

## *Supreme Court Decision Making: An Individual-Level Analysis of the Establishment Clause Cases During the Burger and Rehnquist Court Years*

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In the first Establishment Clause case decided by the Burger Court, the U.S. Supreme Court laid down a new constitutional test. With this addition, the Court now had in place the third prong of a three-part Establishment Clause test. However, this three-part test has not settled what is allowable in church-state relations for many scholars. In fact, it is often complained that constitutional law in this area is confused and conflicting. This study attempts to show that the votes of the justices are not as uncertain or unpredictable as previously has been claimed. It also endeavors to contribute to explaining Supreme Court decision making in general. A fact-attitudinal model is derived from judicial behavior theory, cognitive-cybernetic decision making theory, and the writings of the justices themselves. The results suggest that the model has explanatory as well as predictive value during both the Burger and early Rehnquist Court years.

Alexis de Tocqueville wrote in 1835 that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question" (1945, 280). This certainly holds true in the area of church-state relations. During the past fifty years the United States Supreme Court has been asked repeatedly to interpret the two clauses of the First Amendment which deal with the area of religion. The amendment mandates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." While these clauses may appear to be straightforward, numerous interpretations are possible.

In 1947 the Supreme Court first began to grapple with the meaning of the Establishment Clause. In *Everson v. Board of Education*, Justice Black quoting Thomas Jefferson stated: "The clause against establishment of religion by law was intended to erect 'a wall of separation' between church and state" (1947, 15). While Black's statement is probably the most often quoted language concerning the Establishment Clause, it by no means settled its exact meaning. Precisely what constituted a breach of this "wall of separation" continued to crop up. Although the *Everson* no-aid test was quoted and applied in several later decisions, in the early 1960s the Court enunciated a new test, the "secular purpose and primary effect" test (*Engel v. Vitale* 1962; *School District v. Schempp* 1963). This required that when

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a law was challenged under the Establishment Clause it must have both a secular purpose and a primary secular effect. Then in 1970, in the first Establishment Clause case decided during Warren Burger's tenure as Chief Justice, the Supreme Court laid down the entanglement dimension of the present Establishment Clause test, the purpose-effect-entanglement test (*Walz v. Tax Commission* 1970). This new test added to the purpose-and-effect test the requirement that a law must not involve the government in an excessive entanglement with religion.

This series of tests or factors has not cleared up the matter for many scholars. In fact, it is often complained that constitutional law in this area is "confused, conflicting and uncertain" (Pfeffer 1979, 5). In the area of aid to nonpublic schools, McCarthy claims that the Supreme Court has not provided clear guidance, but rather has provided more questions than answers (1983, 117). Choper has referred to these decisions as "ad hoc judgments which are incapable of being reconciled on any principled basis" (1980, 680). This "confusion" has led some legal scholars to doubt that reasonable predictions can be made about future cases (Nowak, Rotunda, and Young 1978, 858; Pfeffer 1984, 37; Tager 1984, 235).

This study focuses on the U.S. Supreme Court and the decision making of the individual justices in cases involving the Establishment Clause of the First Amendment. It will attempt to show that the justices' decisions in this area are not as uncertain or unpredictable as many scholars claim. The time period to be analyzed includes both the Burger and Rehnquist Courts (1969-1992). This time period offers an interesting opportunity to examine the justices' decision making because the Court created and purported to use the purpose-effect-entanglement test throughout the period. Thus, the stability in official constitutional doctrine allows one to study whether the justices behaved in a consistent manner.

Furthermore, this research attempts to contribute to explaining Supreme Court decision making in general. It extends fact model research into a new area of law. While this approach has been relatively successful in the constitutional realm of search and seizure (e.g., Segal 1984, 1985, 1986), is it also effective in the present issue area?<sup>1</sup> It should be mentioned that this area of law may be a more stern test of the value of fact models than was search and seizure due to the less specific language of the First Amendment as compared to the Fourth. Additionally, this project endeavors to provide a greater theoretical basis for the analysis than most previous efforts involving fact models. Many of these models have been intuitively attractive yet have lacked a theoretical foundation.

This research arguably is also consistent with the approach urged by George and Epstein in their recent work (1992). This study considers factors

which are both legal and extralegal. Rather than a mutually exclusive explanation of judicial decision making, an integrated model is presented.

### **The Justices of the Supreme Court as Limited, Human Decision Makers**

Rohde and Spaeth have written that Supreme Court decisions "are the consequences of three factors: goals, rules, and situations" (1976, 70-74). They assume that the justices have certain goals they wish to achieve. These goals are policy goals (which are based on the justices' beliefs, attitudes, and values). A justice's decision could also be affected by formal and informal rules. However, in the case of the Supreme Court the "rules of the game" allow the justices great liberty in their actions. Lastly, the specific situational factors or facts in a case before the Court can influence a justice's vote.

This third factor is closely related to the ideas underlying previous work done on fact models and cue theory<sup>2</sup> (e.g. Kort 1957, 1973; Ulmer 1962, 1984; Tanenhaus et al. 1963; Songer 1979; Teger and Kosinski 1980; Armstrong and Johnson 1982; Segal 1984, 1985, 1986; Gryski, Main and Dixon 1986). It also is the linchpin for what is to be discussed next. This study attempts to fuse previous attitudinal research with cue theory and fact models. This is accomplished by applying Herbert Simon's view of decision making with cognitive-cybernetic theory.

In this work, human decision makers (Supreme Court justices) are viewed in terms of constrained maximization, and cognitive-cybernetic theory (e.g., Simon 1957, 1959, 1979, 1981, 1985; Steinbruner, 1974). If individuals had unlimited computational powers and resources they might behave as utility maximizers, but it will be assumed here that instead their behavior is boundedly rational: "Behavior that is adaptive within the constraints imposed both by the external situation and by the capacities of the decision maker" (1985, 294). The justices arguably do not have the time, resources, or intellectual capacity to make all of their decisions in a more comprehensive manner.

Similar in many ways to Simon's work is cognitive-cybernetic theory. With a cognitive-cybernetic decision maker there is no attempt to be comprehensive or make extensive calculations. The decision maker is "engaged in buffering himself against the overwhelming variety which inheres in his world..." (Steinbruner 1974, 66). Uncertainty and variety are reduced by focusing upon only a few critical variables or cues. Furthermore, the individual relies upon previous experience and a small set of decision rules to aid in the decision making process.

Rohde and Spaeth's three part framework is quite compatible with the work of Simon and Steinbruner. Rohde and Spaeth focused on the personal policy preferences or goals of the justices. The third factor of their framework (the situation) was not as fully developed. Simon and Steinbruner's work simply bolsters and fleshes out the importance of the particular situation facing the Court. Thus, the cognitive-cybernetic model and bounded rationality can be used to supplement Rohde and Spaeth's work. This simplified approach to decision making can also provide a theoretical foundation for cue theory or fact models which in general have lacked such support. It gives a cognitive basis for such explanations of Supreme Court behavior. Consequently, these different ideas and theories have the potential to be unified and provide a more complete view of Supreme Court decision making.

### Establishment Clause Decision Making

This study views the justices as boundedly rational or cognitive-cybernetic decision makers. It is argued here that the justices will tend to pick out certain cues or facts to simplify the decision they need to make. The justices create an internal formula or mechanism which aids them in their decision making process. Thus, when hearing a case on the Establishment Clause, certain facts will stand out as being important to a justice.

Upon accepting the idea that there are key facts or cues which guide the justices, how does this discussion then specifically relate to Establishment Clause cases? This section offers a perspective to help identify the factors which make a difference in these cases. This perspective comes primarily from the justices themselves and accounts for the varying situations that arise.

As stated above, the Burger Court's purpose-effect-entanglement test does not put this matter to rest. In *Lemon v. Kurtzman* Burger admits that "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law" (1971, 612). He goes on to say that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship," (614). In later cases, the Court says that this three-prong test provides "no more than a helpful signpost" in dealing with Establishment Clause cases (*Hunt v. McNair* 1973, 741; *Mueller v. Allen* 1983, 394). It "serves only as guidelines" to the necessary constitutional inquiry (*Meek v. Pittenger* 1975, 359; *School District of Grand Rapids v. Ball* 1985, 383; see also *Tilton v. Richardson* 1971, 677; *Lynch v. Donnelly* 1984, 678).

### *Establishment Clause Typology*

Since the Supreme Court itself admits that the purpose-effect-entanglement test does not fully capture how the justices reach their decisions, this research proposes the use of a more specific typology or classification scheme. Its major headings are derived from a three-part test given in *Lemon*, yet different from the purpose-effect-entanglement test. In addition, the various components of the typology are based upon and bolstered by statements made in numerous Establishment Clause cases.<sup>3</sup> Common themes run throughout this area of law, and the concepts used here repeatedly were supported.

In the *Lemon* decision, Chief Justice Burger writes:

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority (1971, 615).

From this "excessive entanglement" test three basic issues or types of questions are derived. First, what is the specific aid or practice being proposed? More particularly, what is its nature and purpose? Second, who is getting the aid or will be affected by this practice? In other words, what is the character, purpose, and history of the institutions that will benefit from the aid or activity? Third, what is the resulting relationship between the government and religion? Precisely how much and what type of contact will there be between church and state if this aid is provided or activity allowed?

It will be argued here that these three basic questions or areas cover not only excessive entanglement, but the entire inquiry into church-state relations. These questions raise the key and fundamental issues confronting the Court. They provide the essential factual information necessary for deciding these cases. It should be noted that the major concepts of the purpose-effect-entanglement test are incorporated into this typology, but in a more detailed and straightforward manner. Lastly, in addition to these core Establishment Clause questions, one may want to consider other complicating issues. There may be cues or factors beyond the bounds of the Establishment Clause that potentially could influence the outcome of a case in this area.

#### *What is (the Nature of) the Aid/Practice?*

Three types of factual questions or areas need to be studied. The first of these factual areas concerns the nature of the aid or practice. As should

be expected, the members of the Court have an interest in precisely what is being proposed. What is being given? Why is it being given?

In *Roemer v. Board of Public Works*, the Court writes that the state must confine itself to secular objectives (1976, 747). The Court in *Lynch v. Donnelly* proclaims that legislation or governmental action can be struck down when a secular purpose is lacking (1984, 680). In *Wallace v. Jaffree*, the Court states that a statute that is motivated in part by religious purpose may satisfy the Establishment Clause—but if it is entirely motivated by the purpose to advance religion, it must be invalidated (1985, 56; see also *Stone v. Graham* 1980). Thus, the Supreme Court has made clear in a number of cases that if a statute or practice has an essentially religious purpose, it is unconstitutional. Consequently:

*HYPOTHESIS 1: Where the sole (or predominant) purpose of a law is religious, the majority of justices will find such a law to be unconstitutional.*

In *Lynch v. Donnelly*, the Court writes: "Not every law that confers an indirect, remote, or incidental benefit upon religion is constitutionally invalid" (1984, 683; *Meek* 1975, 359; *Widmar v. Vincent* 1981, 273). Using similar language, the Court has accepted "neutral, nonideological aid, which only indirectly and incidentally promotes a religious function" (*Nyquist v. Committee for Public Education* 1973, 775). Following this principle, the Court in *Wolman v. Walter* found certain general health services provided to non-public schools to be constitutional (1977). The majority's rationale was that these services have no educational content, and therefore do not create an impermissible risk of fostering ideological views. They were simply the provision of a general welfare service to the community (see also *Walz v. Tax Commission* 1970, 671; *Lemon v. Kurtzman* 1971, 614). Thus, when considering the nature of the aid, the Supreme Court examines how indirect, remote, and incidental the benefits to religion are. To be acceptable, it must be of a nature which simply aids the general health, welfare, or needs of citizens. Accordingly:

*HYPOTHESIS 2: When aid fits the description of being a nonideological, general, welfare service, the majority of justices will find it to be constitutional.*

*Who is Receiving the Aid or is Involved with the Practice?*

The second main factual question concerns who receives the aid. The Court in *School District of Grand Rapids* writes: "Our inquiry must begin

with a consideration of the nature of the institutions in which the programs operate" (1985, 384). As would be expected, the Supreme Court is interested not only in the aid itself but also in the parties getting aid or affected by it.

The Court has claimed that the central purpose of the Establishment Clause is to insure government neutrality in the area of religion. First of all, no particular religion should be favored or preferred, and none interfered with (*Walz* 1970, 677; *Larson v. Valente* 1982, 244; *Harris v. McRae* 1980, 319.) The government may not use religion as a basis for the imposition of duties, penalties, privileges, or benefits (*McDaniel v. Paty* 1978, 639). Furthermore, while there is to be no favoritism nor discrimination among religious sects, there also is to be none between religion and nonreligion (*Walz* 1970, 695; *School District of Grand Rapids* 1985, 381). In keeping with the principle of neutrality, the Court also repeatedly has considered whether the aid being examined benefits a broad class of individuals (*Walz* 1970, 673; *Mueller v. Allen* 1983; see also *Lemon* 1971, 616; *Nyquist* 1973, 775; *Meek* 1975, 362). Consequently, in Establishment Clause cases, whether all groups are treated evenhandedly can play a pivotal role in the outcome. Therefore:

*HYPOTHESIS 3: When legislation in this area generally aids or affects all groups equally, it has a far better chance of being upheld by the majority of justices.*

The Supreme Court, however, does not always follow the policy of absolute neutrality. Accommodation is espoused rather than strict neutrality in certain situations. This brings us to the second aspect concerning the parties involved. The issue here is whether there is a long history of the government providing aid to or allowing certain practices within particular institutions. The importance of history and tradition was made quite evident in the Burger Court's first Establishment Clause case. Burger, writing for the Court, cites Justice Holmes: "a page of history is worth a volume of logic" (*Walz* 1970, 676; also quoted in *Nyquist* 1973, 777). Burger goes on to say that while no one acquires a protected right in violation of the Constitution by long use, "an unbroken practice . . . is not something to be lightly cast aside" (*Walz* 1970, 678; see also *Marsh v. Chambers* 1983, 790). The more long-standing and widely accepted a practice, the greater its impact upon constitutional interpretation (*Walz* 1970, 681). Such long term practices can become "deeply embedded in the fabric of our national life . . ." (676; see also *Marsh* 1983, 792). In addition, if the practice or aid dates to the early years of this nation's existence it possibly reflects "the

understanding of our Founding Fathers" (Walz 1970, 680-681; see also Marsh 1983, 790; Lynch 1984, 674). Therefore:

*HYPOTHESIS 4: If a certain act or practice has a long history or tradition, it is far more likely to be found acceptable constitutionally by the majority of justices.*

One final aspect of this second part of the typology needs to be examined. This deals with the age and maturity of those affected by the aid or included in the activity. In addition, it covers the purpose and motivations of the institution which is directly responsible for distributing the aid. These questions arise almost exclusively in the area of parochial aid. In discussing nonpublic elementary and secondary schools in *Walz*, the Court declares these schools "plainly tend to assume future adherents to a particular faith by having control of their total education at an early age" (1970, 671). In *Lemon*, Burger says church-related elementary and secondary schools have a "religious mission" and are dedicated to rearing children in a specific faith (1971, 613 and 618). The Court, in *Aguilar v. Felton*, refers to the "pervasively sectarian environment" of these schools (1985, 412; see also *Committee for Public Education v. Regan* 1980).

Almost diametrically opposed to this view of primary and secondary schools is the Supreme Court's perception of nonpublic colleges and universities. According to the Court, church-related colleges perform essentially secular educational functions (*Roemer v. Board of Public Works* 1976). In fact, these institutions exist in an "atmosphere of academic freedom rather than religious indoctrination" (*Tilton* 1971, 682). Additionally, college students are less impressionable and less susceptible to religious indoctrination than are students in primary and secondary schools (*Tilton* 1971, 686; *Grand Rapids School District* 1985, 383). Accordingly:

*HYPOTHESIS 5: It is far more likely that practices involving colleges and universities will be accepted by the majority of justices.*

### *What is the Resulting Relationship?*

Upon discussing what the aid is and who is getting it, the next logical question is: what type of contact will there be between church and state if this action is allowed? This directly and explicitly strikes at the heart of the separation of church and state issue.

The Supreme Court has made clear that if the involvement between church and state is too close or intimate, it is improper. In *Walz*, Chief

Justice Burger asks whether government involvement, in the activity under scrutiny, is excessive (1970, 675). Is the involvement "a continuing one calling for official and continuing surveillance" (1970, 675)? Does it require "a sustained and detailed administrative relationship" (1970, 675)? In *Lemon*, the justices rejected aid that creates "an intimate and continuing relationship" between church and state, since the state would be allowed to "inspect and evaluate a church-related school's financial records . . ." (1971, 621). The Chief Justice expresses that this kind of state inspection is fraught with Establishment Clause difficulties. "A comprehensive, discriminating, and continuing state surveillance" is the sort of entanglement the Constitution forbids (1971, 620; see also *Meek* 1975; *Aguilar* 1985; *Estate of Thornton v. Caldor* 1985). The Court also repeatedly has pointed out the potential problems of government audits or on-site inspections of church-connected institutions (e.g., *Tilton* 1971; *Hunt* 1973). Therefore:

*HYPOTHESIS 6: The majority of justices will likely strike down any law or practice requiring governmental surveillance or significant inspection of religious institutions and their financial records.*

A second aspect of the resulting relationship between church and state already has been noted in a number of the above quotations. This concerns whether the government's involvement continues into the future or not. For example, in *Lemon*, the Court mentions the "intimate and continuing relationship" and "continuing state surveillance" (1971, 621 and 620). In *Walz*, Burger states: "the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance . . ." (1970, 675). Directly opposed to aid given in a continuing or continuous fashion are benefits given only once. In *Tilton* and *Hunt*, the aid provided was a "one-time" grant with "no continuing financial relationship" between government and church-related institutions (1971, 688; 1973, 754).

Why should it matter whether aid is provided only once or may continue to be provided in the future? The justices have expressed concern over fractionalizing the electorate and officeholders by religious belief and practice (*Lemon* 1970, 623; *Walz* 1970, 695-698; see also *Sloan v. Lemon* 1973, 831; *Nyquist* 1973, 796; *Meek* 1975, 365). Such division is seen as a threat to the normal political process. Further, it is alleged that aid involving annual or continuing appropriations is more likely to lead to such political divisiveness. Consequently:

*HYPOTHESIS 7: If aid is given as a one-time grant rather than on a continuing basis to religious organizations, it is far more likely to be upheld by the majority of justices.*

This completes the review of the Establishment Clause issue typology. However, one should consider a few final factors before attempting to explain and predict these decisions. There are factors or issues that fall somewhat beyond the bounds of the Establishment Clause per se, but that potentially may influence the outcome of a case in this area.

### *Potential Complicating Issues*

Cohen and Kaplan write that the Establishment and Free Exercise Clauses of the First Amendment were not designed to serve contradictory purposes. "They have a single goal—to promote freedom of individual religious beliefs and practices" (1982, 411). Despite this, these scholars claim there is "an uneasy tension" between the two clauses (411). They are not alone in this assessment. Others have also discussed the "tension," "serious tension," or "natural antagonism" between the First Amendment's two religion clauses (e.g., Choper 1986, 1657; Tribe 1978, 815; Nowak, Rotunda, and Young 1978, 849).

While the Court has mentioned the potential clash between these clauses, it has never specifically indicated the dominance or preferred position of one clause over the other. However, Tribe claims that the free exercise principle should be dominant in any conflict with the anti-establishment principle. He believes that when the Free Exercise and Establishment Clauses conflict, "support of the former would be more faithful to the consensus present at the time of the Constitutional Convention and of the First Congress" (1978, 819). Choper states that the Court sometimes has held that "the free exercise clause *obliges* government to act with a non-secular purpose—actually, to give a preference to religion—when the action is necessary to permit the unburdened exercise of religion" (1986, 1652). Based on this scholarship:

*HYPOTHESIS 8: If the Free Exercise Clause is raised as an issue in a case, the majority of justices will be somewhat more likely to decide a case in favor of a litigant stating the free exercise claim (even if this is at odds with Establishment Clause arguments).*

Another possible complicating influence in Establishment Clause decisions concerns the involvement of the U.S. Government in a case. The bulk

of previous research indicates that the federal government seems to enjoy an advantage before the Supreme Court (e.g., Tanenhaus 1960 and 1963; Werdgar 1967; Scigliano 1971; Cannon and Giles 1972; Puro 1981; O'Connor 1983; Caplan 1987; Segal 1984 and 1988).<sup>4</sup> For example, from 1979 to 1983, the Court usually decided in favor of the federal government's position where it appeared as a litigant or as an *amicus curiae*. Depending on the year, the government's winning percentage ranged from 66 to 83 percent (U.S. Department of Justice 1985). It may be the quality of work done by the solicitor general, or some broader reason. Yet, in any case, as an *amicus* or a party to a case, the U.S. tends to do better than other litigants. Therefore:

*HYPOTHESIS 9: If the U.S. is involved in an Establishment Clause decision, it is hypothesized that the majority of justices will be more likely to decide the case in favor of the position argued by the federal government.*

### Establishment Clause Model

Nine hypotheses have been presented concerning the Court's decisions dealing with the Establishment Clause. An Establishment Clause model now can be proposed by incorporating all of these hypotheses into a single explanation. It can be specified as follows:

$$\Pr(Y_1=1) = b_0 + b_1X_1 + b_2X_2 + b_3X_3 + b_4X_4 + b_5X_5 + b_6X_6 + b_7X_7 + b_8X_8 + b_9X_9 + e_1$$

where

$Y_1$  = VOTE

$X_1$  = PURPOSE

$X_2$  = GENERAL GOVERNMENT SERVICE

$X_3$  = NEUTRAL

$X_4$  = HISTORY-TRADITION

$X_5$  = LEVEL OF EDUCATION

$X_6$  = SURVEILLANCE

$X_7$  = ONE-TIME AID

$X_8$  = FREE EXERCISE

$X_9$  = US-AMICUS

$\Pr(Y_1=1)$  = the probability that a given justice's vote equals "1" or is "accommodationist"

$b_0, \dots, b_9$  = the constant and coefficients

$e_1$  = the random disturbance or error term

The dependent variable for this equation is the vote of the individual justices in each decision involving the Establishment Clause. The basic question before a justice is whether the statute or practice involved in the case violates this part of the Constitution. Therefore, each decision can be seen as having one of two possible outcomes: a violation of the Establishment Clause or no violation. The dependent variable, VOTE, was coded "1" when the justices took an "accommodationist" stance, and "0" otherwise.<sup>5</sup> The independent variables were coded in a similar dichotomous or trichotomous style.<sup>6</sup> How these variables were operationalized is presented in the Appendix.

In addition to the independent variables which were derived from the nine hypotheses and which are part of the basic model, it is important to add independent variables which deal with the Court's personnel. This research is based upon attitudinal and cognitive-cybernetic theory. It is being argued that it matters who is on the Court and how they perceive and react to the information given them. The justices have goals and policy preferences and these affect the decisions they reach. The factual variables discussed thus far were selected based on these ideas.

Consequently, in an attempt to capture further the particular preferences of each justice generally in this area, "Justice" variables were also added into the original model. These variables are meant to tap into the specific biases and predispositions held by each separately. They also potentially capture changes in attitudes and personnel over time. When adding these justice variables to the nine factual variables, a more complete or comprehensive model can be proposed for each Court. The justice variables for the Burger Court are: BLACK, HARLAN, DOUGLAS, STEWART, MARSHALL, BRENNAN, WHITE, BURGER, BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR. These variables represent the thirteen justices who served on the Court during Burger's tenure as Chief Justice. For the Rehnquist Court, in addition to the justices who were holdovers, four new justices and variables needed to be considered (SCALIA, KENNEDY, SOUTER, and THOMAS). All these variables were coded in a very simple fashion. A justice variable was coded "1" if the dependent variable, VOTE, was the vote of that particular justice, and each of the other justice variables were coded "0" for that decision or vote.

### **Data and Methodology**

The data set on which this research is based was drawn from Phase I of the U.S. Supreme Court Judicial Data Base (Harold Spaeth, principal investigator), and the computerized legal text data bases Lexis and Westlaw.

The goal was to include all cases during the Burger Court and early Rehnquist Court years which raised significant establishment of religion questions. The search produced 62 cases which dealt with the Establishment Clause and were given docket numbers by the Burger Court and 15 cases by the Rehnquist Court through 1992. In addition, each decision the Supreme Court reached in each of the cases was considered. The reason for the distinction between decisions within cases and the cases themselves is because the Court, at times, makes several decisions within one case (e.g., *Meek v. Pittenger* 1975; *Wolman v. Walter* 1977). The Court may uphold certain parts of a statute and strike down other parts. Therefore, the Court often makes more decisions than the number of cases would indicate. When each decision was treated as a separate entity, this results in a data set of 92 "cases" or "observations" for the Burger Court and 17 for the Rehnquist Court. Furthermore, these observations also can be broken down into the individual votes of the justices (the focus of this study). When individual voting is used as the unit of analysis, the data set consists of 790 observations during the Burger years and 149 during Rehnquist's era.<sup>7</sup>

The operationalized dependent variable in the model under study is not continuous. In fact, it is binary in nature and is associated with a qualitative choice made by the justices. Thus, probit (a nonlinear probability model) was used to estimate the parameters for this project (see, e.g., McKelvey and Zavoina 1975; Aldrich and Nelson 1984).

### **Presentation of the Results**

The votes of the justices were considered as either "accommodationist" (usually meaning that the law in question was deemed to be constitutional and should be upheld) or "separationist" (usually meaning the law in question was deemed to be unconstitutional and should be struck down). Accommodationist votes were coded as "1" and separationist votes as "0". This resulted in 501 of the 790 Burger Court votes being coded "0" (63 percent) and 289 being coded as "1" (37 percent). For the Rehnquist Court, the breakdown was 70 of the 149 votes being "0" (47 percent) and 79 being "1" (53 percent). Thus, while Burger Court members usually voted in a separationist fashion, Rehnquist Court justices usually voted as accommodationists.

#### *Burger Court*

With this background, the results of the probit estimation for the Burger Court are given in Table 1. As can be seen, it appears the model does a good job of explaining the votes of the justices of the Burger Court

Table 1. Probit Estimation of Burger Court Justices' Votes

Variable	MLE	S.E.	MLE/S.E.
PURPOSE	- .37	.25	-1.47
GENERAL GOV.	.44	.20	2.26*
NEUTRAL	1.43	.15	9.35***
LEVEL	.26	.24	1.07
HISTORY-TRADITION	.95	.25	3.74***
SURVEILLANCE	- .36	.15	-2.42**
ONE-TIME	1.08	.29	3.77***
FREE EXERCISE	.56	.13	4.14***
US-AMICUS	.52	.10	5.00***
BLACK	- .34	.70	- .48
DOUGLAS	-1.92	.71	-2.73***
STEWART	- .01	.53	- .02
MARSHALL	-1.01	.54	-1.87*
BRENNAN	-1.09	.54	-2.03*
WHITE	1.56	.52	3.02***
BURGER	1.24	.51	2.40**
BLACKMUN	- .40	.52	- .76
POWELL	1.65	.52	3.16***
REHNQUIST	.08	.52	.16
STEVENS	- .82	.56	-1.48
O'CONNOR	.91	.57	1.59
CONSTANT	-1.48	.51	-2.87***
Estimated R <sup>2</sup>	.67		
% correctly predicted	85.19		
% in modal category	63.42		
N	790		
* significant at .05			
** significant at .01			
*** significant at .005			

decisions in this area. The model predicts or correctly categorizes 85 percent of the votes correctly. Since the modal category is 63 percent, this is a reduction of error of approximately 60 percent.

In terms of the individual coefficients or MLE (maximum likelihood estimate) values, all nine of the factual variables are in the predicted direction, as are eleven of the twelve justice variables.<sup>8</sup> Only the negative coefficient for BLACKMUN was not expected.<sup>9</sup> Seven of the nine factual variables are significant at the .05 level. In fact, NEUTRAL, HISTORY-

TRADITION, ONE-TIME, FREE EXERCISE, and US-AMICUS are significant at .005. Each category of the Establishment Clause typology had at least one significant variable, and both complicating issues are significant. As for the justice variables, six of the twelve are statistically significant at .05. This includes DOUGLAS, WHITE, and POWELL which are significant at .005.

In terms of importance, variables with relatively large coefficients (in absolute value) have the potential to have the greatest impact on the outcome of a decision. They potentially can have the greatest influence on the estimated probability of whether the dependent variable takes on the value of 0 or 1. Thus, among the factual variables, NEUTRAL, ONE-TIME, and HISTORY-TRADITION have the potential for the greatest impact (their respective coefficients are 1.43, 1.08, and .95). Among the justice variables, DOUGLAS, POWELL, WHITE, BURGER, BRENNAN, and MARSHALL potentially can have the greatest impact (their respective coefficients are 1.92, 1.65, 1.56, 1.24, -1.09, and -1.01).

However, this influence depends upon the values of the other variables. This factor needs to be taken into account. For example, since the coefficient of HISTORY-TRADITION is .95, if the activity in question is historical or traditional, the probability of a justice voting to find the practice to be acceptable increases by .95 standard deviations (it adds .95 standard deviations to the cumulative probability function). If all other variables were controlled for (at  $z = 0.00$ , probability = .50), the probability of a justice finding an historical/traditional practice acceptable is .83. The probability of the activity not violating the Establishment Clause is thus 66 percent greater if the practice meets the requirements of this variable. Yet if all the other variables were controlled for at a higher level ( $z = 1.00$ , probability = .84), then the probability of a justice finding there is no violation goes up to .97. While the probability of finding no violation of the Constitution has increased, the impact of this variable is far less in this second scenario. It is quite likely that the practice would have been found to be constitutional even if it were not historical or traditional.

### *Rehnquist Court*

While the model appears to explain most of the decisions during the Burger years, can it also be useful during the Rehnquist era? This is a more stern test for the model because the fact variables or voting cues of the Establishment Clause typology were extracted from the Burger Court decisions. In addition, as was mentioned above, over time the Supreme Court became more accommodationist. Are the same fact variables which were significant for justices in 1970 also significant in 1992?

Table 2 gives the results of the probit estimation for the Rehnquist Court. These results clearly provide support for the strength and generalizability of the model. Rather impressively, the model predicts or correctly categorizes approximately 91 percent of these more recent votes and thus surpasses the 85 percent accuracy rate for the Burger years. Furthermore, since the modal category here is 53 percent, the reduction of error now jumps to 80 percent.

**Table 2. Probit Estimation of Rehnquist Court Justices' Votes**

Variable	MLE	S.E.	MLE/S.E.
PURPOSE	-4.45	1.56	-2.85***
GENERAL GOV.	8.59	3.37	2.25**
NEUTRAL	9.59	36.69	.26
HISTORY-TRADITION	7.58	2.26	3.35***
SURVEILLANCE	-1.84	.78	-2.37**
FREE EXERCISE	-7.96	2.52	-3.15***
US-AMICUS	-1.37	.62	-2.21**
MARSHALL	-8.43	29.95	-.28
BRENNAN	-8.42	29.65	-.28
WHITE	-.58	.70	-.82
BLACKMUN	-3.60	1.22	-2.95***
REHNQUIST	.67	.77	.86
STEVENS	-12.57	36.72	-.34
O'CONNOR	-.18	.69	-.26
SCALIA	2.45	1.42	1.73*
CONSTANT	6.12	2.06	2.97***
Estimated R <sup>2</sup>	.98		
% correctly predicted	90.06		
% in modal category	53.02		
N	149		
* significant at .05			
** significant at .01			
*** significant at .005			

In terms of the individual coefficients for the fact variables, again, most (six of seven)<sup>10</sup> are significant at .05. However, a number of differences should be noted between the two estimations of the model. First, for the Rehnquist Court votes PURPOSE is significant, while NEUTRAL becomes insignificant. Also, the direction of two of these variables changed:

FREE EXERCISE and US-AMICUS became negative factors. For FREE EXERCISE, this simply appears to indicate that in more recent years, those who raise this issue often want and indeed have the opposite impact than in previous years (which again shows the fluidity of the relationship between these clauses). The coefficient for US-AMICUS, at least partially, substantiates Grunes' (1990) claim of mixed support for positions taken by solicitors general at various times in this issue area. But it is still interesting to note, and a bit surprising, that during these years (with Reagan and Bush in office) the presence of the U.S. as party or *amicus* increased the odds of a separationist vote.

As for the justice variables, five of the eight are in the predicted direction.<sup>11</sup> The negative coefficient for BLACKMUN again was not predicted. More surprising was that the coefficients for WHITE and O'CONNOR changed direction during the Rehnquist Court years. This change indicates that both Justice White and O'Connor became more likely to vote in a separationist direction in recent years. In terms of significance, only BLACKMUN and SCALIA were significant at .05. The primary problem here simply may be that too few cases have been decided during the Rehnquist era thus far. It should be pointed out that each one of these justice variables could, at most, have been present (or coded "1") in seventeen of the 149 observations (or votes), while the factual variables could potentially have been present in all 149 observations. For this reason, the variables for Justices Powell, Kennedy, Souter, and Thomas were removed from the estimation, since those justices voted the fewest times (ranging from eleven votes to one) and thus these parameter estimates were the least reliable.

## SUMMARY AND CONCLUSION

The overall results of the empirical analysis clearly provide support for what has been argued here. The Establishment Clause model's performance was quite good. It correctly categorized 85 percent of the justices' votes during the Burger Court era and 91 percent in the early years of the Rehnquist Court. This is a reduction of error of approximately 60 percent and 80 percent, respectively. The model was not only effective during the time period from which the fact variables were taken but also in a later time period with several new justices, and with the Court becoming more accommodationist. In terms of the estimated coefficients, most were significant at .05, and were in the predicted direction. The estimation of the Rehnquist Court votes produced the most surprises, and some disappointment in terms of significance tests; however, this could be the result of simply relatively few observations to work with.

In conclusion, this study appears to do a rather good job of explaining the individual votes of the justices from both the Burger and Rehnquist Courts in this area of constitutional law. The discussion and findings clearly indicate that relying on the Court's official test in judging such matters does not capture a great deal of what is actually occurring. Instead the justices seem to be predisposed in certain directions and greatly influenced by certain facts. When viewed from the perspective used here, most votes by the justices can be explained and predicted in a consistent manner. The generalizability of these results for both the Burger and Rehnquist Courts makes it very unlikely that they were due to chance alone. Therefore, an area of law that many scholars thought was uncertain and confused was shown to have a good deal of order and predictability.

Additionally, this research hopefully also contributes to explaining and predicting Supreme Court decision making in general. This work takes fact model research into a new area of law, and illustrates that this approach can be valuable in areas other than search and seizure. It endeavors to provide a greater theoretical foundation for fact models than generally has been the case by supplementing judicial behavior theory with work dealing with decision making limitations. The overall results of the analysis provide justification or corroboration for viewing the justices as political decision makers who often will simplify their decision making processes. Lastly, this research also discusses and considers factors that are both legal and extra-legal, and thus provides an integrated approach to studying the behavior of justices.

## NOTES

\*I wish to thank David Rohde, Joseph Schlesinger, Harold Spaeth, Robert Hawley, and Larry Slayton for their various contributions.

<sup>1</sup>Another recent effort also tested this question in terms of the Free Exercise Clause (see Ignagni 1993).

<sup>2</sup>It should be mentioned that a distinction can be drawn between cue theory and fact models. Cue theory is normally associated with the docket decisions of the Court, and fact models with case-resolution voting. However, both are related to factors or decision rules which greatly simplify the justices' decision making. They are being placed together in this study only to indicate that similarity.

<sup>3</sup>All of the following quotations are taken from majority opinions or from opinions concurring with the majority during the Burger Court years.

<sup>4</sup>It should be noted that Grunes' study of President Reagan's solicitor generals indicated moderate success in this issue area (1990). He found the solicitor generals were clearly more successful in terms of case outcome than in convincing the Supreme Court to alter its approach in resolving these disputes.

<sup>5</sup>In a vast majority of Establishment Clause cases, the government is attempting to aid or accommodate religion in some fashion, and the question is whether the government has gone too far. Has it breached the wall of separation by giving too much aid or allowing too much contact between

church and state? In these cases, VOTE was coded "1" when the justice voted to uphold the law or practice. In a small percentage of the cases, the government has placed special restrictions on religion. It has erected a "high wall" in an attempt to guarantee separation. Instead of being accommodationist, this might be viewed as being "separationist." For example, in *Widmar v. Vincent* (1981), a state university refused to grant a student religion group access to its facilities while allowing all other organized groups such access. In such a case, VOTE was coded "1" if the justice voted to strike down the law or practice.

<sup>6</sup>One concern when dealing with fact variables is the source from which they are drawn. In this study, the facts were first drawn from the U.S. Supreme Court's opinions. This was done because this research is based on how these particular individuals react to certain facts and make decisions. The facts which matter are the ones these justices notice and place importance upon. The potential problem with doing this, however, is that the justices could distort their recitation of the facts to achieve a desired result. Thus, believing the justices' own writings were important yet concerned about reliability, certain precautions were taken. First, all opinions (majority, concurring, and dissenting) were read. If a justice in the majority was distorting the facts to advance his/her argument, one would expect a dissenting member of the Court to raise this issue (most decisions were non-unanimous). Second, lower courts' interpretations of the cases were also reviewed and compared. In fact, differences in interpretations of the facts turned out to be quite rare. Third, by using certain variables such as PURPOSE and HISTORY-TRADITION, additional sources (e.g., legislative history) were compared with the Court's writings.

<sup>7</sup>There were thirty-eight "missing" observations due to fewer than nine justices participating in a decision during Burger's years and four during the Rehnquist Court.

<sup>8</sup>The "Justice" variables are dummy variables, and therefore one needs to be removed or suppressed in order for the analysis to be conducted. The procedure would break down if all the dummies were used together. This is due to the fact that once one knows the values for the first twelve variables, the value of the thirteenth is known with certainty. Justice Harlan was chosen because he and Justice Black participated in the fewest number of cases (14), and Justice Black is more closely associated with this area of law due to his opinion in the *Everson* case. Furthermore, it should be noted that the analysis was repeated with Harlan included and Black removed, with no significant difference in the results. In terms of predicted direction, Spaeth's work concerning the value systems of the justices (1979) was primarily relied upon. For updating purposes, Segal and Spaeth (1989), Segal and Cover (1989), and the *Harvard Law Review's* annual statistics also were considered.

<sup>9</sup>This is not altogether surprising since, relatively, Justice Blackmun was a borderline case in Spaeth's research and the estimate found here also is, relatively, a weak borderline case.

<sup>10</sup>The variables LEVEL and ONE-TIME were removed from this estimation of the model because they were not present in any of the Rehnquist Court decisions, and the analysis cannot be conducted when there is such uniformity.

<sup>11</sup>See note 8.

## APPENDIX

Variable	Operationalization
PURPOSE (X <sub>1</sub> )	Coded "1" if the clear and predominant purpose of the law was deemed to be an attempt to advance religion (after reading the Court's decision, the relevant statute, and other available information such as the legislative history). Coded "0" otherwise.

## APPENDIX (continued)

GENERAL GOVT (X <sub>2</sub> )	Coded "1" if the aid was any of the following: police protection, reimbursement for student transportation to and from school, the loaning of secular textbooks to students, school breakfasts or lunches, diagnostic health services, standardized state tests, or costs associated with taking attendance. Coded "0" otherwise.
NEUTRAL (X <sub>3</sub> )	Coded "1" when the law or practice generally attempted to treat citizens in equal terms (when no distinctions appeared to be made based on religious grounds). Coded "0" otherwise.
HISTORY (X <sub>4</sub> )	Coded "1" if the practice or activity dated back approximately 200 years or more. Coded "0" otherwise.
LEVEL (X <sub>5</sub> )	Coded "1" if the decision involved institutions of higher education. Coded "0" otherwise.
SURVEILLANCE (X <sub>6</sub> )	Coded "1" in cases involving governmentally required reporting, regulations, on-site inspections, or auditing of records which was deemed to be in any way substantial. Coded "0" otherwise.
ONE-TIME (X <sub>7</sub> )	Coded "1" when aid was to be given only once. Coded "0" otherwise.
FREE EXERCISE (X <sub>8</sub> )	Coded "1" when free exercise was raised as an issue and the litigant raising the issue argued for an accommodationist decision. Coded "0" when no free exercise claim was raised. Coded "-1" when free exercise was raised as an issue but the litigant raising the issue did not want an accommodationist decision.
US-AMICUS (X <sub>9</sub> )	Coded "1" if the U.S. was a party in a case or filed an amicus curiae brief and argued for an accommodationist decision. Coded "0" when the U.S. was not a party or an amicus. Coded "-1" if the U.S. was a party in a case or an amicus but it did not want an accommodationist decision.

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