties" (138). He added that the court is expected "to develop policy incrementally and to rely on precedent" (263). (Wasby, 1988; Way, 1985).

Jeffrey Segal's 1984 study regarding search and seizure cases highlighted the success of the legal model. Legal factors, including the nature of intrusion (home, business, car, or person), the extent of the intrusion (full search or stop and frisk) and prior justification (warrant or probable cause) accurately predicted all five conservative outcomes and one of two liberal outcomes in the 1981 term. Segal concluded that the legal model worked satisfactorily well but noted that incorporating the extra-legal model might increase predictability (Segal, 1984).

Wasby noted that justices disagree regarding interpretation of the law and the role of the court. He said background, personality, attitudes, values, ideology, and public opinion also affect judicial behavior (Wasby, 1988).

Recently, many scholars have begun to integrate legal and extra-legal models to determine the relative influence of both types of factors on Supreme Court decisions. (George and Epstein, 1992; Segal, Songer and Cameron, 1995; Flemming and Holian, 1998; Spaeth, 1995). They argue that extra-legal factors, such as justices' personal attitudes, determine the perspective from which they view the facts in specific cases. Therefore, both extra-legal and legal factors influence judicial outcomes. The primary question, then, no longer is whether extra-legal factors affect justices' decisions, but how much influence they have and if they play a larger role than legal factors do.

George and Epstein's 1992 study compared the legal and extra-legal models to see which better predicted Supreme Court decisions in death penalty cases. The legal factors included were the following: whether a due process claim was raised regarding jury selection by predisposition to the death penalty, whether the charged offense was intentional or unintentional murder, whether mitigating circumstances against death were present, whether over-broad claims regarding aggravated circumstances for death were present, and whether unsatisfactory psychiatric reports were present. The extra-legal factors were the following: the experience of the defense attorney in death penalty litigation, the experience of the state in trying death penalty cases in front of the Supreme Court, whether or not the Solicitor General (who was conservative throughout the period in this study) filed an amicus curiae brief, whether the defendant or the State appealed to the Supreme Court, and whether the political environment was conservative or liberal as defined by whether the Republican or Democratic party controlled Congress and the Presidency.

The extra-legal model performed slightly better, but both had weaknesses. The legal model over-predicted liberal outcomes and the extra-legal model over-predicted conservative outcomes. The best model resulted from incorporating legal and extra-legal factors.

Setting up the study

The goal of this study is to determine how certain factors influence Supreme Court justices' decisions in Establishment Clause cases, and which factors have the greatest influence.

This will be a quantitative study of every justices' vote in about 70 Establishment Clause cases decided between 1947 and 2000 (see appendix for list of cases and justices). The cases were either listed in

a Lexis-Nexis search with the subject "Establishment Clause" or mentioned in the Epstein and Walker text. Only the cases in which a majority of the justices voting identify the Establishment Clause as a primary factor are included in this study. Summary judgments and denials of cert are excluded. Some cases require justices to vote on a variety of issues (i.e. public funds going to hearing tests in private schools and textbooks in private schools). When cases include multiple votes, each vote is counted separately. In this example, each justice would have made two votes.

This study has two dependent variables. Each variable is coded similarly to the variables in the George/Epstein study on death penalty cases. The first dependent variable (vote1) is whether a justice votes to support interaction between church and state (mixing, coded with a 1) or to oppose interaction between church and state (separation, coded with a 0). For example, voting to allow public funds in private schools would be supporting interaction between church and state and would receive a 1. Voting not to allow this would receive a 0. The other dependent variable (vote2) is whether the justice votes in favor of the religious interest (aiding, coded with a 1) or against it (not aiding, coded with a 0). (A justice not voting is always coded with a 9 and does not affect the results.)

In the above example regarding public funds in private schools, and in many other cases, a justice's vote will have the same value for both dependent variables. In other cases, however, a religious group claims it is exempt from tax laws, employment laws or other statutes because of the "separation of church and state" (*Walz v. Tax Commissioner of New York; Texas Monthly, Inc. v. Bullock*). In these cases, voting to separate church from state (0 for vote1) would be voting in favor of the religious interest (1 for vote2) and vice-versa.

The written opinions in the cases seem to put greater weight on whether religion is "advanced or inhibited" (vote2) than on whether "excessive entanglement" between religion and government occurs (vote1). In other words, justices seem less concerned with whether church and state are separated than with whether the church is helped or hurt by this separation or lack of it. Consequently, I expect a stronger relationship to exist between the independent variables and vote2 than between the independent variables and vote1.

The independent variables will be among three categories: legal factors specific to each case, extra-legal factors specific to justices, and extra-legal factors regarding political climate.

Legal factors

I expect these factors to have a substantial influence on justices' decisions, just as legal factors were influential in Wasby's and Segal's studies.

The first legal factor is whether a secular purpose is present—whether the religious interest serves some purpose not tied to religion (i.e. assisting education, promoting order, etc.). This parallels the "mitigating circumstances" factor in the George/Epstein study. If a secular purpose is present, it provides support for a law that might otherwise violate the Establishment Clause. A case with a secular purpose (i.e. *Everson v. Board of Education*) is coded with a 1 and a case without a secular purpose (i.e. *Widmar v. Vincent*) is coded with a 0. I expect the presence of a secular purpose to correlate with more votes in favor of both integrating church and state (1 for vote1) and supporting the religious interest (1 for vote2).

The second legal factor considers the strength of religion-based claims and also correlates with the mitigating circumstances element of the George/Epstein study. In every religious liberty case, the religious interest makes some argument regarding its freedom to exercise religion. These appeal to ideals condemning discrimination or to the Free Exercise Clause following the Establishment Clause in the U.S. Constitution. Together, these clauses read: "Congress shall make no law respecting an establishment of religion***, or prohibiting the free exercise thereof***."

These claims are one of four types. The first type (coded as 3) is a specific religion claiming it is being discriminated against (i.e. *Sherbert v. Verner*). I expect this to be the most influential religion-based argument because it indicates both hostility to religion and preference to other religions. The second type (coded as 2) is religion in general claiming it is being discriminated against (i.e. *Zorach v. Clauson*). I expect this to be the second most influential religion-based argument because it indicates hostility instead of neutrality to religion in general. The third type (coded as 1) is a religious group requesting special privileges for religion in general (i.e. *National Labor Relations Board v. Catholic Bishop of Chicago*). I expect this free-exercise argument to be the second least influential religion-based argument because it requests that government aid religion directly or indirectly. The fourth type (coded as 0) is a specific religion requesting special privileges (i.e. *Board of Education v. Grumet*). I expect this free-exercise argument to be the least influential religion-based argument because it both requests that government aid religion and, in doing so, grant preference to one particular religion over others. I expect that the more highly-coded religion-based arguments will correlate with more votes in

favor of both integrating church and state (1 for vote1) and supporting the religious interest (1 for vote2).

The third legal factor considers the scope of the religious activity under scrutiny. Some activities are tailored to religion in general (coded as 1), such as public funds paying for textbooks in all private schools (i.e. *New York v. Cathedral Academy*). Others are tailored to specific religions (coded as 0), such as a Judeo-Christian doctrine being mandated in school curricula (i.e. *Epperson v. Arkansas*). This factor is critical for the non-preferentialism interpretation of the Establishment Clause that Rehnquist introduced in *Wallace v. Jaffree*. According to this interpretation, funding religion in general is less threatening than funding a particular religion because aiding religion in general is less threatening than preferring one religion over another. This is similar to the George/Epstein study in which unintentional murder is less severe than intentional murder and likely to result in a different outcome. I expect activities related to religion in general (coded as 1) to correlate with more votes in favor of both integrating church and state (1 for vote1) and supporting the religious interest (1 for vote2).

The fourth legal factor considers the influence of precedent, which both Levi (1948) and Wasby (1988) noted as primary elements of the legal model. The outcome of *Everson v. Board of Education* accommodated religion. Its interpretation of the Establishment Clause, however, set a precedent that required all public aid to religion either to have a secular purpose or to be necessary in order to avoid abridging someone's freedom to exercise his or her religion (Carroll, 1967). *Abington v. Schempp* (1963) added that laws must have both a secular purpose ***and effect***. This established the first two prongs of the Lemon test (1971), which is the most recent precedent to date. This test, which originated in *Lemon v. Kurtzman*, raised the wall separating church and state by adding a third prong ***restricting excessive government entanglement with religion*** (Epstein and Walker, 1998). I expect cases between *Everson* and *Abington* (coded as 2) to correlate with more votes in favor of both integrating church and state (1 for vote1) and supporting the religious interest (1 for vote2), followed by cases between *Abington* and *Lemon* (coded as 1), and finally by cases following *Lemon* (coded as 0). (*Everson* was not under any of these precedents and is coded with a 9.)

The fifth legal factor considers the extent to which religion and government are mixing in each case. Religious activities take place in public settings in some cases (coded as 0), such as prayer at football games (i.e. *Santa Fe Independent School District v. Doe*). Public resources privately support religious interests in other cases (coded as 1), such as public funds paying for textbooks in parochial schools (i.e. *Board of Education v. Allen*). The latter is less threatening because religion does not garner attention in a public forum. Justice Black, writing for the majority in *Everson v. Board of Education* (330 U.S. 855), noted that it would be undesirable to restrict all public funds from benefiting parochial school children. While city buses might seem expendable, other public-supported services, such as police, are not. I expect cases involving public funding of religion (coded as 1) to correlate with more votes in favor of both integrating church and state (1 for vote1) and supporting the religious interest (1 for vote2).

In some cases (coded as 2), the religious activity does not take place in public and does not request public resources. An example is when a private religious group seeks exemption from a court's overview of employment practices (i.e. *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*). I expect these cases to have the strongest correlation with votes in favor of both integrating church and state (1 for vote1) and supporting the religious interest (1 for vote2).

Extra-legal factors specific to justices

I expect these factors to have the greatest influence on justices' decisions, just as extra-legal factors were the most potent in the George/Epstein study (1992).

The first extra-legal factor specific to justices is political ideology (conservative or liberal). This is a commonly used variable in studies of extra-legal factors and both Pritchett and Nagel used it in their previously noted studies. Unlike Nagel's use of political party to indicate ideology, however, this study will use the Segal/Cover scores (Segal and Cover, 1989; Segal interview). These scores range from –1 to 1. The sign on these scores is switched so that more conservative justices receive the higher numbers. As a result, this factor is consistent with the other factors in this study in that the higher score is expected to correlate with more votes in favor of both integrating church and state (1 for vote1) and aiding the religious interest (1 for vote2).

The other extra-legal factor specific to justices is religious affiliation. Some scholars have considered factors regarding personal attributes to be "crude and unworkable" (Goldman and Sarat, 1978). Elifson and Hadaway's 1985 study of public opinion, however, found religious affiliation influenced people's support for prayer in school. More specifically, he found that conservative Protestant denominations (i.e. Baptist and Sects) were most in favor of prayer and Bible reading in schools, followed by moderate Protestants (i.e. Lutheran and Methodist) and then liberal Protestants (i.e. Episcopalian, Presbyterian, and Unitarian). Those labeled simply as Protestants or Catholics were generally comparable to the moderate Protestants. Jewish respondents were substantially less supportive of prayer and Bible reading in schools than any Christian denomination was.

The Establishment Clause cases in this study involve questions similar to those posed in the Elifson/Hadaway study (1985), and justices are people who might be influenced in ways similar to those surveyed in this study. Therefore, I expect that cases in which the religion in question matches the justice's religion (coded as 1) will correlate with more votes in favor of both integrating church and state (1 for vote1) and supporting the religious interest (1 for vote2) than cases in which the religion in question does not match the justice's religion (coded as 0). Furthermore, I expect justices of the more conservative Christian denominations noted above to be progressively more supportive of integrating church and state and supporting religious interests in cases concerning Christianity.

Extra-legal factors regarding political climate

Despite the strong influence political climate had on death penalty cases in the George/Epsten study, the written opinions in the Establishment Clause cases seem to rely more on legal factors and extra-legal factors that are specific to the justices. Supreme Court justices might be attempting to hide the influence that political pressure has on what has traditionally been viewed as an objective, non-political branch of government, but I expect factors regarding political climate really are less influential than both extra-legal factors specific to justices and legal factors.

The first extra-legal factor regarding political climate is whether the President is Republican (coded as 1) or Democratic (coded as 0) when the case is decided. Just as the

George/Epstein study did, I expect a Republican president to indicate a more conservative political climate and to correlate with more votes in favor of both integrating church and state (1 for vote1) and supporting the religious interest (1 for vote2).

The other extra-legal factor regarding political climate is whether Congress is controlled by Republicans in both houses (coded as 2), Republicans in one house and Democrats in the other (coded as 1), or Democrats in both houses (coded as 0). Again, I expect more Republican power to indicate a more conservative political climate and to correlate with more votes in favor of both integrating church and state (1 for vote1) and supporting the religious interest (1 for vote2).

(It should be noted that previous studies have considered the influence of amicus curiae briefs in measuring political climate. The cases in this study, however, regularly include a plethora of briefs from a variety of viewpoints. This compromises the variability of this factor and its ability to provide a useful measure of the political climate.)

Procedure

I will use cross tabulations and Chi Square tests to determine the relationship between each factor (except for ideology) and each of the dependent variables that the tables show. The chi-squared statistic tells the difference between the observed outcomes and the outcomes expected if no relationship between the dependent and independent variables exists. The probability tells the likelihood that such results would occur in data in which no relationships exist between the variables in the population. For this study, we will use the 5% threshold for rejecting the null hypotheses. That is, we will accept the null hypothesis of no relationship unless there is less than a 5% chance the observed relationship in all of the data has come from a population of cases where the two variables are correlated. The percentages tell the influence that each factor has on each of the dependent variables (Bohrnstedt and Knoke, 1982, 106-117).

I will run a regression analysis to determine the influence of ideology on each of the dependent variables because this factor is coded with continuous data, unlike the other factors that include nominal data. I will also use a multiple regression analysis to see what factors have a direct influence on how justices vote and what factors are only

influential through other factors. In the multiple regression analysis, I will use robust regression to get the standard error because, as a result of dichotomous dependent variables, the errors are heteroscadastic. This study will indicate the influence of each factor on justices' decisions and how much influence each factor has.

The R-squared values will show the strength of the correlation between each independent variable and each of the dependent variables. The p-values will show the probability that these relationships happened by chance (the relationship and effect will be considered statistically insignificant for any value greater than .05, or 5%). The coefficients will show the effect of these relationships on the two dependent variables (Balsley, 1964; Triola, 1989).

Summary of hypotheses

I expect this study to show that (1) the political climate has little effect on justices' voting, (2) extra-legal factors have a greater effect on justices' voting than legal factors do, (3) justices vote more on whether to help or hurt religion (vote2) than on whether church and state should be separated (vote1), and (4) justices are more likely to support religions with which they are affiliated.

Results

Political Climate

President: The correlation between a Republican being President when an Establishment Clause case is decided and how justices vote in the case is negative rather than positive as expected, minimal, and statistically insignificant.

Justices are .4% less likely with a Republican president to vote in favor of mixing church and state. This is statistically insignificant with a p-value of .922.

	President	
Vote 1	Democrat	Republican
Separate	50.6%	51.0%
Mix	49.4%	49.0%
Total	100%	100%

	(241)	(390)
Pearson chi2(2) = 0.0097 Pr = 0.922		

Justices are 3% less likely with a Republican president to vote in favor of aiding a religious interest. This is statistically insignificant with a p-value of .483.

	President	
Vote 2	Democrat	Republican
No aid to religion	50.2%	53.1%
Aid to religion	49.8%	46.9%
Total	100%	100%
	(241)	(390)
Pearson chi2(2) = 0.4914 Pr = 0.483		

Congress: The party controlling Congress has no statistically significant correlation with how justices decide Establishment Clause cases. The expectation that the number of votes in favor of (1) mixing church and state and (2) aiding religious interests increases as Republican control increases holds in some instances and does not hold in others.

Justices are 10% more likely to support mixing church and state when Republicans control one house than when Democrats control both houses. Justices are only 7% more likely to support mixing church and state when Republicans control both houses. The relationship between congress and vote1, however, is statistically insignificant at p=.073.

	Congress		
Vote 1	Democrat	Divided	Republican

Separate	54.2%	43.8%	47.2%
Mix	45.8%	56.2%	52.8%
Total	100% (406)	100% (153)	100% (72)
Pearson chi2(2) = 5.2388 Pr = 0.073			

The correlation between Republican control of Congress and how justices vote regarding whether or not to aid religious interests is minimal and statistically insignificant. Justices are 1% less likely to aid a religious interest when Republicans control one house and 5% more likely to aid a religious interest when Republicans control both houses. The p-value is .663.

	Congress		
Vote 2	Democrat	Divided	Republican
No aid to religion	52.2%	53.6%	47.2%
Aid to religion	47.8%	46.4%	52.8%
Total	100%	100%	100%

	(406)	(153)	(72)
Pearson chi2(2) = 0.8219 Pr = 0.663			

In summary, neither factor measuring political climate has a statistically significant relationship with justices' votes to mix church and state or to aid religious interests. This supports the hypothesis that political climate has little effect on how justices vote in Establishment Clause cases.

Legal Factors

Secular purpose: The presence of a secular purpose in a case does correlate with and significantly affect how justices vote on whether to mix church and state (vote1). Furthermore, this effect is opposite the expected effect. Justices are about 11% less likely to support mixing church and state when a secular purpose is present than when it is not present, and this number is statistically significant at p=.005.

	Secular purpose	
Vote 1	Not present	Present
Separate	44.1%	55.4%
Mix	55.9%	44.6%
Total	100%	100%
	(252)	(379)
Pearson chi2(2) = 7.8174 Pr = 0.005		

This relationship directly contradicts expectations. All three Establishment Clause precedents state that a secular purpose is necessary in order for a law to be upheld. Yet this study concludes that *a law mixing church and state is (11%) less likely to be upheld if a secular purpose is present.*

One possible explanation is that lawyers frequently failed to highlight the presence of a secular purpose, especially when other factors, such as certain discrimination or free-exercise claims, were present. Consequently, the presence of the secular purpose did not have the effect it otherwise would have had in influencing justices to vote in favor of mixing church and state. This possibility deserves further study at another time. Such a study would include an analysis of the briefs that attorneys filed and the arguments they made in each of the Establishment Clause cases. This study does not include such qualitative data.

Another possible explanation is that the presence of a secular purpose frequently occurs with other legal factors that are negatively correlated with votes in favor of mixing church and state (i.e. the absence of a strong religious-based claim or the presence of a general request instead of a specific request, both of

which are addressed later). The negative effects of these factors could outweigh what would otherwise be a positive correlation between the presence of a secular purpose and voting to mix church and state.

The statistical results in this study, however, do not support the latter explanation. Instead, the presence of a secular purpose is negatively correlated with voting to mix church and state even when each of the other legal factors are held constant. In many cases, the presence of a secular purpose actually has a stronger negative effect on voting to mix church and state when other variables are held constant. The most prominent example of this occurs when the effect of a secular purpose is measured in only those cases where the religious-based claim is a specific religion claiming it is being discriminated against (*Sherbert vs. Verner, Welsh v United States*). When isolating the secular purpose factor in this way, voting to mix church and state is 42% less likely when a secular purpose is present than when it is not present (p=.004).

The presence of a secular purpose in a case does not correlate significantly with how justices vote on whether to aid a religious interest (vote2). Justices are about 5% less likely to vote in favor of aiding a religious interest when a secular purpose is stated. This relationship is again opposite the expected relationship, but it is statistically insignificant at p=.194.

	Secular purpose	
Vote 2	Not present	Present
No aid to religion	48.8%	54.1%
Aid to religion	51.2%	45.9%
Total	100%	100%
	(252)	(379)
Pearson chi2(2) = 1.6906 Pr = 0.194		

Isolating the effects of this variable as previously explained does provide one instance in which the presence of a secular purpose is positively correlated in a statistically significant way with voting to aid a religious interest. For only those cases in which a specific religion is asking for special rights (*McGowan v. Maryland*, *Epperson v. Arkansas*), justices are 38% more likely to vote in favor of aiding the religious interest when a secular purpose is stated than when it is not (p=.000).

Religion-based claim: As expected, the type of religion-based argument present in the Establishment Clause case has a strong, statistically significant correlation and influence on how justices vote regarding both mixing church and state (vote1) and aiding a religious interest (vote2).

As expected, discrimination against a specific religion is the most effective argument for mixing church and state. Justices are 14% more likely to support mixing church and state with this argument than

with an argument claiming discrimination against religion in general, 26% more likely than when special rights are requested for religion in general, and 18% more likely than when special rights are requested for a specific religion. These relationships are statistically significant at p=.008.

Each religion-based argument has the influence expected relative to the other arguments, with one exception. Justices are about 9% more likely to vote in favor of mixing church and state when special privileges are requested for a specific religion than when these privileges are requested for religion in general. This means justices are more likely to prefer one religion over another than to give all religions the same special rights. *This indicates that justices do not use Rehnquist's non-preferentialism standard and do put more emphasis on limiting the extent to which church and state mix*.

	Religion-based claim			
Vote 1	Specific free-exercise	General free-exercise	General discrimination	Specific discrimination
Separate	52.5%	61.3%	49.4%	35.0%
Mix	47.5%	38.7%	50.6%	65.0%
Total	100%	100%	100%	100%
	(99)	(124)	(348)	(60)
Pearson chi2(2) = 11.8329 Pr = 0.008				

As expected, discrimination against a specific religion is the most effective argument for aiding a religious interest, also. Furthermore, every argument has the expected influence relative to the other arguments. Justices are 18% more likely to vote in favor of aiding a religious interest with this argument than with an argument claiming discrimination against religion in general, 31% more likely than with an argument requesting special rights for religion in general, and 39% more likely than with an argument requesting special rights for a specific religion. These results are statistically significant at p<.001.

	Religion-based claim

Vote 2	Specific free-exercise	General free-exercise	General discrimination	Specific discrimination
No aid to religion	68.7%	61.3%	47.7%	30.0%
Aid to religion	31.3%	38.7%	52.3%	70.0%
Total	100%	100%	100%	100%
	(99)	(124)	(348)	(60)
Pearson chi2(2) = 29.5424 Pr < 0.001				

General/specific: The scope of a religious claim (i.e. general or specific) does not correlate significantly with how justices vote regarding whether or not to allow church and state to mix. Contrary to expectations, justices are about 8% less likely to vote in favor of mixing church and state for a general claim than for a specific claim. This is just outside the boundaries of statistical significance set for this study with a p-value of .059. Nevertheless, this result does fit results from the free-exercise variable in which justices were more likely to allow mixing of church and state for a specific religion requesting special rights than for religion in general requesting special rights. *Again, justices seem to be ignoring the non-preferentialism standard that Rehnquist proposed, limiting the extent to which church and state mix, and responding more aptly to individual claims than to general concerns regarding the relationship between church and state.*

	Scope of religious claim	
Vote 1	Specific	General
Separate	44.6%	53.3%
Mix	55.4%	46.9%
Total	100%	100%
	(168)	(463)
Pearson chi2(2) = 3.5543 Pr = 0.059		

No statistically significant correlation exists between whether a religious claim is general or specific and how justices vote on whether to aid a religious interest. Justices are about 1% more likely to

vote in favor of aiding a religious interest when the claim is general. This is consistent with expectations but statistically insignificant with a p-value of .763.

	Scope of religious claim	
Vote 2	Specific	General
No aid to religion	53.0%	51.6%
Aid to religion	47.0%	48.4%
Total	100%	100%
	(168)	(463)
Pearson chi2(2) = 0.0909 Pr = 0.763		

Precedent: A statistically significant relationship exists between the standing precedent in each case and how justices vote regarding whether or not church and state can mix ($p<.001$). The effect of precedent is significant, and the relative influence of each precedent is different than expected. Justices are about 24% more likely to vote in favor of mixing church and state under the Lemon precedent than under both the Everson precedent and the Abington precedent. This differs substantially from expectations that justices would be most likely to vote in favor of mixing church and state with the Everson precedent, then with the Abington precedent, and finally with the Lemon precedent.

	Precedent			
Vote 1	Pre-Everson	Everson	Abington	Lemon
Separate	44.4%	70.5%	70.0%	46.3%
Mix	55.6%	29.5%	30.0%	53.7%
Total	100%	100%	100%	100%
	(60)	(61)	(501)	(9)
Pearson chi2(2) = 22.5046 Pr < 0.001				

The relationship between the standing precedent in each case and how justices vote regarding whether or not to aid the religious interest is also statistically significant ($p=.014$). Again, the effect of precedent is substantial and the relative influence of each precedent is different than expected. Justices are

surprisingly most likely to vote in favor of aiding a religious interest under the Lemon precedent—21% more so than under the Everson precedent and 7% more so than under the Abington precedent.

	Precedent			
Vote 2	Pre-Everson	Everson	Abington	Lemon
No aid to religion	44.4%	70.5%	56.7%	49.3%
Aid to religion	55.6%	29.5%	43.3%	50.7%
Total	100%	100%	100%	100%
	(60)	(61)	(501)	(9)
Pearson chi2(2) = 10.5475			Pr = 0.014	

Public/private: A statistically significant relationship exists between the setting of the religious activity and how justices vote regarding both mixing church and state (vote1) and aiding a religious interest (vote2). The effects are substantial and consistent with those expected.

Justices are 21% more likely to vote in favor of mixing church and state when the religious activity does not come into public space than when it does. This relationship is statistically significant with a p-value less than .001.

	Setting of religious activity		
Vote 1	Religion in public setting	Public funds in religion, private setting	No public funds, private setting
Separate	65.2%	44.1%	48.1%
Mix	34.8%	55.9%	51.9%
Total	100%	100%	100%
	(178)	(322)	(131)
Pearson chi2(2) = 20.8719		Pr < 0.001	

Justices are also 21% more likely to vote in favor of aiding a religious interest when the religious activity does not come into public space than when it does. This relationship is also statistically significant with a p-value less than .001.

	Setting of religious activity		
Vote 2	Religion in public setting	Public funds in religion, private setting	No public funds, private setting
No aid to religion	65.2%	44.1%	53.4%
Aid to religion	34.8%	55.9%	46.6%
Total	100%	100%	100%
	(178)	(322)	(131)
Pearson chi2(2) = 20.5265			Pr < 0.001

In summary, legal factors do significantly affect how justices vote in Establishment Clause cases, in accordance with the hypothesis. Some of these effects are different than expected, however. The presence of a secular purpose and of a religious claim being general instead of specific in nature are negatively correlated with justices' votes to mix church and state and to aid religious interests. Justices have become more likely to vote in favor of mixing and of aiding with more recent precedents. As expected, justices are more likely to vote in favor of mixing and of aiding when the religion-based claim is requesting equal treatment instead of special rights, and when the religious activity takes place in private instead of in public.

Extra-Legal Factors

Ideology: As noted in the section on procedure, the relationship between justices' ideologies and how they vote is tested using regression analysis. Justices' ideologies correlate significantly with how they vote regarding both mixing church and state (vote1) and aiding a religious interest (vote2). The effect of ideology on how justices vote is substantial and consistent with expectations.

Justice	**Ideology**
Vinson	-0.5
Black	-0.75
Reed	-0.45
Frankfurter	-0.33
Douglas	-0.46
Murphy	-1
R. Jackson	-1
W. Rutledge	-1
Burton	0.44
Clark	0
Minton	-0.44
Warren	-0.5
Harlan II	-0.75
Brennan	-1
Whittaker	0
Stewart	-0.5
B. White	0
Goldberg	-0.5
Fortas	-1
T. Marshall	-1
Burger	0.77
Blackmun	0.77
Powell	0.67
Rehnquist	0.91
Stevens	0.5

O'Connor	0.17
Scalia	1
Kennedy	0.27
Souter	0.34
Thomas	0.68
Ginsburg	-0.36
Breyer	0.05

The R-squared value for vote1 is .0890. More conservative justices are as much as 43% more likely to vote in favor of mixing church and state than more liberal justices, and this number is statistically significant with a p-value less than .001.

	Ideology				
Vote1	Co-efficient	Standard error	R-squared	Probability	Intercept
	21.4%	2.59%	0.0890	< 0.001	48.0%

The R-squared value for vote2 is .0818. More conservative justices are 20% more likely to vote in favor of aiding a religious interest than more liberal justices, and this number is statistically significant with a p-value less than .001.

	Ideology				
Vote2	Co-efficient	Standard error	R-squared	Probability	Intercept
	20.5%	2.59%	0.0818	< 0.001	47.0%

Religious affiliation: The relationship between justices' religious affiliation (either Jewish or Christian) and how they vote on Establishment Clause cases with different types of religious and philosophical claims is statistically significant. Furthermore, the effect of a justice's religious affiliation matching the religion addressed in a particular case is substantial and generally in line with expectations.

The first variable (match3) considered how the justices voted in cases regarding religious claims specific to Christianity and general claims affecting Christianity and other religions. As expected, justices affiliated with Christianity are substantially more likely (31%) to vote in favor of mixing church and state in these cases than justices affiliated with Judaism are, and this relationship is statistically significant with a p-value of .018.

	Christian Cases

Vote 1	Jewish justices	Christian justices
Separate	80.95%	50.19%
Mix	19.05%	49.81%
Total	100%	100%
	(21)	(532)
Pearson chi2(2) = 8.0710 Pr = 0.018		

As expected, justices affiliated with Christianity are 27% more likely to vote in favor of aiding the religious interest in these cases than justices affiliated with Judaism are, and this relationship is statistically significant with a p-value less than .001.

	Christian Cases	
Vote 2	Jewish justices	Christian justices
No aid to religion	80.95%	53.76%
Aid to religion	19.05%	46.24%
Total	100%	100%
	(21)	(532)
Pearson chi2(2) = 20.1476 Pr < 0.001		

Sufficient evidence is not available to quantitatively evaluate how justices' religious affiliation affects their voting in non-Christian cases. Only in two instances did a justice affiliated with a religion other than Christianity vote on a case regarding a religion other than Christianity.

Sufficient evidence is available to evaluate how justices affiliated with Christianity voted in cases regarding Christianity compared to cases regarding other religions. Surprisingly, these justices were 3% more likely to support mixing church and state in cases when the religion was not Christianity than when it was. Furthermore, these justices were 7% more likely to support aiding Judaism and 27% more likely to

support aiding other non-Christian religions. The p-values for all of these statistics using robust regression were less than .05.

	Christian Justices Voting to Mix or Separate Church and State				
Religion addressed in case	Coefficient	Standard error	R-squared	Probability	Intercept
Christianity	28.1%	8.9%	0.0117	0.002	21.70%
Judaism	31.20%	14.9%	0.0117	0.037	21.70%
Other religion/philosophy	30.80%	10.8%	0.0117	0.005	21.70%

	Christian Justices Voting whether or not to Aid Religion				
Religion addressed in case	Co-efficient	Standard error	R-squared	Probability	Intercept
Christianity	24.5%	8.9%	0.0346	0.006	21.7%
Judaism	31.2%	14.9%	0.0346	0.037	21.7%
Other religion/philosphy	51.1%	10.4%	0.0346	0.000	21.7%

Two explanations exist for these observations. The first is that justices affiliated with Christianity really are more supportive of religions other than Christianity. The more likely explanation, however, is that other factors more common in these cases (i.e. the type of religion-based claim, the scope of the religious claim, etc.) make votes in favor of mixing church and state and aiding religion more likely. For example, cases regarding less mainstream religions are more likely to include claims of discrimination against their specific religion. Votes in favor of mixing church and state and aiding religion are more likely when these claims are made (*Welsh v United States*). In order to accurately test the influence of religious affiliation in these cases, more than one affiliation has to be included. As previously stated, this data is not available.

This study can test the hypothesis that, in cases regarding Christianity, voting in favor of mixing church and state and allowing government to aid religion correlates positively with how conservative the justice's denomination is. This hypothesis holds true in some cases and does not hold true in others. (Sufficient evidence is not available to see the relationship between the justice's Christian denomination and vote in cases regarding religions other than Christianity.)

As expected, justices affiliated with a moderate Protestant denomination are about 16% more likely than justices affiliated with a liberal Protestant denomination to vote in favor of mixing church and state and about 12% more likely than justices affiliated with Catholicism to do so. These justices are about 14% more likely than those affiliated with liberal Protestant denominations to vote in favor of allowing government to aid Christianity and about 12% more likely than those affiliated with Catholicism to do so.

Justices affiliated generally with Protestantism, but no specific denomination, are slightly less supportive than expected of mixing church and state (16% less than justices affiliated with liberal Protestant denominations and 20% less than justices affiliated with Catholicism) and of allowing government to aid religion (36% less than justices affiliated with liberal Protestant denominations and 28% less than justices affiliated with Catholicism).

As expected, however, justices affiliated with any of these Christian denominations are more supportive than justices affiliated with Judaism are of mixing church and state (45% more for justices affiliated with moderate Protestant denominations and 14% more for justices affiliated generally with Protestantism) and of allowing government to aid religion (41% more for justices affiliated with moderate Protestant denominations and 5% more for justices affiliated generally with Protestantism) in Christian cases.

Justices affiliated with conservative Protestant denominations contradict expectations. These justices are expected to be the most supportive of both mixing church and state and allowing government to aid religion in Christian cases. Instead these justices are the least supportive of mixing church and state (50% less than justices affiliated with a moderate Protestant denomination and 5% less than justices affiliated with Judaism) and the second-least supportive of allowing government to aid religion (39% less than justices affiliated with a moderate Protestant denomination and only 2% more than justices affiliated with Judaism).

The p-value for these relationships between religious affiliation and voting to mix church and state is .001. The p-value for these relationships between religious affiliation and voting to allow government to aid religion is less than .001. It should also be noted, however, that in this study justices affiliated with conservative Protestant denominations voted on Establishment Clause cases only 14 times, compared to a total of 378 votes for justices affiliated with less conservative Protestant denominations. Perhaps with a greater number of votes, the results would be more similar to those predicted.

	Justices' religious affiliation in Christian cases					
Vote 1	Cons. Prot.	Mod. Prot.	Lib. Prot.	Gen. Prot.	Catholic	Jewish
Separate	85.71%	35.71%	51.43%	67.35%	47.25%	80.95
Mix	14.29%	64.29%	48.57%	32.65%	52.75%	19.05
Total	100%	100%	100%	100%	100%	100%
	(14)	(98)	(280)	(49)	(91)	(21)
Pearson chi2(2) = 38.1443 Pr = 0.001						

Extract of Christian cases from Chi-squared test with religious affiliation and vote1 for all cases:

Extract of Christian cases from Chi-squared test with religious affiliation and vote2 for all cases:

Along with the statistical concern previously noted, two explanations exist for the unexpected voting of justices affiliated with conservative Protestant denominations. One possibility is that Goldman and Sarat were right in noting that attributes such as religious affiliation are "crude and unworkable" and cannot accurately predict behavior. "In reality, each of the background or attribute

	Justices' religious affiliation in Christian cases					
Vote 2	Cons. Prot.	Mod. Prot.	Lib. Prot.	Gen. Prot.	Catholic	Jewish
No aid to religion	78.57%	39.80%	54.29%	75.51%	51.65%	80.95%
Aid to religion	21.43%	60.20%	45.71%	24.49%	48.35	19.05%

Total	14	98	280	49	91	21
	100%	100%	100%	100%	100%	100%
Pearson		chi2(2)		=		54.7406
Pr < 0.001						

variables tested … is not easily linked to just one set of attitudes and values," according to their 1978 study (Goldman and Sarat, 1978). This explanation seems unlikely, however, in light of the accurate predictions for the other five categories of religious affiliation. Contrary to Goldman and Sarat's claims, religious affiliation seems to predict remarkably well how justices vote in Establishment Clause cases.

Another explanation is that more information is necessary to improve this factor's ability to predict how justices will vote. In their 1985 study of the relationship between religious affiliation and support for prayer and Bible-reading in school, Elifson and Hadaway asked numerous questions (i.e. frequency of church attendance, beliefs about whether the Bible was divinely inspired, etc.) to determine the degree of commitment the respondent had to his/her religion (Elifson and Hadaway, 1985). These factors are not included in this study. Not being able to measure the degree of religious affiliation is probably the best explanation for this variable's shortcomings in predicting judicial behavior.

Anecdotal evidence

William Rehnquist, the current Chief Justice of the Supreme Court, and William Brennan, an associate justice from 1956 to 1990, exemplify justices whose voting behavior is consistent with that predicted and generally observed in this study.

Rehnquist is a conservative justice (Segal/Cover score of .91) who is affiliated with the Lutheran church, a moderate Protestant denomination. Brennan is a liberal justice (Segal/Cover score of -1) who is affiliated with the Roman Catholic Church. Rehnquist and Brennan voted as expected considering these characteristics, specifically in *Texas Monthly, Inc. vs. Bullock* and in *Committee for Public Education and Religious Liberty vs. Regan*.

Texas Monthly, Inc. vs. Bullock: Between 1984 and 1987, religious publications were exempted from sales and use taxes in Texas. In 1985, the publisher of a non-religious, general-interest magazine sued to receive a similar exemption. The Third District Court of Appeals in Texas found the tax exemption for religious publications to be valid under each of the three prongs in the Lemon test: it served a secular purpose in separating between church and state, it did not have the primary effect of advancing or inhibiting religion, and it did not produce impermissible government entanglement with religion. This law kept sectarian money separate from public funds.

Brennan disagreed. Writing for the majority, he argued that the exemption separating church and state had an effect that benefited religion unnecessarily and therefore violated the Establishment Clause. Rehnquist dissented from Brennan's opinion and upheld the ruling of the Texas court.

This is an example in which both justices voted on whether to let government aid religion, not whether government and religion should be separate. Rehnquist, the more conservative justice both

ideologically and religiously, voted in favor of the religious interest, which in this case meant separating church and state. Brennan, the more liberal justice both ideologically and religiously, voted against religion receiving aid from the government—even indirectly, which in this case meant not separating church and state.

Committee for Public Education and Religious Liberty vs. Regan: The state of New York mandated schools to perform certain testing and reporting services. Sectarian, non-public schools received reimbursements from New York for completing these state-mandated tasks. This law allowed public funds to sectarian schools. It was challenged in lower courts and eventually reached the Supreme Court in 1980.

Rehnquist voted with the majority to uphold this law allowing public funds to go to sectarian schools. He argued this law and these funds went toward a purpose that was entirely secular and had no risk of being entangled with the sectarian roles of the religious institutions. Brennan dissented on the ground that public funds were going to sectarian, non-public schools.

This is an example in which voting to relax the separation between church and state is compatible with voting to aid religion. Rehnquist, the more conservative justice both ideologically and religiously, voted in this way. Brennan, the more liberal justice both ideologically and religiously, voted to separate church and state and to prevent the sectarian schools from receiving public aid.

These justices' behavior is consistent with predictions in both of these cases. They seem to vote on whether the law aids or hinders religion more than whether the law separates church and state. The ideologically and religiously more conservative justice voted to aid religion both times, and the more liberal justice voted against aiding religion both times.

A third case, *Hernandez vs. Commissioner of Internal Revenue*, exemplifies another prediction and observation in this study: justices vote in favor of their religious affiliation and against other religious affiliations. This case, like *Texas Monthly, Inc. vs. Bullock*, is a tax-exemption case. This case, however, focuses on the Church of Scientology instead of religious publications in general.

Charitable donations to religious and other organizations are eligible for tax exemptions. The Church of Scientology provides services, which are called, "auditing." In these one-on-one sessions, a church member pays a church official a set price to perform certain services (i.e. doctrinal training to become an auditor, etc.). Refunds are available for unperformed services. The Commissioner of Internal Revenue disallowed these deductions. The Tax Court of the United States rejected Establishment Clause and Free-Exercise arguments and upheld the commissioner's decision, arguing that these religious contributions were not donations because the contributor received benefits.

Rehnquist voted with the majority to uphold this decision. (Brennan did not pariticipate in this case.) This is an example of a justice voting in support of tax exemptions for the religion with which he is affiliated and against tax exemptions for another, less mainstream religion. This supports the hypothesis that justices affiliated with Christianity are more likely to support aid to Christianity than other religions. The factual distinctions among these religions, specifically the distinction between a charitable donation to

a religious institution and a fee for personal religious service, also provide deeper understanding of how some religions are more compatible with government objectives than others are.

Following is a table of the nine current justices, their tenure, their ideology, their religious affiliation, and the percentage of their votes in favor of mixing church and state and of aiding a religious interest. Justices with the most conservative (highest scoring) ideologies and religious affiliations voted in favor of mixing church and state and of aiding religious interests most frequently. Justices with the most liberal ideologies who were affiliated with Judaism voted in favor of mixing church and state and of aiding religious interests least frequently.

Justice	Tenure	Ideology	Religious affiliation	% of votes for mixing church and state (# of cases)	% of votes for aiding religious interest (# of cases)
Rehnquist	1/7/72-	0.91	Lutheran	80.0% (55)	81.8% (55)
Stevens	12/19/75-	0.5	Protestant	28.3% (46)	23.9% (46)
O'Connor	9/25/81-	0.17	Episcopal	68.6% (35)	54.3% (35)
Scalia	9/26/86-	1	Roman Catholic	90.0% (20)	95.0% (20)
Kennedy	2/18/88-	0.27	Roman Catholic	75.0% (16)	75.0% (16)
Souter	10/9/90-	0.34	Episcopal	20.0% (10)	20.0% (10)
Thomas	10/23/91-	0.68	Roman Catholic	100.0% (10)	100.0% (10)
Ginsburg	10/10/93-	-0.36	Jewish	0.0% (7)	0.0% (7)
Breyer	8/3/94-	0.05	Jewish	50.0% (6)	50.0% (6)

Multiple Regression

This multiple regression includes all independent variables to see which factors directly affect voting and which factors have only an indirect influence through other factors. The coefficients recorded as percentages here are the influence these factors have when combined with all other factors in the study.

Six factors have a statistically significant relationship with vote1 in the multiple regression. Justices are 17% less likely to vote in favor of mixing church and state if a secular purpose is present than if it is not ($p<.001$). Justices are 39% less likely to support mixing church and state for a general claim than for a specific claim ($p=.001$). Justices are 37% more likely to allow mixing if public funds are going to religion in a private setting than if the religious activity takes place in a public setting ($p<.001$). Justices are about 2% more likely to vote in favor of mixing church and state under the Lemon precedent than under the Everson precedent and about 19% more likely than under the Abington precedent ($p=.0293$). Conservative justices are as much as 37% more likely to vote in favor of mixing church and state than liberal justices are ($p<.001$). Justices affiliated with Christianity are 28% more likely to vote in favor of mixing church and state in cases regarding Christianity than Jewish justices are ($p=.0006$). The R-squared value for vote1 is .2120.

Multiple regression for vote1 with each independent variable

	Coefficient	Standard Error	R-squared	Probability	Intercept
Secular purpose	-0.1699	0.0440	0.2120	< 0.001	0.1125
Special privileges for specific religion*	Dropped	Dropped	0.2120	Dropped	0.1125
Special privileges for religion in general*	0.0108	0.1213	0.2120	0.929	0.1125
Equal treatment for religion in general*	0.0944	0.1492	0.2120	0.527	0.1125
Equal treatment for specific religion*	0.0700	0.1056	0.2120	0.508	0.1125
General claim	-0.3872	0.1156	0.2120	0.001	0.1125
Private setting for religious activity	0.3699	0.0731	0.2120	< 0.001	0.1125
Abington**	0.0852	0.2215	0.2120	0.701	0.1125
Everson**	0.2485	0.2290	0.2120	0.278	0.1125
Lemon**	0.2702	0.2160	0.2120	0.211	0.1125
Ideology (Conservative)	0.1865	0.0270	0.2120	< 0.001	0.1125
Christian justice with Christian case	0.2773	0.0889	0.2120	0.001	0.1125
Democratic Congress***	Dropped	Dropped	0.2120	Dropped	0.1125
Split Congress***	0.0489	0.0519	0.2120	0.347	0.1125
Republican Congress***	0.0068	0.0845	0.2120	0.936	0.1125
President (Republican)	-0.0959	0.0536	0.2120	0.074	0.1125

* Test-parameter for religion-based argument is p=.761

** Test-parameter for precedent is p=.029

*** Test-parameter for party controlling Congress is .642

Four factors have a statistically significant relationship with vote2. Compared to cases in which the religion-based argument is a specific religion requesting special privileges, justices are 31% more likely to vote in favor of aiding religion when the claim is special privileges for religion in general, 48% more likely when the religious claim addresses discrimination against religion in general, and 17% more likely when the religious claim addresses discrimination against a specific religion (p=.0333). Justices are 33% less likely to support aiding religion for a general claim than for a specific claim (p=.011). Conservative justices are as much as 39% more likely to vote in favor of aiding religion than liberal justices are (p<.001). Justices affiliated with Christianity are 25% more likely to vote in favor of aiding Christianity than justices affiliated with Judaism are (p=.0011). The R-squared value for vote2 is .1684.

Multiple regression for vote2 with each independent variable

	Coefficient	Standard Error	R-squared	Probability	Intercept
Secular purpose	-0.0815	0.0456	0.1684	0.074	-0.0396
Special privileges for specific religion*	Dropped	Dropped	0.1684	Dropped	-0.0396
Special privileges for religion in general*	0.3098	0.1327	0.1684	0.020	-0.0396
Equal treatment for religion in general*	0.4778	0.1633	0.1684	0.004	-0.0396
Equal treatment for specific religion*	0.1709	0.1147	0.1684	0.137	-0.0396
General claim	-0.3273	0.1285	0.1684	0.011	-0.0396
Private setting for religious activity	0.1324	0.0784	0.1684	0.108	-0.0396
Abington**	0.1313	0.2333	0.1684	0.574	-0.0396
Everson**	0.2022	0.2391	0.1684	0.398	-0.0396
Lemon**	0.1668	0.2242	0.1684	0.457	-0.0396
Ideology (Conservative)	0.1971	0.0277	0.1684	< 0.001	-0.0396
Christian justice with Christian case	0.2458	0.0972	0.1684	0.001	-0.0396
Democratic Congress***	Dropped	Dropped	0.1684	Dropped	-0.0396
Split Congress***	0.0038	0.0527	0.1684	0.943	-0.0396
Republican Congress***	-0.0414	0.0857	0.1684	0.629	-0.0396
President (Republican)	-0.0992	0.0529	0.1684	0.061	-0.0396

* Test-parameter for religion-based argument is p=.033

** Test-parameter for precedent is p=.776

*** Test-parameter for party controlling Congress is .883

Summary of results

Hypothesis 1: This study supports the hypothesis that the political climate has little effect on how justices vote. No statistically significant relationship exists between how justices vote and either of the factors measuring political climate.

Hypothesis 2: This study does support the hypothesis that extra-legal factors have a greater effect on justices' voting than legal factors do, but both factors substantially influence how justices vote in Establishment Clause cases. When isolated, the two extra-legal factors have a greater influence on how justices vote than any of the legal factors do. These relationships are slightly weaker when the influence of all factors in this study are considered. These relationships are still, however, among the most influential in determining how justices vote. The only legal factor that has a comparably strong relationship with how justices vote in both mixing church and state and aiding a religious interest is whether the religious claim is general or specific.

Hypothesis 3: This study does not support the hypothesis that justices vote more on whether to help or hurt religion (vote2) than on whether church and state should be separated (vote1). The chi-square value was used to evaluate the strength of the relationships. For four of the nine independent variables, the relationship between the independent variable and voting whether or not to mix church and state is stronger than the relationship between the independent variable and voting whether or not to aid the religious interest. For three of the variables, the relationship between the variable and voting whether or not to aid the religious interest is stronger. For two of the variables, the relationship is almost identical. This study suggests that when justices vote in Establishment Clause cases, they do place significant consideration on whether or not to aid a religious interest. They base their decision slightly more, however, on whether or not to mix church and state.

Hypothesis 4: This study does support the hypothesis that justices are more likely to support religions with which they are affiliated, at least in Christian cases. This is especially relevant considering justices do vote based on whether to aid a religious interest, even if this decision is not as critical as expected in comparison to deciding whether to allow church and state to mix. In Establishment Clause cases concerning Christianity, justices affiliated with Christianity vote to mix church and state and to aid a religious interest about 50% of the time. Justices affiliated with Judaism vote to mix church and state and to aid a religious interest only about 20% of the time.

Toward a solution

In order to establish consistent jurisprudence regarding the relationship between religion and government, the factors complicating the interpretation of the Establishment Clause that were noted at the beginning of this study must be addressed.

The Supreme Court must establish an applicable definition of religion. As Deshano (1999) and Carroll (1967) note, limiting religion to subjects referring to God is different than including any set of answers to questions regarding human origin and life after death in the scope of religion. In *Welsh v. United States*, the court expanded the scope of religious exemptions to include philosophies not related to God. Along with having similar protections, philosophies and traditional religions must also have similar restrictions. For example, scientific support for theistic explanations of the origin of the universe, and scientific criticisms of evolution, could not be exempted for being religious in nature any more than evolution could be exempted for being atheistic in nature. The Supreme Court must treat different belief systems equally regardless of whether they are traditionally religious, theistic beliefs, or atheistic philosophies.

The Supreme Court must also determine if promoting religious instruction is a secular responsibility. If it is not, the Court must determine the proper relationship between religious instruction and the government's secular responsibilities. The government does have a secular responsibility to maintain order. Religious instruction often promotes order (Romero, 2001). However, the government is concerned with actions more than the beliefs that influence those actions. The government's emphasis on coercion to influence behavior would be less effective in promoting a genuine change in an individual's belief system (Locke). For these reasons, religious instruction is not a secular responsibility. The government should not interfere, however, with religious instruction that does not compromise and might even foster order.

Without these clarifications in key components of Establishment Clause cases, Establishment Clause jurisprudence has serious shortcomings. First, it is inconsistent, as noted at the beginning of this study. The lack of a clearly established legal principle to apply to individual cases has two other negative effects, also.

Without this legal principle, justices are more apt to prefer some religions over others. This is evident in the significantly greater success rate (39% higher) for cases promoting a specific religious interest than for cases addressing all religions. In some cases, this corresponds to the democratic ideal of protecting a specific belief from discrimination. This study indicates, however, that justices are about 9% more likely to breach the separation of church and state to give special privileges to a specific belief system than to give special privileges to religion in general.

One explanation is that justices are attempting to minimize the interaction between church and state, and allowing special privileges to one religion is less threatening than allowing special privileges for all religions. This is inconsistent, however, with the constitutional ideals in the clauses addressing religious liberties. One primary reason for separating church and state is to prevent the government from preferring one religion over others (Malbin, 1978). Rehnquist's non-preferentialism standard is based on this ideal that the government must treat religions equally (*Wallace v. Jaffree*). Granting privileges to specific religions that are not granted to all religions might reduce the interaction between church and state, but it violates the constitutional values that support separation of church and state in the first place.

Another shortcoming in Establishment Clause jurisprudence is that justices tend to vote excessively on the effect a law has on religion. The Lemon precedent even requires the law to have a primary effect "that neither advances nor inhibits religion" and that does not "foster an excessive government entanglement with religion" (Epstein, 1998). The Establishment Clause, however, only forbids laws from addressing a religious establishment. It does not forbid laws respecting education, transportation, taxes, or general charity contributions to indirectly affect religion. Furthermore, the Establishment Clause is silent on whether laws can aid religion or threaten religion (although the free exercise clause does limit threats to religion). It simply forbids laws that directly address religion, specifically a religious establishment. To strike down a law for indirectly helping or hindering religion is a misuse of the Establishment Clause, because it is silent regarding the effect that laws can constitutionally have on religion.

Focusing on the effect of laws makes consistent jurisprudence nearly impossible to provide. The same justice who bans parochial schools from receiving public funds because it aids religion might require these schools to pay taxes—even though they are not entitled to these public funds—because tax exemptions would aid them. Another justice who argues that parochial schools should not be hindered by state taxation might require public funds to go to these schools in order to prevent discrimination against religion. Inconsistent legal principles, often based on individual justices' ideologies and preferences, are prevalent from these precedents. Furthermore, the inconsistency between the constitutionality of aiding or hindering religion allows justices to support government aid to one religion and oppose aid to other religions, as was addressed earlier in the anecdotal evidence.

A workable standard would be the following: No law can have the primary purpose of benefiting one belief system over another. This interpretation of the Establishment Clause would compliment the free-exercise clause that forbids laws prohibiting the free-exercise of religion. It would eliminate the ambiguous effect of the presence of a secular purpose by permitting all laws whose primary purpose is not aimed at religion.

This standard is drawn largely from the first prong of the Lemon test and Rehnquist's non-preferentialism standard. It omits the elements of the Lemon test and alternative standards that focus on indirect effects and contribute to the legal quagmire previously addressed. This standard would be compatible with Kennedy's coercion standard prohibiting government from directly coercing adherence to any religion. It would omit Kennedy's focus on the coercive effects of indirect benefits. It would be compatible with O'Connor's endorsement approach in prohibiting laws that require adherence to any religious belief in order to run for office or enjoy other benefits in the political community. It would omit O'Connor's focus on the indirect effects some laws might have on one's standing in the political community.

Conclusion

The ambiguous Establishment Clause jurisprudence does not provide sufficient guidance to make policy or to predict how the Supreme Court will respond to policies such as Bush's faith-based initiative. The absence of an applicable definition for religion and of a clear explanation of how religion fits into the government's secular responsibilities prevents the development of an applicable legal standard regarding the proper relationship between religion and government. Without this legal standard, some religions are preferred over others. Justices' individual characteristics and preferences have a significantly expanded influence in determining the relationship between church and state, and these justices can determine which religions do benefit and which religions do not benefit in this relationship.

Further study would provide a more thorough understanding of how the Supreme Court addresses religious liberties. It would be helpful to analyze legal briefs and oral arguments to consider why the secular purpose is negatively correlated with justices' votes to mix church and state and to aid religious interests. The data necessary to evaluate the effect of religious affiliation in non-Christian cases could be attained in a study of lower courts. A study similar to this one that is focused on the Free-Exercise Clause would be especially useful. An analysis of the most polarizing religious liberty cases might also be interesting. These studies would not provide an explanation of why justices respond the way they do to legal and extra-legal factors. These studies would, however, further reveal what factors determine how Supreme Court justices decide cases regarding religious liberties.

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