ABSTRACT

Supreme Court Decisions and Public Opinion Concerning First Amendment Religious Liberties, 1947-2011

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It has often been noted that the Supreme Court's decisions regarding prayer and Bible reading in public schools are inconsistent with public opinion. This is in contrast to the overall findings of congruence between the Court's decisions and public opinion more generally. However, no study has provided a comprehensive view of the relationship specifically for the Court's First Amendment religious liberty jurisprudence. This research analyzes the relationship between Supreme Court decisions and public opinion concerning the First Amendment's Establishment Clause and Free Exercise Clause. Using nationally representative public opinion polls as evidence of public opinion, the results of this study are that, generally speaking, the Court has issued opinions that have been consistent with public opinion in a majority of its decisions dealing with the First Amendment's religion clauses. In addition, trend analysis denotes the possibility that consistency is slightly higher. Further, when a clear public opinion expression is present (at least fifty-five percent of public opinion supports a position on an issue) the level of congruence between the Court's decisions and public opinion is almost seventy percent. While the Court is inconsistent with public opinion on some

issues, primarily regarding stand-alone displays of religious symbols on government property and prayer at school events, these issues appear to be the exception. Overall, the Court has shown a general level of agreement with public opinion in its decisions concerning the First Amendment's religion clauses.

Supreme Court Decisions and Public Opinion Concerning First Amendment Religious Liberties, 1947-2011

by

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A Dissertation

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CHAPTER ONE

Introduction

In 1962, the United States Supreme Court ruled that the United States Constitution prohibited public schools from beginning each school day by leading students in prayer; the following year the Court struck down a practice whereby public schools began each school day by reading passages from the Bible. These decisions have received widespread criticism and have been noted as inconsistent with public opinion on the issues.[1] Moreover, it has been shown that these practices have continued in some schools, in clear non-compliance with the Court's rulings.[2]

Generally speaking, the nature of the relationship between government and religion has been the focus of much interest and debate. It is clear that religion played an important role during the American Revolution in the fight for political freedom. Indeed, there has been a consistent presence of religion in politics, specifically in American political movements, such as the prohibition movement, the abolitionist movement, the labor movement, and the civil rights movement.[3] Also clear is that the United States

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[1] Ed Cray, *Chief Justice: A Biography of Earl Warren* (New York: Simon & Schuster, 1997), 386-389; Kenneth W. Starr, *First Among Equals: The Supreme Court in American Life* (New York: Warner Books, 2002), 95; and Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2009), 263-264.

[2] Kevin T. McGuire, "Public Schools, Religious Establishments, and the U.S. Supreme Court: An Examination of Policy Compliance," *American Politics Research* 37 (January 2009): 50-74; Lucas A. Powe, Jr., *The Warren Court and American Politics*, (Cambridge, Mass: The Belknap Press, 2000), 362-363.

[3] Dean M. Kelley, "The Rationale for the Involvement of Religion in the Body Politic," in *The Role of Religion in the Making of Public Policy*, ed. James E. Wood, Jr. and Derek Davis (Waco, Tx: Baylor University Press, 1991), 159-189.

Constitution was amended to prevent an official establishment of religion by the national government and to protect individual liberties with respect to the free exercise of religion. Less certain is what specific actions by government are prohibited by the amendment.

Questions of constitutional law related to the religion clauses have changed over time as a result of the shifting roles of government and religion in society. For example, once the religion clauses were incorporated, and thereby applied to state governments, questions about public school policies, such as prayer, Bible reading, and use of facilities by religious groups, came under scrutiny and were eligible for Supreme Court review for compliance with the United States Constitution. In addition, as various types of taxation were developed for purposes of raising government revenues, questions about how these policies should apply to religious organizations and individuals became important constitutional issues. Further, during the twentieth century, government became more involved in providing funding to support social welfare programs, such as unemployment compensation, rehabilitation services, and education; religious organizations were expanding their presence in these areas as well. The altered roles of government and religion led to new relationships between the two. Understanding what constitutes a constitutionally proper relationship, however, has been difficult to attain.

One early interpretation of the First Amendment's religion clauses, by Thomas Jefferson, was that they served to build "a wall of separation between Church and State."[4] This description was then used by the Supreme Court in some of its earlier

[4] "Jefferson's Letter to the Danburry Baptists," Library of Congress, http://www.loc.gov/loc/lcib/9806/danpre.html (accessed November 22, 2011).

cases.[5] Americans have consistently shown agreement with this language, as depicted in Figure 1.1, reporting high levels of support for the general principle of the "separation of church and state."[6] The lowest level of support, at fifty-three percent, was in response to the 1994 statement, "We have to keep church and state completely separate." However, the highest level of agreement, at seventy-three percent, was reported in two separate 1984 polls, in response to the statement, "It is important to maintain a strict separation between church and state." This statement was posed to respondents again in 2010, at which time sixty-seven percent reported support for the strict separation of church and state. Thus, it appears that Americans, at the turn of the twenty-first century, are in agreement with the sentiment expressed by Thomas Jefferson two hundred years earlier.

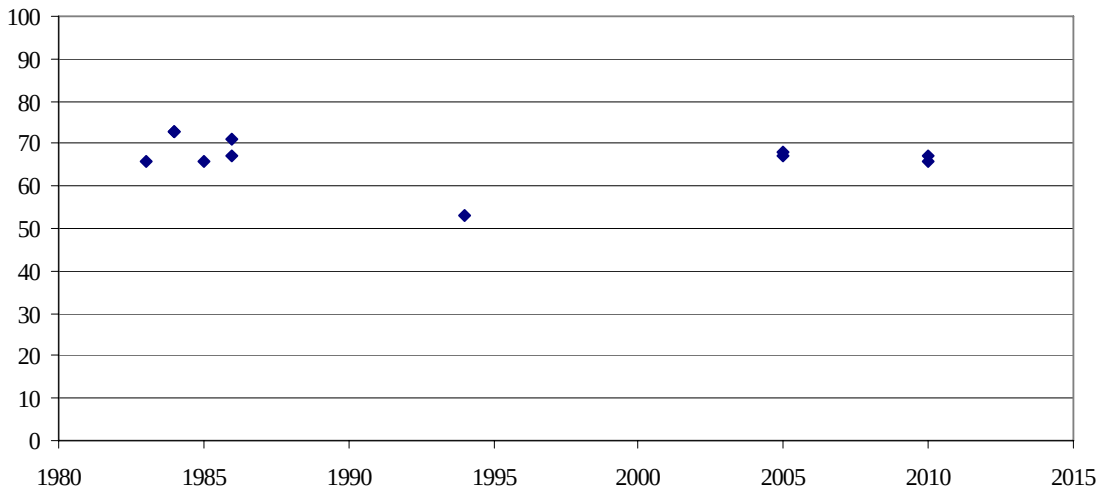

Figure 1.1. Support for the separation of church and state, 1983-2010

[5] *Reynolds v. U.S.*, 98 U.S. 145, 164 (1878); *Everson v. Board of Education*, 330 U.S. 1, 16 (1947); *McCollum v. Board of Education*, 333 U.S. 203, 212 (1948).

[6] Los Angeles Times Poll, Jun, 1983; Time/Yankelovich, Skelly, Sep, 1984; Time/Yankelovich, Skelly, Oct, 1984; Associated Press/Media General Poll, Sep, 1985; Los Angeles Times Poll, Jul, 1986; Judicial Nominations, Jul, 1986; U.S. News, Mar, 1994; Los Angeles Times Poll, Jan, 2005; Associated Press/Ipsos-Public Affairs Poll, Feb, 2005; State Of The First Amendment Survey, Jul, 2010; Public Religion Research Institute American Values Survey, Sep, 2010.

Nevertheless, at the turn of the twenty-first century Americans were also reporting that "prayer in schools" is not a violation of the "constitutional principle of the separation of church and state."[7] In fact, public opinion has shown general disagreement with the Court's 1960's decisions regarding prayer and Bible reading in public schools (see Figure 3.4). Further, as illustrated by Table 1.1, public opinion between 2002 and 2005 reported that students in public schools have too little religious freedom. This is a striking contrast to public opinion polls reporting that Americans feel they have about the right amount of religious freedom, generally speaking (see Figure 6.1).

Table 1.1. Religious Freedom of Students in Public Schools

	Percentage of Respondents			
Year	Too much	Too little	Right amount	Don't know
2002	3	53	40	4
2003	4	46	45	5
2004	3	52	41	5
2005	3	50	41	5

Public opinion poll results on the issue of the separation of church and state have, at times, portrayed a mixed message. For example, seventy-one percent of respondents in 1981 agreed with the statement, "The Supreme Court and Congress have gone too far in keeping religious and moral values like prayer out of our laws, our schools and many areas of our lives."[8] This is quite different than sentiment reported in 1986, where seventy-one percent of Americans agreed with the statement, "(I'm going to read you some decisions that the Supreme Court has made on various issues. For each one, please

[7] Seventy-four percent reported this in the Associated Press/Media General Poll, Sep, 1985; and sixty percent reported this sentiment in the For Goodness Sake Survey, Nov, 2000. In 1989, fifty-seven percent disagreed that the religion clauses were "an adequate reason not to have prayer in public schools." Parents Magazine Poll, Jan, 1989.

[8] Time/Yankelovich, Skelly & White Poll, May, 1981.

tell me if you tend to support this decision or tend to feel the decision should be reversed. If you have no opinion on a particular issue, feel free to say so.)...the decisions that require the government to maintain a strict separation of church and state."[9] One might interpret an opinion poll that reports seventy-one percent of Americans agreeing with a statement as a clear expression of public sentiment on an issue. However, this rate of approval was reported for what appears to be two contradictory statements.

Three polls conducted in 2005 further reveal just how divided public opinion can appear on the issue of the separation of church and state. In February 2005, a plurality of forty-eight percent reported that the courts have gone too far in enforcing the separation between church and state (thirty-five percent responded that the courts have handled the situation about right).[10] Just four months later, a plurality of forty-one percent reported that it would be a step in the wrong direction if President (George W.) Bush appointed "a judge who would be less strict about the separation between church and state" (thirty-six percent responded that it would be a step in the right direction).[11] Another poll reported in the same month noted a plurality of forty-seven percent of respondents agreeing that "it is important to keep our tradition of separation of government and religion" (twenty-seven percent answered that "the separation of church and state has become too severe and needs to be less strictly interpreted").[12]

We are left with a general understanding that Americans support the principle of a strict separation of church and state, that they believe their overall level of religious

[9] Judicial Nominations, Jul, 1986.

[10] Associated Press/Ipsos-Public Affairs Poll, Feb, 2005.

[11] NBC News/Wall Street Journal Poll, Jul, 2005.

[12] Council for America's First Freedom Survey, Jul, 2005.

liberties is “just right,” but that prayer in public schools is not a violation of the principle of the separation of church and state, and that the religious liberties of students in public schools is too restricted. Are Americans expressing competing ideas, or is there a more nuanced understanding of public opinion that makes each of these expressions consistent with the others? Further, how do these general public sentiments on the issue of church and state compare to public opinion on particular policy issues (other than prayer in school)? Finally, how do Supreme Court decisions compare to public sentiment on the wider range of church-state issues?

For issues of constitutional law more generally, scholars have reported a positive correlation between Supreme Court decisions and public opinion. However, the issue of school prayer has been reported as an exception to the general level of agreement between the two. What has not been determined, however, is whether it is the issue of school prayer specifically, or the Supreme Court’s jurisprudence for the First Amendment’s religion clauses more generally, that deviates from the general findings of congruence. This study will attempt to fill that gap by assessing the relationship between Supreme Court decisions and public opinion for issues dealing with the First Amendment’s Establishment Clause and Free Exercise Clause.

Also of interest for this study is the opinion of many church-state scholars who have criticized the Court for not having developed a comprehensive, coherent, or consistent jurisprudence for the religion clauses. There is much literature on the subject for purposes of attempting to discover the Court’s approach to the religion clauses and to provide guidance for a proper understanding of the religion clauses. However, less clear is whether the Court’s approach to the religion clauses is consistent with how public

opinion believes the religion clauses should be interpreted for specific policy issues. If constitutional law for the religion clauses is indeed a patchwork of guidelines, is there a pattern of congruence between the Court's opinion and general public opinion on the issues? It seems as though the relationship between the Court's decisions and public opinion should be taken into consideration in any critique of the Court's jurisprudence in this area of law.

The purpose of this study, therefore, is to determine whether the general consistency that has been reported to exist between Supreme Court opinions and public opinion is also present for one specific area of constitutional law, First Amendment religious liberties. Within the overarching research that has tested the relationship between public opinion and public policy and the relationship between public opinion and Supreme Court decisions, this study will test the relationship between the Supreme Court's decisions and public opinion for issues dealing with the First Amendment's religion clauses.

Brief Background

Government and Religion

The relationship between religion and government in the United States has undergone a series of transformations. America has developed from a land in which government, through a formal establishment of religion, legally created a link between the institutions of religion and society, to a land in which any unit of government is prohibited from declaring an official church or religion as the legitimate faith for all of society. What has become clear throughout the history of the United States is that the

political and religious roles and influences have changed. These changes can be viewed as having occurred as part of broader societal transformations and have resulted in altered roles for both church and state. This, in turn, has modified the relationship between government and religion.

When the Puritans came to America in the seventeenth century, it was to be free from a particular application of religious establishment in England, not to promote a system of disestablishment or a system of religious liberty for purposes of supporting religious pluralism. As such, the Puritans formed a political system in which government would serve to enforce important religious doctrines, such as church attendance and godly behavior in individuals. The relationship between government and religion was viewed in the context of a covenant between society and God, whereby government and religion would work together to promote a uniform system of belief to which all in society would adhere, and nonconformists would be cast out.[13] Civil offices, while technically independent of the church, were limited to church members, and these officials were responsible for upholding Puritan convictions through enforcement and regulation. According to one account, in mid-seventeenth century New England, "By law every town had to sustain a church, supported by taxes levied on all the householders, whether members or not. And law required all inhabitants to attend midweek religious 'lectures' and Sunday services, both morning and afternoon, each about two hours long."[14]

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[13] Sydney E. Ahlstrom, *A Religious History of the American People, second edition* (New Haven: Yale University Press, 1972), 130-133.

[14] Alan Taylor, *American Colonies* (New York: Viking, 2001), 179.

In other areas, colonists were content with the official Anglican faith, and in some states, such as Virginia, the Church of England was the officially established church. Even in some of the middle colonies that were initially tolerant of various religions, by the early eighteenth century the Anglican faith had become the officially established religion.[15] As Edwin Gaustad has explained, in colonial America, Congregationalism was established in New England, and Anglicanism was established just about everywhere else, and by the mid-eighteenth century establishment was stronger than ever before.[16] In fact, even though Sabbath laws, or blue laws, were linked strongly with the Puritan tradition, they existed in all thirteen colonies, including Rhode Island.[17]

Eventually, it became clear that individuals in society were not as uniform in their beliefs as these institutional structures required.[18] The Great Awakening in eighteenth century America played a central role in the transition away from the traditional Puritan covenantal view towards one that demanded less social cohesion and collective accountability.[19] This new freedom of conscience was necessitated by, among other things, the religious pluralism that existed in America.[20] In turn, the legal system was adjusted to allow for a reduced level of uniformity. While church attendance may have

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[15] Taylor, 339-340.

[16] Edwin S. Gaustad, *Neither King Nor Prelate: Religion and the New Nation 1776-1826* (Grand Rapids, Michigan: William B. Eerdmans Publishing Company, 1993), 13 and 30.

[17] David N. Laband and Deborah Hendry Heinbuch, *Blue Laws: The History, Economics, and Politics of Sunday-Closing Laws* (Lexington, Massachusetts: Lexington Books, 1987), 28-29. The term "blue law" was coined during colonial times in reference to Sabbath legislation, probably in reference to the color of the paper on which the laws were printed. See also Carl Bridenbaugh, *Cities in the Wilderness: The First Century of Urban Life in America, 1625-1742* (New York: Alfred A. Knopf, 1955), 474.

[18] Patricia U. Bonomi, *Under the Cope of Heaven: Religion, Society, and Politics in Colonial America, updated edition* (New York: Oxford University Press, 2003), 13-14.

[19] Ahlstrom.

[20] Bonomi, 13-21.

been required, one was free to choose his/her particular congregation.[21] Eventually, many of the coercive elements for membership and belief were removed. However, formal establishment remained in many colonies, and tax support was still considered necessary for purposes of supporting religion which, in turn, was viewed as essential for instructing the morality of the citizenry.

During the revolutionary and founding eras, Enlightenment ideals of religious liberty, equality, and rationality were influencing both religious and political reform.[22] The ideology of classic liberalism provided the ideal that man could become involved in working out his own destiny; this system of belief was adopted to achieve both political and religious goals. Just as orthodox political beliefs and attachments were being rejected, so were orthodox religious views and affiliations. As many authors have noted, America was going through a democratization process, both politically and religiously.[23] As Gordon Wood described the effect on religion, "Christianity was republicanized."[24]

In fact, the success of the American Revolution has been attributed to the integration of religious and political forces. According to Ruth Bloch, the combination of secular political thought and religious identity provided support for the revolutionary spirit in America.[25] If we understand the American Revolution as the final effort of a political movement, in order to achieve political goals through revolt, then the

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[21] Bonomi, 21.

[22] Ahlstrom.

[23] Nathan Hatch, *The Democratization of American Christianity* (New Haven, CT: Yale University Press, 1989).

[24] Gordon S. Wood, *The Radicalism of the American Revolution* (New York: Alfred A. Knopf, 1992), 332.

[25] Ruth Bloch, *Visionary Republic: Millennial Themes in American Thought, 1756-1800* (New York: Cambridge University Press, 1985).

Enlightenment political philosophy was bolstered with a religious vision that was essential for securing popular support that enabled the movement to transition from mere resistance to outright revolt. It has been shown that clergymen were critical in this effort.[26] As one author explained, "Most Americans before and after 1763, and especially in New England, 'absorbed' Lockean political ideas *with* the Gospel," in large part due to sermons that implanted these ideas in them.[27] As such, the dissent during the Revolution, and ultimate struggle for freedom, was supported from both religious and political viewpoints, where both were attempting to attain freedom from traditional central authorities.

Once freedom from Great Britain was obtained, ideals of political and religious liberties continued. Nathan Hatch has pointed out that the Jeffersonian Republican political viewpoint during the turn of the nineteenth century was mirrored in theology, where both the political and theological viewpoints rejected the idea that an elite few had the right to determine affairs for all.[28] Society had rejected tradition as the guiding force for politics and religion, and instead favored a populist approach to both. People became attracted to the democratic ideal that they could shape their own belief system and submit to leaders of their own choosing. New governments and new religions followed.

Denominationalism emerged, creating a further fragmented religious landscape. The Second Great Awakening heightened awareness of the idea that individuals could religiously assemble and worship in a non-traditional manner. Not only were new

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[26] Bonomi, 216.

[27] Michael P. Zuckert, *The Natural Rights Republic: Studies in the Foundation of the American Political Tradition* (Notre Dame, Indiana: University of Notre Dame Press, 2001), 150-151.

[28] Hatch, 44.

religions established, but divisions within existing religious denominations emerged. As Gordon Wood described it, "There were not just Presbyterians, but Old and New School Presbyterians, Cumberland Presbyterians, Springfield Presbyterians, Reformed Presbyterians, and Associated Presbyterians; not just Baptists, but General Baptists, Regular Baptists, Free Will Baptists, Separate Baptists, Dutch River Baptists, Permanent Baptists, and Two-Seed-in-the-Spirit Baptists."[29] What resulted was not just pluralism, but diversity, where the most successful were those that appealed to the people. Whereas the two largest denominations in mid-eighteenth century colonial America had been the Congregationalists and Episcopalians,[30] fifty years later the two strongest denominations were the Baptists and Methodists.[31]

The legal system came to recognize the legitimacy of a variety of communions.[32] By the time of the Civil War, America had accepted the idea that religious institutions were denominations, and denominations were able to exist and flourish within their own version of religious "truth." No longer was there a belief that universal and uniform standards needed to be maintained based on the views of any single church. However, even with this religious diversity, during the early nineteenth century Protestantism was the dominant religious affiliation of most Americans. Society shared a set of Protestant ideals, and religious liberty meant religious liberty for the Protestant religions. There was a link between the shared set of Protestant values and the decisions made by government,

[29] Wood, 332-333.

[30] Taylor, 342.

[31] Gaustad, 111.

[32] Ahlstrom, 381.

resulting in a de-facto Protestant establishment.[33] Thus, Protestantism indirectly provided the underpinnings for the legal system.

It is with this understanding that one can shed light on the federal anti-bigamy statute that was written specifically for the purpose of regulating the Mormon faith and outlawing its belief in polygamy, a policy that was upheld by the Supreme Court as an appropriate government limitation on the free exercise of religion.[34] This shared Protestant belief system is also reflected in support of Sabbath legislation during the nineteenth century. With Sunday as a common day of worship for most members of society, Sabbath legislation benefited the various denominations and represented a social issue that could unite the different religious groups.

During the nineteenth century, voluntary reform societies became a way for members of various religious denominations to unite and impact social reform. The philosophy of these societies changed over the course of the nineteenth century, from methods of persuasion to methods of coercion. Persuasion included educating members on the issues and urging them to voluntarily make changes within their own lives. With coercion, the state became the instrument used to affect reform. Groups focused on the passage of laws that would mandate moral behavior. Reform efforts during the Progressive Era included eradicating government corruption, regulating big business, protecting the health and safety of workers and consumers, prohibiting alcohol, and making a more direct participation democratic government. George Marsden noted one

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[33] Phillip E. Hammond, *Religion and Personal Autonomy: The Third Disestablishment in America* (Columbia, South Carolina: University of South Carolina Press, 1992); Robert T. Handy, *Undermined Establishment: Church-State Relations in America, 1880-1920* (Princeton: Princeton University Press, 1991).

[34] *Reynolds v. U.S.*, 98 U.S. 145 (1878).

estimate that eighty-five percent of social reformers during the Progressive Era were connected to evangelical Protestantism.[35]

Changing socio-economic conditions at the turn of the twentieth century resulted in a new form of liberalism in America. Mainstream ideology shifted from a view that rights existed in and of themselves to a belief that rights were tied to social responsibility.[36] During the founding generation, and popular among the federalists, was the view that man had some unalienable rights that government was responsible for protecting. During the Progressive Era, however, many scholars began to link rights with the social obligation that required the use of rights in a manner consistent with the welfare of the corporate community. This shift in political thought was mirrored by a new form of liberalism within the churches that focused on social action in response to the social and economic conditions resulting from an industrial society. This "social Christianity," as Robert Handy described it, favored government involvement in improving social and economic conditions.[37] As such, supporters worked toward political solutions to the problems. George Marsden described the social gospel as "the Progressive movement at prayer."[38] Thus, liberal Protestantism during the early twentieth century was politically influential in the reform process.

Generally speaking, seventeenth century Americans were Protestant, primarily Congregationalists and Episcopalians, and the "others" were Catholics and a few Jews.

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[35] George M. Marsden, *Fundamentalism and American Culture*, second edition (New York: Oxford University Press, 2006), 107.

[36] Wilson Carey McWilliams, "Democracy and the Citizen: Community Dignity, and the Crisis of Contemporary Politics in America," in *How Democratic Is the Constitution?*, ed Robert A. Goldwin and William A. Schambra (Washington, DC: American Enterprise Institute, 1980), 84.

[37] Handy, 112.

[38] Marsden, 129.

Waves of immigrants during the nineteenth century changed the ethnic and religious make-up of America, and by the turn of the twentieth century Catholicism represented the religious affiliation of a plurality of Americans. Will Herberg described social identification by the mid-twentieth century in terms of religious identification, with the religious classifications of Protestant, Catholic, or Jew characterizing individual identities.[39] Thus, the new set of shared beliefs for the members of society was no longer merely Protestantism, but rather a broader, Judeo-Christian set of beliefs. Phillip Hammond has identified this period of time as that of a second disestablishment in America, whereby the de-facto Protestant establishment was replaced with a de-facto Judeo-Christian establishment in the United States.[40] The legal system was no longer tied to simply Protestantism, but instead to a general Judeo-Christian set of values that represented the views of most Americans.

After the social revolutions of the 1960's and 1970's, however, the mainline denominations began to have less significance in the lives of many individuals. While religious voluntarism had become an important aspect of early religious life in the United States, unique to this period of time was a personal autonomy that resulted in individuals consciously making a decision about whether or not to be religious and which religion best suited them. People were joining churches for their own reasons and choosing churches based on their own set of personal values, as opposed to belonging based on family ties and traditions. It has been noted that individuals were moving across denominational lines at a greater rate than previously. As a result, the negative

[39] Will Herberg, *Protestant – Catholic - Jew: An Essay in American Religious Sociology* (Garden City, NY: Doubleday & Company, Inc., 1955), 45.

[40] Hammond.

attachments to the distinctions between the mainline Judeo-Christian faiths were no longer as prevalent.[41]

Robert Wuthnow has argued that, according to polling conducted in 1984, while membership along denominational lines still prevailed, the most prominent religious distinction was based on a liberal versus conservative divide that corresponded to the liberal and conservative divide in politics.[42] Rather than denominational differences forming the significant religious distinctions for individuals, differing belief systems within denominations became important. Wuthnow identified the roots of this divide in the modernist/fundamentalist division that occurred in the early twentieth century. While the religious liberals (modernists) participated in politics and worked toward social improvement, the fundamentalists focused on millennial visions of the kingdom of God and removed themselves from "this-worldly" political affairs. These religious conservatives stayed within the mainline denominations, but focused on the spiritual, rather than political, aspects of religion. However, their disagreement with the 1960's and 1970's revolutions dealing with racial and gender rights and equality heightened their interest in being politically active.

While the issues themselves did not result in clear denominational divides, special interest groups, which cut across denominational lines in support of the social issues, were particularly significant during this time.[43] The special interest organizations, which have served an important role throughout American religious history, served as non-

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[41] Robert Wuthnow, *The Restructuring of American Religion: Society and Faith Since World War II* (Princeton: Princeton University Press, 1988), 97.

[42] Wuthnow, 133.

[43] Wuthnow.

denominational (even multi-denominational) organizations that allowed members to express their political, as well as religious, views. As such, religion played a role in politics through special interest organizations that provided the political expressions of these religiously-based views.

Phillip Hammond, while looking at the shift in the role of the institution of religion in society, determined that America has undergone a series of disestablishments.[44] Thus, a historical glance at the relationship between government and religion can be summarized in successive disestablishments, moving from legally established involuntary links between religion and society, to de-facto involuntary links between religion and society, to voluntary links between religion and society. According to this perspective, the first disestablishment took place with the adoption of the First Amendment, followed by state disestablishments, whereby the legal link between religion and society was removed. Involuntary religious association still existed, resulting in a de-facto Protestant establishment, under which public policy was formed by a set of Protestant values shared by the majority of Americans.

This de-facto Protestant establishment was then replaced, by the end of World War II, with a three-tier (Protestant, Catholic, and Jewish) Judeo-Christian establishment, whereby the three main faiths within the United States marked the social distinctions of individuals,[45] and public policy was consistent with the values shared by these three groups. This establishment then ended after the revolutions of the 1960's and 1970's, where the link between religion and society became consciously voluntary, and therefore the link between public policy and traditional organized religion receded. In line with

[44] Hammond.

[45] Herberg.

this perspective, it would make sense that public opinion would support an institutional separation between church and state, while at the same time supporting increased religious liberties that would serve to protect the link between religion and society on a voluntary basis.

What has become clear throughout the history of the United States is that the political and religious realms have changed, and the roles of church and state in the lives of Americans have been transformed. As a result, the relationship between church and state has also shifted. A constant theme throughout the history of the United States is that government and religion have gone through evolutions as part of broader societal changes that were taking place in America. During the founding era, both politics and religion were undergoing a democratization process. At the turn of the twentieth century, during the Progressive era, government and religion were undergoing further transformation, becoming more involved in issues related to social welfare. Both government and religion have played a role in the lives of individuals within society, and those roles have been greatly transformed since the founding era. As society shifted its understanding of generally accepted norms, government and religion have attempted to accommodate the changes.

The Bill of Rights

The debate over the proper relationship between government and religion did not begin with the ratification of the First Amendment in 1791. However, the First Amendment's religion clauses did serve to further the debate, particularly during the twentieth century when the amount of litigation focusing on the religion clauses increased. It is clear that the United States Constitution limits the ability of Congress to

make a law "respecting an establishment of religion, or prohibiting the free exercise thereof." However, there is debate about what specific acts of Congress would constitute an establishment of religion, and to what extent Congress, in its authority to enact legislation for the public good, is limited when the legislation restricts the free exercise of religion.

The political fight over a Virginia assessments bill in 1785 provides insight to the concept of religious liberties during the founding era. In response to a bill that would have assessed a tax for purposes of supporting the teaching of religion, James Madison issued his *Memorial and Remonstrance against Religious Assessments*, in which he argued against the assessments bill. Although the petition garnered ten thousand signatures, that was less than one-fifth of all of the signatures collected for various petitions circulating against the assessments bill at the time. Thus, as one author explained, this expression of public opinion "proved decisive when the assembly resumed discussion of the bill at its fall session of 1785" and the bill was defeated.[46]

In place of the defeated assessments bill, the Virginia legislature passed Thomas Jefferson's "Statute for Establishing Religious Liberties," an action that has been described as a "landmark in the struggle for religious liberty,"[47] and among the precursors to the national Bill of Rights. Stating "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever,"[48] the law rejected the idea that someone should be compelled to contribute money to support the

[46] Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1997), 310-311.

[47] Rakove, 311.

[48] Virginia, *Act for Establishing Religious Freedom* (October 31, 1785) http://press-pubs.uchicago.edu/founders/documents/amendI_religions44.html (October 11, 2011).

teaching of even his/her own religion. As such, the state of Virginia placed financial support of religion in the private sector.[49] Of course, the state of Virginia did regulate some aspects of religious exercise, particularly for purposes of maintaining public order. For example, the state maintained its "Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers."[50] Sabbath legislation, for religious purposes, was still deemed as appropriate state government action. In fact, laws recognizing a Sabbath day lasted well into the twentieth century, albeit without the earlier coercive elements that had required church attendance.

Another precursor to the Bill of Rights in the current United States Constitution was a document that can be viewed as the first national bill of rights, namely the expressions of rights included in the Northwest Ordinance of 1787. Since the first constitution for the United States, the Articles of Confederation, was established by the states in order to create a national government for the states, the national government did not possess power over "the people." However, when Congress passed the Northwest Ordinance, in order to establish the first territorial government for the United States, it was creating a government that would be exercising power over the people, and it included a bill of rights.[51] Of course, at the same time that the Northwest Ordinance was passed, the delegates at the constitutional convention in Philadelphia were in the process

[49] Leonard W. Levy, *Original Intent and the Framers' Constitution* (New York: Macmillan Publishing Company, 1988), 177, 192.

[50] John Witte, Jr., *Religion and the American Constitutional Experiment*, second edition (Boulder, Colorado: Westview Press, 2005), 33; and Rakove, 311.

[51] John P. Kaminski, "The Constitution without a Bill of Rights," in *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties*, ed. Patrick T. Conley and John P. Kaminski (Madison, WI: Madison House, 1992), 18-19.

of creating a new national constitution for "we the people," and it did not include a bill of rights.

The religious liberties mentioned in the First Amendment to the United States Constitution can be understood as the result of a political compromise for purposes of securing final ratification of the national constitution by promising the addition of a bill of rights. However, there is much debate as to the correct interpretation of the Constitution with respect to religious liberties. The task of providing an interpretation for cases of law dealing with the First Amendment's religion clauses has naturally fallen to the Supreme Court. Since the Court provides the legal meaning of the law, any changes in the Court's constitutional interpretation results in a change in the legal parameters for what constitutes an impermissible action by government.

Americans appear to agree with this assignment of legal interpretation, with sixty-five percent of respondents in 1987 reporting that "The Supreme Court is the best place to decide controversies about the separation of church and state."[52] In addition, as shown in Figure 1.2, public opinion has reported that is has confidence the Supreme Court.[53]

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[52] Religion And Public Life, December, 1987.

[53] Gallup Poll (AIPO), May, 1973; Gallup Poll (AIPO), May, 1975; Gallup Poll, Jan, 1977; Unchurched Americans Survey, 1978, Apr, 1978; Gallup Poll (AIPO), Apr, 1979; Gallup Poll (AIPO), Oct, 1980; CBS News/New York Times Poll, Jun, 1981; Gallup Poll (AIPO), Jul, 1981; ABC News/Washington Post Poll, Sep, 1981; Gallup Poll (AIPO), Nov, 1981; Gallup Report, Aug, 1983; Gallup/Newsweek Poll, Oct, 1984; Gallup Poll (AIPO), May, 1985; Gallup Report, Jul, 1986; Gallup Poll (AIPO), Oct, 1986; Gallup Poll (AIPO), Jul, 1987; Gallup Report, Sep, 1988; Gallup Poll, Feb, 1991; Washington Post Poll, Mar, 1991; Gallup/Newsweek Poll, Mar, 1991; Gallup Poll, Oct, 1991; ABC News/Washington Post Poll, Oct, 1991; Gallup Poll, Mar, 1993; Gallup/CNN/USA Today Poll, Mar, 1994; Gallup/CNN/USA Today Poll, Apr, 1995; Trust In Government Survey, Nov, 1995; Gallup/CNN/USA Today Poll, May, 1996; Attitudes Toward Government Survey, Feb, 1997; Gallup/CNN/USA Today Poll, Jul, 1997; Gallup/CNN/USA Today Poll, Jun, 1998; America Unplugged: Citizens and Their Government Survey, May, 1999; Gallup/CNN/USA Today Poll, Jun, 1999; NPR/Kaiser/Kennedy School Attitudes Toward Government Survey, May, 2000; Gallup Poll, Jun, 2000; PSRA/Newsweek Poll, Jun, 2000; E-Government: The Next American Revolution Survey, Aug, 2000; CBS News/New York Times Poll, Nov, 2000; NBC News/Wall Street Journal Poll, Dec, 2000; CBS News Poll, Dec, 2000; ABC News/Washington Post Poll, Dec, 2000; Gallup/CNN/USA Today Poll, Dec, 2000; CBS News Poll, May, 2001; Gallup/CNN/USA Today Poll, Jun, 2001; E-Government: To Connect, Protect, and Serve Us Survey, Nov, 2001;

When those reporting they are very confident are added to those reporting they are somewhat confident, the confidence level exceeds seventy percent for the entire period between 1973 and 2011.

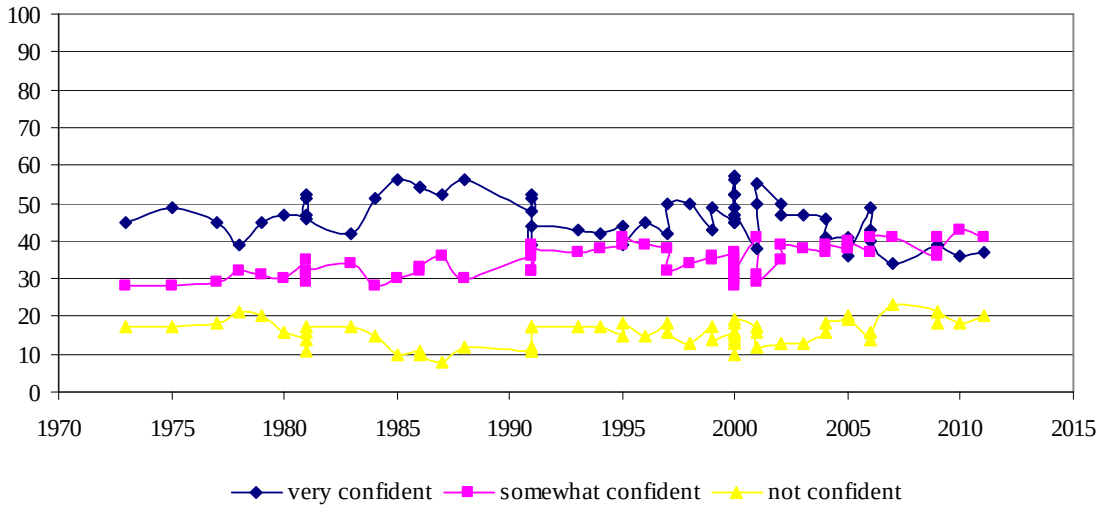

Figure 1.2. Confidence in the Supreme Court, 1973-2011

In addition, as illustrated in Figure 1.3, Americans between 1986 and 2010 generally reported an approval rating for the Court in excess of fifty percent.[54] However, there appears to have been a general decline in approval over the years. This decline, occurring most apparently beginning in 2000, is mirrored by a decline in those reporting they were very confident in the Court (see Figure 1.2).

Gallup/CNN/USA Today Poll, Jun, 2002; Washington Post Poll, Sep, 2002; Gallup/CNN/USA Today Poll, Jun, 2003; Gallup Poll, May, 2004; CBS News/New York Times Poll, Nov, 2004; Gallup Poll, May, 2005; NBC News/Wall Street Journal Poll, Jul, 2005; CBS News Poll, Jul, 2005; CBS News Poll, Jan, 2006; Council for Excellence in Government Survey, May, 2006; Gallup Poll, Jun, 2006; Gallup Poll, Jun, 2007; NBC News/Wall Street Journal Poll, Jan, 2009; Gallup Poll, Jun, 2009; CNBC Poll, Dec, 2009; Gallup Poll, Jul, 2010; Gallup Poll, Jun, 2011.

[54] ABC News/Washington Post Poll, Jun, 1986; ABC News/Washington Post Poll, Sep, 1987; Washington Post Poll, Jun, 1989; ABC News/Washington Post Poll, Jul, 1991; ABC News/Washington Post Poll, Jul, 1995; Los Angeles Times Poll, Jun, 2000; Gallup Poll, Aug, 2000; Gallup Poll, Jan, 2001; Gallup Poll, Jun, 2001; Gallup Poll, Sep, 2001; Gallup Poll, Sep, 2002; Gallup Poll, Jul, 2003; Gallup Poll, Sep, 2003; Gallup Poll, Sep, 2004; Gallup/CNN/USA Today Poll, Jun, 2005; Gallup Poll, Sep, 2005; Gallup Poll, Sep, 2006; Gallup Poll, May, 2007; Gallup Poll, Sep, 2007; Gallup Poll, Jun, 2008; Gallup Poll, Sep, 2008; Gallup Poll, Aug, 2009; Gallup Poll, Sep, 2010.

Supreme Court Interpretation

Originally, the First Amendment, as with the entire Bill of Rights, applied only to the federal government. The First Amendment begins, "Congress shall make no law…" As such, states were under no obligation from the national constitution to refrain from creating establishments of religion, or preventing the free exercise of religion.[55]

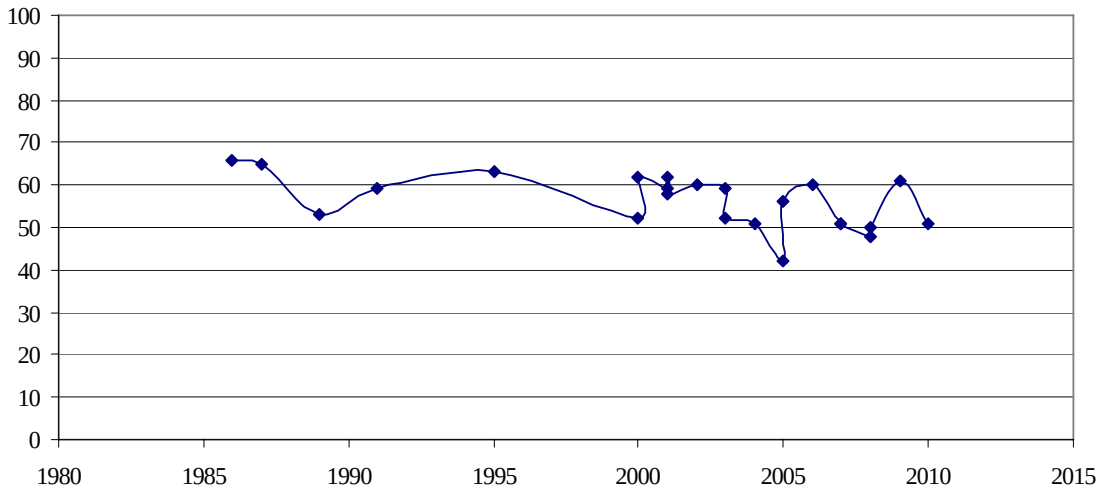

Figure 1.3. Approval of the way the Supreme Court is handling its job, 1986-2010

It was not until passage of the Fourteenth Amendment in 1868 that the possibility of protections from state action emerged. Ultimately, it was the language of the Fourteenth Amendment's Due Process Clause that the Court used to provide protections against state action. The Fourteenth Amendment reads, "nor shall any state deprive any person of life, liberty, or property, without due process of law." During the twentieth century, the Court established a jurisprudence of incorporation by interpreting the term "liberties" in the Fourteenth Amendment to include some of the liberties represented in the Bill of Rights. The Court began in 1925 by incorporating the First Amendment's

[55] This interpretation of the constitution was confirmed by the Supreme Court in *Barron v. Baltimore*, 32 U.S. 243 (1833).

liberty of free speech.[56] The Court followed with an opinion that the Bill of Rights would not be incorporated in its entirety, but rather, as cases came to the Court, the Court would review to determine which rights were so fundamental as to provide protection from state government action.[57] In 1940, the Court determined that the free exercise of religion was a right that states could not deny without due process of law,[58] and the Court then specifically incorporated the Establishment Clause in 1947.[59] Thus, since the mid-twentieth century, the First Amendment's Establishment and Free Exercise clauses have provided protection from state action, as well as actions of Congress.

Since the federal judiciary utilizes the legal principle of *stare decisis*, it operates under a system whereby legal interpretations of the Court establish a body of case law that is then used in deciding subsequent cases. Thus, precedent, or legal principles established by the Court in earlier cases, guides the Court's decision-making in subsequent cases. Since the Supreme Court issues *writs of certiorari* to very few cases each year, case law provides an important guide for lower courts. In addition, the guidelines established by the Court are also used by the other branches of government in order to operate in a manner considered constitutionally acceptable by the Court. Over time, this system has provided stability and predictability in matters of constitutional law.

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[56] *Gitlow v. New York*, 268 U.S. 652 (1925).

[57] See, for example, *Palko v. State of Connecticut*, 302 U.S. 319, 323 (1937). Palko challenged a violation of double jeopardy, arguing that the Fifth Amendment protection applied to the state through the Fourteenth Amendment's Due Process Clause. In his opinion, Justice Cardoza stated that there is no general rule that "…whatever would be a violation of the original bill of rights… if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state."

[58] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[59] *Everson v. Board of Education* 330 U.S. 1 (1947).

Even with a system of *stare decisis*, however, interpretations can change. As the Court's interpretations change, the legal meaning of the Constitution changes, and the parameters for individual protection from government action change. Over the course of the Court's history in dealing with the Free Exercise Clause and Establishment Clause, changes in interpretation have occurred. Generally speaking, the Court's Establishment Clause jurisprudence has resulted in an expansion of government's ability to interact with religion. The Court's interpretation of the Free Exercise Clause has gone through a series of transformations, with heightened free exercise protections during the course of the twentieth century and then reduced protections towards the end of the twentieth century.

The Supreme Court's Establishment Clause jurisprudence was shaped, for the most part, during the twentieth century. Beginning in the 1940's, the Court began with a view that government must enact policy for strictly secular public purposes. Over the years, the Court developed further guidelines, putting them together in 1971 to create a "test" for purposes of determining if government action related to religion was constitutionally acceptable. According to the test, the government policy is deemed acceptable if: the government action has a secular governmental purpose, the government action does not have the primary effect of advancing nor inhibiting religion, and the government action avoids excessive entanglement with religion.[60] While these guidelines are still generally used by the Court, beginning in the 1990's the Court began to interpret them in a much broader manner, providing more flexibility for government programs that aid religion.

[60] *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

The Supreme Court's interpretation of the Free Exercise Clause has been less linear. The Court began with a general view that religious beliefs were protected, but that actions based on those beliefs could be regulated through the majority-rule legislative process. Since the legislature is responsible for passing laws for purposes of the public good, the Free Exercise Clause did not require special exemptions from those laws. Thus, an individual was required to exercise his/her religion within the parameters of the existing legal structure. During the 1940's the Court provided for heightened protections of individual religious exercise, particularly for Jehovah's Witnesses in cases dealing with religious canvassing and the flag salute. However, laws passed for general social welfare purposes (such as labor laws restricting child labor and labor on Sunday) were still valid and did not require Free Exercise exemptions.

The Court's guidelines then changed in 1963, at which time the Court implemented a "compelling state interest test," which placed a higher burden of proof on government when its laws effectively limited an individual's ability to freely exercise his/her religion.[61] While government was able to meet this heightened scrutiny in several subsequent cases, this new standard resulted in the striking down of some laws that, most likely, would not have failed prior to the change in precedent. However, the Court in 1990 did away with the compelling interest test for the Free Exercise Clause, resorting back to the basic belief/action distinction, whereby actions based on religious belief had to comply with valid public policy.[62] As long as the law was not passed for purposes of

[61] *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

[62] *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990).

religious discrimination, the First Amendment did not provide additional protection from a law that had the effect of limiting the ability to freely exercise one's religion.

Separationism versus Accommodationism

The terms "separationist," "nonpreferentialist," and "accommodationist" have been widely used to describe views on church-state issues. One early study created five categories of church-state thought (strict separationist, pluralistic separationist, institutional separationist, nonpreferentialist, and restorationist),[63] and much effort has been made since then to refine the taxonomy. As Ted Jelen has noted, the two basic church-state positions for the Establishment Clause (regarding the appropriate relationship between government and religion) are accommodationist and separationist.[64] While some flexibility exists in the exact nature of how the terms are used by various authors, there are some general guidelines that provide useful differences between the terms and will therefore serve as the distinctions used in this study.

Separationism is a term that will be used to describe a perspective of church-state relations that ranges from a view that rejects any form of government aid to or in support of religion, to a view that would allow for a relationship between government and religion as long it was grounded in a secular governmental purpose and carried out in a secular manner.[65] Nonpreferentialism will be used to describe a position that supports

[63] Carl H. Esbeck, "Five Views of Church-State Relations in Contemporary American Thought," *Brigham Young University Law Review* 86 (1986): 371-404.

[64] Ted G. Jelen, *To Serve God and Mammon: Church-State Relations in American Politics, second edition* (Washington D.C.: Georgetown University Press, 2010), 11.

[65] Leonard Levy, *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan, 1986); Kent Greenawalt, *Religion and the Constitution: Establishment and Fairness* (Princeton, N.J.: Princeton University Press, 2008); James E. Wood, *The First Freedom: Religion & the Bill of Rights* (Waco, Texas: J.M. Dawson Institute of Church-State Studies, Baylor University, 1990); and Jelen. Jelen, writing in support of separationism, would allow for school vouchers based on the conclusion

government aid to religion, even for religious purposes, as long as one religion is not preferred over the others, and as long as religion is not promoted to a place that is controlling over government.[66] Accommodationism can be viewed as a middle ground between separationism and nonpreferentialism. As such, it "accommodates" government aid and support for religion, provided the aid serves a more general secular purpose. For purposes of this study, one distinction between accommodation and separation is that accommodationism allows for the government aid and/or support (for a secular purpose) to be carried out in a manner that includes religion, as long as all religions are treated equally.[67] For instance, an accommodationist position could allow for government education vouchers to assist in providing an education (secular purpose) at a religious school (carried out in a religious manner).

If one uses these terms to describe the Court's jurisprudence during the twentieth century and the beginning of the twenty-first century, one can make the following observations. Beginning in the 1940's and lasting through 2000, the Court has consistently issued separationist opinions when ruling on cases dealing with religion as part of the official, organized public school program. When public officials made a

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that to do otherwise would be a violation of the Free Exercise Clause. For purposes of this study, however, his position would be labeled as accommodationist.

[66] Walter Berns, *The First Amendment and the Future of American Democracy* (New York: Basic Books, 1976); Daniel L. Dreisbach, *Real Threat and Mere Shadow: Religious Liberty and the First Amendment* (Westchester, Ill.: Crossway Books, 1987); and Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law: an Essay* (Princeton, N.J.: Princeton University Press, 1997).

[67] Daniel O. Conkle, *Constitutional Law: The Religion Clauses* (New York: Foundation Press, 2003); Witte, Jr.; Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Doubleday, 1993); Noah Feldman, *Divided by God: America's Church-State Problem-- and What We Should Do About It* (New York: Farrar, Straus and Giroux, 2005). Of course, different authors have different views about specifically which programs would be an appropriate accommodation of religion.

determination about religion in order to implement a public school program, the Court ruled against the policy.[68]

The remainder of the Court's jurisprudence for the Establishment Clause can be viewed as having shifted from a position of separationism to one of accommodationism, with the level of accommodation increasing after 1975. For instance, the Court has consistently ruled in favor of a "child benefit" theory, whereby government assistance is, to some extent, allowed for school children attending religious schools.[69] What has changed is the extent of accommodation allowed by the Court and the ability of the government aid to be used in a religious manner. In addition, the Court's free exercise jurisprudence has been transformed, as evidenced by the shift from a requirement of government to prove a compelling interest for legislation that limited free exercise,[70] to a principle of neutrality that no longer requires a compelling interest.[71]

Methodology

The objective of this study is to determine whether Supreme Court opinion and public opinion are in agreement on issues related to constitutionally protected religious

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[68] See *McCollum v. Board of Education* (1948, public school released time program), *Engel v. Vitale* (1962, public school prayer), *School District of Abington Township v. Schempp* (1963, Bible reading in public school), *Stone v. Graham* (1980, posting the Ten Commandments in public school), *Wallace v. Jaffree* (1985, moment of silence purposes of meditation or prayer), *Edwards v. Aguillard* (1987, requiring the teaching creationism along with evolution), *Lee v. Weisman* (1992, prayer at graduation ceremony), and *Sante Fe Ind. School District v. Doe* (2000, prayer before school football game).

[69] See *Everson v. Board of Education* (1947, transportation reimbursements), *Board of Education v. Allen* (1968, textbooks), *Meek v. Pittenger* (1975, textbooks), *Wolman v. Walter* (1977, speech, hearing, diagnostic tests, and standardized tests), *Mueller v. Allen* (1983, state income tax deduction for tuition, textbooks, and transportation costs), *Agostini v. Felton* (1997, public school teachers teaching remedial classes in parochial school), *Mitchell v. Helms* (2000, educational materials and equipment for secular, neutral, and non-ideological programs), *Zelman v. Simmons-Harris* (2002, school voucher program),

[70] *Sherbert v. Verner*, 374 U.S. 398 (1963).

[71] *Employment Division v. Smith*, 494 U.S. 872 (1990).

liberties. For purposes of this study, public opinion is measured by nationally representative public opinion polls, which report the aggregate of individual opinions on specific issues, and therefore provide quantitative descriptions of public sentiment. The source of polling data is the Roper Center's Public Opinion Archives (at the University of Connecticut), which boasts "the oldest and most comprehensive collection of public opinion survey datasets in the world."[72] Since existing public opinion polls are used, this study is limited to secondary analysis of opinion collected for other purposes.[73]

In this study, bivariate analysis (quantitative analysis of two variables for purposes of determining the relationship between the two) is used for purposes of testing the hypothesis that there exists a positive correlation between Supreme Court opinion and public opinion for issues dealing with the First Amendment's religion clauses. The variables for this study are (1) Supreme Court decisions for cases in which the Court was asked to review for compliance with the First Amendment's Establishment Clause and/or Free Exercise Clause, and (2) public opinion polls that have asked questions relating to an issue that matches with one or more of the Supreme Court's cases dealing with the First Amendment's Establishment Clause and/or Free Exercise Clause.

The scope of the project is limited to Supreme Court decisions in which the Court was presented with a constitutional question regarding the First Amendment

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[72] Roper Center Public Opinion Archives, "About the Collection," http://www.ropercenter.uconn.edu/data_access/data/survey_collection_coverage.html (July 15, 2010). Included in the collection: Gallup Polls, ABC News and Washington Post, CBS News and New York Times Polls, Exit Polls, Los Angeles Times Polls, PSRA/Newsweek Polls, Time Soundings/CNN/Yankelovich Polls, NBC News and Wall Street Journal Polls, National Opinion Research Center Surveys, and Roper Reports.

[73] The hypothesis is derived from studies performed by Thomas Marshall (*Public Opinion and the Supreme Court*, 1989 and *Public Opinion and the Rehnquist Court*, 2008). This study will extend his work in the church-state realm, focusing solely on church-state cases argued under the First Amendment's religion clauses. Marshall's study included a total of 146 cases, only four of which were cases dealing with religion.

Establishment Clause or Free Exercise Clause (or both), and for which the court issued a written opinion. In order to establish the cases to be included in the project, the following steps were taken. First, the Findlaw, NexisLexis, and Supreme Court online databases were searched for Supreme Court cases dealing with the First Amendment's Establishment Clause and Free Exercise Clause. This provided the initial list of cases to be considered for inclusion in the study. Additional cases were added to the list as they were discovered in Supreme Court opinions that cited other Court cases as being important precedents for this area of law.

Next, the Roper Center's database, iPOLL, was used to access national public opinion polls.[74] The iPOLL database includes public opinion polls dating back to September 1935; therefore, public opinion polls conducted between 1935 and 2011 are included in the scope of polls to be considered for inclusion in this study. Due to the sheer number of public opinion poll questions contained in the iPOLL database, searches by keyword, topic, organization, and date were utilized for the purpose of locating public opinion poll questions that correlated to Supreme Court decisions dealing with the First Amendment's religion clauses. Unless otherwise noted, only polls with a sample of the national adult, or national registered voter, population were used.[75] These population groups were determined to provide an adequate representation of the American public.

[74] Unless otherwise noted, all public opinion poll data reported in this study is from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html (accessed in 2011).

[75] In addition to the national adult population, the registered voter population appears to be a very common population for public opinion polling purposes. Data from polls with both the national adult and national registered voter population is combined in the analysis performed in this study; any differences identified in polling results from the two populations will be mentioned, if apparent.

Samples with more restricted populations (*i.e.*, ones based on race, religion, gender, or age), unless otherwise noted, were not used for this study.

The Court's decision (upholding or striking down the policy under review), as well as the Court's opinion (a more nuanced understanding of what the Court described as acceptable for compliance with the religion clauses) is used to determine the consistency between the Court's decisions and public opinion. In addition, the resulting policy outcome is considered when determining if the Court's opinion is consistent with public opinion. For instance, if the Court determined that it could not issue a decision on the merits of the First Amendment (due to jurisdiction of the Court or due to lack of "standing" of the plaintiff), then the outcome of the policy as a result of the Court's decision is compared to public opinion.

The pair-wise and trend analysis methods are used for comparing the Supreme Court's opinion and public opinion. The pair-wise method, which matches specific Court decisions to individual opinion poll questions, is used in order to compare the Court's opinion to contemporary public opinion. This method is used only when a public opinion poll question directly relates to an issue under review by the Supreme Court, and the poll response is reported within five years of the Court's decision. Therefore, the pair-wise analysis only includes Supreme Court decisions for which there is a corresponding, contemporary, public opinion poll question. When multiple contemporary public opinion poll questions exist that directly relate to an opinion of the Court, the aggregate expression of public opinion is used to determine the general relationship between the Court's opinion and contemporary public opinion. For instance, the average of opinion

in agreement is compared to the average of opinion in disagreement, and whichever percentage is higher is determined as the aggregate expression of opinion.

While the pair-wise method is beneficial due to the fact that only a single poll question is needed, it does not allow for analysis of public opinion on an issue over a period of time. In order to assess the relationship between the Court's opinion and public opinion on a specific issue over a period of time, the "trend analysis" method is used.[76] For those instances in which polls have captured public opinion about a specific issue over a period of time, the trend analysis method shows the trend of public opinion, including any changes in public opinion over time. Trend analysis will include the entire length of time, since 1935, that public opinion polls asked questions related to the particular issue. The trend is then compared to the Court's opinion in order to determine how public opinion trends over time compare to the Court's opinion. This analysis will uncover not only movement in opinion (*i.e.*, change in support from twenty percent to forty percent), but also changes in opinion that result in a changed relationship between public opinion and the Court's opinion (*i.e.*, change in support from forty-five percent to fifty-five percent). When appropriate, a scatter-plot chart is used to illustrate these over-time trends in public opinion.

This study also attempts to provide for the degree of correlation between the Court's opinion and public opinion. For purposes of the pair-wise analysis and trend analysis, any opinion poll that reported more respondents (even if it is only a plurality) answering in agreement with the Court's opinion is coded as "consistent." In order to provide a better understanding of the relationship, however, this study also reports the

[76] This method was referred to as the "over-time trend" method by Thomas Marshall.

opinion in a more nuanced manner. For instance, an opinion poll reporting fifty-two percent in favor and forty-eight percent opposed will receive the same classification of "consistent" as a poll that reports eighty-eight percent in favor and twelve percent opposed. However, the former poll indicates a public that is much more divided, perhaps even conflicted, on an issue, whereas the latter gives the impression of a much more united, perhaps settled, opinion on an issue. This expression of public opinion is provided as part of the understanding of the relationship between the Court's opinion and public opinion on each issue.

Thus, the aggregate expression of consistency between the Supreme Court's opinion and public opinion is reported in very blunt, "black and white," terms, particularly for the pair-wise analysis, but also in a more nuanced manner, providing for a more in-depth understanding of the relationship between the Supreme Court's opinion and public opinion on the various issues related to religious liberties. This will allow for distinctions in the degree of correlation. This will also provide for alternate understandings of the overall conclusions. For instance, the Court in 1985 was inconsistent with public opinion when it struck down a moment of silence for purposes of prayer. However, the Court clarified its specific objection to the policy, and it would most likely uphold a moment of silence when the stated purpose is not prayer. This is an opinion that is consistent with public opinion and is a level of agreement that the blunt measure would not detect.

Supreme Court decisions that do not correspond to at least one public opinion poll question will not be included in this study. Therefore, the scope of the study is limited to (1) Supreme Court decisions since 1935 dealing with a First Amendment religion clause

issue for which at least one public opinion poll has captured public opinion on the matter[77]; and (2) public opinion poll questions asked since 1935 that are stored in the iPOLL database and that correspond to issues addressed in Supreme Court cases dealing with the First Amendment's religion clauses.

Concluding Remarks

Based on the research that shows general agreement between the Supreme Court's decisions and public opinion, one would expect the differences in the Court's opinions for the religion clauses, including the shifts that have occurred in the Court's

[77] These cases include: *Bradfield v. Roberts*, 175 U.S. 291 (1899); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1 (1947); *McCollum v. Board of Education*, 333 U.S. 203 (1948); *Zorach v. Clauson*, 343 U.S. 306 (1952); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School Dist. V. Schempp*, 374 U.S. 203 (1963); *Chamberlin v. Public Instruction Bd.*, 377 U.S. 402 (1964); *Jehovah's Witnesses, St., Washington v. King Cty. Hosp*., 390 U.S. 598 (1968); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970); *Lemon v. Kurtzman* 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Unites States v. Christian Echoes Ministry*, 404 U.S. 561 (1972); *Hunt v. McNair*, 413 U.S. 734 (1973); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976); *Wolman v. Walter*, 433 U.S. 229 (1977); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Harris v. McRae*, 448 U.S. 297 (1980); *Committee For Public Education v. Regan*, 444 U.S. 646 (1980); *Stone v. Graham*, 449 U.S. 39 (1980); *Heffron v. Int'l Soc. for Krishna Consc*., 452 U.S. 640 (1981); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Mueller v. Allen*, 463 U.S. 388 (1983); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Board of Trustees of Scarsdale v. McCreary*, 471 U.S. 83 (1985); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985); *Witters v. Wash. Dept. Of Services For Blind*, 474 U.S. 481 (1986); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 5 (1989); *Swaggart Ministries v. California Board of Equalization*, 493 U.S. 378 (1990); *Westside Community Bd. of Ed. v. Mergens*, 496 U.S. 226 (1990); *Int. Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); *Lee v. Weisman*, 505 U.S. 577 (1992); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); *Lamb's Chapel v. Center Moriches Sch. Dist*., 508 U.S. 384 (1993); *Capitol Sq. Review Bd. V. Pinette*, 515 U.S. 753 (1995); *Agostini et al. v. Felton* et al., 521 U.S. 203 (1997); *Mitchell et al. v. Helms et al*., 530 U.S. 793 (2000); *Santa Fe Independent School District v. Doe* 530 U.S. 290 (2000); *Good News Club et al. v. Milford Central School*, 533 U.S. 98 (2001); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Hibbs v. Winn*, 542 U.S. 88 (2004); *McCreary County, Kentucky, et al. v. American Civil Liberties Union of Kentucky et al*., 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Hein v. Freedom From Religion Foundation, Inc*., 551 U.S. ___ (2007); *Pleasant Grove City, Utah, et al., v. Summum*, 555 U.S. ___ (2009); *Hastings Christian Fellowship v. Martinez*, 561 U.S. ___ (2010); *Salazar v. Buono*, 559 U.S. ___ (2010); *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. ___ (2011);

jurisprudence, to be consistent with public opinion. Thus, what might seem as inconsistent to many scholars writing in the field of church-state studies might in reality reflect a strategic choice on the part of the Court. While not directly deferring to public opinion polls for its decisions (*i.e.*, not using public opinion polls as the sole determining factor when deciding a case), it seems fair to assume that, in general, the Court's decisions would be consistent with what the public views as acceptable governmental policy dealing with religion. Philosophical foundations have been provided to support the notion that this should be the outcome,[78] and this work will show the relationship.

This study will attempt to partially fill the gap in scholarship assessing the relationship between Supreme Court decisions and public opinion. By testing the hypothesis that there is a positive correlation between Supreme Court decisions and public opinion dealing with the First Amendment's Establishment Clause and Free Exercise Clause, this study will show that, generally speaking, the Supreme Court's decisions are consistent with public opinion on issues of religious liberties. The level of consistency uncovered in this study is similar to that reported by previous studies that have assessed the relationship on a broader scale. Thus, the level of congruence between the Court's opinion and public opinion for matters of religious constitutional law is consistent with the relationship between the two for constitutional law more generally.

In addition to the blunt measures of opinion, this study also provides a more comprehensive understanding of the Court's opinion and public opinion and, as a result,

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[78] See Walter F. Murphy and Joseph Tanenhaus, "Public Opinion and the Unite States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes," *Law & Society Review* 2 (May 1968): 357-384; Glenn T. Miller, *Religious Liberty in America: History and Prospects* (Philadelphia: The Westminster Press, 1976); Stephen G. Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York : Knopf, 2005); and John F. Wilson, "Original Intent and the Quest for Comparable Consensus," in *The First Freedom: Religion & the Bill of Rights*, ed. James E. Wood (Waco, Texas: J.M. Dawson Institute of Church-State Studies, Baylor University, 1990).

uncovers some additional relationships. For instance, in some issue areas, such as prayer in school, this study shows that the relationship is not as overtly inconsistent as originally believed.

While beyond the scope of this study, these results will lay the foundation for future work on the issue. For example, this study does not research the nature or direction of the relationship between the Court's opinion and public opinion. Further research could use results from this study to investigate whether public opinion has influenced the Court's opinion or if the Court's opinion has influenced public opinion. Scholars have analyzed the directional relationship between Supreme Court decisions and public opinion (see chapter 2), and this data can be used to continue that research. In addition, further study could investigate the causes that factor into the relationship between Supreme Court decisions and public opinion on matters of religious liberties.

The specific issues to be included in this study will be grouped into the following categories: religion in public schools; religious expression and government property; public aid and religion; and free exercise. These divisions are relatively standard in church-state literature, and the Supreme Court's precedents for First Amendment religion cases often differ along these lines. These categories are also consistent with how public opinion polls have asked Americans their opinion on the different issues. Each chapter will assess the relationship between the Court's opinion and public opinion for a particular category of church-state relations. The conclusion chapter will then bring the results of each chapter together, showing the overall results of congruence, as well as general themes discovered during the study. This will add another level of understanding

to the relationship between the Supreme Court's decisions and public opinion with regard to issues of constitutional law dealing with the religion clauses.

CHAPTER TWO

Literature Review

Background

Since it was proposed in 1787, there has been an ongoing debate over the democratic nature of the Constitution of the United States.[1] While one might argue that any government needs, to some extent, the support of its people in order to establish legitimacy for its authority, democratic government places a core emphasis on the consent of the governed. Operating under the principle of popular sovereignty, a democratic government is based on the foundation of "rule by the people," either by direct or indirect means. While there has been substantial consensus supporting the idea of democratic government in America, the exact nature and role of that democratic

[1] During the ratification process, expressions can be found in both Anti-Federalist and Federalist writings. See Brutus, "Republican Government," The Founders' Constitution, http://press-pubs.uchicago.edu/founders/documents/v1ch4s14.html (accessed June 15, 2010); Cato, "Republican Government," The Founders' Constitution, available from http://press-pubs.uchicago.edu/founders/documents/v1ch4s16.html (accessed June 15, 2010); Federal Farmer, "Representation," The Founders' Constitution, http://press-pubs.uchicago.edu/founders/documents/v1ch13s20.html (accessed June 15, 2010); Herbert J. Storing, *The Anti-Federalist* (Chicago: University of Chicago Press, 1985); James Madison, "#10," in *The Federalist Papers*, ed. Charles R. Rossiter (New York: New American Library, 2003), 76; Alexander Hamilton, "#71," in *The Federalist Papers*, ed. Charles R. Rossiter (New York: New American Library, 2003), 430-431. During the Progressive era see J. Allen Smith, *The Spirit of American Government*, ed. Cushing Strout (Cambridge, MA: Harvard University Press, 1965); and Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: The MacMillan Company, 1948). For more recent scholarship see *How Democratic Is the Constitution*?, ed Robert A. Goldwin and William A. Schambra (Washington, DC: American Enterprise Institute, 1980); Walter Berns, *Democracy and The Constitution: Essays* (Washington, D.C.: AEI Press, 2006); and Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We The People Can Correct It)* (New York: Oxford University Press, 2006).

government, as well as the nature and role of "popular sovereignty," has been debated throughout the history of the United States.[2]

One point of interest has been the relationship between the policies established by the national government and the opinions of those governed.[3] Some debate has focused on whether the attitudes of the people are reflected in government decision-making and, if so, to what extent and how immediately.[4] It is clear that during the election process public opinion in the form of votes determines the outcome, at least to the extent that it represents the views of those who are eligible and actually participate in the process.[5] However, is public opinion subsequently reflected in the policies established by those elected officials?

The Relationship between Public Opinion and Public Policy

The connection between public policy and public opinion has been the focus of many normative studies, and most have supported the view that opinion influences

[2] There is an ongoing debate about whether sovereignty rests with the people of the nation as a whole, or the people organized in each individual state. This study will use the prior understanding. Only with this understanding does it make sense to use opinion polls of the national population. Some may argue in favor of each state making a determination for itself the religious liberties of its population; in this type of scenario, it might make sense to view opinion polling data within each state to determine if it is consistent with a state's decision on the matter. However, the Court currently operates under the theory that the religion clauses apply to state governments, and therefore precedents established by the Court set a national standard that applies to each state.

[3] Robert A. Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956); V. O. Key, Jr., *Public Opinion and American Democracy* (New York: Alfred A Knopf, 1965); Robert S. Erikson, Gerald C. Wright, and John P. McIver, *Statehouse Democracy: Public Opinion and Policy in the American States* (New York: Cambridge University Press, 1993); and James A. Stimson, *Tides of Consent: How Public Opinion Shapes American Politics* (Cambridge: Cambridge University Press, 2004).

[4] See Dahl, *A Preface to Democratic Theory*; and Key.

[5] George Gallup and Saul Rae, *The Pulse of Democracy* (New York: Greenwood, 1940). It must be noted that elections, while direct links to public opinion, are difficult to assess in terms of public opinion on specific issues. Public opinion in the form of votes is a mix of opinion for a candidate and the variety of issues that are represented in his or her platform.

policy.[6] A range of empirical studies was also performed in order to better understand and measure the linkage. For the most part, the studies were consistent in their findings of congruence between public opinion and public policy, but they disagreed on the extent, cause, and direction of the linkage. Initial studies performed in the 1960's and 1970's identified relationships of varying degrees, with one study even describing the relationship as "awesome"[7]; however, the causal direction of the relationship was less than certain.[8]

In 1983, Benjamin I. Page and Robert Y. Shapiro attempted to address this uncertainty by analyzing public opinion and policy data from 1935 to 1979. They identified considerable congruence between changes in citizens' preferences and public policy, especially for large, stable opinion changes on salient issues. In addition, they determined that shifts in public opinion occurred prior to shifts in public policy, indicating that citizens' opinions likely caused the shifts in policy more than the policy caused changes in opinion.[9]

Many subsequent studies have supported the hypothesis that public opinion influences public policy; however, there is disagreement on the degree to which public policy is responsive to public opinion. Some argue that a lesser influential relationship

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[6] Dahl, *A Preface to Democratic Theory*; Kenneth J. Arrow, *Social Choice and Individual Values, Second edition* (New York: John Wiley and Sons, 1964); and Key.

[7] Erikson, Wright, and McIver.

[8] Warren E. Miller and Donald E. Stokes, "Constituency Influence in Congress," *American Political Science Review* 57 (Mar., 1963): 45-56; Ronald E. Weber and William R. Shaffer, "Public Opinion and American State Policy-Making," *Midwest Journal of Political Science* 16 (Nov., 1972): 683-699; Christopher H. Achen, "Measuring Representation," *American Journal of Political Science* 22 (Aug., 1978): 475-510; Robert S. Erikson, "Constituency Opinion and Congressional Behavior: a Reexamination of the Miller-Stokes Representation Data," *American Journal of Political Science* 22 (Aug., 1978): 511-535.

[9] Benjamin I. Page and Robert Y. Shapiro, "Effects of Public Opinion on Policy," *The American Political Science Review* 77 (Mar., 1983): 175-190.

exists,[10] while others argue that the relationship is significant.[11] Stimson, Machuen, and Erikson are among those who have argued in favor of a more significant impact on policy. In 1995, after analyzing the aggregate of policy and opinion in the postwar United States, they concluded that when the public asks for a more activist or a more conservative government, politicians oblige. They found that large-scale shifts in public opinion yielded large-scale shifts in government action, a process they labeled "dynamic representation."[12]

The overall lack of conclusive evidence, and therefore consensus, on the issue led Paul Burstein to publish a study in 2003 that analyzed the results of studies published in major sociology and political science journals from 1990 through 2000.[13] He found that public opinion influences public policy most of the time, and sometimes even substantially. We can conclude that research testing the relationship between public opinion and public policy has revealed that (1) there is a positive relationship between public opinion and public policy, and (2) there is no conclusive evidence to form a consensus about the level and cause of the relationship.

The research conducted by Stimson, Machuen, and Erikson, however, found that the Supreme Court, since 1981, has moved at a more deliberate speed than the two

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[10] Philip E. Converse, "Changing Conceptions of Public Opinion in the Political Process," *The Public Opinion Quarterly* 51 (1987): S12-S24; Douglas R. Arnold, *The Logic of Congressional Action* (New Haven, CT: Yale University Press, 1990); John R. Zaller, *The Nature and Origins of Mass Opinion* (New York: Cambridge University Press, 1992), 328-332; Bryan Jones, *Reconceiving Decision-Making in Democratic Politics* (Chicago: University of Chicago Press, 1994).

[11] Benjamin I. Page, "Democratic Responsiveness? Untangling the Links between Public Opinion and Policy," *PS: Political Science and Politics* 27 (Mar., 1994): 25-29.

[12] James A. Stimson, Michael B. Mackuen, Robert S. Erikson, "Dynamic Representation," *The American Political Science Review* 89 (Sep., 1995): 543-565; Robert S. Erikson, Michael B. MacKuen, James A. Stimson, *The Macro Polity* (New York: Cambridge University Press, 2002).

[13] Paul Burstein, "The Impact of Public Opinion on Public Policy: A Review and an Agenda," *Political Research Quarterly* 56 (March 2003): 29-40.

elected branches of the national government.[14] Indeed, research has been conducted specifically to test the nature of the relationship between Supreme Court decisions and public opinion.

The Relationship between Public Opinion and Supreme Court Decisions

Research focusing on the relationship between Supreme Court decisions and public opinion is a subset of the overarching body of scholarship studying the link between public opinion and public policy. As such, it is understood that the United States Supreme Court is one of the three branches of government that plays a role in shaping national policy. This role differs from the legislature's ability to create laws and the executive's ability to implement laws, but it, too, plays a role in defining the nature of the policy that applies to "we the people." Following the lead of the judicial realists of the 1920's and 1930's, Robert Dahl argued that the Supreme Court is indeed a policy-making institution; it is an institution that arrives at decisions on controversial questions of national policy.[15] This idea has been widely adopted.[16] Kevin R. den Dulk and J. Mitchell Pickerill explain that there is in fact a "cross-institutional" nature of the

[14] Stimson, Mackuen, and Erikson.

[15] Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law* 6 (1957): 279-295.

[16] Dahl, "Decision-Making in a Democracy"; Robert G. McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, 1960); Lawrence Baum, *The Supreme Court, tenth edition* (Washington D.C., CQ Press, 2010); Jonathan D. Casper, "The Supreme Court and National Policymaking," *The American Political Science Review* 70 (Mar., 1976): 50-63; David Adamany and Joel B. Grossman, "Support for the Supreme Court as a National Policymaker," *Law and Policy Quarterly* 5 (1983): 405-437; Michael W. Link, "Tracking the Public Mood in the Supreme Court: Cross-Time Analyses of Criminal Procedure and Civil Rights Cases," *Political Research Quarterly* 48 (Mar., 1995): 61-78.

lawmaking process, in which both Congress and the Supreme Court contribute to the form and substance of laws.[17]

Unlike the other two branches of government, however, there exists a tension in the Court's role as part of a democratic government, primarily stemming from its more isolated institutional design. Some have raised the concern that the ability of the Court to declare acts of the legislature as null and void is "antimajoritarian" and in fact a potential threat to the democratic system.[18] Due to the manner in which the justices are selected, by presidential appointment with the consent of the U.S. Senate, and the lack of specific term limits, accountability of the justices to the populace has been a concern throughout the history of the United States. In addition, the power of judicial review, by which the Court may declare a law passed by a legislative body as invalid, has led some to believe that public sentiment, as expressed through elected representatives, can be thwarted. When added to the criticism that justices are more educated, older, and more affluent than the average American,[19] the resulting view is that the Supreme Court is an institution that acts in an undemocratic, anti-majoritarian fashion.

An alternative view of the Court is that of an institution with the task of protecting against majoritarian decision-making that goes beyond constitutional limitations. As Alexander Hamilton explained in *Federalist* 78, "It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the

[17] Kevin R. den Dulk and J. Mitchell Pikerill, "Bridging the Lawmaking Process: Organized Interests, Court-Congress Interaction, and Church-State Relations," *Polity* 35 (Apr., 2003): 419-440.

[18] Walter Berns, *The First Amendment and the Future of American Democracy* (New York: Basic Books, Inc., 1976), 229-237; Henry Steele Commager, *Majority Rule and Minority Rights* (New York: Oxford University Press, 1943); and Jamin B. Raskin, *Overruling Democracy: The Supreme Court vs. The American People* (New York: Routledge, 2003).

[19] Thomas R. Marshall, *Public Opinion and the Rehnquist Court* (Albany: State University of New York Press, 2008), 23.

legislature in order, among other things, to keep the latter within the limits assigned to their authority."[20] In this role the Court, through its power of judicial review, has the ability to rule actions of the other two branches of government as null and void, when ruling on real cases of law in which individuals who have been "injured" by the law have appealed to the Supreme Court for ultimate review.

From this perspective, the idea of studying the link between public opinion and judicial opinion may seem controversial. After all, if it turns out that the Court issues decisions that are consistent with public opinion, and if public policy is consistent with public opinion, then one might wonder if the Court is doing its job in protecting minority rights. James Madison provided important insight regarding the role of the judiciary in the relationship between the sovereign ("we the people") and the national government. According to Madison, although the federal judiciary "is, in all questions submitted to it by the forms of the constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other departments of the government; not in relation to the rights of the parties to the constitutional compact, from which the judicial as well as the other departments hold their delegated trusts."[21] In other words, it is perfectly appropriate for the Court to be anti-majoritarian when the majority in question is the decision-making majority of the legislative body. However, the Court should not be anti-majoritarian to the extent that it is inconsistent with principles that "we the people" have incorporated into the Constitution.[22]

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[20] Hamilton, "#78," in *The Federalist Papers,* ed. Charles R. Rossiter (New York: New American Library, 2003), 466.

[21] Daniel Farber, *Lincoln's Constitution* (Chicago: The University of Chicago Press, 2003), 49.

[22] This seems to be more of a philosophical debate in order to appease an eighteenth century audience that the national government was not something to fear. Especially since 1913, with all members

Ironically, it was research conducted to examine the Court as an anti-majoritarian institution that led to the body of scholarship concluding that the Court does in fact operate in a manner consistent with public opinion. During the 1950's and 1960's, the Court's critics believed the "activist" Court should be more restrained in overturning the decisions of popularly elected officials.[23] However, research showed that, in fact, the Court was operating in a manner consistent with public opinion.

In 1957, Robert Dahl published an article that set the tone for much of the subsequent work that was performed to analyze the relationship between the Supreme Court and public opinion. Dahl began by testing the hypothesis that the Supreme Court served as a protector of minorities against national majorities. However, he discovered that the Court, influenced by the Presidential appointment and Senatorial confirmation processes, did not in fact act in a "countermajoritarian" fashion; instead, it acted in a relatively consistent manner with the national majority.[24] Dahl argued that the Supreme Court, as a national policy maker, in fact does not succeed in protecting minority rights for long periods of time when acting against a contemporary "law making majority" in Congress and the executive branch.[25]

In 1962, Alexander Bickel published *The Least Dangerous Branch*, a classic and influential study of constitutional law, in which Bickel argued that the Court is limited in its use of judicial review due to its need for support from the other branches of

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of Congress directly elected by the people it would seem likely that acts of Congress would be consistent with public opinion (of the electorate, at a minimum). In fact, studies that have reviewed public policy and public opinion since the mid-twentieth century have shown a positive correlation between the two.

[23] Thomas Marshall, *Public Opinion and the Supreme Court* (New York: Longman, 1989).

[24] Dahl, "Decision-Making in a Democracy."

[25] Dahl, "Decision-Making in a Democracy."

government, as well as popular acceptance of its decisions, in order for its decisions to be implemented and enforced.[26] Bickel observed that, while the Supreme Court must overrule legislative decisions that are contrary to constitutional principles, the Court has in fact implemented methods of compromise, or "passive virtues," that allow the Court "leeway to expediency without abandoning principle."[27] These passive virtues can best be seen through the Court's case selection process. For example, at least four justices must agree to hear a case, and the Court might choose multiple cases raising the same question in order to provide a more comprehensive legal interpretation. Likewise, it can choose to not hear a case, and therefore not provide its legal interpretation on a particular issue. In addition, the Court can determine the specific issues to consider in a case.[28] After assessing the Court's "counter-majoritarian difficulty," Bickel concluded that, through judicial passivity, the Court did act in a majoritarian fashion. Therefore, the Court is, and must be, influenced by popular opinion.[29]

This reasoning has been generally accepted on normative grounds.[30] Bruce Ackerman, Larry Kramer, and Barry Friedman have all argued that the people possess ultimate constitutional interpretive authority and that the Court must issue opinions

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[26] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics, Second Edition* (New Haven: Yale University Press, 1986). This conclusion had also been reached by Robert McCloskey in his 1960 assessment that America's historic dualism of popular sovereignty and fundamental law had resulted in a Supreme Court that, when determining legal values, must take into consideration what popular opinion will tolerate. See McCloskey, 2005.

[27] Bickel.

[28] Baum, 86; Kevin T. McGuire and Barbara Palmer, "Issue Fluidity on the U.S. Supreme Court," *The American Political Science Review* 89 (September 1995): 691-702.

[29] Bickel, 244-272.

[30] Adamany and Grossman; Kevin T. McGuire and James A. Stimson, "The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences," *The Journal of Politics* 66 (Nov., 2004): 1018-1035; Jeffrey Rosen, *The Most Democratic Branch: How the Courts Serve America* (New York: Oxford University Press, 2006).

within that broader authority. Kramer and Friedman have argued that the Court possesses power only to the extent allowed by the people, and it is therefore restricted in its decision-making to issuing opinions that are consistent with the "will of the people."[31] This is consistent with Ackerman's conclusion that "the people" periodically make thoughtful and meaningful changes to the Constitution, and it is the Court's responsibility to protect those fundamental changes.[32]

Many of the early studies, including those of Dahl and Bickel, relied on actions of the national electoral branches of government (Congress and the executive branch), as national majorities, and therefore as expressions of national "public opinion." These national majorities were weighed against Supreme Court decisions in order to determine the relationship. Beginning in the 1980's, however, public opinion polling became the predominant method of measuring public opinion for these types of studies. Research using public opinion polling provided similar results: the Court does indeed act in a majoritarian fashion.[33]

Empirical studies testing these majoritarian theories have found that, while the inputs (structure and power) of the Court appear to be undemocratic in nature, the outcomes (decisions) of the Court have exhibited a positive correlation to public

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[31] Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004); Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2009).

[32] Bruce A. Ackerman, *We the People* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1991).

[33] Alan D. Monroe, "Consistency between Public Preferences and National Policy Decisions," *American Politics Quarterly* 7 (1979): 3-19; David G. Barnum, "The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period," *Journal of Politics* 47 (1985): 652-666; Page and Shapiro; and Marshall, *Public Opinion and the Supreme Court.*

opinion.[34] In shifting focus from inputs to outcomes, these studies have concluded that, generally speaking, the Supreme Court does act in a manner consistent with the views of the governed. Therefore, in response to the Court's "counter-majoritarian difficulty," these studies have supported Dahl's and Bickel's conclusion that the Court acts in a majoritarian fashion.

Within the literature that has been developed to expand on this research, two schools of thought have emerged to explain the direction of the link between public opinion and Supreme Court opinions. Whereas one view of the relationship is based on the theory that Supreme Court decisions influence public opinion, an alternate view is based on the belief that public opinion influences the Court's decisions.

The first theory has been labeled the "positive response" hypothesis by Charles H. Franklin and Liane C. Kosaki in an article in which they referred to the Supreme Court as a "republican schoolmaster." After analyzing public opinion polling on the issue of abortion prior to and subsequent to the Court's 1973 *Roe v. Wade* decision, they concluded that, at the aggregate level, the public did respond with increased support for the position taken by the Court.[35] Investigating the linkage further, Timothy R. Johnson and Andrew D. Martin concluded that, when the Court rules on highly salient issues, its

[34] Casper; Adamany and Grossman; Link; Stimson, Mackuen, and Erikson; Burstein; den Dulk and Pikerill; McGuire and Stimson; and Michael W. Giles, Bethany Blackstone, and Richard L. Vining, Jr., "The Supreme Court in American Democracy: Unraveling the Linkages between Public Opinion and Judicial Decision Making," *Journal of Politics* 70 (Apr 2008): 293-306.

[35] Charles H. Franklin and Liane C. Kosaki, "Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion," *The American Political Science Review* 83 (Sep., 1989): 751-771.

initial ruling has influence on public attitudes, but that subsequent rulings on the same issue do not have the same effect.[36]

One understanding of the Court's influence on public opinion is based on the public's positive perception of the institution. Based on the fact that, constitutionally, no fundamental changes have been made to alter the Court's power and procedural processes, it seems that there must be some overarching public support for the actions of the Court, whether based on agreement of particular outcomes of cases, agreement on principles used to decide the outcome of cases, or some reverence for the Court in general. Studies have long shown that the Supreme Court enjoys a great deal of institutional legitimacy; most Americans have a positive view of the Court, think it is doing a pretty good job, and are fairly committed to supporting the institution.[37] Gibson, Caldeira, and Spence noted that confidence in the Court does not seem affected by approval or disapproval of specific court decisions. Rather, there appears to be a general satisfaction with the overall outputs of the institution.[38]

Using the term "legitimation," Jeffery J. Mondak concluded that the institutional legitimacy maintained by the Court can produce significant shifts in the public's policy evaluations. As Mondak explained, "The Supreme Court's institutional legitimacy represents a form of source credibility."[39] Testing the "legitimation" theory at the local

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[36] Timothy R. Johnson and Andrew D. Martin, "The Public's Conditional Response to Supreme Court Decisions," *The American Political Science Review* 92 (June 1998): 299-309.

[37] James L. Gibson, Gregory A. Caldeira, and Lester Kenyatta Spence, "Measuring Attitudes Toward the United States Supreme Court," *American Journal of Political Science* 47 (April 2003): 354-367; and Thomas Marshall, *Public Opinion and the Supreme Court*.

[38] Gibson, Caldeira, and Spence, 364.

[39] Jeffery J. Mondak, "Policy Legitimacy and the Supreme Court: the Sources and Contexts of Legitimation," *Political Research Quarterly* 47 (September 1994): 677. Mondak concluded that

level, Hoekstra and Segal found that information levels of the population affected by a case was increased, but that the Court's decisions received increased support among those for whom the decision was less salient.[40] In other words, individuals were more likely to be influenced by information (*i.e.*, media reports of a Court decision) when they had knowledge of the issue but were not directly impacted by the issue.

Testing the hypothesis of legitimation on the issue of gay civil rights, James W. Stoutenborough, Donald P. Haider-Markel, and Mahalley D. Allen determined that, while the Court might not be able to consistently influence public opinion, in can do so under the right conditions: the case has to have significant national implications, and it has to be covered in the national media. In fact, the nature of the media coverage (positive versus negative) also affected the public opinion response.[41] This is consistent with a hypothesis advanced by Page and Shapiro, namely that "rational" public opinion can be formed when the public is provided with accurate information. As such, the media plays a crucial role in the opinion that is formed.[42]

Even with this research, however, there is widespread belief that the primary link between public opinion and Supreme Court decisions is not due to the Court's influence of public opinion, but rather due to public opinion influencing the Court. Consistent with the theory of dynamic representation presented by Stimson, Machuen, and Erikson, many

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legitimation likely operates on the margins of public opinion; this is consistent with how James Stimson, in *Tides of Consent*, explains public opinion change.

[40] Valerie J. Hoekstra and Jeffrey A. Segal, "The Shepherding of Local Public Opinion: The Supreme Court and Lamb's Chapel," *The Journal of Politics* 58 (Nov., 1996): 1079-1102.

[41] James W. Stoutenborough, Donald P. Haider-Markel, and Mahalley D. Allen, "Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases," *Political Research Quarterly* 59 (September 2006): 419-433.

[42] Benjamin Page and Robert Shapiro, *The Rational Public: Fifty Years of Trends in American's Policy Preferences* (Chicago: University of Chicago Press, 1991).

scholars view the Supreme Court as a national policy-maker that senses movement in public opinion and issues opinions that respond to the change. In fact, Stimson, Mackuen, and Erikson concluded that, while it is the institution that responds the least, the Supreme Court reflects public opinion more than one might expect from its constitutional design.[43]

In 1989, Thomas Marshall published a study that analyzed the extent to which the modern Supreme Court has reflected public opinion, and why[44]; he then published a companion book in 2008 to update his findings to include the Rehnquist Court.[45] Both studies were consistent in their findings that the Supreme Court reflected public opinion about three-fifths of the time. He found a strong correlation between public opinion and Supreme Court decisions when public opinion was closely focused on an issue in a Court case and when nearly all Americans expressed an opinion on the controversy.[46]

In 1993, William Mishler and Reginald S. Sheehan analyzed aggregate yearly data from 1956-1989 in order to measure the strength of the relationship between public opinion and Supreme Court decisions, as well as assess its causal direction. They determined that the Court responded in a deliberate fashion to public opinion prior to 1981, but that it has since been less responsive.[47] This seems to support the Stimson, Machuen, and Erikson study, which, due to analysis of post-1981 data for the Court, had

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[43] Stimson, Mackuen, and Erikson.

[44] Marshall, *Public Opinion and the Supreme Court*.

[45] Marshall, *Public Opinion and the Rehnquist Court*.

[46] Thomas R. Marshall, "Policymaking and the Modern Court: When Do Supreme Court Rulings Prevail?" *The Western Political Quarterly* 42 (December 1989): 493-507.

[47] William Mishler and Reginald S. Sheehan, "The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions," *The American Political Science Review* 87 (Mar., 1993): 87-101.

to qualify its conclusions about the strength of the relationship between public opinion and public policy. Drawing on the Mishler and Sheehan study, Michael W. Link studied the relationship between public attitudes and Supreme Court rulings for two specific areas of constitutional law: criminal procedure and race-related civil rights. His conclusions supported the previous study's results but qualified them with the conclusion that the Court follows changes in the dominant political alliance in some issue areas more than in others.[48]

While studies have shown a positive relationship between public opinion and Supreme Court decisions, causal inference has been less than certain.[49] Indeed, scholars often note that "quantitative analysis of the type done here cannot answer" why justices respond to changes in public opinion.[50] Thus, within the body of scholarship that believes the primary cause for the correlation between public opinion and Supreme Court decisions is the influence of public opinion over the Court's opinions, additional work has been performed in order to test the nature of the link. Two main theories have emerged. One theory (described as the "rational choice," "strategic behavior," or "separation of powers" model) holds that the Court is consistent with public opinion due to its need to maintain legitimacy, and therefore its need to maintain broad popular approval of its decisions. The second theory, the "attitudinal change" theory, maintains that the Court's consistency with public opinion is due to the fact that justices are part of

[48] Link.

[49] Gregory Caldeira, "Courts and Public Opinion," in *The American Courts*, ed. John B. Gates and Charles A. Johnson (Washington: Congressional Quarterly, 1991).

[50] Roy B. Flemming and B. Dan Wood, "The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods," *American Journal of Political Science* 41 (April 1997): 493.

society and, therefore, are affected by the same social forces that shape general public opinion.

Rational choice theorists believe that government institutions will make strategic decisions based on a calculation of how the other institutions will react.[51] Applying this theory to the actions of the Supreme Court, the "separation of powers" model provides a theory that justices make a "constrained choice" due to the checks and balances of the other branches of government.[52] With little ability to enforce its decisions, the Court must make strategic decisions in order to ensure compliance with its decisions.[53] This theory can find its roots in *Federalist* 78, where Alexander Hamilton, in an effort to respond to critics of the newly written constitution, explained that the judiciary "will always be the least dangerous to the political rights of the Constitution," and that the judiciary "has no influence over either the sword or the purse … and can take no active resolution whatever. It may truly be said to have neither FORCE nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[54] As such, some scholars argue that Supreme Court's responsiveness to public opinion occurs as a result of a strategic choice of what is acceptable, and therefore possible, to implement.

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[51] William N. Eskridge, Jr., "The Judicial Review Game," *Northwestern University Law Review* 88 (1993): 382-395.

[52] Jeffrey A. Segal, "Separation-of-Powers Games in the Positive Theory of Congress and Courts," *The American Political Science Review* 91 (Mar., 1997): 28-44.

[53] William Mishler and Reginald S. Sheehan, "The Supreme Court as a Countermajoritarian Institution?"; and McGuire and Stimson.

[54] Hamilton, "#78," in *The Federalist Papers,* ed. Charles R. Rossiter (New York: New American Library, 2003), 464.

Labeled by some as the "strategic behavior" model,[55] this theory stresses that the Supreme Court is interested not only in policy ideals,[56] but also on maintaining its institutional legitimacy. With no active powers to implement its decisions, scholars have recognized the Court's need for cooperation from the other branches of government. Therefore, even though the constitutional design is to insulate the justices from the public, the Court is concerned about maintaining public support for its institutional legitimacy.[57] If, due to checks and balances, the Court consistently issues opinions that are not implemented, it potentially threatens its legitimacy as a constitutional authority.

The separation of powers (or strategic behavior) model has received both support and rejection through empirical data analysis.[58] In an attempt to refine the model, Tom Clark reviewed judicial review between 1877 and 2006 and found that 284 laws were struck down as unconstitutional. Showing support for the separation of powers model, he then predicted that an additional 143 laws would have been struck down had there been no "court curbing" efforts by the other branches of government.[59]

Another perspective as to why public opinion influences actions of the Court is explained by the "attitudinal change" model. According to this model, Supreme Court

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[55] Giles, Blackstone, and Vining.

[56] Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993); Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002).

[57] Tom S. Clark, "The Separation of Powers, Court Curbing, and Judicial Legitimacy," *American Journal of Political Science* 53 (Oct., 2009): 971-989.

[58] Brian R. Sala and James F. Spriggs, "Designing Tests of the Supreme Court and the Separation of Powers," *Political Research Quarterly* 57 (June 2004): 197-208.

[59] Clark, 982. "Court curbing" refers to actions of the other branches of government for purposes of counter-acting the Court's decisions. This would include attempts to propose amendments to the Constitution, and attempts to re-write laws, including those that would limit the authority (jurisdiction) of the Court.

justices are influenced by the same social factors that shift opinion in the general public.[60] According to this theory, justices, as members of society, are subject to the same social forces that affect overall public opinion changes. Based on a belief that justices issue opinions based on their individual policy preferences,[61] the link between public opinion and Supreme Court decisions occurs as a result of presidential elections and the subsequent judicial appointment and confirmation processes.[62] This is consistent with the writings of future Supreme Court Justice Benjamin Cardozo, who argued that, "The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by."[63]

Giles, Blackstone, and Vining tested both the separation of powers model and the attitudinal change model and concluded in 2008 that it is the attitudinal change model, and not the strategic behavior model, that provides the most likely explanation for the direct link between judicial decision making and public opinion. They argued that justices, as members of society, are affected by the overall shift in the public mood; therefore changes in judicial decisions are consistent with the overall shift in the public mood.[64]

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[60] Segal and Spaeth, *The Supreme Court and the Attitudinal Model*.

[61] Segal and Spaeth, *The Supreme Court and the Attitudinal Model*; Joseph A. Ignagni, "U.S. Supreme Court Decision-Making and the Free Exercise Clause," *The Review of Politics* 55 (Summer, 1993): 511-529; Jeffrey A. Segal, Lee Epstein, Charles M. Cameron, and Harold J. Spaeth, "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited," *The Journal of Politics* 57 (Aug., 1995): 812-823.

[62] Dahl, "Decision-Making in a Democracy"; Richard Funston, "The Supreme Court and Critical Elections," *The American Political Science Review* 69 (September 1975): 795-811; and Helmut Norpoth and Jeffrey Segal, "Comment: Popular Influence on Supreme Court Decisions," *American Political Science Review* 88 (Sep., 1994): 711-724.

[63] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 168.

[64] Giles, Blackstone, and Vining, 303.

In 2011, a study was published re-testing these results. Developing a strategy to control for the justices' attitudinal changes that stem from social forces that influence public policy, the researchers found that public opinion serves as an important constraint on the Court's decisions, independent of the broader social forces affecting the public and members of the Court alike.[65] Able to show that public opinion does constrain the decisions made by the Court, they concluded that both the strategic behavior and the attitudinal change models influence the Court's decisions.

As with studies on the relationship between public opinion and public policy, studies analyzing the relationship between public opinion and decisions of the Supreme Court provide a variety of results. While most studies support the theory that judicial decision-making is responsive to public opinion, the extent and conditions of the relationship remain inconclusive.

Little attention has been given, however, to the relationship between public opinion and Court decisions dealing specifically with the First Amendment's religion clauses. Barnum determined that, although the Court has generally operated in a "majoritarian" fashion, the issue of prayer in public schools represents a departure from this finding.[66] This is a common observation,[67] which has also been confirmed through empirical research.[68] While this finding deviates from the general conclusion that the

[65] Christopher J. Casillas, Peter K, Enns, and Patrick C. Wohlfarth, "How Public Opinion Constrains the U.S. Supreme Court," *American Journal of Political Science* 55 (January 2011): 74-88.

[66] Barnum, 659.

[67] Kenneth W. Starr, *First Among Equals: The Supreme Court in American Life* (New York: Warner Books, 2002), 95; Melvin I. Urofsky, *The Public Debate Over Controversial Supreme Court Cases* (CQ Press, 2005), 215; and Baum, 141.

[68] Marshall, *Public Opinion and the Supreme Court*; Mariana Servín-González and Oscar Torres-Reyna, "Religion and Politics," *The Public Opinion Quarterly* 63 (Winter 1999): 592-621; and Alison Gash

Supreme Court issues decisions that agree with public opinion, it is not clear what this means for the First Amendment's religion clauses more generally. Specifically, do the religion cases in general depart from the overall findings that the Court's opinion is consistent with public opinion, or is the issue of school prayer an exception even within Supreme Court jurisprudence dealing with the religion clauses? Existing research has not explored the relationship between public opinion and Supreme Court decisions dealing solely, and comprehensively, with the First Amendment's religion clauses.

Public Opinion and the Supreme Court's First Amendment Religion Cases

Church-state literature also lacks in-depth research on the connection between public opinion and the Supreme Court's First Amendment religion cases. Much literature in the field of church-state studies describes the evolution of the Supreme Court's doctrine over time[69] or creates and explains various categories of church state thought.[70] Some research has analyzed Supreme Court decisions in light of an ideal standard.[71] All

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and Angelo Gonzales, "School Prayer," in *Public Opinion and Constitutional Controversy*, ed. Nathaniel Persily, Jack Citrin, and Patrick J. Egan (New York: Oxford University Press, 2008), 62-79.

[69] Edwin S. Gaustad, *Proclaim Liberty Throughout all the Land: a History of Church and State in America* (New York: Oxford University Press, 2003); Thomas C. Berg, *The State and Religion in a Nutshell* (St. Paul, MN : Thomson/West, 2004); A. E. Dick Howard, "The Wall of Separation: The Supreme Court as Uncertain Stonemason," in *Religion and the State: Essays in Honor of Leo Pfeffer*, ed. James E. Wood, Jr. (Waco, TX: Baylor University Press, 1985), 85-118; and Daniel O. Conkle, *Constitutional Law: The Religion Clauses* (New York: Foundation Press, 2003).

[70] Carl H. Esbeck, "Five Views of Church-State Relations in Contemporary American Thought," *Brigham Young University Law Review* (1986): 371-404; John Witte, Jr., "The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay," *Emory Law Journal* 8 (1991): 489-507; John Witte, Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties* (Boulder, CO: Westview Press, 2000); and Noah Feldman, *Divided by God: America's Church-State Problem-- and What We Should Do About It* (New York: Farrar, Straus and Giroux, 2005).

[71] Daniel L. Dreisbach, *Real Threat and Mere Shadow: Religious Liberty and the First Amendment* (Westchester, Ill.: Crossway Books, 1987); Michael McConnell, "The Origins and Historical Understandings of Free Exercise of Religion," *Harvard Law Review* 103 (May 1990): 1409-1517; Steven D. Smith, *Getting Over Equality: A Critical Diagnosis of Religious Freedom in America* (New York: New York University Press, 2001); Gregg Ivers, *Lowering the Wall: Religion and the Supreme Court in the 1980's* (New York: Anti-Defamation League, 1991); Ronald B. Flowers, *That Godless Court?, Second*

of these studies show the variety of decisions issued by the Court, but they do not provide insight about whether the Court's decisions have been consistent with public opinion. In other words, there has been no assessment to determine whether the variations and changes in the Court's jurisprudence corresponds to variations and changes in public opinion.

One common criticism is that the Supreme Court does not have a consistent approach to its First Amendment religion cases, and therefore constitutional law for the religion clauses is in a constant state of flux.[72] For example, one author noted that the Court has "failed to establish a consistent standard," for either the Establishment Clause or Free Exercise Clause.[73] Another writer expressed the sentiment that the "constitutional law of religion is in 'significant disarray.'"[74] As such, much scholarship has been directed toward helping the Court discover a correct interpretation of the religion clauses.

What is missing from all of this work is a study to determine whether constitutional law for the religion clauses is consistent with public opinion. It is clear that the Court's jurisprudence for the religion clauses is controversial. It is clear that the Court's decision regarding the issue of school prayer, in particular, does not seem to

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Edition: Supreme Court Decisions on Church-State Relationships (Louisville, Kentucky: Westminster John Knox Press, 2005); Douglas Laycock, "Original Intent and the Constitution Today," in *The First Freedom: Religion & the Bill of Rights*, ed. James E Wood (Waco, Texas: J.M. Dawson Institute of Church-State Studies, Baylor University, 1990); and Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* (Princeton, N.J.: Princeton University Press, 2006).

[72] Leonard Levy, *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan, 1986), 162.

[73] Clyde Wilcox, Joseph Ferrar, John O'Donnell, et al., "Public Attitudes Toward Church-State Issues: Elite-Mass Differences," *Journal of Church and State* 34 (Spring 1992): 259-277.

[74] Mark Tushnet, "The Constitution of Religion," *The Review of Politics* 50 (Autumn 1988): 628-658.

agree with public opinion. However, it is not yet understood how constitutional law for the religion clauses, in general, compares to public opinion. This study will attempt to fill this gap.

In order to learn more about the relationship between Supreme Court decisions dealing with the First Amendment's religion clauses and public opinion, this study will test the hypothesis that there is a positive correlation between the two. It is difficult to theorize about expectations for this study. On the one hand, as a result of previous research showing general agreement between public opinion and Supreme Court decisions, one can expect general agreement between public opinion and the Supreme Court on issues touching the religion clauses. On the other hand, since prayer in school has been noted as an exception to the general congruence between public opinion and the Court's opinion, it is understandable to anticipate an overall jurisprudence for the religion clauses that is at odds with public opinion. Whether based on the belief that public opinion influences the Court's opinion, the Court influences public opinion, or both, it is expected that this study will find a level of general consistency between public opinion and Supreme Court decisions. It is also expected that there will be a few departures from this general level of agreement, such as the issue of prayer in public schools.

CHAPTER THREE

Religion in Public School

Introduction

In 1962, the United States Supreme Court determined that the First Amendment's Establishment Clause prohibited organized public school sponsored and supervised prayer.[1] As this type of program was widespread throughout America at the time,[2] there were broad implications and reactions to the Court's ruling. Scholars have consistently reported that the Court's decision did not agree with public opinion, and that it remains an issue with which the public disagrees.[3] In fact, studies have shown that the practice of having organized verbal prayer in public schools has continued, in clear non-compliance with the Court's ruling.[4]

That the Court's ruling on prayer in public schools is inconsistent with public opinion has been demonstrated through public opinion polling data. Studies that have

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

[2] Alison Gash and Angelo Gonzales, "School Prayer," in *Public Opinion and Constitutional Controversy*, ed. Nathaniel Persily, Jack Citrin, and Patrick J. Egan (New York: Oxford University Press, 2008), 62; Melvin I. Urofsky, *The Public Debate Over Controversial Supreme Court Cases* (CQ Press, 2005), 215. See also Lucas A. Powe, Jr., *The Warren Court and American Politics*, (Cambridge, Mass: The Belknap Press, 2000), 362. Gash and Gonzales state that by the middle of the twentieth century, twenty-four states either allowed or required prayer as part of the school day. According to Powe, Jr., religious exercises in public schools were largely practiced in the eastern and southern states, with about half of the schools in the West and only about a third of the schools in the Midwest engaged in the practice.

[3] Gash and Gonzales; Urofsky; Lawrence Baum, *The Supreme Court* (Washington D.C., CQ Press, 2010), 141; Thomas Marshall, *Public Opinion and the Supreme Court* (New York: Longman, 1989); and Robert Weissberg, *Public Opinion and Popular Government* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1976), 121-122.

[4] Kevin T. McGuire, "Public Schools, Religious Establishments, and the U.S. Supreme Court: An Examination of Policy Compliance," *American Politics Research* 37 (January 2009): 50-74; Powe, Jr., 362-363; and Weissberg, 125. Studies show that noncompliance was largely in the South; just as it had ignored the Court's ruling on segregation a decade before, the South similar ignored the Court's ruling on prayer in school.

focused on the issue of prayer in school, and specifically the Supreme Court's opinion regarding organized prayer in public schools, have portrayed an American public that supports prayer in school and, therefore, disapproves of the Court's decision.[5] As a result, it was expected that this study would report similar findings, namely that the Supreme Court's opinion regarding prayer in public schools has been inconsistent with public opinion.

Not only have public opinion polls shown disapproval of the Court's decision, but actions of the other branches of the national government have also indicated disagreement. In an attempt to curb the Supreme Court's powers as a result of its school prayer decision, in 1979 the U.S. Senate voted, 61-30, in favor of an act that would have removed from the Court's jurisdiction the ability to review any case dealing with a state law relating to voluntary prayers in public schools and public buildings.[6] The bill was not, however, brought up for a vote in the U.S. House.

In addition, beginning in 1962, and as recently as 2011,[7] individual members of Congress sponsored bills in an attempt to propose an amendment to the U.S. Constitution for purposes of establishing a constitutional statement regarding prayer in public

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[5] Kirk W. Elifson and C. Kirk Hadaway, "Prayer in Public Schools: When Church and State Collide," *The Public Opinion Quarterly* 49 (Autumn, 1985): 317-329; and Mariana Servín-González and Oscar Torres-Reyna, "Religion and Politics," *The Public Opinion Quarterly* 63 (Winter 1999): 592-621; Gash and Gonzales, 62.

[6] *Supreme Court Jurisdiction Act of 1979*, S.450, 96th Cong., 1st sess., in the Thomas (Library of Congress) database, http://thomas.loc.gov/cgi-bin/bdquery/D?d096:1:./temp/~bdzkKO:@@@D&summ2=m&|/home/LegislativeData.php?n=BSS;c=96| (accessed June 10, 2011).

[7] *Proposing an amendment to the Constitution of the United States restoring religious freedom*, H.J. Res. 27, 112th Cong., 1st sess., in the Thomas (Library of Congress) database, http://www.gpo.gov/fdsys/pkg/BILLS-112hjres27ih/pdf/BILLS-112hjres27ih.pdf (accessed July 15, 2011).

schools.[8] During a time of peak support, the U.S. House in 1997 voted 224-203 in favor of an amendment for purposes of "restoring religious freedom." The wording was as follows:

> Declares that: (1) to secure the people's right to acknowledge God according to the dictates of conscience, neither the United States nor any State shall establish any official religion, but the people's right to pray and to recognize their religious beliefs, heritage, or traditions on public property, including schools, shall not be infringed; and (2) neither the United States nor any State shall require any person to join in prayer or other religious activity, prescribe school prayers, discriminate against religion, or deny equal access to a benefit on account of religion.[9]

One could argue that legislators were complying with the wishes of voters in the 1996 general election. One public opinion poll reported that sixty-nine percent of those who voted in the 1996 election were in favor of "passing a constitutional amendment to allow voluntary prayer in public schools."[10] However, the House vote fell short of the two-thirds majority required for passage in the chamber, and it was not brought up for a vote in the Senate.

There has been some legislative success with efforts to protect voluntary prayer in public schools, particularly when these measures have been added to school funding bills. For example, in 1984, an appropriations act prohibited "using funds appropriated under this Act to prevent the implementation of programs of voluntary prayer and meditation in the public schools."[11] In 1990, an applied technology education bill included the

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[8] By one account, members of Congress introduced fifty-six constitutional amendments within days after the Court's ruling in *Engel*, and almost 150 after the Court's ruling in *Schempp*. See Gash and Gonzales, 63.

[9] *Proposing an amendment to the Constitution of the United States restoring religious freedom*, H.J. Res. 78, 105th Cong., 2nd sess., in the Thomas (Library of Congress) database, http://www.gpo.gov/fdsys/pkg/BILLS-105hjres78rh/pdf/BILLS-105hjres78rh.pdf (accessed July 15, 2011).

[10] Health Care Agenda For The Next Congress Survey, Nov. 1996.

[11] *Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriation Act, 1985*, Public Law 98-619, 98th Cong. (November 8, 1984).

following: "An amendment to prevent the availability of funds under the bill to any state or local educational agency which has a policy of denying or which effectively prevents participation in prayer in public schools by individuals on a voluntary basis."[12] This language has been present in numerous appropriations bills for education programs.[13]

It is interesting to note, however, that the language in each of these instances does not contradict the Court's ruling when it comes to prayer in public schools. The sheer number and consistency of these measures would indicate strong disagreement with the Court's opinion and an interest in reversing the Court's ruling. However, the actual language of the sponsored amendments and bills, as well as the language added to bills that have become law, is in fact consistent with the Court's decisions regarding the legal threshold for prayer in public schools.[14]

This chapter will provide an in-depth review of the Court's opinion and public opinion polling data on the issue of religion in public school in order to determine if similar results are revealed, if perhaps public opinion is more consistent with the Court's opinion than what has previously been reported. The public has certainly expressed interest in this issue. From 1980 to 1998, between eighty and eighty-six percent of

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[12] *Carl D. Perkins Vocational and Applied Technology Education Act Amendments of 1990*, Public Law 101-392, 101st Cong. (September 25, 1990).

[13] *Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1994*, Public Law 103-112, 103rd Cong. (October 21, 1993); *Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1995*, Public Law 103-333, 103rd Cong. (September 30, 1994); *Goals 2000: Educate America Act*, Public Law 103-227, 103rd Cong. (March 31, 1994); *Omnibus Appropriations Act, 2009*, Public Law 111-8, 111th Cong. (March 11, 2009); *Consolidated Appropriations Act, 2010*, Public Law No: 111-117, 111th Cong. (December 16, 2009).

[14] It is possible that the legislative language was in response to school district policies that had gone further than the Court's ruling, and had completely removed religion from the public school; however, the purpose of the legislative action does not fall within the scope of this study.

respondents reported they were interested enough in the issue to favor one side over the other.[15]

Religion in Public Schools

The Supreme Court has issued written opinions in several cases that have served as guidelines for various policies regarding religion in public schools.[16] These cases included issues such as released time programs held both on and off school grounds[17]; school organized and supervised prayer[18]; Bible reading[19]; posting of the Ten Commandments[20]; a moment of silence for purposes of mediation or voluntary prayer[21]; and teaching evolution and creationism.[22]

In each of the cases reviewed by the Court, the official school program required government (*i.e.*, public school officials) to make a decision regarding religion. All but one of the government policies under review were struck down by the Court as a violation of the First Amendment's Establishment Clause. In each policy that was determined unconstitutional, a public school student would have had to excuse

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[15] Washington Post/Kaiser Family Foundation/Harvard Americans on Values Followup Survey 1998, Aug. 1998; American National Election Study 1984 (Post-Election), Nov. 1984; American National Election Study 1980 (Post-Election), Nov. 1980.

[16] It should be noted that, in this chapter, "religion in public schools" refers to religion as part of an official public school program. Likewise, religion that occurs on public school grounds, but not as part of the public school program (such as use of school facilities by student groups and private religious organizations), will not be included in this chapter. The latter will be covered in Chapter 4.

[17] *McCollum v. Board of Education*, 333 U.S. 203 (1948); and *Zorach v. Clauson*, 343 U.S. 306 (1952).

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

[19] *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963).

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

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

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

himself/herself from the public school program in order not to be part of a religious exercise. Consistently, in each of the cases, the Court ruled that public officials may not prescribe religion as part of the official public school program.

McCollum v. Board of Education (1948) and Zorach v. Clauson (1952)

In 1948, the Supreme Court, by a vote of 8-1, struck down a school board policy that allowed religious teachers, employed by private religious groups, to come into the public schools and provide religious instruction during regular school hours.[23] The Court ruled that a state could not use the public school system to aid religious groups in the "dissemination of religious doctrines."[24]

In July of 1950, a Roper poll asked respondents, "Do you think that a class in religion should be taught in the public schools, or do you think it should be completely kept out of the schools as it is now?"[25] Fifty-five percent responded that it should be kept out, and forty percent responded that it should be taught. Thus, a majority of respondents appeared to be in agreement with the Court's ruling in the *McCollum* case. However, in the same poll, respondents answered a question about a released time program, to which fifty-one percent answered that they would prefer to have religious representatives come to the public schools to teach religion, as opposed to a system whereby public school students would leave school and attend religious centers for religious education. Public opinion expressed in response to the latter question makes it more difficult to determine support for the Court's ruling. Thus, public opinion appears divided on the issue and it is

[23] *McCollum v. Board of Education*, 333 U.S. 203 (1948).

[24] *McCollum v. Board of Education*, 333 U.S. 203, 212 (1948).

[25] Roper Commercial Survey, Jul. 1950.

difficult to make a strong argument one way or the other about the public's support of the Court's decision that religious instruction should not occur in public schools.

The Court then, in April of 1952, provided further clarification on the issue when it approved, by a 6-3 vote, a public school "released time" program under which students were allowed, during regular school hours, to go to religious centers for religious instruction or devotion. Students who did not participate were required to stay in the school classrooms.[26] In June of that same year an opinion poll showed approval for the Court's decision, with fifty-four percent responding that the program was a good idea.[27] The question was asked again in 1965, this time with a plurality of forty-nine percent of the respondents in favor of the program.[28]

As shown in Table 3.1, these poll results also show an apparent decrease in support for religious instruction in the public schools. Of those who favored the released time program, only twenty-four percent in 1952 and twenty percent in 1965 favored the instruction to be held within the public school building. Whereas public opinion in 1950 seemed to indicate a preference for having religious officials come into the public school buildings for religious education, this preference does not appear in 1952 and 1965.

Table 3.1. Opinion for public school "released time" program

	Percentage of respondents	
	1952	1965
Good idea/favor in public school	24	20
Good idea/oppose in public school	17	16
Good idea/makes no difference where	13	13
Bad idea	22	24
Makes no difference	24	27

[26] *Zorach v. Clauson*, 343 U.S. 306 (1952).

[27] Religion and the American People Survey, Jun. 1952.

[28] Religious Life In America, Nov. 1965.

While surely not in reference to the 1948 and 1952 Supreme Court decisions, an opinion poll in 1980 asked respondents if they agreed or disagreed that religion should be taught in the public schools, to which forty-seven percent answered they agreed and fifty percent answered they disagreed.[29] Further, in 1999, seventy-eight percent of respondents in an education survey answered they believed "The way we educate our children needs to change."[30] Of that seventy-eight percent, ninety-six percent (seventy-five percent of all respondents in the poll) answered that religion was not an area of education that needed to change. Therefore, between 1950 and 1999, public opinion has expressed general agreement with the Court's decisions that religious instruction should not occur in public school.

Similarly, in 1952 and 1965 the public expressed agreement with the Court in favor of a released time program, whereby public school children would be released to their individual centers for religious instruction. While the level of support for the program decreased from fifty-four percent in 1952 to forty-nine percent in 1965, the percent of respondents that favored holding the religious classes in public schools also decreased from twenty-four to twenty percent, respectively, and those reporting the released time program was a "bad idea" was only twenty-two percent and twenty-four percent, respectively.

Engel v. Vitale (1962)

The next case in which the Supreme Court issued its opinion on the topic of religion in public schools was *Engel v. Vitale*, a case that continues to stir political debate

[29] ABC News/Harris Survey, Sep. 1980.

[30] Horace Mann Education Survey, Aug. 1999.

almost fifty years later. In 1962, by a 6-1 vote, the Court ruled against a public school district directive for schools to have a prayer, composed by state officials, "…said aloud by each class in the presence of a teacher at the beginning of each school day."[31] The Court ruled that the Establishment Clause prohibited government from composing official prayers "…for any group of the American people to recite as a part of a religious program carried on by government."[32] According to the Court, even though the prayer was non-denominational, the New York law officially prescribed, and therefore established, religion, making it inconsistent with the U.S. Constitution.[33]

One month after the Supreme Court issued its opinion, seventy-nine percent of respondents to a Gallup poll reported that they approved of "religious observances in public schools."[34] While this poll has been used to illustrate disagreement with the Court's opinion,[35] the wording of the question does not provide for a great comparison. It was not until 1964 that an opinion poll asked a question directly related to the case, and it was not until the 1980's that opinion polls began to regularly ask questions about prayer in public schools. In general, opinion polls have asked the public its opinion on school prayer in two ways: (1) does it support an amendment regarding prayer in school, and (2) does it support prayer in public schools. In addition, some polls refer specifically to the Supreme Court and its decision on the matter, while others ask about the policy issue in general, with no reference to the Court by name.

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[31] *Engel v. Vitale*, 370 U.S. 421, 422 (1962).

[32] *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

[33] *Engel v. Vitale*, 370 U.S. 421, 430-433 (1962).

[34] Gallup Poll (AIPO), Jul. 1962.

[35] Weissberg, 122.

In September 1964, respondents were asked, "The U.S. Supreme Court has held that prayers in public schools are unconstitutional because they violate the doctrine of separation of church and state. Would you favor or oppose a constitutional amendment to legalize prayers in public schools?"[36] Seventy-seven percent reported they favored the amendment. Subsequent polls, between 1974 and 2005, asked respondents if they would support a constitutional amendment related to prayer in public schools.[37] As shown in Figure 3.1, in all but a few of the polls, a majority of respondents answered yes to the question.

However, as illustrated in Table 3.2, the polls in 1984 worded the question differently and, as a result, reported different expressions of public opinion to what appeared to be similar questions. If the results of these questions accurately reflect the difference in opinion, then, potentially, wording a question to read "allow" would result in a positive outcome, whereas wording a question to read "require" would result in a negative outcome. In each of the years reporting a majority in favor of a constitutional

[36] Hopes And Fears, Sep. 1964. This was the same year that Barry Goldwater made the Supreme Court central to his presidential campaign, attacking the Court's decisions regarding rights of the criminally accused, school prayer, and re-apportionment. See Michael Kammen, *A Machine That Would Go Of Itself: The Constitution in American Culture* (New York: Alfred A. Knopf, 1986), 328; Walter F. Murphy and Joseph Tanenhaus, "Public Opinion and the Supreme Court: The Goldwater Campaign," *Public Opinion Quarterly* 32 (Spring 1968): 31-50.

[37] Gallup Poll, Aug. 2005; Gallup Poll, Aug. 2001; Gallup Poll, Oct. 2000; Gallup/CNN/USA Today Poll, Sep. 2000; Washington Post/Kaiser/Harvard Education Survey, May 2000; Health Care Agenda For The Next Congress Survey, Nov. 1996; CBS News/New York Times Poll, Feb. 1996; ABC News/Washington Post Poll, Aug. 1996; Gallup Poll, Apr. 1996; ABC News Poll, Jan. 1995; NBC News/Wall Street Journal Poll, Dec. 1994; CBS News Poll, Nov. 1994; PSRA/Newsweek Poll, Aug. 1994; CBS News/New York Times Poll, Jul. 1994; People, The Press, Jul. 1994; CBS News/New York Times Poll, Dec. 1994; People, The Press , May 1993; NBC News/Wall Street Journal Poll, Dec. 1991; CBS News/New York Times Poll, Jul. 1988; CBS News/New York Times Poll, Sep. 1987; People, The Press, Apr. 1987; CBS News/New York Times Poll, May 1987; ABC News/Washington Post Poll, Apr. 1987; Time/Yankelovich, Skelly, Jul. 1985; People, Jun. 1985; Harris Survey, Sep. 1984; Business Week/Harris Poll, Sep. 1984; Harris Survey, Apr. 1984; Harris Survey, Feb. 1982; Gallup Report, Sep. 1982; Time/Yankelovich, Skelly, Sep. 1981; and Time/Yankelovich, Skelly, May 1981; Gallup/Kettering Poll of Public Attitudes Toward the Public Schools 1974, May, 1974; Hopes And Fears, Sep. 1964.

amendment, respondents were providing their opinion to a question asking if prayer should be allowed in public schools. However, each time a question was worded to ask respondents if they supported an amendment that would "require" prayer in public schools (two polls in 1984, two polls in 1994, and one poll in 1996), a majority answered no. Thus, the major difference in support was due to the wording of the question.[38]

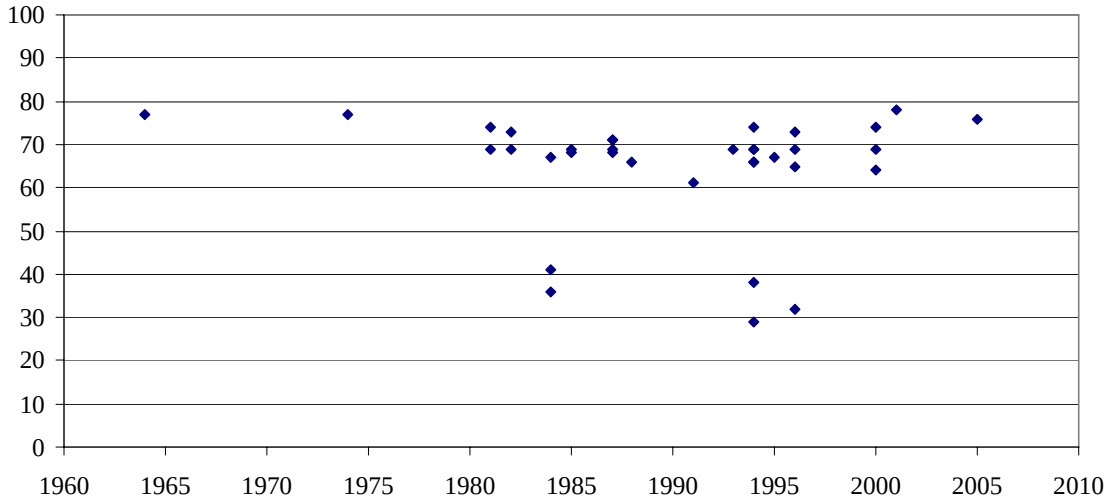

Figure 3.1. Approval for School Prayer Amendment, 1964-2005

Table 3.2. Effect of wording changes in questions about school prayer amendment

	Percentage of Respondents		
	Favor	Oppose	Not sure
Do you favor or oppose a constitutional amendment to require daily prayer to be recited in public school classrooms?	41	53	5
Do you favor or oppose a constitutional amendment to allow daily prayer to be recited in school classrooms?	67	29	4

In fact, a majority of respondents in 1994 answered that they would oppose "a constitutional amendment to allow prayer in public schools, if that meant school officials

[38] Gash and Gonzales conclude that, "The public has been and continues to be highly supportive of a constitutional amendment overturning these [*Engel* and *Schempp*] decisions." Results from this study, however, provide an alternate understanding of opinion on the issue. See Gash and Gonzales, 77.

would be involved in selecting the prayers to be used."[39] Thus, even with the term "allow," respondents answered negatively. That same year, a poll asked if it would matter if Congress were not able to bring up a proposal within the first 100 days (1995) to amend the constitution to allow voluntary prayer in public schools; fifty-five percent answered it would not matter.[40] In 1994 and 1996, in polls that reminded respondents that private prayer was permitted in public schools, respondents were asked if organized prayer in public school was the kind of issue for which they would like to change the constitution, and the answer was "no," fifty-nine percent and sixty-one percent, respectively.[41]

Further, in 1996 and 1997, a majority of respondents in two separate polls answered that organized prayer should be permitted in public school; however, when those who answered in the affirmative were then asked if they thought this was the type of issue for which they would like to change the constitution, in both polls more respondents answered "no" than "yes."[42] Lastly, when asked in 1997 if the U.S. Constitution should or should not be amended to allow local communities to decide on prayer in the schools, fifty-six percent answered that it should not.[43]

[39] NBC News/Wall Street Journal Poll, Dec. 1994.

[40] Gallup/CNN/USA Today Poll, Nov. 1994.

[41] CBS News/New York Times Poll, Dec. 1994; and CBS News/New York Times Poll, Feb. 1996.

[42] CBS News/New York Times Poll, Aug. 1996; and CBS News/New York Times Poll, Jan. 1997.

[43] State Of The First Amendment Survey, Jul. 1997.

It is clear that public opinion does not support amending the U.S. Constitution in order to reverse the Court's ruling.[44] However, polls have also asked respondents whether they support religion in public school, without any reference to amending the constitution for this purpose, and Americans have shown consistent support for prayer in public schools. While some opinion poll questions ask for a general sentiment, others refer specifically to the Supreme Court and its decision on the matter.

Beginning in 1966, polls asked if individuals agreed or disagreed with the Supreme Court's opinion regarding prayer in school. Three polls, conducted in 1966, 1986, and 1992, asked the question with reference just to prayer. The results demonstrated disapproval of the Court's decision seventy percent, fifty-two percent, and sixty-six percent, respectively.[45] While the question in 1992 was clearly not directed at the 1962 Court case, the language of the question was general about school organized prayer, with no specific reference to the specific issue at which it was most likely targeted (prayer at graduation ceremonies), and is therefore included in this analysis. In addition, there is a question that has appeared in public opinion polls from 1971 to 2010, that has asked respondents if they approve or disapprove of the Supreme Court's ruling that "no state or local government may require the reading of the Lord's Prayer or Bible verses in public schools."[46] As shown in Figure 3.2, in each of the years that the question

[44] This is based on an understanding that the Court struck down a policy whereby school officials would compose and lead students in saying a prayer. The Court did not rule that students may not individually pray in public schools.

[45] Harris Survey, Nov. 1966; Judicial Nominations, Jul. 1986; and NBC News/Wall Street Journal Poll, Jul. 1992.

[46] Gallup Poll (AIPO), Oct. 1971; General Social Survey, 1974, 1975, 1977, 1982, 1983, 1985, 1986, 1988, 1989, 1990, 1991, 1993, 1994, 1996, 1998, 2000, 2002, 2006, 2008, 2010; ABC News/Washington Post Poll, May 1981, Feb. 1984. Sep. 1987.

specifically referred to the Supreme Court's ruling, a majority responded that they disapproved of the Court's decision.

What these polls convey is a clear trend, from 1966 to 2010, of disagreement with the Court's decision regarding school-organized and sponsored prayer. Of the three questions referring to the Supreme Court that referenced only the issue of prayer in public school, the lowest disapproval rate, and also the highest level of "not sure" answers, was in response to the 1986 question which asked if the Court's opinion should be reversed. When combined with the earlier assessment of questions that asked about amending the constitution, there seems to be a clear hesitation to support reversing the Court's decision on this matter.

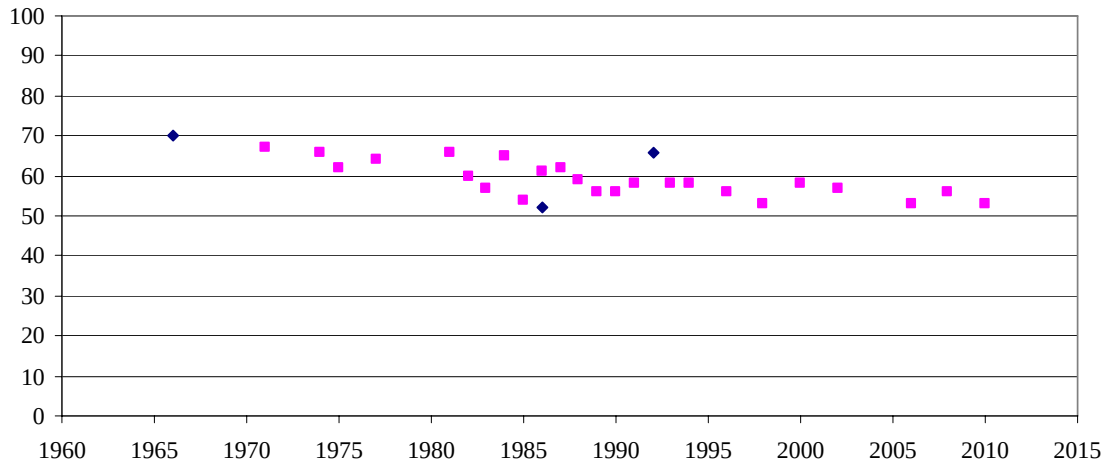

Figure 3.2. Disapproval of the Court's decision concerning prayer in public school, 1966-2010

The questions that refer to the Supreme Court are, on the one hand, a good indication of public opinion about the Court's decision because they refer specifically to the Court and its decision. On the other hand, referring to the Supreme Court by name might result in some level of opinion being expressed about the Court itself, and not solely about the specific policy issue. Therefore, looking at opinion polls that have asked

respondents their opinion about prayer in public school, without any mention of the Court, can provide further insight regarding the relationship between the Court's opinion and public opinion on the matter. Public approval for prayer in public school, when the question does not ask about an amendment to the Constitution, and when the question does not refer specifically to the Court, is illustrated in Figure 3.3.[47] Public opinion in response to questions that do not mention the Court is similar to response to questions that do mention the Court specifically: public opinion supports prayer in school.

Figure 3.2 and Figure 3.3 show that, with only one exception, no matter how the question was worded (as long as it did not ask about approval for a constitutional amendment), and no matter when the question was asked, between 1964 and 2007 a majority of respondents expressed approval for prayer in public school.[48]

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[47] Anti-Semitism in the United States Survey, 1964, Oct, 1964; Roper Report 82-3, Feb. 1982; Merit Report, May 1982; Garth Analysis Survey, Aug. 1982; CBS News/New York Times Poll, Mar. 1982; ABC News Exit Poll, Nov. 1982; Garth Analysis Survey, Jun. 1983; Time/Yankelovich, Skelly, Dec. 1983; Time/Yankelovich Poll, Sep. 1983; Public Attitudes Toward Refugees And Immigrants, Feb. 1984; Time/Yankelovich, Skelly, Sep. 1984; American National Election Study 1984 (Post-Election), Nov. 1984; Gordon Black/USA Today Poll, Apr. 1985; Gallup Report, Jun. 1988; Parents Magazine Poll (Wave 8), Jan. 1989; Time/CNN/Yankelovich Clancy Shulman Poll, Oct. 1991; Time/CNN/Yankelovich Partners Poll, Jan. 1993; NBC News/Wall Street Journal Poll, Jul. 1994; CBS News/New York Times Poll, Dec. 1994; CBS News/New York Times Poll, Aug. 1996; CBS News/New York Times Poll, Jan. 1997; State Of The First Amendment Survey, Jul. 1997; Washington Post/Kaiser Family Foundation/Harvard Americans on Values Survey 1998, Jul. 1998; Washington Post/Kaiser Family Foundation/Harvard Americans on Values Followup Survey 1998, Aug. 1998; FOX News/Opinion Dynamics Poll, May 1999; Americans Attitudes About the First Amendment Survey, Feb. 1999; Gallup/CNN/USA Today Poll, Jun. 1999; NBC News/Wall Street Journal Poll, Jun. 1999; State of the First Amendment Survey, Apr, 2000; Washington Post/Kaiser/Harvard 2000 Election Values Survey, Sep. 2000; Gallup/CNN/USA Today Poll, Sep, 2000; Gallup/CNN/USA Today Poll, Feb. 2001; Washington Post/Kaiser/Harvard University Politics and Policy Survey, Aug. 2002; Time/CNN/Harris Interactive Poll, Sep. 2003; Quinnipiac University Poll, Jun. 2003; FOX News/Opinion Dynamics Poll, Nov. 2005; State Of The First Amendment Survey, May 2005; and State Of The First Amendment Survey, Aug. 2007.

[48] The lower level of support in 1989 was probably due to the wording of the question: "The Constitution provides for the separation of church and state by saying that Congress shall not establish a religion and shall not interfere with the free exercise of religion. Do you think this provision for the separation of church and state is an adequate reason not to have prayer in public schools?" Subsequent poll questions were not worded with this language. It would be interesting to see the results of questions worded in this manner between 1997 and 2007, when the overall support for prayer in school declined. A decline from this point could have changed the overall reporting of public opinion support for prayer in public school.

There do, however, seem to be some factors that affect the level of approval. Most evident are the splits in opinion reported in various polls in 1994 and 2005. The two polls in 1994 with higher levels of approval asked respondents if they favored permitting, or allowing, prayer in public schools. The 1994 poll showing approval at only forty-five percent was in response to a question asking if respondents favored "requiring organized prayer in public schools." Similar results occurred in 2005. While eighty-one percent favored "allowing voluntary prayer in public schools," only fifty-two percent of respondents answered that "teachers and other public school officials should be allowed to lead prayers in public school."[49]

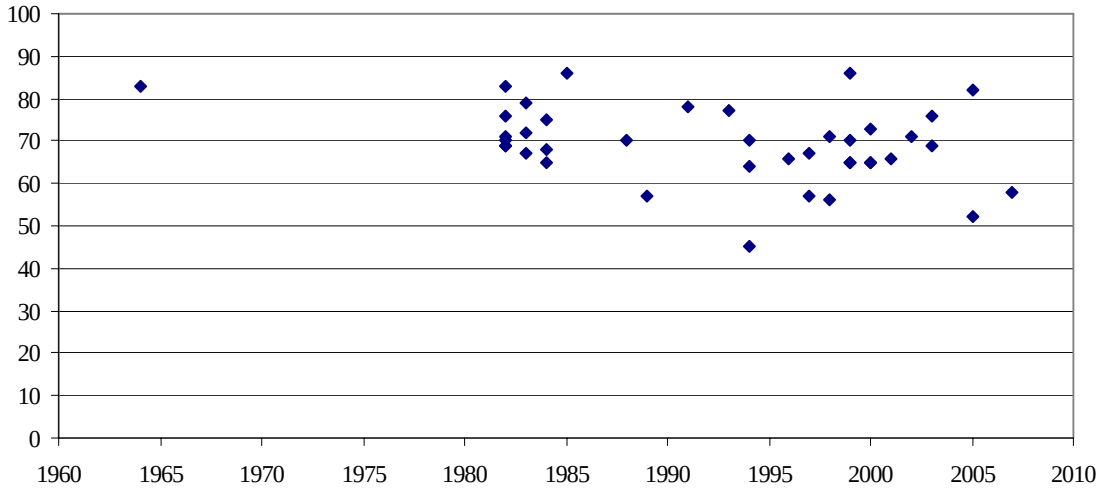

Figure 3.3. Approval for prayer in public school, 1964-2007

At times, such as in 1997, 1999, and 2005, as shown in Figure 3.3, when the level of support changed from one poll to another during the same year, the lower levels of support were in response to questions asking about approval for teachers or other public school officials leading prayers in school. This type of question was asked in 1997, 1999,

[49] State Of The First Amendment Survey, May 2005. Thirty-five percent strongly agreed and seventeen percent mildly agreed.

2000, 2005, and 2007, and answers to these questions represent some of the lower levels of support during the period of time shown. The higher levels of support in 1997 and 1999 were in response to questions that asked if respondents thought prayer should be permitted, or allowed, in public schools. This type of question was asked in 1985, 1991, 1993, 1996, 1997, 1999, 2000, 2001, 2003, and 2005. Thus, generally speaking, higher levels of support were reported when respondents were asked if they believed prayer should be allowed in public school than when they were asked if it should be required or if teachers or government officials should lead students in prayer.

This is similar to the findings reported for questions asked about constitutional amendments. When the question asked respondents if they favored allowing, or permitting, students to pray in public schools, the overwhelming answer was yes. Of course, this opinion is not in conflict with any of the Court's rulings, as the Court has never issued an opinion stating that individual students may not pray in public schools.[50] Therefore, these polls are not all that helpful if we really want to determine how the Supreme Court's opinion correlates to public opinion on the issue of prayer in public schools. Polls asking about teachers or government officials leading prayer provide a better comparison, for this is closer to the specific policy decision of the Court.

What seems evident from these results is that public opinion supports the right of students to pray in public schools. Less clear is the extent to which public opinion would support public school officials organizing and leading this effort. Support for a constitutional amendment waned whenever there was mention of school officials being in charge of the organized effort; however, opinion not linked to an amendment showed

[50] If such a case came to the Court, it would most likely be argued as a Free Exercise, as opposed to an Establishment Clause, issue.

moderate support for the ability of teachers and government officials to lead prayer in public school.

Public opinion polls conducted in 1979, 1982, and 1983 might shed light on why a public that is interested in having prayer in school is not also interested in making changes to accommodate this opinion. In each of these three years Gallup asked, "Which one of the following do you think is the most important in the religious and spiritual development of a child – the home, school, or the Church?"[51] As illustrated in Table 3.3, very few respondents selected "school."

Table 3.3. Important places for religious and spiritual development of children

	Percentage of Respondents			
Year	Home	School	Church	No Opinion
1979	73	3	14	10
1982	86	2	10	2
1983	80	2	15	3

While Americans support prayer in school, perhaps they do not view school as the primary place for providing religious development for children and therefore do not feel it is necessary to challenge the Court's ruling. One could also argue, however, that the statistics reflect a general perception that, as a result of the Court's decisions, prayer is not part of the school program and therefore does not play a role in the religious development of children.

It is difficult to determine if the Court's decision regarding prayer in public school is consistent with public opinion, as there have been very few opinion polls that have worded the question in a way to provide for a direct comparison. What can be

[51] Gallup Report, Jul. 1983; Gallup Poll, May 1982; Gallup Poll (AIPO), Mar. 1979.

determined is that Americans support prayer in public schools but not a constitutional amendment to require prayer in public schools. Therefore, if the Supreme Court's opinion is at odds with public opinion, something that the opinion polls referenced above might suggest, public opinion does not show an interest in amending the Constitution in order to overcome the ruling.

Abington School District v. Schempp (1963)

The Supreme Court furthered the debate about religion in public school when, by a vote of 8-1 in 1963, it struck down two state laws that required public school days to begin with the reading, without comment, of verses from the Bible (one of the laws included organized verbal reading of the Lord's Prayer).[52] Arguing that the First Amendment's Establishment Clause withdraws "…all legislative power [both federal and state] respecting religious belief or the expression thereof," the Court looked to the purpose and primary effect of the law, and found that the religious character of the exercises were a violation of the Establishment Clause.[53] The Court reiterated this opinion the next year, when it ruled that "devotional Bible reading required by statute…[is] unconstitutional."[54]

The 1962 poll, to which seventy-nine percent of respondents reported they approved of "religious observances in public schools,"[55] is often used to demonstrate that the Court's opinion was not consistent with public opinion for this case. However, it was

[52] *Abington School Dist. V. Schempp*, 374 U.S. 203 (1963).

[53] *Abington School Dist. V. Schempp*, 374 U.S. 203, 223 (1963); J. Clark, opinion of the Court.

[54] *Chamberlin v. Public Instruction Bd.*, 377 U.S. 402 (1964).

[55] Gallup Poll (AIPO), Jul. 1962.

not until almost a decade later that public opinion polls asked questions specifically regarding the recitation of Bible verses in public schools. Between 1971 and 2010, respondents to public opinion polls have been asked the following question: "The United States Supreme Court has ruled that no state or local government may require the reading of the Lord's Prayer or Bible verses in public schools. What are your views on this--do you approve or disapprove of the court ruling?"[56] As shown in Figure 3.4, public opinion has reported consistent disapproval of the Court's decision. While no opinion poll specifically relating to Bible verses in public schools, and conducted within five years of the Court's decision, could be located for this study, it is most likely that the Court's decision was inconsistent with contemporary public opinion.

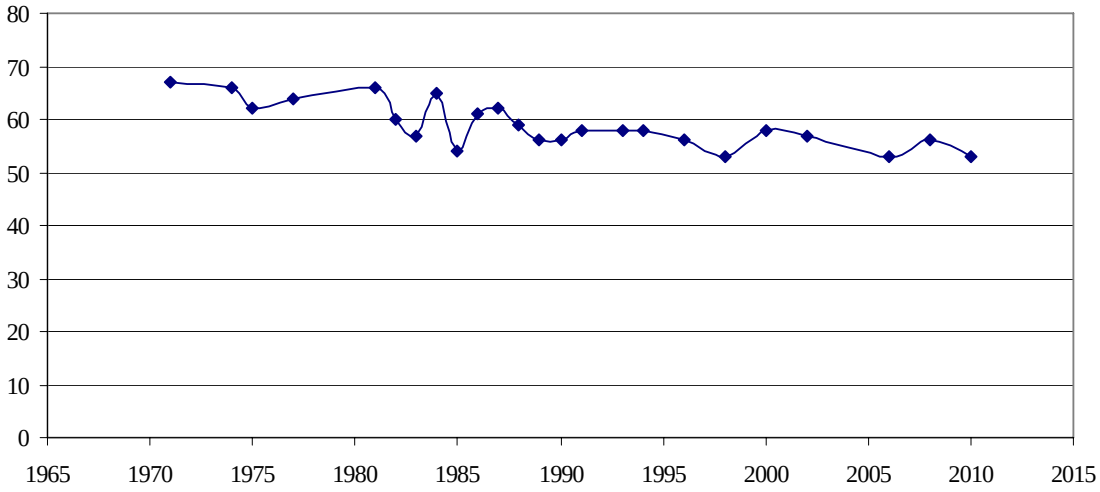

Figure 3.4. Disapproval of Court's decisions regarding the Lord's Prayer and Bible reading, 1970-2010

When comparing these results with those reported in Figure 3.3, it can be noted that wording the question the same in each poll reduces the level of variation from one poll to another. While both Figure 3.3 and Figure 3.4 show a constant majority of

[56] See footnote 46.

respondents approving of prayer and Bible reading in public schools, both also show about a ten percent decline in support over time. Thus, while the Court's opinion appears to have been inconsistent with public opinion, public sentiment on the issue seems to be moving toward agreement with the Court's opinion. At a minimum, public opinion has become more evenly divided over the issue, with just about as many Americans in agreement as in disagreement with the Court's decision.

In 2006 a poll asked respondents if they believed that teaching the Bible in public school violated the Constitution and the separation of church and state. Opinion was split evenly, with forty-six percent answering it was a violation and forty-six percent answering it was not.[57] Between 1986 and 2006 there were four additional poll questions asking respondents their opinion about reading the Bible in public school, without reference to prayer. Respondents were asked if they approved of public schools using the Bible in literature, history and social studies classes. As shown in Table 3.4, the level of support in 1986 was seventy-five percent, and by 2006 it had declined to sixty-four percent.[58] While the overall approval rate indicates that a large majority of the public supports using the Bible in public schools, evident once again is the decline in support by about ten percent.

Public opinion polls have further clarified opinion about using the Bible in public schools by asking about different subject matters in separate questions. This has provided a more nuanced understanding of how Americans support use of the Bible in

[57] CBS News Poll, Apr. 2006.

[58] Gallup Poll, Oct. 1986; Gallup/CNN/USA Today Poll, Jun. 1999; Gallup/CNN/USA Today Poll, Sep. 2000; and CBS News Poll, Apr, 2006.

public schools. As illustrated in Table 3.5,[59] there is strong support for using the Bible in literature and comparative religion classes, but much less support for using the Bible in history and social studies classes. Based on the level of support for using the bible in history classes in 1991, it seems likely that public opinion would not support using the Bible in social studies classes, but additional data is needed in order to support this conclusion.

Table 3.4 Support for using the Bible in public school studies, 1986-2006

	Percentage of Respondents		
Year	Support	No not support	Don't know
1986	75	20	5
1999	71	28	1
2000	64	34	3
2006	64	29	7

Table 3.5. Opinion about use of Bible in public schools, divided by subject

	Percentage of Respondents			
Year	History	Social Studies	Literature	Comparative Religion
1991	73		68	78
2000	56		75	85
2006		64		
2007	50		80	88

While the Court has not reviewed a case related to use of the Bible in these types of classes, it did express its opinion on the matter in *Stone v. Graham*. In this 1980 decision regarding the posting of the Ten Commandments in public school, the Court mentioned that the Bible could be used "…in an appropriate study of history, civilization,

[59] Time/CNN/Yankelovich Clancy Shulman Poll, Oct. 1991; State of the First Amendment Survey, Apr. 2000; CBS News Poll, Apr. 2006; and State Of The First Amendment Survey, Aug. 2007.

ethics, comparative religion, or the like."[60] In 2005, in a case that used the *Stone* opinion as one basis for its decision, the Court elaborated on its opinion, stating that the Ten Commandments can only be used if they are used in a manner "…to forestall the broadcast of an otherwise clearly religious message."[61] Thus, using the Bible as part of a secular studies class would most likely be upheld by the Court.

What we find from this review is very similar to the findings for prayer in public school: there has consistently been a majority of respondents who favor prayer and Bible-reading in public school. This support, while continuing to be a majority, has declined over the decades and now hovers just above fifty percent.

Stone v. Graham (1980)

The Supreme Court then, in 1980, with a majority of five justices supporting the opinion of the Court, ruled that a state law, requiring the posting of the Ten Commandments on the wall of each public school classroom, had no secular purpose and therefore violated the First Amendment's Establishment Clause.[62] The Court ruled that the stand-alone display of the Ten Commandments served a plainly religious purpose.

Between 1999 and 2005, the public was asked its opinion on whether or not public schools should be allowed to display the Ten Commandments. As reported in Table 3.6, public opinion between 1999 and 2005 consistently showed high levels of

[60] *Stone v. Graham*, 449 U.S. 39, 42 (1980).

[61] *McCreary County, Kentucky, et al. v. American Civil Liberties Union of Kentucky et al*., 545 U.S. 844, 847 (2005).

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

support for allowing public schools to post the Ten Commandments.[63] Although not captured at the time of the Court's ruling, these reports of public opinion on the issue would lead one to believe that the Court issued an opinion that was not consistent with public opinion in 1980.

Table 3.6. Opinion about displays of the Ten Commandments in public schools

	Percentage of Respondents		
Year	Good Idea	Bad Idea	Don't know
1999	74	24	2
1999	69	24	7
2000	61	36	2
2003	70	29	1
2005	64	35	1
2005	66	24	10

Wallace v. Jaffree (1985)

As referenced above, between 1982 and 2007 there were dozens of opinion polls that asked respondents their opinions about prayer in public school. All but a few of the questions asked for an opinion about allowing prayer in school, with many specifying the prayer in question as "voluntary." It is obvious that these questions are not helpful in determining a direct comparison of the Court's 1962 opinion and public opinion, as the Court did not rule that individual students may not pray in public school. These polls can be viewed, however, as the public expressing an interest in a policy to accommodate voluntary prayer during the public school day. By 1983, one report identified twenty three states with legislation providing for moments of silence in public schools, all dating

[63] Gallup/CNN/USA Today Poll, Jun. 1999; Fox News/Opinion Dynamics Poll, Sep. 1999; State of the First Amendment Survey, Apr. 2000; Gallup/CNN/USA Today Poll, Sep. 2003; State Of The First Amendment Survey, May 2005; and FOX News/Opinion Dynamics Poll, Nov. 2005.

between 1963 and 1983.[64] One way to view these policies is as state legislative responses to accommodate public support of prayer in public school, while at the same time attempting to comply with the Court's 1962 guidelines regarding prayer in public school.

The Supreme Court issued its opinion on one of these policies in 1985, in the case *Wallace v. Jaffree*. Under review was a 1981 Alabama statute that authorized public schools to have a moment of silence "for meditation or voluntary prayer."[65] The Court used a previously established test[66] for purposes of determining government compliance with the Establishment Clause and, by a vote of 6-3, determined that there was no secular purpose for the statute. Since a previous law had allowed for a moment of silence for purposes of meditation, the Court could find no secular purpose in the addition of the language, "or voluntary prayer." Writing the Opinion of the Court, Justice Stevens made it clear that it was the addition of this phrase that caused the constitutional problem.[67] Thus, while we can understand the Court's ruling to invalidate a moment of silence for purposes of prayer, we can likewise assume that a moment of silence, when prayer is not specified as the intended purpose, would be acceptable.

Three opinion poll questions were written to capture public sentiment regarding moments of silence in public schools. In 1985 respondents were asked if they would favor or oppose a moment of silence in schools in which students can silently pray; in

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[64] "The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools," *Harvard Law Review* 96 (June 1983): 1874-1893.

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

[66] *Lemon v. Kurtzman* 403 U.S. 602 (1971).

[67] *Wallace v. Jaffree*, 472 U.S. 38, 39 (1985); J. Stevens, Opinion of the Court.

1991 a question asked if respondents favored or opposed allowing school children to spend a moment in silent meditation; and in 2005 respondents were asked if they favored or opposed allowing public schools to set aside time for a moment of silence. Between eighty-seven and eighty-nine percent of the respondents approved of each scenario.[68] The public, by very large majorities, agreed with a policy whereby public schools would include a moment of silence.

However, the 1985 opinion poll asked an additional question about a moment of silence and reported a different level of support. When asked "Do you favor or oppose a moment of silence in schools in which students can silently pray if they want to?" eighty-seven percent answered at they favored the policy (as noted above). However, when asked, "Do you favor or oppose a moment of silence in schools in which students are encouraged to pray?" sixty-three percent answered they favored the policy. A majority supported a moment of silence, no matter how the question was worded. However, support declined significantly when the question asked about students being encouraged to pray. One might interpret the results of the first question as representing public opinion about a moment of silence when students can pray, but are not instructed that prayer is the purpose of the activity, and the results of the second question as representing opinion about a moment of silence for purposes of prayer. With this interpretation of the opinion poll results, one can then report that the Court's decision was inconsistent with approximately sixty-three percent of Americans.

Between 1982 and 2005, public opinion polls also asked questions about prayer in public school, where respondents were given a variety of choices for purposes of

[68] Associated Press/Media General Poll, Sep. 1985; Time/CNN/Yankelovich Clancy Shulman Poll, Oct. 1991; and FOX News/Opinion Dynamics Poll, Nov. 2005.

expressing their attitudes. As reported above, public opinion has consistently favored prayer in public schools. These additional polls, however, provide further clarity of public opinion on the issue. As reported in Table 3.7, four questions, between 1982 and 2005, gave respondents at least the following options: moment of silence, spoken prayer, no prayer, and "don't know."[69] In each of these polls, a plurality of respondents chose a moment of silence as their preferred method of including prayer in public schools.

Table 3.7. Support for prayer aloud versus moment of silence

	Percentage of Respondents				
Year	say prayer aloud	period of silence	neither	both	don't know
1982	28	47	22		3
1995	24	70	3	2	1
1996	22	55	21		2
2005	23	69	5	3	

Additional public opinion poll questions have provided even more options, including at least the following: moment of silence, non-denominational prayer, Christian prayer, no prayer, and "don't know."[70] As shown in Table 3.8, a majority of respondents chose a moment of silence as their preferred method of including prayer in public schools.

Table 3.8. Preferred method of including prayer in school

	Percentage of Respondents				
Year	Moment of silence	Say a prayer to God	Avoid all	Say a prayer that refers to Jesus	Don't know
1982	47	28	22		3
1988	51	25	10	10	3
1994	54	24	11	9	3
1996	55	22	21		2
2000	53	20	19	6	1

[69] Roper Report 82-6, Jun. 1982; Gallup/PDK Poll of Public Attitudes Toward the Public Schools 1995, May 1995; NBC News/Wall Street Journal Poll, Dec. 1996; and Gallup Poll, Aug. 2005.

[70] American National Election Study 1988 (Post-Election), Nov. 1988; American National Election Study 1994 (Post-Election), Nov. 1994; and For Goodness Sake Survey, Nov. 2000.

When the categories for non-denominational prayer and Christian prayer in Table 3.8 are combined and used as representative of opinion in favor of spoken prayer, the results can be displayed with polling data reported in Table 3.7. As demonstrated by Figure, 3.5, not only does public opinion support a moment of silence as the preferred method for including prayer in public schools, but the level of support has increased since 1982. Since the Court issued its opinion in 1985, a majority of respondents have answered that a moment of silence is the method they favor for prayer in public school.

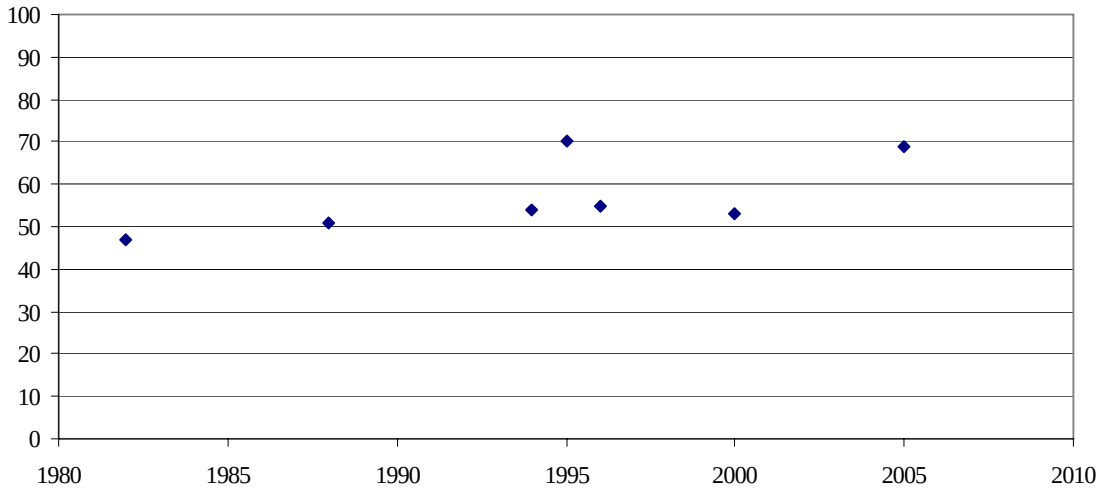

Figure 3.5. Preference for moment of silence in public schools, 1982-2005

As discussed previously, when respondents are given a choice between supporting prayer in public school and not supporting prayer in public school, they show a clear majority preference for supporting prayer. However, when given a choice to express the manner in which prayer should be included in public schools, respondents have chosen a moment of silence, not an organized verbal prayer, as their preference. This changes how one might report the way in which public opinion compares to the Court's opinion on the issue of prayer in public school. Clearly a majority of respondents support prayer in school. However, it now seems likely that the consistently large majorities reporting

approval for prayer in public school were expressing an opinion about allowing voluntary prayer and therefore not expressing complete disagreement with the Court's 1962 decision.

The Court has repeatedly ruled that organized, officially prescribed prayer in public schools is not acceptable. The Court's opinion in *Wallace v. Jaffree* can be interpreted as allowing for a moment of silence, as long as it is not specified for purposes of prayer. With this understanding, one can now make the argument that public opinion, which favors a moment of silence as opposed to a spoken prayer, is consistent with the Court's opinion on the matter. We could, therefore, argue that unlike what has previously been reported about how public opinion compares to the Court's opinion on the issue of prayer in public school, public opinion since the 1980's has been consistent with the Court's opinion that a moment of silence is an appropriate public school policy. Of course, a Supreme Court decision upholding a moment of silence would provide for a more accurate measure of the Court's opinion on the matter. If this understanding is correct, however, then this discovery sheds a new light on what has previously been reported as a disagreement between the Supreme Court and public opinion regarding prayer in public schools.

Epperson v. Arkansas (1968) and Edwards v. Aguillard (1987)

The issue of religious instruction in public school has also included the debate over whether to teach evolution and/or creationism. In 1968, the Court unanimously voted to strike down a 1928 Arkansas "anti-evolution" law that prohibited "the teaching in its public schools and universities of the theory that man evolved from other species of

life."[71] In the wake of the 1925 Scopes trial, the prohibition was achieved through a referendum, in which sixty-three percent of Arkansas voters approved of the law.[72] Ruling that the state cannot require teaching and learning be tailored to "the principles or prohibitions of any religious sect or dogma," the Court in 1968 determined the forty-year-old law not to be religiously neutral and therefore to be in violation of the Establishment Clause.

In 1981, Arkansas then passed a law providing for "equal time" for creationism whenever evolution was taught in public schools. Based on one account, by 1984 at least twenty-one states had mandated the teaching of creationism on an equal basis with evolution.[73] The Supreme Court in 1987 struck down one such law, ruling as unconstitutional a 1982 Louisiana statute that required the teaching of "creation science" any time the theory of evolution was taught. The Court, by a 7-2 vote, decided that the purpose of the act was religious in nature and that the primary effect of the law was to advance religion. Writing the Opinion of the Court, Justice Brennan explained, "The Louisiana Creationism Act advances a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety. The Act violates the Establishment Clause of the First Amendment because it seeks to employ the symbolic

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

[72] Powe, Jr., 363; Edward J. Larson, *Summer for the Gods: The Scopes Trial and America's Continuing Debate Over Science and Religion* (Cambridge, Mass: Harvard University Press, 1997), 221; Virginia Gray, "Anti-Evolution Sentiment and Behavior: The Case of Arkansas," *The Journal of American History* 57 (Sep., 1970): 352-366.

[73] James E. Wood, Jr., "Religion and Education in American Church-State Relations," in *Religion, the State, and Education*, ed. James E. Wood, Jr. (Waco, Tx: Baylor University Press, 1984), 38.

and financial support of government to achieve a religious purpose."[74] Given this statement, it is hard to imagine the Court upholding any policy that allows for the teaching of creationism, mandatory or voluntary, in public schools.

Between 1981 and 2006, opinion polls asked respondents whether they favored or opposed the teaching of creationism in public schools.[75] Each of the four times this question was asked, a majority of the respondents were in favor of teaching creationism. Respondents further clarified their position in 1999, when fifty-six percent answered that creationism should not be required, but rather offered as an elective; only twenty-five percent answered that it should be required instruction for students.[76]

Further, opinion polls conducted between 1981 and 2008 asked respondents whether they favored or opposed public schools teaching creationism along with evolution.[77] As shown in Figure 3.6, generally speaking, Americans have expressed support for teaching creationism along with evolution, with the level of support increasing after 1990. However, during the 1990's, there was a shift in how the question was worded. Between 1981 and 1996, the polls asked respondents if they would favor or oppose a policy "…making it mandatory to teach the biblical version of evolution in the classroom as well as Darwinian scientific theory." The polls conducted between 1999 and 2008 asked if respondents would "…generally favor or oppose teaching creationism

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[74] *Edwards v. Aguillard*, 482 U.S. 578, 597 (1987); J. Brennan, opinion of the Court.

[75] Gallup Poll, Aug. 1999; NBC News/Wall Street Journal Poll, Sep. 1999; Gallup Poll, Aug. 2005; and Princeton Survey Research Associates International/Newsweek Poll, Nov. 2006;

[76] Gallup Poll, Aug. 1999.

[77] Time/Yankelovich, Skelly, Sep. 1981; Roper Report 82-3, Feb. 1982; Time/Yankelovich, Skelly, Jul. 1985; Time/CNN/Yankelovich Clancy Shulman Poll, Sep. 1991; Time/CNN/Yankelovich Clancy Shulman Poll, Oct. 1991; Gallup Poll, Apr. 1996; Gallup/CNN/USA Today Poll, Jun. 1999; Pew Research Center for the People , Mar. 2005; Pew Forum on Religion , Jul. 2005; Pew Forum on Religion , Jul. 2006; and CBS News Poll, Sep. 2008.

along with evolution in public schools." It seems as though the shift upward began prior to the change in the wording of the question, but it is hard to determine without the continuance of the question asking about a mandatory, legally required policy. Thus, it is hard to know whether the upward shift is the result of a change in how the question is worded, or if there has been an increased level of support in public attitudes regarding the teaching of creationism in public schools.

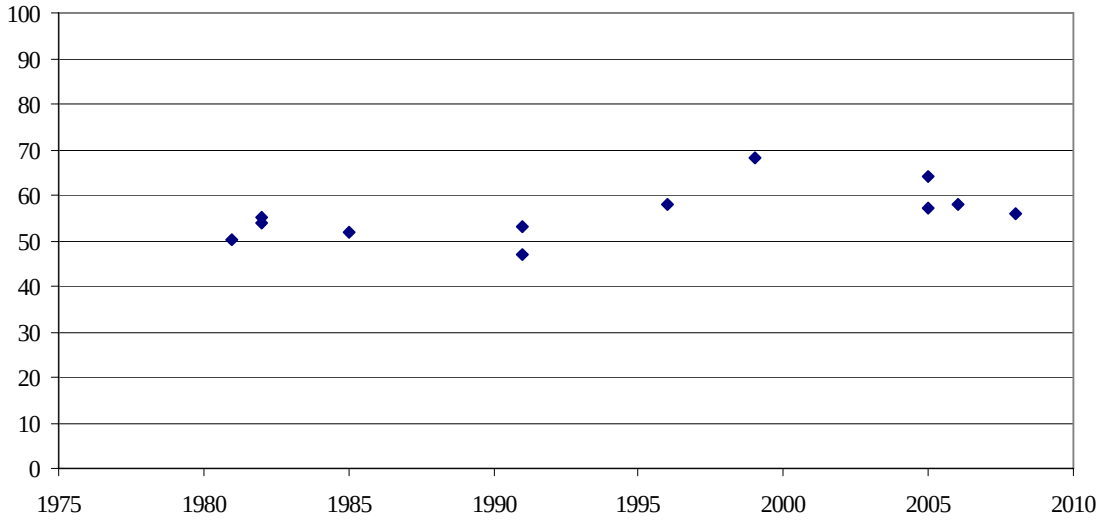

Figure 3.6. Support for teaching creationism along with evolution, 1981-2008

Respondents have also been asked if they would favor a policy of teaching creationism instead of teaching evolution. The four times this was asked, between 1999 and 2005, support ranged from thirty-three to forty percent.[78] Thus, even during times of peak support for teaching creationism in public schools, public opinion did not support a policy under which schools would teach only creationism.

In 2005, a poll asked respondents about their views on the teaching of evolution, creationism, and intelligent design, where support for each was asked in a separate

[78] Gallup/CNN/USA Today Poll, Jun. 1999; CBS News/New York Times Poll, Nov. 2004; Pew Research Center for the People, Mar. 2005; and Pew Forum on Religion, Jul. 2005.

question. Evolution received the highest level of support, with sixty-one percent; fifty-four percent of respondents supported teaching creationism; and forty-three percent showed support for intelligent design.[79] These statistics are consistent with what opinion polls report when respondents are provided with a variety of options for how these theories could be included in public school education. For example, in 1981, 1987, and 2005, public opinion polls asked if respondents favored the scientific theory of evolution only, the Biblical theory of creationism only, or all theories (in 2005 the polls included intelligent design). In each of the three years, more people showed a preference for teaching all of the theories than for any single theory.[80]

Even though public opinion has shown support for including the subjects of evolution and creationism in public schools, there does not seem to be support for a requirement that students receive instruction in both subjects. Therefore, comparing the polling results to the Supreme Court's opinion is a bit difficult. The Court ruled that creationism could not be required whenever evolution was taught. When asked in 2005, Americans showed support for having evolution taught in public schools.[81] However, public opinion polls have also reported a high level of support for teaching creationism in public schools. In fact, when provided with the opportunity, public opinion has shown support for teaching all of the different theories together in public schools. Whether or not public opinion is squarely at odds with the Supreme Court depends on how one

[79] Gallup Poll, Aug. 2005.

[80] NBC News/Associated Press Poll, Oct. 1981; Religion And Public Life, Dec. 1987; Harris Poll, Jun. 2005; and VCU Life Sciences Survey, Sep. 2005.

[81] Gallup Poll, Aug. 2005. Sixty-one percent supported teaching evolution in public school science classes.

interprets the Court's opinion regarding whether creationism can be taught at all in public schools.

One could argue that the ability to compare public opinion with the Court's opinion comes down to the specific ruling, which was that a policy could not "require" teaching creationism alongside evolution. In 1999 fifty-six percent of Americans expressed their preference for having creationism as an elective option for students, not as a required topic.[82] As demonstrated in Figure 3.6, approval for the requirement of creationism hovered around the fifty percent mark between 1981 and 1991, with the rate of those responding "not sure" ranging from eight percent to seventeen percent. From this standpoint, it would be difficult to support the idea that public opinion disagreed with the Court's decision, even though public opinion has shown strong support for teaching creationism in public schools. If anything, public opinion has appeared evenly divided on the issue, which means that the Court would most likely have been at odds with about half of the American public, no matter which way it ruled on the issue.

One important factor to take into consideration in this analysis is the level of "don't know" and "no opinion" responses. There has definitely been interest in the issue from opinion polling organizations. For example, in 2005 five different polls asked no fewer than ten questions about these theories being taught in public schools.[83] However, the responses provided an uncertain measure of public opinion. Woodum and Hoban argue that, unlike the issue of school prayer, support for teaching creationism in public

[82] Gallup Poll, Aug. 1999. Only twenty-five percent believed it should be required, and sixteen percent answered that it should not be offered at all. In the same poll a plurality of respondents answered that evolution should also be offered as an elective.

[83] Pew Research Center for the People (March), Harris Poll (June), Pew Forum on Religion (July), Gallup Poll (August), VCU Life Sciences Survey (September).

school science classes comes with a level of philosophical inconsistency, as the actual theory of creationism is inconsistent with the theory of evolution.[84] And yet, when asked, respondents show high levels of support for both creationism and the theory of evolution being taught in the public schools.

Some additional polling data highlights this tension. In 1981, 2005, and 2006, respondents answered, by fifty-seven percent, sixty-seven percent, and sixty-two percent, respectively, that it is possible to believe in both God and evolution.[85] However, in 1982 and 2001 when asked if they agreed more with the theory of evolution or more with the theory of creationism, fifty-four percent and forty-eight percent, respectively, answered creationism, with twenty-seven and twenty-four percent, respectively, providing "no opinion" as their response.[86] Also, in 2009 the Pew Research Center for the People & the Press provided survey results showing that, while eighty-seven percent of scientists "say that humans and other living things have evolved over time and that evolution is the result of natural processes such as natural selection," only thirty-two percent of the public believes this to be true.[87] This is interesting, because (1) respondents clearly rejected the idea of teaching only creationism in public schools, and (2) public support in 1999 was seven percent higher for teaching evolution than for teaching creationism.

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[84] E Woodrum and T Hoban, "Support for Prayer in School and Creationism," *Sociological Analysis* 53 (Fall 1992): 309-321.

[85] Time/Yankelovich, Skelly, Dec. 1981; CBS News Poll, Oct. 2005; and CBS News Poll, Apr. 2006.

[86] Gallup Poll (AIPO), Apr. 1982; and Gallup Poll, Feb. 2001.

[87] Pew Research Center for the People & the Press, "Public Praises Science; Scientists Fault Public, Media: Scientific Achievements Less Prominent Than a Decade Ago," http://people-press.org (accessed July 3, 2011), 5 and 37; Pew Research Center for the People, April 2009. Sixty-one percent of the public believed that humans have evolved over time, but only thirty-two percent believed it was due to natural processes, such as evolution.

Further, when asked in 2007 and 2009 if respondents believed in the theory of evolution, opinion was evenly split in 2007, and in 2009 thirty six-percent answered "no opinion," almost the same level as those answering that they believe in evolution.[88] Finally, in 2010, an opinion poll asked: "In general, would you say the theory of evolution conflicts with your own religious beliefs or is mostly compatible with your own religious beliefs?"[89] Opinion was evenly split, with sixteen percent having "no opinion." These results are consistent with a 2009 poll, where fifty-five percent of respondents reported that, generally speaking, science and religion are often in conflict; however, sixty-one percent reported that they did not believe science was in conflict with their own religious beliefs.[90] What is striking is the level of "no opinion" responses for these issues. And yet, when asked in 2001, forty percent of respondents answered they felt "very informed" about the theory of creationism, with another forty percent answering they were "somewhat informed."[91]

Of course, determining how public opinion compares to the Court's opinion on the issue might be easier if one starts from the premise that the Court would reject the teaching of creationism, whether in a required or voluntary manner, in public schools. With this understanding, it is quite evident that public opinion disagrees with the Court's opinion on the issue, and the gap is widening.

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[88] Gallup Poll, May 2007; and Gallup Poll, Feb. 2009.

[89] VCU Life Sciences Survey, May 2010.

[90] Pew Research Center for the People, Apr. 2009.

[91] Gallup Poll, Feb. 2001. Forty percent answered they were very informed and forty percent answered they were somewhat informed.

Prayer at School Events

Another element was added to public school prayer litigation when the issue of prayer at public school graduation ceremonies and football games came to the Supreme Court. On the one hand, all of the policies previously discussed that were struck down by the Court were policies under which prayer and/or religion was included as part of the public school program, on school grounds, and during school hours. The one policy that was upheld by the Court was a released time program, whereby the school was allowed to accommodate religion, as long as the religious instruction was held independently of the school, both in instruction and location. The cases dealing with prayer at school events are different, therefore, because, while not part of the regular-hours public school program, and not within the public school building, they involved policies whereby schools were making determinations about a religious exercise that was part of an official school program.

Lee v. Weisman (1992)

In 1992, a divided Court issued its opinion in *Lee v. Weisman*. Under review was a public school policy whereby members of the clergy were invited to give invocations and benedictions at public school graduation ceremonies. The school would invite the clergy to participate and then give the individual guidelines for composing a prayer for the ceremony. The Court, by a 5-4 vote, ruled that it was unconstitutional for the school to include members of the clergy, for purposes of offering prayer, as part of the official program.[92] Writing the opinion of the Court, Justice Kennedy stated that, "The government involvement with religious activity in this case is pervasive, to the point of

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

creating a state-sponsored and state-directed religious exercise in a public school."[93] Using the precedent established by the Court in *Engel v. Vitale*, that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government," the following elements of the *Lee* case were key to the outcome: the school decided that the invocation and benediction should be given; the school chose the religious participant; and the school directed and controlled the content of the prayers through the guidelines provided to the religious participant.[94]

A July 1992 poll reported that sixty-six percent of respondents disapproved of "the recent Supreme Court ruling that public schools may not sponsor organized prayers because this establishes religion and unfairly forces students to participate."[95] While not specifically mentioning the case of *Lee v Weisman*, or the issue of prayer at graduation ceremonies, the timing and wording of the question makes it clear that it was directed at gauging opinion about the case. The first public opinion poll that specifically asked about this issue of prayer at graduation ceremonies was in 1993, to which seventy-four percent of the respondents answered that prayers should be part of public school graduation ceremonies.[96] Without specific mention of the Supreme Court's decision, polls continued to capture public opinion about prayers at public school graduation

[93] *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

[94] *Lee v. Weisman*, 505 U.S. 577, 588 (1992).

[95] NBC News/Wall Street Journal Poll, Jul. 1992.

[96] Gallup/PDK Poll of Public Attitudes Toward the Public Schools 1993, May 1993.

ceremonies. Between 1999 and 2005, approval ranged from seventy-eight to eighty-three percent in response to questions worded in a variety of ways.[97]

Opinion polls have reported strong public support for prayer at graduation ceremonies. While there has not been much change in how the question has been worded, support does not seem affected by the wording of the question. Respondents supported "allowing students to say prayers at graduation ceremonies as part of the official program,"[98] "allowing public schools to have a prayer during graduation ceremonies,"[99] and prayers "to be said at a high school graduation if a majority of the graduating class favors it."[100] The lowest level of support, at seventy-four percent, was in 1993 when the Supreme Court's decision was specifically mentioned and respondents were asked if they believed "that prayers should or should not be part of public school graduation ceremonies."[101] The Supreme Court's decision was clearly not in agreement with public opinion on this matter.

Santa Fe Independent School District v. Doe (2000)

In 2000, the Court then struck down a public school district policy that allowed student-led, student-initiated prayers at football games.[102] Using language from *Lee v.*

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[97] State Of The First Amendment Survey, Jul. 1997; Gallup/CNN/USA Today Poll, Jun. 1999; State of the First Amendment Survey, Apr. 2000; Gallup/CNN/USA Today Poll, Sep. 2000; Gallup/CNN/USA Today Poll, Feb. 2001; and FOX News/Opinion Dynamics Poll, Nov. 2005.

[98] Gallup/CNN/USA Today Poll, Feb, 2001; Gallup/CNN/USA Today Poll, Sep, 2000; and Gallup/CNN/USA Today Poll, Jun, 1999.

[99] FOX News/Opinion Dynamics Poll, Nov, 2005.

[100] State of the First Amendment Survey, Apr, 2000; State Of The First Amendment Survey, Jul, 1997.

[101] Gallup/PDK Poll of Public Attitudes Toward the Public Schools 1993, May, 1993.

[102] *Santa Fe Independent School District v. Doe* 530 U.S. 290 (2000).

Weisman, the Court explained that government may not coerce anyone to participate in a religious exercise, or act in a way that tends to establish a religion or religious faith. The Court determined that the prayers were authorized by government (the school had created an election process to determine who the speaker would be for the year); took place as part of a "government-sponsored school-related event" (attendance was mandatory for at least the members of the team, the cheerleaders, and the band); had to comply with a district policy that prescribed appropriate content; and were broadcast over the school's public address system as part of the pre-game program.[103]

In 1987, fifty-nine percent of respondents answered that it was "…good for sporting events at public high schools to begin with a public prayer."[104] The level of approval rose to seventy-three percent in 1991, when respondents answered that they thought prayers before football games should be allowed on school grounds.[105] The year that the Court issued its opinion, three separate public opinion polls asked respondents their opinion on the issue. In March, sixty-seven percent responded that students should be permitted to use the public address system to lead the audience in religious prayers at public school activities such as sporting events.[106] In April, sixty-four percent agreed that students should be allowed to lead prayers over the public address system at public school-sponsored events such as football games.[107] In June, sixty-eight percent reported

[103] *Santa Fe Independent School District v. Doe* 530 U.S. 290, (2000).

[104] Religion And Public Life, Dec. 1987.

[105] Time/CNN/Yankelovich Clancy Shulman Poll, Oct. 1991.

[106] ABC News Poll, Mar. 2000.

[107] State of the First Amendment Survey, Apr. 2000. Forty-four percent reported strong agreement.

they disagreed with the recent Supreme Court decision that public school districts cannot promote prayer before high school football games.[108]

In addition, polls have included questions asking respondents their opinion about prayer at both graduation ceremonies and sporting events. In 2003, seventy-eight percent approved of a non-denominational prayer as part of the official program at a public school ceremony such as a graduation or sporting event.[109] In 2010, a poll asked respondents their opinion in two different ways.[110] In response to a question asking if student speakers should be allowed to offer a prayer at a public school event, eighty percent agreed.[111] In response to a question asking if student speakers should be allowed to speak about their religious faith at public school events, seventy-five percent agreed.[112]

As evident in Figure 3.7, public opinion has reported high levels of support for prayer at public school events, and the level of support appears to be increasing. This is a clear indication of the Court ruling in an anti-majoritarian fashion. Also apparent, specifically in the five poll questions in 2000, is that the level of support for prayer at graduation ceremonies is about fifteen percent higher than support for prayer at public school sporting events. The Supreme Court has not issued opinions consistent with public opinion for cases dealing with prayer at public school graduation ceremonies and football games.

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[108] PSRA/Newsweek Poll, Jun. 2000.

[109] Gallup/CNN/USA Today Poll, Sep. 2003.

[110] State Of The First Amendment Survey, Jul. 2010.

[111] Sixty-one percent strongly agreed, nineteen percent mildly agreed.

[112] Fifty-four percent strongly agreed, twenty-one percent mildly agreed.

Discussion and Conclusion

This chapter compared Supreme Court decisions dealing with public school programs involving religion as part of the official public school program to public opinion poll questions related to the various issues. The Court cases dealt with three broad issue areas regarding religion in public schools: religious instruction, prayer, and use of the Bible. Generally speaking, the Court's opinions in these cases were not in agreement with public opinion.

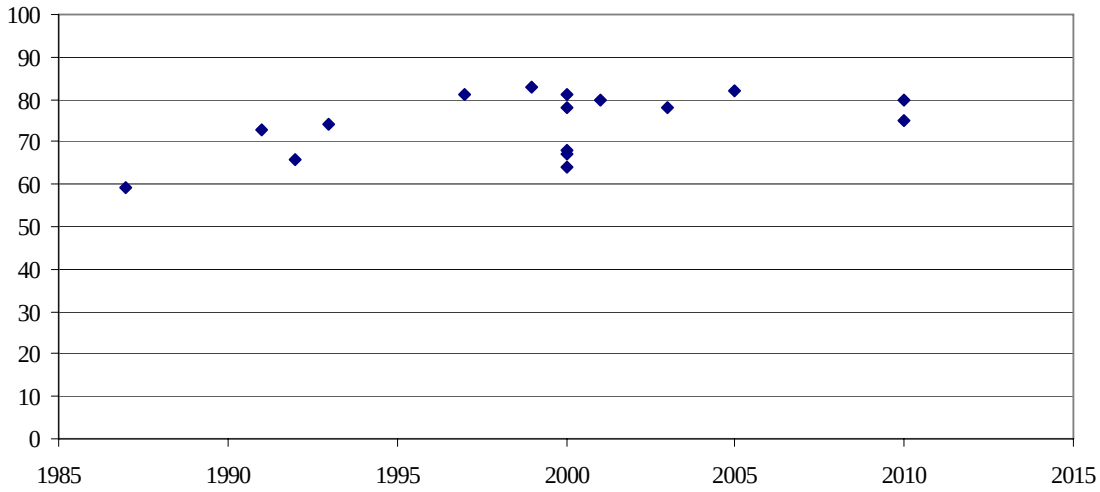

Figure 3.7. Support for prayer at public school events, 1987-2010

The pair-wise method cannot be used for the 1960's Bible reading cases and the 1980 case dealing with the Ten Commandments because opinion poll questions about these issues were not asked within five years of the Court's decisions. In addition, the pair-wise method cannot be used for the 1948 case dealing with religious instruction in public schools due to the conflicting opinion reported in the poll that asked respondents their opinion on the issue.

The pair-wise method, when used for the remaining cases, reveals that, with the exception of the released-time program, the Supreme Court's opinions were not

consistent with contemporary public opinion on issues dealing with religion in public schools. As illustrated in Table 3.9, the Court struck down public school policies related to organized spoken prayer, a moment of silence for purposes of prayer, required teaching of creationism along with evolution, and prayer at graduation ceremonies and football games. In general, when each case is analyzed independently and contemporary public opinion polls are used as a comparison, it appears that the Court issued anti-majoritarian opinions when interpreting the Establishment Clause for these cases.

Table 3.9. Measure of congruence for cases dealing with religion as part of official public school program

				Relationship	
Case	Date of Decision	Policy Decision	Public Opinion (%)	agree	disagree
Zorach v. Clauson	1952	upheld	54	x	
Engel v. Vitale	1962	struck down	77		x
Wallace v. Jaffree	1985	struck down	75		x
Edwards v. Aguillard	1987	struck down	52		x
Lee v. Weisman	1992	struck down	74		x
Santa Fe Independent School District v. Doe	2000	struck down	66		x

It is hard to determine if the Court's 1948 decision regarding general religious instruction in public schools was consistent with public opinion, and in the one case in which there was agreement with the Court's opinion (released time program), the Court was dealing with a program whereby the religious instruction was occurring outside and independently of the public school. In fact, the only time that the Court's opinion was in agreement with public opinion was when the Court upheld the public school policy in question. In each of the instances where the Court's opinion was inconsistent with public opinion, the Court had invalidated a government policy which allowed for religion in public schools. Thus, placing the 1948 and 1952 cases aside, there has been clear

disagreement between the Court's opinion and public opinion each time the Court made a ruling on the constitutionality of religion as part of the official public school program.

Analyzing the relationship through trend analysis reveals similar results. The public, between 1950 and 1999, expressed general agreement with the Court's 1948 decision that religious instruction should not take place within the public school. Between 1964 and 2010, a majority of the public expressed disapproval of the Court's 1962 and 1963 decisions regarding prayer and Bible reading in public schools. The public, expressing its opinion between 1999 and 2005, has consistently reported high levels of disagreement with the Court's 1980 opinion about posting the Ten Commandments in public schools. Public opinion has also shown high levels of support for prayer at official school events, a position at odds with the Court's 1992 and 2000 opinions.

Public opinion, expressed between 1982 and 2005, has shown support for a moment of silence in public schools. While this can be viewed as consistent with the Court's statements in its 1985 opinion, the public appears to disagree with the Court's requirement that prayer not be the stated purpose for the moment of silence. Similarly, public opinion, from 1981 to 2010, can be viewed as consistent with the Court's 1987 opinion that creationism may not be required in public school; however, public opinion is probably not consistent with what appears to be the Court's position that creationism can not be allowed in public schools.

A cursory review of the results is that, in general, the Court has issued opinions regarding religion in public school that have not been consistent with contemporary public opinion. Over time, the disagreement has generally maintained. However, over

time some very important distinctions between the Court's opinion and public opinion are apparent and are critical to a fuller understanding of the relationship. Further insight shows that, while the individual comparisons show disagreement, there is room for debate on the exact nature of the relationship.

Even though public opinion polls have shown inconsistency between the Court's opinion in individual cases and public opinion related to the specific issue in each case, some areas of agreement should be noted. The level of public opinion in disagreement with the Court's decision about reciting the Lord's Prayer and Bible verses in public school has diminished perceptibly over time. Public opinion is currently very near fifty percent, and future movement in the same direction may affect the overall results. If the decline in disapproval of the Court's opinion regarding prayer and Bible reading continues, very soon opinion polls could report a public opinion expression that is in agreement with the Court's opinion. In addition, if these declines are indicative of how the public responds to the Court's rulings over time, and the Court does influence public opinion, then we could anticipate similar results for prayer at official school events. Perhaps the prayer-at-school-event cases are simply too recent for public opinion shifts to have occurred on the issue.

One area in which polling results provide conflicting information is prayer in public schools. Public opinion polls show constant support for prayer in public school. However, when given the choice, Americans express support for a moment of silence, instead of spoken prayers, in public schools. The public's support for moments of silence maintains its strength whether the stated purpose is religious or not. Therefore, if we understand the Court's opinion to allow for moments of silence, as long as the stated

purpose is not religious, then we can identify increasing public support for this policy. In other words, even though the public does not reject moments of silence for purposes of prayer, it also does not reject moments of silence for purposes not stated as prayer. It is likely that the Supreme Court and the public are in agreement that a moment of silence is an appropriate way to incorporate prayer, for those who wish to pray, into the public school setting. This is probably the only other point of agreement (the first being a rejection of religious instruction in public school) between the Court and public opinion on issues regarding religion as part of the official public school program.

This seems crucial for establishing a new understanding for the long and contentious debate about prayer in public school. Given these poll results, it is possible to re-assess the polls that reported public opinion in favor of allowing voluntary prayer in public schools. It seems likely that these sentiments were directed more toward efforts to establishing an alternate policy, such as a moment of silence, rather than overturning the Court's 1962 ruling about programs of spoken prayer in the classroom.

Something that is evident from the opinion poll results is that public opinion supports a greater degree of religious involvement in public school than does the Court. This general attitude can be illustrated by a 1987 public opinion poll in which fifty-two percent of the respondents answered that the Supreme Court has gone too far in limiting the opportunity for religious expression in the public schools.[113] Similarly, in 2005 fifty percent of respondents answered that students in public school have too little religious freedom.[114] While isolated polls, they support what appears to be a general trend in the

[113] Gallup/Newsweek Poll, Sep. 1987.

[114] State of the First Amendment Survey, May 2005.

polling data: the public is not as strict as the Court in limiting the religious purpose from public school policies and programs. While public opinion and the Court's opinion appear to agree on some general conclusions, specifically regarding religious instruction, a moment of silence, and use of the Bible, public opinion, unlike the Court, is not as restrictive of programs that have a stated religious purpose. However, support for a constitutional amendment received very limited support, indicating an American public that is not hostile to the Court's decisions.

CHAPTER FOUR

Religious Expressions and Government Property

Introduction

Some have viewed the Supreme Court's decisions beginning in the 1980's regarding religious expression within public schools as a departure from the Court's historic separationist position. After all, the Court had consistently, beginning in 1948, struck down public school policies that made decisions regarding religion as part of the official public school program. In the 1980's, however, the Court began to accommodate religious expression in public schools by allowing use of public school facilities by student religious groups and non-student religious groups. As one author described it, "…the ice of resistance to religious activity in public schools had been broken."[1]

While some might view this as a shift in the Court's opinion, there are significant differences in the policies being reviewed by the Court. In each case that the Court struck down a public school policy that allowed religious activity within the school, the school was making a crucial decision regarding the religious activity, and the religious activity was part of the official public school program. In its more accommodationist opinions, the Court was reviewing policies whereby religious expression was occurring on school grounds, but independent of the school function and independent of any decision-making by school officials regarding the religious expression taking place. Therefore, whereas the Court had been separationist when reviewing policies under the

[1] Ralph D. Mawdsley, "Access to Public School Facilities for Religious Expression by Students, Student Groups and Community Organizations: Extending the Reach of the Free Speech Clause," *Brigham Young University Education and Law Journal* (2004): 270.

Establishment Clause with regard to what decisions government may make regarding religion in public schools, the Court adopted a more accommodationist position for cases challenged under the Free Exercise Clause with regard to what individuals and groups may do while on public school property.

In addition to private religious expression on school property, the Court has also issued opinions about private religious expression on non-school government property. In some church-state cases, such as those involving prayer as part of a government program, the Court has used a different standard for public school and non-public school cases (if on no other basis than the age of the individual exposed to the religious expression). However, for cases involving private use of government property, the Court has used an "equal access" principle for cases involving both school and non-school property.

Emerging on the Court's docket beginning in the 1980's were cases dealing with government-sponsored religious holiday displays and displays of the Ten Commandments on government property. What makes these cases unique is the long history of government displays of religious symbols. These displays generally represent long-standing traditions involving recognition of a religion that has been tied to the traditions of a majority of Americans. One last issue included in this chapter, and also an issue with a long history within the United States, is prayer at the beginning of a legislative session, led by a publicly paid chaplain.

This chapter will seek to demonstrate the relationship between the Supreme Court's decisions and public opinion for cases dealing with religious expression by government and religious expression by non-governmental entities on government

property. These include Supreme Court cases dealing with religious use of public school facilities by both student and non-student groups; use of government (non-school) property for purposes of religious expression by non-governmental entities; and government expression of religion, including displays of religious symbols and legislative prayer.

Public School Forums

Whether based on a belief in a strict separation between church and state, and therefore religion and public school, or based on uncertainty about the Supreme Court's position regarding the relationship between religion and public schools, many public schools prohibited the use of school property for all religious activity. As a result of legal challenges to these policies, the Supreme Court, beginning the 1980's, issued several opinions to clarify its position on the proper relationship between government and religion in public schools.

Cases involving use of publicly-owned school property by religious groups included use of university, secondary, and elementary public school facilities by student and non-student religious groups. What makes the cases dealing with student groups different from the cases dealt with in the "religion in public school" chapter is the lack of decision-making by public school officials in the religious expression taking place on public school property. The cases included in this chapter deal with use of school facilities and resources by religious groups, whose religious expressions are completely independent of any decision-making by school officials.

For these cases, which involved regulation of religious expression, the Court developed a Free Exercise jurisprudence of non-discrimination, based on a principle of

equal access.[2] This was, in essence, a Free Exercise version of the Court's First Amendment "freedom of expression" jurisprudence.[3] Beginning in 1972, the Court made it clear that, whereas reasonable "time, place, and manner," regulations were generally valid restrictions on expression, government restrictions of expression based on content (of the speech) could only be upheld if government could show a compelling interest for the content-based regulation.[4] Applying this logic to Free Exercise cases involving religious expression in a public school forum, a school could restrict access to a religious group (restriction based on religious content) only if it could show a compelling interest for doing so.[5]

Court Cases

In the 1981 case of *Widmar v. Vincent*, the Supreme Court struck down a state university policy "prohibiting the use of University buildings or grounds 'for purposes of religious worship or religious teaching.'"[6] By a vote of 8-1, the Court determined that the university had violated the First Amendment's Free Exercise Clause by not allowing a student religious group equal access to the university's facilities. The Court ruled that "…a state regulation of speech should be content-neutral,"[7] and it determined that the

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[2] Alan Trammell, "The Cabining of Rosenberger: Locke v. Davey and the Broad Nondiscrimination Principle that Never Was," *Virginia Law Review* 92 (December 2006): 2018.

[3] Mark J. Richards and Herbert M. Kritzer, "Jurisprudential Regimes in Supreme Court Decision-Making," *The American Political Science Review* 96 (June 2002): 310.

[4] *Police Department of Chicago v. Mosley*, 408 U.S. 92, 98 (1972).

[5] In 1990 (*Employment Div. v. Smith*., 494 U.S. 872) the Court declared that it would no longer require a "compelling state interest" for Free Exercise cases. Instead, the Court would uphold a policy as long as it was generally applicable and religiously neutral. Thus, any policy discriminating based on religious content would still violate the Free Exercise clause, even with these new criteria.

[6] *Widmar v. Vincent*, 454 U.S. 263, 265 (1981).

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

university was not able to show a compelling interest for discriminating against religion in this instance. As such, the Court advanced a principle of "equal access" for this type of situation, whereby public facilities, when available to some groups, should be available equally to all groups.[8]

In 1983, the Court then denied to review a Fifth Circuit Court of Appeals ruling which denied the constitutionality of a public school policy that allowed voluntary student religious groups to meet on school property on the same basis as other school groups.[9] In an attempt to further the Court's 1981 equal access principle, Congress subsequently passed the Equal Access Act of 1984.[10] The Act required public secondary schools receiving federal funds to allow student religious groups to hold student-initiated, voluntary, non-school sponsored meetings on school grounds, if other extra-curricular groups were provided the same opportunity.[11] Some view the unrest caused by the school prayer cases in the 1960's as the impetus for passage of the Equal Access Act.[12]

In 1990, the Court upheld the constitutionality of the Equal Access Act and its application at a public high school that had denied a request to start a student Christian club. Writing the Opinion of the Court in *Westside Community Bd. of Ed. v. Mergens*,

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[8] *Widmar v. Vincent*, 454 U.S. 263, 264 (1981).

[9] *Lubbock Civil Liberties Union, Plaintiff-appellant, v. Lubbock Independent School District, et al., Defendants-appellees*, 669 F.2d 1038 (1982).

[10] 20 U.S.C. sec. 4071; Kevin R. den Dulk and J. Mithcell Pickerill, "Bridging the Lawmaking Process: Organized Interests, Court-Congress Interaction, and Church-State Relations," *Polity* 35 (April 2003): 419-440; Steven P. Brown and Cynthia J. Bowling, "Public Schools and Religious Expression: The Diversity of School Districts' Policies Regarding Religious Expression," *Journal of Church and State* 45 (Spring 2003): 263.

[11] den Dulk and Pickerill, 430.

[12] Allen D. Hertzke, "An assessment of the Mainline Churches since 1945," in *The Role of Religion in the Making of Public Policy*, ed. James E. Wood, Jr. and Derek Davis (Waxo, Tx: Baylor University Press, 1991) 68.

Justice O'Connor stated that the "equal access" policy, upheld by the Court in *Widmar*, applied "with equal force to the Act," and, as such, the law was not a violation of the Establishment Clause."[13] Therefore, the high school, which had created a limited open forum for student groups, had violated the act by not granting recognition to the student Christian club.

Whereas *Widmar* and *Mergens* were cases that involved access to student groups at public university and secondary schools, the Court's 1993 opinion in *Lamb's Chapel v. Center Moriches School District* involved use of public school facilities, after school hours, by non-student groups, and as part of a non-school function.[14] The Court, by a unanimous vote, ruled that prohibiting access to the religious group was a violation of the Free Exercise Clause. Since the school had created a public forum,[15] it could not discriminate against the content of the speech for the sole purpose that it was religious. Thus, the Court extended the equal access principle to non-student, as well as student, religious-group use of public school facilities.

In each of the previous cases the Court consistently held that public schools, once they had created a public forum for a specific topic or subject, could not discriminate against a religious viewpoint without violating the Free Exercise Clause. The Court, by a 6-3 vote, then extended this principle to elementary school facilities in the 2001 case of *Good News Club et al. v. Milford Central School*. In this case, the Court ruled that a

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[13] *Westside Community Bd. of Ed. v. Mergens*, 496 U.S. 226, 227 (1990); J. O'Connor, Opinion of the Court.

[14] *Lamb's Chapel v. Center Moriches Sch. Dist*., 508 U.S. 384 (1993).

[15] The Equal Access Act states, "A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. sec. 4071.

public elementary school had discriminated against a religious viewpoint when it denied a religious club after-school access to its facilities (a limited public forum).[16] Since the case involved use of an elementary school's facility, the school was not violating the Equal Access Act. The Court, however, used this case to extend its equal access principle to elementary schools, as well.

The Court had made its opinion clear: once public schools provided general access for use of their facilities, whether to student or non-student groups, and whether at the university, secondary, or elementary level, it must allow access to those facilities equally to religious and non-religious groups. While the school policy can regulate the general topics allowed for use of the facilities, it cannot restrict based on the content of the expression that occurs during use of the facilities, and therefore cannot restrict based on religious content alone.

In 2010, the Court upheld an "all-comers" policy, whereby a state law school had denied recognition to a Christian group based on the group's discriminatory membership policy. In order to be eligible for official school recognition as a student group, and therefore benefit from resources provided by the school, a student group had to allow membership access to all of the school's students. The Court determined that the school's denial was not based on religion, and therefore the school's policy was not a violation of the Establishment Clause. The Court did, however, remand the case back to the lower court in order to determine whether or not the school selectively enforced its policy.[17]

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[16] *Good News Club et al. v. Milford Central School*, 533 U.S. 98 (2001).

[17] *Hastings Christian Fellowship v. Martinez*, 561 U.S. ___ (2010).

Public Opinion

When asking questions about use of school facilities by religious groups, public opinion polls have not distinguished between the various levels of public schools (*i.e.*, university, secondary, and elementary). Since the Supreme Court was consistent in its opinion for each level of public schools, namely that public university, secondary, and elementary schools must provide equal access to religious groups when they provide access to other groups, this single opinion of the Court will be used for purposes of comparing to public opinion on the issue. The opinion poll questions have, however, differed with respect to asking about student group versus non-student group use of publicly owned school property for religious purposes.

The cases in 1981 and 1990 dealt specifically with student religious groups using public school facilities. In 1984, a public opinion poll asked respondents, "Do you think student religious groups should or should not have the same opportunity to meet on public school property as other extracurricular groups, such as a stamp club?"[18] Seventy-seven percent answered that religious groups should have the same opportunity. Between 1985 and 2001, seven additional questions asked respondents if they favored, or would not object to, use of public school facilities by student religious groups.[19] As shown in Figure 4.1, between seventy and eighty-one percent of respondents approved of allowing student religious groups to use public school facilities.

The 1984 and 1985 poll questions were worded in an "equal access" manner, asking respondents if they believed student religious groups should have the same

[18] Gallup Poll (AIPO), Jul. 1984.

[19] Associated Press/Media General Poll, Sep. 1985; Gallup Poll, Oct. 1986; State Of The First Amendment Survey, Jul. 1997; Gallup/CNN/USA Today Poll, Jun. 1999; Gallup/CNN/USA Today Poll, Feb. 2001; Pew Forum on Religion, Mar. 2001.

opportunity, or access, as other groups. Approval rates were seventy-seven and seventy-eight percent, respectively. Five of the questions (1986, 1987, 1999, 2001) specified use of facilities "after school hours," or "when classes are not in session," with support ranging from seventy to eighty-one percent. One of the lowest levels of approval was in 1997, in response to the question, "(I'm going to read you some ways people might exercise their First Amendment right of freedom of religion. For each, tell me if you agree or disagree that someone should be free to do it... Public school students should be allowed to form a religious club that meets on school property." Seventy-one percent agreed with the question (with forty-four percent reporting strong agreement). Thus, in response to all eight of the questions, public opinion showed high levels of support, seventy-percent and above, for use of public school facilities by student religious groups.

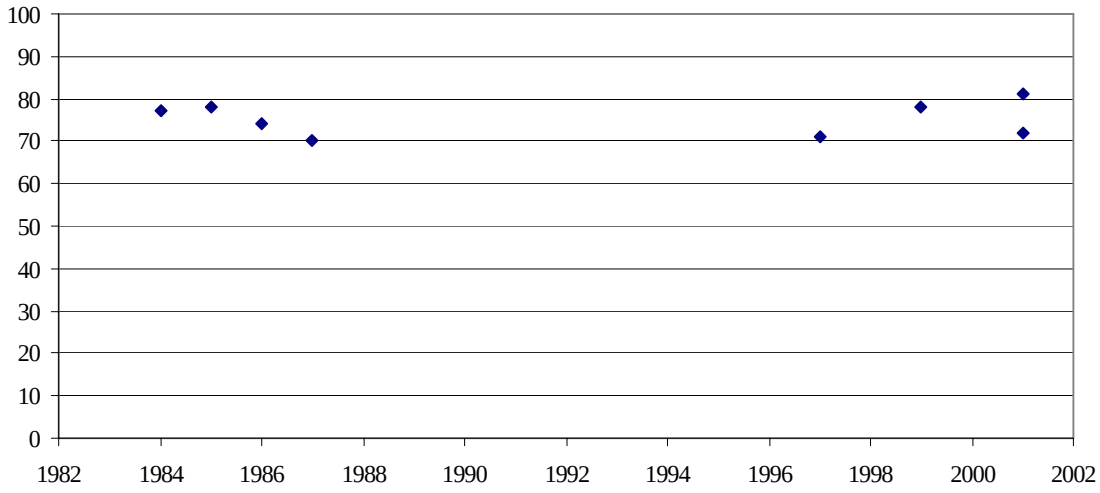

Figure 4.1. Approval for student religious groups to use public school facilities, 1984-2001

The 1993 and 2001 cases involved use of public school facilities by non-student religious groups after school hours. In 1991, a poll asked respondents if they believed voluntary Christian fellowship groups and voluntary Bible classes should be allowed on

school grounds; seventy-eight percent answered yes to both questions.[20] Then, in 2001, respondents were asked, "Would you object to public schools making facilities available after school hours for use by religious groups or organizations, or wouldn't you object to this?"[21] Seventy-five percent answered they would not object.

As shown in Figure 4.2, public opinion has consistently reported support for the use of public school facilities by student and non-student religious groups alike. The wording of the question did not vary greatly from one question to the next, and the wording changes that did occur did not appear to affect the level of approval. Between 1984 and 2001, public opinion consistently reported high levels of agreement with the Court's opinion that it is appropriate for public school facilities to be equally accessible to religious, as well as non-religious, groups.[22]

Government Sponsored Displays of Religious Holiday Symbols

Cases reviewed by the Supreme Court that involved religious activity on non-school government property included religious holiday displays, both on and off public property, as well as by private entities on government property. In these cases the Court turned to an Establishment Clause "test" that it had used since 1971. In 1971, in the case of *Lemon v. Kurtzman*, the Court pieced together criteria that it had used in previous

[20] Time/CNN/Yankelovich Clancy Shulman Poll, Oct. 1991.

[21] Pew Forum on Religion, Mar. 2001.

[22] Not included in this chapter was *Rosenberger v. University of Virginia*, 515 U.S. 819. At issue was a university policy that prohibited use of funds, which were generally available to student groups, for the printing of a student group's religious material. Using its freedom of expression jurisprudence, the Court ruled that the university was violating the Free Exercise Clause by denying the funding solely based on the religious content of the material. Whereas the Court had previously ruled that facilities had to be equally accessible, in *Rosenberger* it extended the equal access principle to a funding decisions, as well. Even though the Court used its equal access precedent in its decision, the specifics of the case did not align with opinion poll questions related to equal access issues.

cases in order to create a contemporary test for purposes of determining if government action was consistent with the Establishment Clause. In order to withstand the Court's scrutiny, the government needed to show a secular legislative purpose, a primary effect that did not advance religion, and a policy that did not foster an excessive entanglement between government and religion.[23]

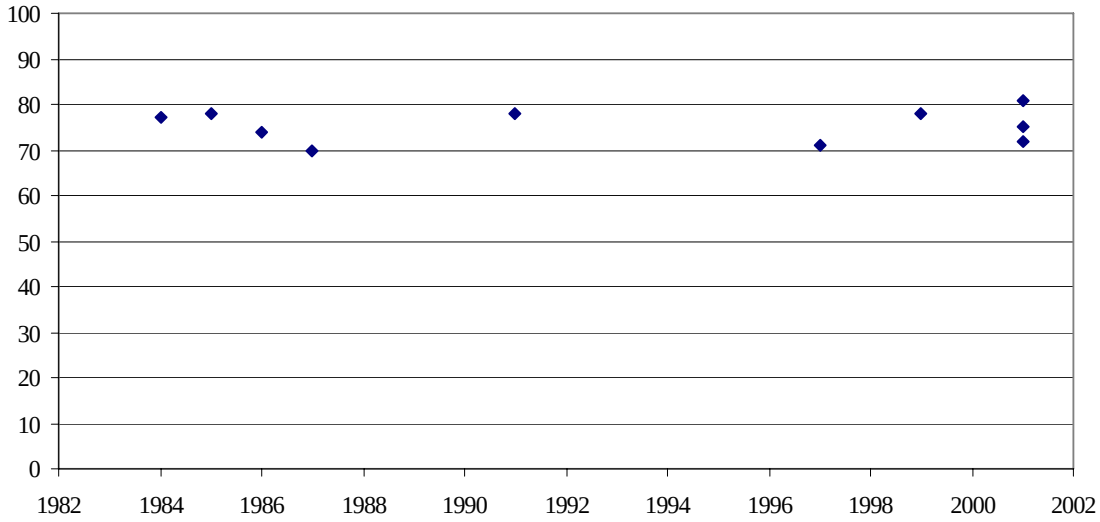

Figure 4.2. Approval for religious groups to use public school facilities, 1984-2001

In cases involving private displays on government property, the Court continued to use its Free Exercise principle of equal access. That is, if government created a forum in which some groups may express themselves, government would be in violation of the Free Exercise Clause if it placed restrictions based solely on the religious content of the expression.

[23] *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

Court Cases

In 1984, in the case of *Lynch v. Donnelly*, the Supreme Court ruled, by a 5-4 vote, that a city holiday display of a crèche, at a privately owned park, did not violate the Establishment Clause. Important to the Court's decision was that the display also included other objects, such as a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing various characters, hundreds of colored lights, and a large banner that read "SEASONS GREETINGS."[24] Stating that the Constitution "mandates accommodation," Chief Justice Burger wrote of the numerous ways throughout history that government acknowledged "our religious heritage" and sponsored "graphic manifestations of that heritage."[25] Rejecting what he referred to as an absolutist approach to the Establishment Clause, Burger reviewed the case, and particularly the crèche, as depicting "…the historical origins of this traditional event long recognized as a National Holiday."[26] Determining that the city had a secular purpose for including the crèche, that the city was not impermissibly advancing religion, and that including the crèche did not create excessive entanglement between religion and government, the Court concluded that the display did not violate the Establishment Clause.

Illustrating just how divided the Court was with regard to a holiday display of a crèche on government property, the Court in 1985 was evenly divided, by a vote of 4-4, in the case of *Board of Trustees of Village of Scarsdale v. McCreary*. This result

[24] *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984).

[25] *Lynch v. Donnelly*, 465 U.S. 668, 677 (1984). C.J. Burger, Opinion of the Court.

[26] *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). C.J. Burger, Opinion of the Court.

affirmed the judgment of the Second Circuit Court of Appeals, which had allowed the private display of a crèche on public property during the Christmas holiday season.[27]

Four years later, in the 1989 case of *Allegheny County v. Greater Pittsburgh ACLU,* the Supreme Court reviewed another holiday display of a crèche. While still divided on the issue, this time the Court issued a majority opinion. Whereas the *Lynch* case dealt with a holiday display owned and displayed by a city on private property, the *Allegheny* case involved privately owned symbols that were used as part of government holiday displays on government property. At issue were two separate displays: a stand-alone display of the crèche, with a banner stating "Gloria in Excelsis Deo," and a display that included a menorah, Christmas tree, and a sign with the words, "salute to liberty."[28] While upholding the display with the menorah and Christmas tree, the Court, by a vote of 5-4, struck down the display of the crèche. As a stand-alone display, the Court ruled that it lacked the broader, non-religious context that the Court had attributed to the display in *Lynch*. As such, the Court determined that the crèche in the *Allegheny* case had the primary effect of advancing religion and was, therefore, a violation of the Establishment Clause.

Then, in 1995, the Court, by a vote of 7-2, upheld a private holiday display of a cross on public property; the public property had been designated as a "forum for discussion of public questions and for public activities."[29] Justice Scalia, writing the Opinion of the Court, applied the Court's Free Exercise freedom of expression precedent, stating that regulation of religious content must serve a compelling state interest. Thus,

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[27] *Board of Trustees of Scarsdale v. McCreary*, 471 U.S. 83 (1985); 739 F2d. 716 (1984).

[28] *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 573-579 (1989).

[29] *Capitol Sq. Review Bd. V. Pinette*, 515 U.S. 753 (1995).

as in the cases dealing with religious expression in public school forums, the Court's opinion was that government, when it has created a public forum, must provide equal access to religious and non-religious expressions alike. As such, it was not a violation of the Establishment Clause for the display to be present on public property that had been designated as a public forum.

Regarding government displays of religion during the holiday season, the Court has determined that a stand-alone display of a religious symbol (*i.e.*, a crèche) is a violation of the Establishment Clause. However, a holiday display that includes a religious symbol as one of many holiday decorations, where the overall context is not purely religious, is acceptable. Likewise, holiday religious symbols displayed by private individuals and groups on property designated as a public forum is not a violation of the Establishment Clause; in fact, these displays would be protected by the Free Exercise Clause.

Public Opinion

In 1987 respondents were asked if it was "…O.K. for a city government to put up a manger scene on government property at Christmas."[30] Eighty percent answered yes. The same poll asked if it would be "…O.K. for a city government to put up candles on government property for a Jewish religious celebration." Seventy-nine percent answered yes. As shown in Figure 4.3, support for government displays of religious symbols during the holiday season has been between sixty-two and eighty-seven percent.[31] The

[30] Religion And Public Life, Dec. 1987.

[31] Religion And Public Life, Dec. 1987; Time/CNN/Yankelovich Clancy Shulman Poll, Oct. 1991; Fox News/Opinion Dynamics Poll, Dec. 1998; Time/CNN/Harris Interactive Poll, Sep. 2003; Fox News/Opinion Dynamics Poll, Dec. 2003; FOX News/Opinion Dynamics Poll, Nov. 2005; Pew News Interest Index Poll, Dec. 2005.

higher levels of support (eighty percent in 1987, eighty-seven percent in 2003, and eighty-three percent in 2005) were in response to questions that asked solely about government displays of nativity, or manger scenes (*i.e.*, displays of a crèche).[32] The lowest levels of support, sixty-seven percent in 1991 and sixty-two percent in 2003, were in response to questions that asked respondents if they favored or opposed "displaying such religious symbols such as a Christian nativity scene or Jewish menorah, on government property such as city hall lawn."[33]

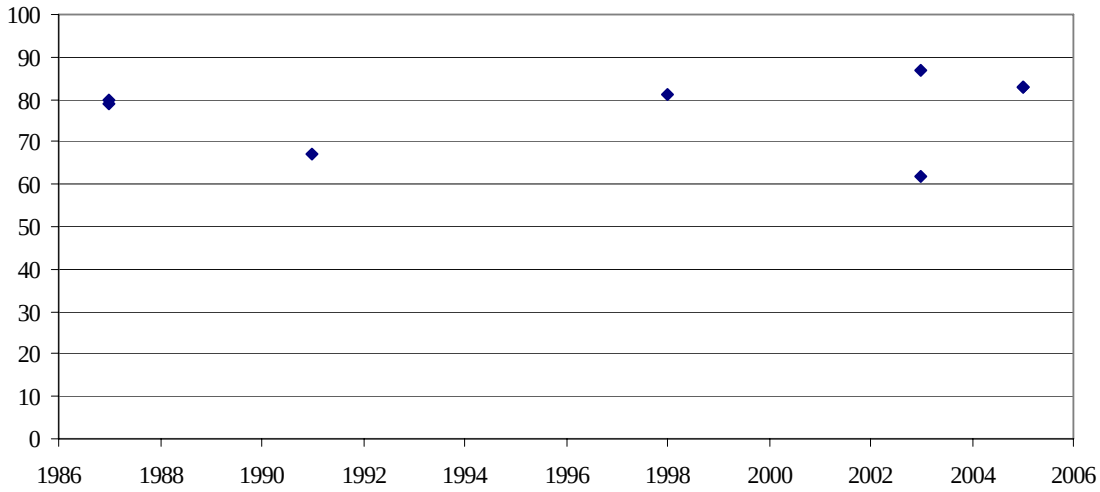

Figure 4.3. Support for government holiday displays of religious symbols, 1987-2005

Whereas the two 1987 questions referenced above would lead one to believe that opinion did not fluctuate based on the specific religion being represented by the symbol, these responses indicate a different conclusion. Adding the words "Jewish menorah" to the questions resulted in approximately a twenty percent decline in support of a government display of religious symbols. Perhaps the structure of the poll questions led

[32] The question in 1998 asked, "In recent years, many communities have prohibited Christmas decorations or a display of the manger scene on public property such as in government buildings. Do you approve or disapprove of allowing Christmas decorations on public property?"

[33] Time/CNN/Yankelovich Clancy Shulman Poll, Oct, 1991; and Time/CNN/Harris Interactive Poll, Sep, 2003.

to the difference in response rates. The 1987 question about candles for a Jewish religious celebration was asked immediately after the question about the manger scene at Christmas time. Respondents may have felt some "halo effect" when answering the second question, feeling the need to reciprocate the ability of both Christian and Jewish groups to be represented. The 1991 and 2003 questions that included both the nativity scene and menorah in the same question were preceded by a school prayer question (to which seventy-eight and seventy-six percent, respectively, favored allowing school children to say prayers in public school); the 1991 poll question was then followed by a question about making it mandatory to teach the biblical version of evolution in the classroom (to which a plurality answered in favor); and the 2003 question was followed by a question about removing references to God from all oaths of public office (to which seventy-seven percent disapproved).

These lower levels of support are also consistent with a 2003 poll that asked respondents, "If Christmas nativity scenes are placed on public property, do you think a Jewish holiday symbol, such as a menorah, and other religious symbols must also be displayed or can Christmas decorations be displayed even if symbols from other religions are not?"[34] Sixty-one percent answered yes, that if Christmas nativity scenes are placed on public property, then other religious symbols, such as a menorah, should also be displayed. Similarly, another 2003 poll reported fifty-eight percent in agreement that it was acceptable to display symbols for all religions.[35] This level of support (sixty-one percent) is similar to the level of support in response to the questions that included

[34] Fox News/Opinion Dynamics Poll, Dec. 2003.

[35] Gallup/CNN/USA Today Poll, Sep. 2003.

mention of a nativity scene and menorah, as opposed to the questions asking solely about nativity scenes, which received support in excess of eighty percent.

In its decisions regarding government displays of religious symbols during the holiday season, the Court made it clear that the displays must have a secular purpose in order to maintain constitutional validity. In other words, it was possible for displays of religious symbols to have a secular purpose. In 1996, respondents were asked if they believed "…most Americans focus on the material aspects of Christmas rather than the religious or spiritual aspects."[36] Eighty-five percent were in agreement with the statement, with fifty-four percent in strong agreement.[37] Further, sixty-nine percent of respondents in 2005 reported that they believed a Christmas tree was more a cultural than a religious symbol.[38] Thus, public opinion appears to share the Court's view that, to most Americans at least, there are non-religious aspects of religious holidays and holiday decorations.

Even though public opinion polls have reported high levels of support for government displays of religious symbols during the holiday season, there appears to be only mild public interest in the issue. In December 2005, respondents were asked, "(As I read a few things about this Christmas holiday season, tell me how much, if at all, each bothers you.) Does...opposition to religious symbols in public places bother you a lot, some, not much, or not at all?" Fifty-six percent answered "not at all."[39] Therefore, even

[36] KRC Research Survey, Nov. 1996; U.S. News, Nov. 1996.

[37] However, in response to a different question in the same poll, sixty-three percent reported that they and their family did not focus on the material, rather than the religious or spiritual, aspects of Christmas.

[38] Fox News/Opinion Dynamics Poll, Nov. 2005.

[39] Pew News Interest Index Poll, Dec. 2005.

though public opinion between 1987 and 2005 indicated a high level of support for religious holiday displays, this poll would suggest that public opinion does not feel strongly about the issue.

It is harder to determine if the Court's 1995 decision to uphold a private display of a cross on government property during the holiday season is in agreement with public opinion. On the one hand, public opinion has shown high levels of support for displays of holiday decorations, including religious symbols, on government property. On the other hand, in response to a 1997 question, "I'm going to read you some ways people might exercise their First Amendment right of freedom of religion. For each, tell me if you agree or disagree that someone should be free to do it …People should be allowed to display religious symbols on government property,"[40] public opinion was evenly divided, with forty-seven percent in agreement and forty-seven percent in disagreement.[41] This makes it difficult to determine if public opinion supported the Court's decision in 1995 to allow a private display of a cross on government property (public forum) during the holiday season. Since questions have not asked specifically about private displays of the cross on government property, it is hard to gauge public opinion on the specific issue. However, this one poll shows that, while Americans may not object to government holiday displays of religion, there is not a clear consensus that individuals should have a constitutional right to display their religious symbols on government property.

[40] State of the First Amendment Survey, Jul. 1997.

[41] State Of The First Amendment Survey, Jul. 1997.

Displays of the Ten Commandments on Government Property

In August 2003, an opinion poll reported that seventy-seven percent of respondents did not agree with a federal court decision that ordered an Alabama court to remove a public display of the Ten Commandments from its building.[42] In September, the Pew News Interest Index Poll reported that sixty-three percent of the nation closely followed the removal of the five thousand pound granite monument from the courthouse.[43] While the Alabama issue did not involve the Supreme Court, these public opinion expressions are generally representative of public opinion regarding displays of the Ten Commandments on government property.

Government displays of the Ten Commandments were central in cases involving religion in public schools. In those cases, the Court concluded that displays of the Ten Commandments, lacking any context providing for a secular purpose, were a violation of the Establishment Clause. While the Court has used a similar principle in deciding cases dealing with displays of the Ten Commandments on non-school public property, it has not ruled against all displays on non-school government property. Central to the Court's rulings in the non-school cases were the context and history of the displays.

Court Cases

In the 2005 case of *McCreary County v. ACLU*, the displays in question were the result of a legal requirement to post copies of the Ten Commandments on the walls of county courthouses for purposes of showing that they were Kentucky's "precedent legal

[42] Gallup/CNN/USA Today Poll, Aug. 2003.

[43] Pew News Interest Index Poll, Sep. 2003.

code."[44] As a result of litigation, the displays were expanded to include other historical documents, also with religious references. However, the Supreme Court ruled that the "predominantly religious purpose" of the displays invalidated them under the Establishment Clause.[45]

Another case involving a display of the Ten Commandments on non-school government property, and also decided in 2005, was *Van Orden v. Perry*. In this case, the Court upheld a display of the Ten Commandments that had been donated by a private group and was part of a display that included 21 historical markers and 17 monuments surrounding the Texas State Capitol building.[46] Expressing language from *Lynch*, that government may promote a religious message without violating the Establishment Clause, and distinguishing this case from displays in elementary and secondary public schools, Chief Justice Rehnquist, announcing the judgment of the Court, wrote, "We cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment."[47]

In 2009, the Court then ruled that government was not required to accept a request to display a religious monument on public property, even though it had allowed a display of the Ten Commandments, by a private group, on that same property. Explaining the distinction between temporary and permanent displays of religion on government property, Justice Alito, writing the Opinion of the Court in *Pleasant Grove City v.*

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[44] *McCreary County, Kentucky, et al. v. American Civil Liberties Union of Kentucky et al*., 545 U.S. 844 (2005).

[45] *McCreary County, Kentucky, et al. v. American Civil Liberties Union of Kentucky et al*., 545 U.S. 844, 881 (2005).

[46] *Van Orden v. Perry*, 545 U.S. 677 (2005).

[47] *Van Orden v. Perry*, 545 U.S. 677, 692 (2005).

Summum, stated that, whereas temporary displays on government property might be subject to free speech [and free exercise] protection, "The placement of a permanent monument in a public park is a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause."[48] All that was required of government, when it chose to display a permanent religious symbol, was compliance with the Establishment Clause. Thus, while government is restricted by the Establishment Clause as to the nature of its displays of religious symbols, individuals do not have Free Exercise protection to require government to include displays of specific religious symbols on government property that has not been designated as a public forum.

Public Opinion

Public opinion has shown high levels of support for displays of the Ten Commandments on public property. Between 2003 and 2009, public opinion polls reported support, between sixty-eight and seventy-seven percent, in favor of displays of the Ten Commandments on government property.[49] In 2005, five different polls asked questions about this issue. The polls asked respondents if they thought "…it should be legal or illegal to display the Ten Commandments on government property"[50]; if the Supreme Court should allow the displays in the Texas and Kentucky cases[51]; if "…the display of the Ten Commandments ought to be allowed on government property such as

[48] *Pleasant Grove City, Utah, et al., v. Summum*, 555 U.S. ___ (2009).

[49] Time/CNN/Harris Interactive Poll, Sep. 2003; Gallup/CNN/USA Today Poll, Sep. 2003; Gallup/CNN/USA Today Poll, Feb. 2005; Associated Press/Ipsos-Public Affairs Poll, Feb. 2005; FOX News/Opinion Dynamics Poll, Mar. 2005; Gallup/CNN/USA Today Poll, Jun. 2005; FOX News/Opinion Dynamics Poll, Nov. 2005; FOX News/Opinion Dynamics Poll, Aug. 2009.

[50] FOX News/Opinion Dynamics Poll, Nov, 2005.

courthouses."[52] Response rates to the 2005 polls ranged from seventy-four to seventy-seven percent in favor of the displays of the Ten Commandments.

The level of support for displays of the Ten Commandments on government property is similar to support reported for displays of the Ten Commandments in public schools. As shown in Figure 4.4, support for displays of the Ten Commandments on government property, whether school or non-school, has consistently exceeded sixty-percent. Also evident is that support for displays of the Ten Commandments on non-school government property, specifically relating to the 2005 cases, is on average marginally higher than for displays in public schools.

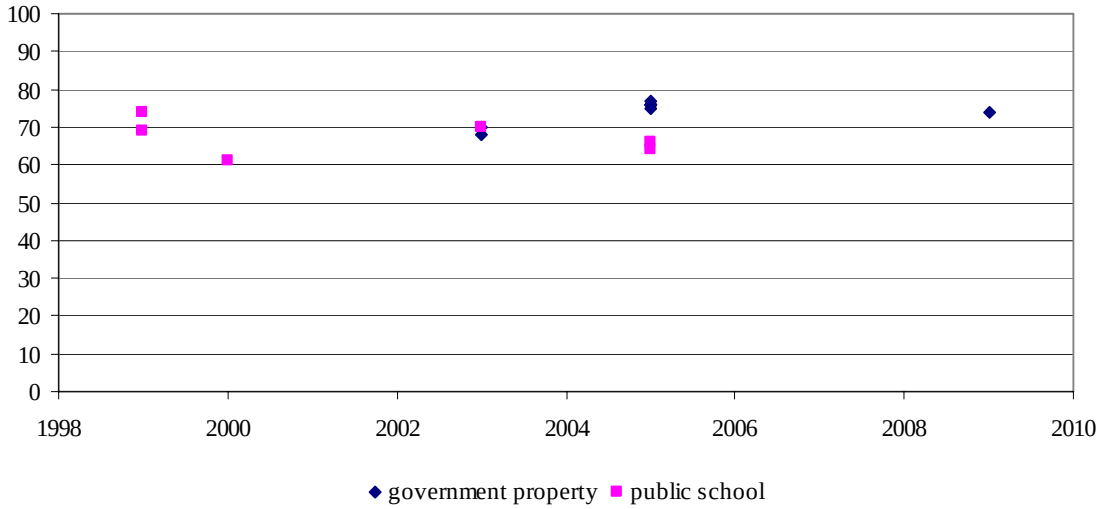

Figure 4.4. Support for displays of the Ten Commandments, 1999-2009

Also, public interest in displays of the Ten Commandments appears to be significantly higher than it was for government holiday religious displays. In 2005 respondents were asked, "(As I read some issues the Supreme Court may rule on over the

[51] Gallup/CNN/USA Today Poll, Jun, 2005; and Gallup/CNN/USA Today Poll, Feb, 2005.

[52] Associated Press/Ipsos-Public Affairs Poll, Feb, 2005; and Associated Press/Ipsos-Public Affairs Poll, Feb, 2005

coming years, please tell how important each issue is to your personally.) Are court decisions on...whether to allow religious displays on government property very important, fairly important, not too important, or not at all important to you?"[53] Fifty-five percent responded that the issue was very important, and twenty-five percent answered that the issue was fairly important. When asked the same question later in the year, forty-six percent of respondents answered the issue was very important, and twenty-five percent responded the issue was fairly important.[54] Therefore, eighty percent and seventy-one percent, respectively, of respondents in 2005 reported interest in the issue, with a plurality in both polls expressing the issue was "very" important.

The Supreme Court is, therefore, partly at odds with public opinion on the matter. Whereas the Supreme Court's criteria will result in some displays being ruled unconstitutional, public opinion shows constant support for displays of the Ten Commandments, including those that have been struck down by the Court. Due to the high levels of support for postings of the Ten Commandments, and due to the previously noted hesitation to amend the constitution to overrule the Court decisions regarding religion in public school, it would be interesting to see the results of public opinion polls that inquire about support for an amendment the United States Constitution to allow for displays of the Ten Commandments on government property.

Legislative Prayer

It is not often that the Supreme Court issues an opinion on the constitutionality of a government activity that has continued, uninterrupted, for approximately two hundred

[53] Pew News Interest Index Poll, Jul. 2005.

[54] Pew News Interest Index Poll, Nov. 2005.

years. However, the 1983 case of *Marsh v. Chambers* presented just such a situation. At issue was the practice of opening a legislative session with a prayer composed and led by a chaplain who was chosen by a legislative council and paid with public funds. By a vote of 6-3, the Supreme Court ruled that the history and tradition of our country included the "…opening of sessions of legislative and other deliberative public bodies with prayer…"[55] and that the practice was, therefore, not a violation of the Establishment Clause.

In December of 1987, an opinion poll asked if respondents agreed or disagreed that "It's good for Congress to start sessions with a public prayer."[56] Sixty-four percent agreed, with twelve percent answering "don't know." Whereas the Supreme Court's decision in the *Marsh* case was specifically related to the Nebraska Legislature, this expression of public opinion is most likely an accurate representation of public opinion on the issue. As such, it is probable that public opinion agrees with the Court's opinion on the matter.

Discussion and Conclusion

In general, the Supreme Court's rulings were in agreement with public opinion for cases dealing with religious expression and government property. As shown in Table 4.1, for those decisions that could be matched with a contemporary public opinion poll reported within five years of the ruling, the Supreme Court issued decisions consistent with public opinion approximately seventy-eight percent of the time.

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[55] *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

[56] Religion And Public Life, Dec. 1987.

In addition, the polls that exist can, potentially, provide a level of understanding about the relationship between the Court's decisions and public opinion for cases not included in Table 4.1. For example, the Supreme Court is in agreement with public opinion that student and non-student religious groups should be given equal access to public school facilities. As illustrated above, the Court's decisions in 1981, 1990, and 2001 were consistent with contemporary public opinion. While the Court's 1993 decision on the same issue could not be matched with an opinion poll within five years of the ruling, the trend of public opinion between 1984 and 2001 would indicate that the Court's decision was consistent with public opinion on the matter.

Table 4.1. Measure of congruence for cases dealing with religious symbols and expression on government property

Case	Date of Decision	Policy	Public Opinion (%)	Relationship	
				agree	disagree
Widmar v. Vincent	1981	struck down	77	x	
Westside Community Bd. of Ed. v. Mergens	1990	struck down	74	x	
Good News Club et al. v. Milford Central School	2001	struck down	75	x	
Lynch v. Donnelly	1984	upheld	80	x	
Board of Trustees of Village of Scarsdale v. McCreary	1985	upheld	80	x	
Allegheny County v. Greater Pittsburgh ACLU - creche	1989	struck down	75		x
Allegheny County v. Greater Pittsburgh ACLU - broad display	1989	upheld	75	x	
McCreary County v. ACLU	2005	struck down	76		x
Van Orden v. Perry	2005	upheld	76	x	

The relationship between the Court's opinion and public opinion on the issue of government holiday displays of religious symbols, however, is more complex. In 1984, the Court upheld a city's holiday display that included both religious (a Nativity scene) and non-religious symbols. In 1987, eighty percent of respondents agreed that a city should be able to put up a manger scene at Christmas. However, the Court in 1989 struck down a stand-alone display of a crèche depicting the Christian Nativity scene, while upholding a display that included a Christmas tree and menorah. The Court's decision with regard to the crèche is inconsistent with the 1987 opinion poll referenced above, as well as with a 1991 opinion poll, to which sixty-seven percent agreed that it was acceptable for a display of religious symbols, such as a Christian nativity scene or Jewish menorah, on government property. Of course, this response also shows approval of the Court's decision to uphold the display that included a menorah. As such, the Court has been in agreement with public opinion each time it has upheld a government-sponsored religious holiday display, and has been in disagreement with public opinion each time it has ruled against a government-sponsored religious holiday display.

It is harder to determine if public opinion is in agreement with the Court's 1995 decision to allow a private display of a cross on government property during the holiday season. On the one hand, public opinion has shown high levels of support for displays of holiday decorations, including religious symbols, on government property. On the other hand, as indicated in a 1997 poll, public opinion appears evenly split about whether people should be able to exercise their religious liberties by displaying religious symbols on government property. Further, public opinion polls have not asked specifically about displays of a cross.

The relationship between public opinion and the Court's opinion regarding displays of the Ten Commandments on government property is similar to that of government sponsored displays of religious holiday symbols. Public opinion has shown high levels of approval of such displays. Therefore, the Court has been in agreement with public opinion when it has upheld the displays and in disagreement with public opinion when it has ruled against the displays. In 2005, the Court upheld the display in the Texas case, an opinion that was consistent with public opinion. However, the Court was inconsistent with public opinion when it struck down the displays in the Kentucky case.

As shown in figure 4.5, public opinion has generally supported government displays of religion. While the highest rate of support was for displays of religious holiday symbols, so too was the lowest. Questions asking about government religious holiday displays had a higher rate of fluctuation than did questions about displays of the Ten Commandments.

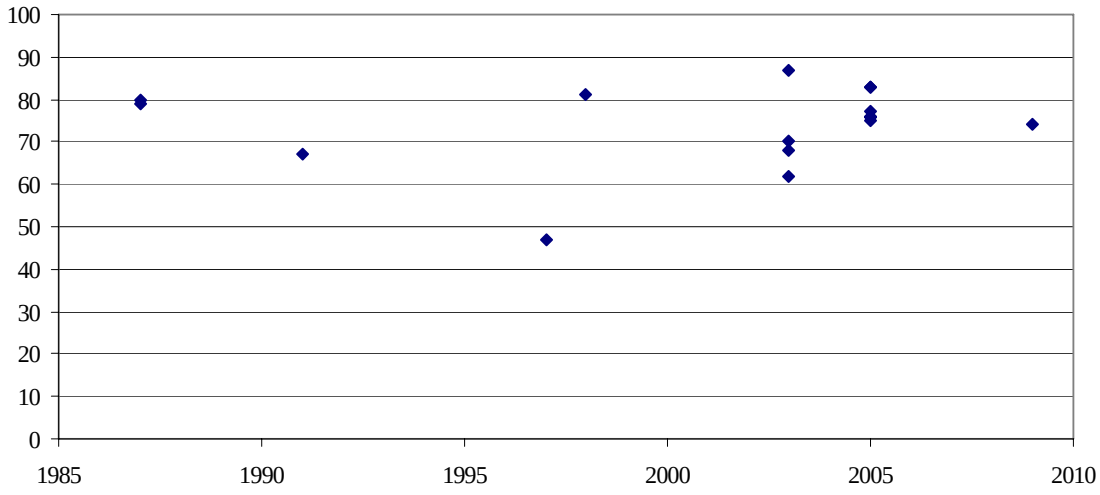

Figure 4.5. Support for government-sponsored religious displays

Overall support for government displays of religious symbols is further illustrated by a 2005 poll that asked respondents if they would oppose any of the following three options, to which they could choose more than one: the posting of the Ten Commandments in the lobby of a public courthouse, the display of a nativity scene in the cafeteria of a public office building, or a Star of David memorial to Holocaust victims in a public park. Fifty-four percent of the respondents answered they would be opposed to none of the above.[57]

The one poll that did not report a majority of respondents in favor of a government-sponsored religious display was in 1997, where public opinion was forty-seven percent in agreement and forty-seven percent in disagreement, about whether people should be able to exercise their religious liberties by displaying religious symbols on government property. As stated above, this poll makes it difficult to determine if public opinion supported the Court's decision in 1995 to allow a private display of a cross on government property (public forum) during the holiday season. It is similarly difficult to assess the relationship between the Court's 2009 decision (regarding a request to display a religious monument on public property) with public opinion, since the most recent opinion poll on the matter was in 1997 and it reported an evenly divided public sentiment. Since the Court has continued to rule on cases involving the ability of private individuals and groups to display religious symbols on government property, it would be useful to have additional public opinion polling on this issue.

The 1997 poll result also makes it difficult to determine public opinion for other situations. For example, in 2010 the Supreme Court reviewed a case involving a cross

[57] Council for America's First Freedom Survey, Jul. 2005

that had been placed on federal land in 1934 by members of the Veterans of Foreign Wars in order to honor American soldiers who died in World War I.[58] The Court did not issue an opinion on the basis of the Establishment Clause, but rather remanded it for a different purpose. While one might apply the 1997 opinion poll results to this case and conclude that public opinion is evenly divided on the issue of the cross on federal land, it is hard to know for certain if this is an accurate public opinion expression for the specific case. It is similarly difficult to know for certain how the Court would rule on the Establishment Clause issue in the case. On the one hand, it is clearly a permanent display on government property, with no secular context (stand-alone cross). On the other hand, it has a seventy-five year history, during which time it has not caused an establishment of religion within the United States.

Whether asked about government-sponsored displays of religious holiday symbols or displays of the Ten Commandments, public opinion has shown high levels of support for government displays of religious symbols. When the Court has ruled in favor of government displays of religious symbols, such as in 1984, 1989 (menorah), 1995, and 2005 (*Van Orden*), it has issued opinions in agreement with public opinion. However, when the Court ruled against religious displays, such as in 1989 (crèche) and 2005 (*McCreary*), it issued opinions that were inconsistent with public opinion.

In addition, generally speaking, public opinion seems to accept a greater degree of religious involvement in public policies than does the Court. Public opinion supports government facilities being equally accessible to religious and non-religious groups alike, a position that is consistent with the Court's opinion. Public opinion also supports

[58] *Salazar v. Buono*, 559 U.S. ___ (2010).

government sponsorship of religious holiday displays. However, public opinion does not seem to require the secular context of a holiday display that is needed to pass constitutional scrutiny by the Court.

The one area where public opinion does not appear to be in clear agreement or disagreement with the Court is private displays of religious symbols on government property. However, there is not enough polling data to make a clear conclusion about public opinion on the issue. Additional public opinion polling could help to clarify whether public opinion supports private displays of religion on public property. Likewise, understanding the Supreme Court's opinion on the issue is limited. Future cases addressing private displays on government property, such as the Establishment Clause issue in the 2010 *Salazar v. Buono* case, would help clarify the Court's position on such matters.

CHAPTER FIVE

Public Aid for Religion

Introduction

Supreme Court decisions at the turn of the twenty-first century indicated that the Court had changed its opinion on Establishment Clause cases, shifting from a position of separationism to one of accommodationism. The Court's separationist view was clear in cases dealing with religion in public schools where, beginning in the 1940's, the Court consistently ruled against public school policies where religion was part of the official school program. However, during that same period of time the Court upheld a variety of public programs that provided aid associated with religious schools. Even in cases in which the Court established guidelines that could be described as separationist, the Court never took a strict separationist approach in its rulings; it always allowed for some government aid associated with education at religious schools. In one such example, *Everson v. Board of Education*, the Court expressed an opinion that the Establishment Clause created a clear separation between church and state and then ruled in favor of the government assistance program. Writing the Opinion of the Court, Justice Black stated:

> 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. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

> In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'[1]

Whereas one might interpret the Court's language as one of strict separation, the Court's ruling was not. The Court concluded that the New Jersey policy of allowing for transportation reimbursements to parents sending their children to parochial schools was not a violation of the Establishment Clause.

Thus, beginning in the 1940's and as recently as 2002 the Court has upheld a variety of programs that involved aid associated with religious organizations, particularly religious schools. Through the decades, the Court slowly allowed for an increased level of aid to religious programs, and by the turn of the twenty-first century the Court's opinions had lost their separationist tenor. Programs reviewed by the Court dealing with aid for religious education included government loans and funding to religious schools and government assistance to religious school students and their parents, in the form of resource lending, financial reimbursements, tax deductions, and direct financial aid for costs associated with attending private religious schools.

Various aid programs for education at religious schools have been upheld based on what has been referred to as the "child-benefit" theory, whereby government aid associated with religious education could be upheld if the aid was for the benefit of the child, and the purpose of the aid was not sectarian in nature. The Court initially established this principle in the 1930 case, *Cochran v. Louisiana State Board of Education*,[2] and then used it in subsequent Establishment Clause cases, beginning in

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[1] *Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1, 15-16 (1947).

[2] *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930). This case involved a state program that provided school books, free of charge, to the school children within the state.

1947, to uphold a variety of government aid programs for students attending religious schools.

Public funding has also been provided to religious organizations that offer general social services for which government funds are available. The Court has a long history of allowing religious organizations to be eligible for government assistance associated with providing social services. This can be traced back to the Supreme Court's 1899 case, *Bradfield v. Roberts*, when the Court ruled that the Establishment Clause would not be violated simply because government aid was going to an entity owned by a religious group.[3] The Court ruled that the legal character of the institution would guide the appropriateness of the government aid, and if not sectarian in nature, then the relationship between government and the religiously-owned institution would be acceptable.[4] This precedent has woven its way into cases dealing with religious schools, where the aid has been provided directly to the religious institution, as opposed to students and parents.

Also significant is the Court's position regarding "standing" for Establishment Clause cases dealing with government financial assistance programs. The Court has long held that in order to bring an issue to a federal court an individual or organization must have "standing"; that is, they must be able to show that they are directly harmed by a law or action of government.[5] Thus, individuals could not challenge government programs solely as interested taxpayers. In 1968 the Court lowered the barrier for justiciability, with regard to standing, for government programs challenged as a violation of the First

[3] *Bradfield v. Roberts, 175 U.S. 291* (1899).

[4] *Bradfield v. Roberts, 175 U.S. 291* (1899).

[5] *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

Amendment's Establishment Clause.[6] As one author noted, this opened the courts "…to an ample tide of disestablishment cases."[7] However, the Court's 2011 interpretation of this precedent severely limited the ability of a taxpayer to challenge a tax policy on Establishment Clause grounds.[8]

In a previous chapter, analysis of the relationship between the Court's opinion and public opinion relating to issues of religion in public schools had shown that, whereas the Court's opinion was separationist, public opinion was more accommodating of the relationship. This chapter will assess the relationship between the Court's opinion and public opinion on issues dealing with public aid to religion, an area of jurisprudence where the Court has been more accommodating of the relationship between government and religion.

Government Aid for Religious Education

Based on the general belief that education is a public good, state constitutions have provided for statewide public education systems. Congress, under the Articles of Confederation, passed the Northwest Ordinance of 1787 in order to establish the first territorial government under the United States of America. While requiring land be reserved for local schools, the act did not actually create a system of public education. Instead, it served as an indication of the general consensus at the time that education was an important goal: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall

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[6] *Flast v. Cohen*, 392 U.S. 83, 105-06 (1968)

[7] John Witte, Jr., *Religion and the American Constitutional Experiment* (Boulder, Colorado: Westview Press, 2005), 187.

[8] *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. ___ (2011).

forever be encouraged."[9] Under the current United States constitution, the function of providing public education has been likewise reserved to the states.

This early expression of the significance of public education has been mirrored in some state constitutions. Several state constitutions explain education as a liberty and right of the people; for example, the Texas Constitution states, "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."[10] Other state constitutions explain that an educated citizenry is essential for the success of democratic government; for example the Constitution for the State of Idaho states, "The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools."[11]

As explained in each state constitution, public education is provided free of charge to eligible members of the state's population. As a result, each state currently operates under a system of taxation, including state and local taxes, that provides funding for its public education system. Since the mid-twentieth century the federal government has also made funding available for public education, and these funds are derived from

[9] "An Ordinance for the government of the territory of the United States northwest of the river Ohio," 13 July 1787, The Founders' Constitution, http://press-pubs.uchicago.edu/founders/documents/v1ch1s8.html (accessed September 24, 2011).

[10] *The Texas Constitution*, Art. 7, sec. 1. Other state constitutions that have similar language include Massachusetts, Rhode Island, Maine, Missouri, Florida, and California.

[11] *Constitution of the State of Idaho*, Art. IX, sec.1. Other state constitutions that have similar language include North Carolina, Indiana, Vermont, Arkansas, Michigan, Minnesota, North Dakota, South Dakota.

revenue that the federal government has generated from its own system of taxation. Therefore, residents of each state, regardless of whether they have children attending public school, contribute to the funding of public education according to the applicable local, state and federal tax codes.

Government funding for private education has been much more controversial. Since funding for public education is broadly assessed through the tax code, parents of public school children do not directly pay for tuition at local public schools. Tuition of private schools, however, must be paid separately by individuals and organizations that must still honor their financial (tax) obligations that fund the public education system.

The public school system that was developed during the nineteenth century was one that provided for a general Protestant education.[12] As a result, the Catholic Church established a separate school system "wherein Catholic children would not hear their own religion ridiculed, their own heritage discounted, or their own parents refuted."[13] Attempts in the 1830's and 1840's to pass legislation that would have provided public funding for Catholic schools were defeated.[14] By the mid-nineteenth century, the Catholic Church had become the largest single denomination in America. Following the Civil War, Catholics not only challenged Protestant practices in the public schools, but fought once again for a share of the public education funding, or at least tax exemptions from that funding in order to financially assist the parochial school system. As one

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[12] George M. Marsden, *Religion and American Culture, Second Edition* (Wadsworth, 2001), 145; John T. McGreevy, *Catholicism and American Freedom*: a History (New York: W.W. Norton & Company, 2003), 38-39.

[13] Edwin Scott Gaustad, "Church, State, and Education," in *Religion, the State, and Education*, ed. James E. Wood, Jr. (Waco, Tx: Baylor University Press, 1984), 20.

[14] Marsden, 145; Steven K. Green, "The Blaine Amendment Reconsidered," *The American Journal of Legal History* 36 (Jan., 1992): 42.

author noted, "This controversy, similar to a school funding issue some thirty years earlier, captivated public attention during the 1870's."[15] The negative popular response is illustrated by the introduction in 1875 of a proposal to amend the United States Constitution in order to prohibit states from using public education money at religious organizations.[16]

The Supreme Court in 1925 issued an important ruling protecting the ability of private schools to compete with the public education system and for parents to have a choice of education for their children. By a unanimous vote, the Court determined that a law requiring parents to send their children to a public school "…unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[17] During the twentieth century, the Court also upheld various policies allowing for public aid to be used in connection with private religious education. The forms of aid reviewed by the Court have included resources loaned to students and religious schools, reimbursements and tax deductions for costs incurred by parents who sent their children to religious schools, and direct aid to parents and religious schools for the education function at religious schools.

Even when the Court's opinion for aid associated with religious education was more separationist, it never adopted a precedent of absolute denial of aid in connection with private religious schools. The Court set this example first in 1947, and then

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[15] Green, 41.

[16] Green, 38. The Blaine Amendment passed the House in 1876 by a vote of 180-7, but came up four votes short of the 2/3 vote needed in the Senate in order to propose the amendment to the states as the sixteenth amendment to the U.S. Constitution. However, many state constitutions contain similar amendments that have prevented states from implementing voucher programs.

[17] *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925).

continued this approach, over the years expanding the level of acceptance for government assistance to religious schools and education.

Everson v. Board of Education (1947)

In the 1947 case, *Everson v. Board of Education*, the Court upheld, by a vote of 5-4, a New Jersey state policy that provided reimbursements for transportation costs incurred by parents who used the public transportation system to send their children to school. The policy was challenged due to the fact that reimbursements were given to parents "for the payment of transportation of some children in the community to Catholic parochial schools."[18] In its decision, the Court was careful to explain that, while a state could limit transportation solely to children attending public schools, it was also permissible for a state to provide this type of general benefit, without regard to a person's religious belief, as long as the benefit had a secular purpose.[19]

In 1950, an opinion poll asked respondents, "Would you agree or disagree that federal money should be given to schools run by churches to help pay for...pupils transportation to and from school?"[20] Only thirty-six percent agreed, with fifty-three percent responding that federal money should not be given to schools run by churches to help with transportation costs. This question does not provide for a direct comparison with the Court's opinion because it asked about use of federal money and referred to aid directly to the school. However, in light of general public opinion about federal

[18] *Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1, 3 (1947). The Court was not reviewing the fact that the policy did not provide transportation reimbursements to parents who sent their children to for-profit schools.

[19] *Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1, 17 (1947).

[20] Roper Commercial Survey, Jul. 1950.

expenditures for purposes of state education, this expression of public opinion can be helpful. In 1948 and 1949, public opinion polls asked respondents their opinions about a proposal in Congress at that time that would send $300 million a year to the states for school aid. In May of 1948, seventy-nine percent of respondents answered that Congress should provide the money.[21] In three additional polls, when asked if Congress should provide the money or if school aid should be left up to each state, a plurality of respondents in each poll answered that Congress should provide the money.[22]

Further, in May and December of 1948, respondents were asked if they would "be willing to pay higher taxes for school aid."[23] Between fifty-five and seventy percent answered yes. In 1950, when asked if respondents were "for or against federal aid to education,"[24] sixty-five percent responded they were in favor. Given this clear public support of federal financial support for education, it would seem reasonable to assume that public opinion expressing disagreement about federal money spent for transportation to religious schools was expressing disagreement with the funding being for a religious school, as opposed to the funding being from the federal government. This is further supported by two polls, one in 1950 and one in 1962, which asked respondents if they believed federal money should go only to public schools, or if it should also go to

[21] Gallup Poll (AIPO), May 1948.

[22] Gallup Poll (AIPO), May 1949; Gallup Poll, Dec. 1948; and Gallup Poll, May 1948.

[23] Gallup Poll (AIPO), May 1949 (this poll specifically referred to federal taxes, whereas the other two polls did not specify); Gallup Poll, Dec. 1948; Gallup Poll (AIPO), Dec. 1948; Gallup Poll (AIPO), May 1948

[24] Roper Commercial Survey, Jul. 1950.

religious schools.[25] In both polls, a plurality answered that it should go only to public schools.

New Jersey was in the process of establishing a new state constitution at the time the Court was deciding the *Everson* case. Since the Supreme Court had made it clear that a state was not required to provide aid for transportation to non-public school students, and therefore state supreme courts could review policies for compliance with state constitutions, the state of New Jersey included the following language in its 1947 constitution: "The Legislature may, within reasonable limitations as to distance to be prescribed, provide for the transportation of children within the ages of five to eighteen years inclusive to and from any school."[26] Even without a public opinion poll asking specifically about the *Everson* case, this addition to the New Jersey state constitution is a clear expression of agreement, by the delegates at the state constitutional convention, with the Court's opinion and an interest in preserving the protection for the state to provide transportation to all school children, including those attending religious schools, in the state of New Jersey.

Board of Education v. Allen (1968)

The Court first ruled on, and upheld, the validity of a state law authorizing the lending of textbooks to school children (attending public and private, religious and non-religious, schools) in the 1930 case, *Cochran v. Louisiana State Board of Education*.[27] However, it was not until 1968 that the Court, in *Board of Education v. Allen*, reviewed a

[25] Roper Commercial Survey, Jul, 1950; Gallup Poll (AIPO), Jul. 1962.

[26] *New Jersey State Constitution 1947*, Article VIII, Section IV, paragraph 3. Delaware, New York, Michigan, and South Dakota have similar constitutional provisions.

[27] *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930).

First Amendment Establishment Clause challenge to such a program. In *Allen*, the Court upheld, by a 6-3 vote, a New York state policy that authorized school authorities to loan textbooks, free of charge, to all students in grades seven to twelve, in both public and private schools.[28] Determining the purpose to be secular ("furtherance of the educational opportunities available to the young"[29]) and the primary effect to not advance religion (only secular books were loaned), the Court affirmed the policy. The Court continued, in 1975 and 1977, to uphold provisions of state laws that allocated secular-subject textbooks either directly to students or directly to non-public (including religious) schools.[30]

In 1950, respondents were asked, "Would you agree or disagree that federal money should be given to schools run by churches to help pay for...textbooks."[31] Fifty-three percent disagreed. Further, a 1965 public opinion poll asked, "Public funds are used in some states to give free bus service and free books to children in the public schools. Do you think public funds should also be used to give free bus service and free books to children in religious schools, or not?"[32] A plurality of forty-eight percent answered yes. Unlike the earlier (1950) polls, a plurality of respondents answered in favor of providing bus service and books to students in religious schools. This poll does

[28] *Board of Education v. Allen*, 392 U.S. 236 (1968).

[29] *Board of Education v. Allen*, 392 U.S. 236, 243 (1968).

[30] *Meek v. Pittenger*, 421 U.S. 349 (1975); and *Wolman v. Walter*, 433 U.S. 229 (1977). While the provision of textbooks was upheld, the Court struck down other aspects of aid to religious schools that were under review in the cases. In 1973 the Court also struck down a Mississippi policy that provided state textbooks to public and private schools, without regard to a private school's racial discrimination policy. This case was not reviewed under the First Amendment's religion clauses, and is therefore not included in this section. The issue of government aid (i.e., tax exempt status) to organizations that discriminate based on race will be reviewed in a subsequent section of this chapter.

[31] Roper Commercial Survey, Jul. 1950.

[32] Religious Life In America, Nov. 1965. Forty-one percent answered no and eleven percent undecided.

not indicate a high level, or even a majority, of support for the policy, but it also does not indicate a public as clearly opposed to such a program as had been the case in 1950. Further, the 1965 poll provides the clearest picture of contemporary opinion regarding the Court's decision and, as such, would leave one to believe that the Court issued an opinion that was in agreement with public opinion at the time.

While obviously not asking about the Court's 1968 decision, but rather the 2000 decision in *Mitchell v. Helms*, forty-nine percent (a plurality) of respondents in 2000 were in disagreement that "…taxpayer money may be used to buy computers and textbooks for religious and other private schools."[33] As seen in Figure 5.1, few questions have been asked specifically related to the issue of providing textbooks to students at religious schools, and fewer where the question asked solely about textbooks.

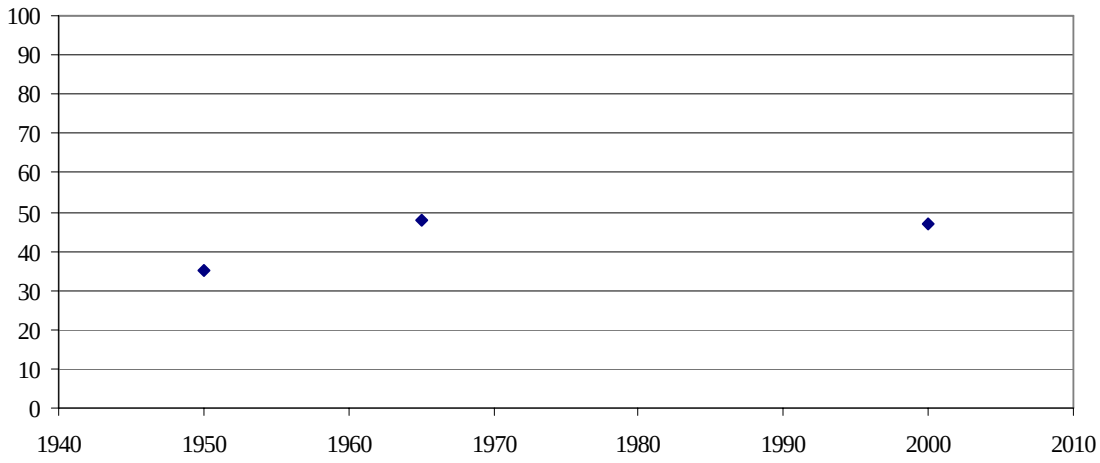

Figure 5.1. Support for providing textbooks to religious school students

However, according to the polls that do exist, only once did more respondents answer in favor of using public funds for use of textbooks, and at no time did the level of support reach a majority. Disagreement has ranged from forty-one to fifty-three percent,

[33] PSRA/Newsweek Poll, Jun. 2000.

and the rate of undecided respondents was reported as eleven percent in 1950 and 1965 and four percent in 2000. Additional public opinion polling would have clarified the relationship between the Court's decision and public opinion.

Lemon v. Kurtzman (1971)

In 1971, the Court ruled against states' policies that provided reimbursements to teachers at religious schools, as well as religious schools themselves, for secular education provided to religious school students. While the Court found the policies grounded in a secular purpose, the Court concluded that "…the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion."[34]

In 1950, a poll asked respondents if they agreed or disagreed that "…federal money should be given to schools run by churches to help pay for...teachers' salaries."[35] Sixty-one percent disagreed, with only twenty-six percent in agreement of such funding. However, there are no other public opinion polls asking specifically about government funding for teachers at religious schools. Instead, public opinion polls have asked, in general, whether respondents favor using public funds to help religious schools. As shown in Figure 5.2, in the years between 1950 and 2000, support for public aid to religious schools was generally below fifty-percent.[36] The highest rate of approval, at

[34] *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

[35] Roper Commercial Survey, Jul. 1950.

[36] Roper Commercial Survey, Jul. 1950; Religion and the American People Survey, Jun. 1952; Gallup Poll (AIPO), Mar. 1961; Gallup Poll (AIPO), Jul. 1962; Religious Life In America, Nov. 1965; Gallup/Kettering Poll of Public Attitudes Toward the Public Schools 1970, Apr. 1970; Gallup Poll (AIPO), Apr. 1972; Gallup/Kettering Poll of Public Attitudes Toward the Public Schools 1974, May 1974; Gallup/PDK Poll of Public Attitudes Toward the Public Schools 1981, May 1981; Roper Report 82-3, Feb. 1982; Gallup/PDK Poll of Public Attitudes Toward the Public Schools 1986, Apr. 1986; Los Angeles

sixty-six percent, was in response to a 2008 question that asked about opinion for government giving money to religious organizations for social services like education and aid to homeless people.[37]

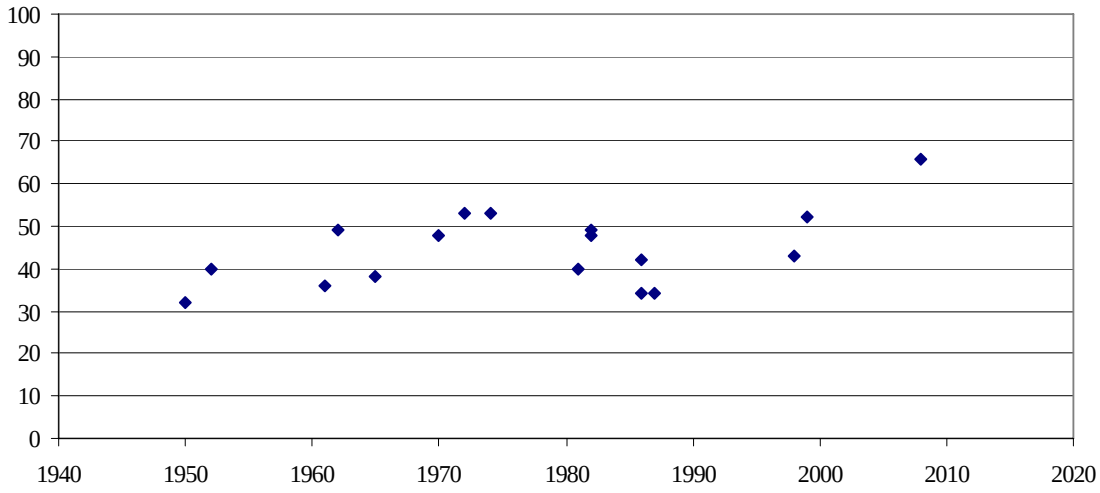

Figure 5.2. Approval of government aid to religious schools, 1950-2008

In 1952, 1965, and 1998, respondents were asked, "People who send their children to religious schools pay taxes for the support of the public schools, as well as paying for the support of the religious schools. Do you think public taxes should be used to support the religious schools also, or not?" In response to the three poll questions pluralities of forty-nine and fifty percent answered that they did not support using tax funds to support religious schools.[38] In 1970, 1981, and 1986, respondents were asked,

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Times Poll, Jul. 1986; Los Angeles Times Poll, Aug. 1987; Washington Post/Kaiser Family Foundation/Harvard Values Survey, Nov. 1998; On Thin Ice Survey, Jun. 1999; Associated Press/National Constitution Center Poll, Aug, 2008.

[37] This response rate is more in line with public opinion about faith-based initiatives (federal funding for religious organizations providing social services). It is possible that opinion expressed in this poll was directed more at faith-based initiatives than actual direct aid to religious schools. Therefore, without additional opinion polling, it is difficult to determine if public opinion increased significantly on the issue of aid to religious schools.

[38] Support ranged from thirty-eight to forty-three percent, with the rate of respondents answering "don't know" ranging from seven to twelve percent.

"It has been proposed that some government tax money be used to help parochial (church-related) schools make ends meet. How do you feel about this? Do you favor or oppose giving some government tax money to help parochial schools?" In 1970, a plurality (forty-eight percent) of respondents favored the proposal, but in 1981 and 1986 a majority of respondents (fifty-one and fifty percent, respectively) opposed the idea.[39]

In 1999, fifty-two percent answered that they would approve of "tax money going to schools run by religious organizations," with twenty-seven percent reporting strong approval and twenty-five percent reporting they somewhat approved. However, most striking of all is the response to the 1974 question, "These proposals are being suggested to amend the U.S. Constitution. As I read each one, will you tell me if you favor or oppose it: An amendment to the Constitution that would permit government financial aid to parochial schools." With fifty-three percent of respondents reporting approval, this question received the highest level of approval for this series of questions, and it was in response to a question that asked about an amendment to the U.S. Constitution. Whereas proposals to amend the Constitution had reduced an otherwise consistent rate of approval for prayer in public schools, in this case a proposal to amend the Constitution raised the rate of approval for an issue that had received lukewarm support at best.

Public opinion has been quite divided on the issue of public aid to religious schools. However, in a majority of the polls, a plurality of respondents answered they did not favor the aid, and in four of those polls the percent in disagreement was a majority. The level of uncertainty can also be seen in the rate of "undecided" and "don't know" answers to these questions. The level of uncertainty is particularly evident in two *Los*

[39] Between eight and nine percent of respondents in each poll answered "don't know" or "no opinion."

Angeles Times polls conducted in 1986 and 1987. These polls reported lower levels of support for government aid to religious schools, but they also gave respondents an opportunity to report if they hadn't heard enough about the issue to either favor or oppose the aid. As shown in Table 5.1, in response to the question, "Generally speaking, are you in favor of having the federal government provide financial aid to schools run by religious organizations or are you opposed to that--or haven't you heard enough about it yet to say," a significant rate of respondents answered that they had not heard enough about the policy to report a favorable or unfavorable opinion.[40]

Table 5.1. Support for federal financial aid to parochial schools

	Percentage of Respondents					
Year	haven't heard enough	favor strongly	favor somewhat	oppose somewhat	oppose strongly	Not Sure
1986	20	17	17	15	24	7
1987	16	17	17	15	28	7

While the number of polls in which a plurality of respondents reported disagreement with government aid to religion is greater than the number of polls in which respondents favored the policy, Figure 5.2 shows a general trend of support that appears to have increased slightly. Thus, even though a majority of the public has not shown support for government aid to religious schools during the last fifty-years, subsequent opinion polling on this issue will be useful in order to determine if there truly is an upward trend in public support for the issue.

The Court has also increased its support of government aid for education at religious schools. In 1977, the Court ruled in favor of not only textbooks, but also testing

[40] Los Angeles Times Poll, Jul, 1986; Los Angeles Times Poll, Aug, 1987.

and scoring, diagnostic services, and therapeutic services.[41] In 1980, the Court allowed reimbursements to non-public schools for state mandated requirements, such as testing and record-keeping.[42] The Court has also allowed special needs assistance to students at religious schools, a ruling in line with its principle that states could provide general benefits to citizens, without regard to religious belief, as long as the benefit had a secular purpose.[43]

During this time, however, the Court also ruled against some programs that provided aid to religious schools, making it clear that providing public funds to religious schools was, to a certain extent, still impermissible.[44] In 1973, the Supreme Court struck down two state plans that provided reimbursements to parents for tuition costs associated with sending their children to nonpublic elementary or secondary schools.[45] In these two cases, the Court ruled by a vote of 6-3 that giving the aid to parents, as opposed to directly to the school, had the same effect of providing financial support to religious schools, and was therefore a violation of the Establishment Clause.

In 1985, in two separate cases, and both by a vote of 5-4, the Court struck down state policies that allowed public employees to teach secular classes to religious school

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[41] *Wolman v. Walter*, 433 U.S. 229 (1977). In this case the Court, by a 7-2 vote, struck down aid for instructional materials and equipment, and field trips.

[42] *Committee For Public Education v. Regan*, 444 U.S. 646 (1980).

[43] *Witters v. Wash. Dept. Of Services For Blind*, 474 U.S. 481 (1986); and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).

[44] *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Wolman v. Walter*, 433 U.S. 229 (1977).

[45] *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973).

students in religious schools.[46] That same year, a public opinion poll asked respondents, "Do you think tax funds should be used to send public school teachers into religious private schools to teach non-religious courses not available in the private school, or not?"[47] Sixty-one percent answered that funds should not be used for this purpose. At a rate higher than the general public disapproval of government aid to religious schools, public opinion rejected the idea that public employees could be sent into religious schools to teach secular subjects. Thus, the Court's ruling agreed with contemporary public opinion on the issue.

Agostini v. Felton (1997) and Mitchell v. Helms (2000)

The Court's 1985 ruling in *Aguilar v. Felton* resulted in a "permanent injunction" prohibiting public school teachers from providing remedial education to disadvantaged children in parochial schools, pursuant to Title I of the Elementary and Secondary Education Act of 1965.[48] Ten years later, the parties bound by the ruling filed suit against the injunction, believing that the Court in the interim had reconsidered its Establishment Clause understanding.[49] They were correct; in 1997, the Supreme Court, in *Agostini v. Felton*, announced that it was reversing its 1985 decision that federal funds could not be used to pay the salaries of public employees who taught in parochial schools. Justice O'Connor wrote that "The doctrine of *stare decisis* does not preclude us

[46] *Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985).

[47] Associated Press/Media General Poll, Sep. 1985.

[48] *Agostini et al. v. Felton* et al., 521 U.S. 203 (1997).

[49] *Agostini et al. v. Felton* et al., 521 U.S. 203 (1997).

from recognizing the change in our law and overruling *Aguilar*…"[50] As such, the Court ruled, by a 5-4 vote, that it was now permissible for states to provide secular education by public employees in religious schools.

In the 2000 case, *Mitchell v. Helms*, the Court then used its new Establishment Clause precedent for government aid to religious schools. By a vote of 6-3, the Court upheld aid for instructional and educational materials, including library services and materials, assessments, reference materials, computer software and hardware for instructional use, and other curricular materials.[51] This decision reversed the Court's previous opinion, expressed in 1975 and 1977, that government aid could not be used for these auxiliary services at religious schools.

A public opinion poll in June of 2000 asked respondents their opinion of the "recent" Supreme Court decision that taxpayer money may be used to buy computers and textbooks for religious and other private schools.[52] Forty-nine percent (a plurality) responded that they disagreed with the Court's opinion. Thus, whereas the Court's opinion had changed between 1985 and 2000 in favor of increased support of government aid for education at religious schools, public opinion had not yet shown consistent support for the aid.

On the one hand, the slight upward trend shown in Figure 5.2 would seem to indicate that an upward shift in public opinion was mirrored by the Court to allow for increased government aid to religious schools. However, even at the increased rate, public opinion was still generally less than fifty-percent, and in a majority of the polls a

[50] *Agostini et al. v. Felton* et al., 521 U.S. 203 (1997).

[51] *Mitchell et al. v. Helms et al.*, 530 U.S. 793 (2000).

[52] PSRA/Newsweek Poll, Jun. 2000.

plurality of respondents reported that they did not favor government aid to religious schools. Thus, each time the Court increased the ability of government to provide aid to religious schools, it was issuing a decision that was not in agreement with public opinion.

Zelman v. Simmons-Harris (2002)

In 2001, the issue of school vouchers was described as "one of the most hotly debated issues in the public policy arena today."[53] Supporters of school vouchers argued that the program gave parents the ability to choose "better" educational opportunities for their children and that the private competition would improve performance of public education systems. Opponents, on the other hand, believed that the program would drain much needed funding from the public school systems and that providing public funding to private institutions of education, ninety percent of which were religiously affiliated, was a violation of the First Amendment's Establishment Clause.[54] Also of concern was whether the vouchers would subject religious schools to a financial and regulatory relationship with government that would thereby diminish the independence and quality of private education.[55]

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[53] Kathryn Kolbert and Zak Mettger, *School Vouchers* (New York: The New Press, 2001), ix.

[54] Kathryn Kolbert and Zak Mettger, *School Vouchers* (New York: The New Press, 2001), ix.

[55] Cato Institute, "Vouchers and Educational Freedom: A Debate," Cato Policy Analysis No. 269, March 12, 1997, http://www.cato.org/pubs/pas/pa-269.html (accessed October 29, 2011).

Of course, only a few states have adopted school voucher programs.[56] One obstacle that has been noted is that most states have "Blaine Amendments" that restrict aid to religious institutions.[57] Thus, while a few states have implemented publicly funded school voucher programs, other states have defeated such proposals, either by popular vote or through litigation.[58] At the national level, Congress in 2001, by a vote of 155-273, defeated an amendment to the "Leave No Child Behind Act of 2001" that would have authorized using federal funding for "private school choice for students who have attended low performing schools for at least 3 years."[59] As a result, the only federal voucher program is the one provided for the District of Columbia's public school system.

Whereas the Supreme Court in 1973 struck down two state plans that provided reimbursements to parents for tuition costs associated with sending their children to nonpublic elementary or secondary schools,[60] the Court in 2002 followed its more recent accommodationist trend and upheld a tuition aid program, also known as a voucher

[56] Only Wisconsin, Ohio, and the District of Columbia provide school voucher programs. In April 2011 Indiana also passed a voucher program. Lawsuits have been filed arguing that it violates the state's constitution, since the Indiana constitution is one of the state constitutions with a "Blaine Amendment," stating that "no money shall be drawn from the treasury, for the benefit of any religious or theological institution." It would seem as though the fate of the bill would be similar to other states that have passed voucher programs and have had them subsequently struck down by state courts based on similar constitutional language; however, as of January 2012 the state courts in Indiana have maintained the constitutionality of the program.

[57] Kavan Peterson, "School vouchers slow to spread," reported in *Stateline*, May 5, 2005, http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=29789 (accessed October 29, 2011).

[58] Edward Gokcekus, Joshua J. Phillips, and Edward Tower, "School Choice: Money, Race, and Congressional Voting on Vouchers," *Public Choice* 119 (April 2004): 242; Peterson; Trip Gabriel, "Budget Deal Fuels Revival of School Vouchers," *The New York Times* (April 14, 2011), http://www.nytimes.com/2011/04/15/us/politics/15voucher.html (accessed October 30, 2011).

[59] Gokcekus, Phillips, and Tower, 247-248.

[60] *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973).

program, for parents sending their children to religious schools.[61] The program gave parents of children in a failing school system tuition aid that could be used to send their children to school at any participating public or private (religious or non-religious) school. Divided by a 5-4 vote, the Court determined that the function being aided by government was secular (education), and that as long as government was providing the funding in a manner neutral to religion, then it was not a violation of the Establishment Clause. Echoing reasoning that was used by the Court in the *Everson* case, the Court in *Zelman* ruled that since the funds were provided to the parents, and the parents independently decided where to send their child to school, any advancement of religion was the result of a decision by the parents, and not by government or its program.

In June of 2000, a public opinion poll asked respondents their views about future presidential appointments to the Supreme Court. Fifty-two percent reported that they would like to see justices appointed who would rule in favor of allowing "…taxpayer dollars to be used for educational vouchers to help parents send their children to religious or other private schools."[62] No new justices were appointed between 2000 and 2002, but one could use this as an indicator of how public opinion, in 2000, would want the Court to rule in any upcoming case involving school vouchers. In addition, fifty-four percent of respondents in 2002 answered that they did not believe using vouchers at religious schools violated the "separation of church and state."[63] These two polls, one asking how respondents would like a justice to vote on the issue, and the other asking about the

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

[62] PSRA/Newsweek Poll, Jun. 2000.

[63] Zogby Poll, Jul. 2002.

constitutionality of the issue, indicated a slight majority of the public in agreement with the Court's decision.

Three other polls in 2002 asked respondents if they favored or opposed a voucher system, without any mention of the Court or the constitutionality of the program. Results were mixed. In May, forty-nine percent (a plurality) of respondents answered that they favored providing "…tax-funded vouchers or tax credits to parents who send their children to private or religious schools."[64] In August, forty-nine percent (a plurality) opposed "…providing parents with tax money in the form of school vouchers to help pay for their children to attend private or religious schools."[65] Finally, in July respondents were asked if they supported "…providing parents in low-income families with tax money in the form of school vouchers…," to which fifty-one percent answered yes.[66] However, when those same respondents were asked if they would still support the measure if "it meant there would be less money for the public schools," support dropped to thirty-one percent.[67] Thus, public opinion in 2002 appears divided on the issue.

Public opinion polls began questioning respondents about voucher programs in 1970. Between 1970 and 2010, over fifty questions asked respondents if they favored or opposed a voucher program. As illustrated in Figure 5.3, public opinion has varied

[64] Education Survey, May 2002. Thirty-one percent reported they strongly favor, while eighteen percent reported they somewhat favor. However, more respondents reported that they strongly opposed than strongly favored vouchers. It was the "somewhat favor" respondents that resulted in the plurality in favor of vouchers.

[65] Washington Post/Kaiser/Harvard University Politics and Policy Survey, Aug. 2002.

[66] Associated Press Poll, Jul. 2002.

[67] According to the Roper Center's data, this was not thirty-one percent of the fifty-one percent who supported vouchers; instead, it was thirty-one percent of all respondents.

considerably on the issue.[68] Opposition to vouchers has been as consistent as support for vouchers. Over the years, even with the significant level of variance from one poll to the next, the overall level of support appears to have increased.

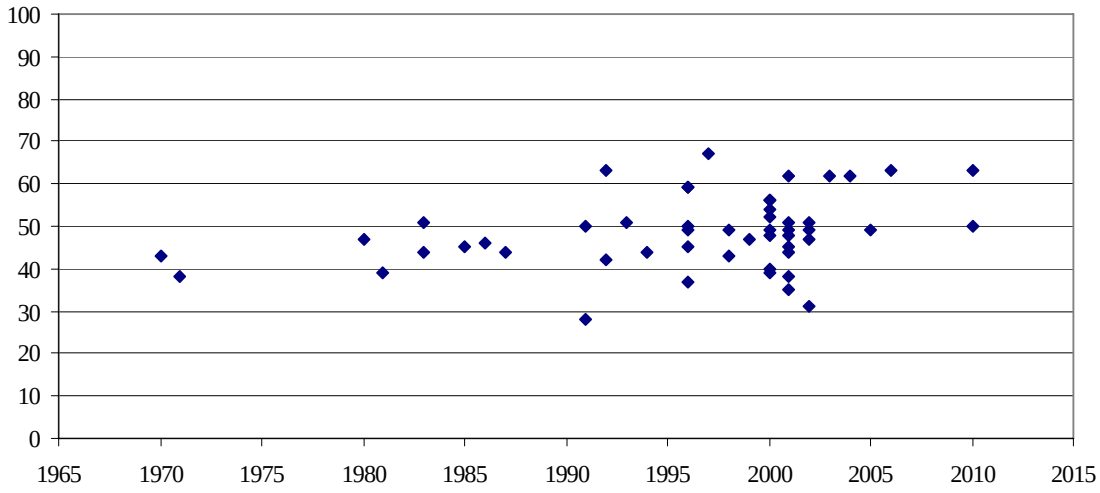

Figure 5.3. Support for a voucher program, 1970-2010

Initially, it would seem as though the wording of a question had some effect on the level of support for vouchers. For instance, between 1996 and 2005, five separate

[68] Gallup/Kettering Poll of Public Attitudes Toward the Public Schools 1970, Apr, 1970; Gallup/Kettering Poll of Public Attitudes Toward the Public Schools 1971, Apr, 1971; Gallup Poll (AIPO), Nov, 1980; Private Initiatives, Nov, 1981; New York Times Poll, Feb, 1983; Gallup Report, Jun, 1983; Gallup Poll, May, 1985; Gallup/PDK Poll of Public Attitudes Toward the Public Schools 1986, Apr, 1986; Gallup/PDK Poll of Public Attitudes Toward the Public Schools 1987, Apr, 1987; Time/CNN/Yankelovich Clancy Shulman Poll, May, 1991; Gallup/PDK Poll of Public Attitudes Toward the Public Schools 1991, May, 1991; Associated Press Poll, Aug. 1992; Los Angeles Times Poll, Oct, 1992; National Family Values, Sep, 1993; PSRA/Newsweek Poll, Aug, 1994; Gallup Poll, Apr, 1996; U.S. News , Sep, 1996; Gallup Poll, Sep, 1996; ABC News Poll, Sep, 1996; CBS News/New York Times Poll, Oct, 1996; American Viewpoint National Monitor Survey, Nov. 1996; American Viewpoint National Monitor Survey, Oct, 1997; NBC News/Wall Street Journal Poll, Jun, 1998; Washington Post/Kaiser Family Foundation/Harvard Americans on Values Survey 1998, Jul, 1998; NBC News/Wall Street Journal Poll, Jun, 1999; ABC News / Washington Post, Oct. 2000; PSRA/Newsweek Poll, Mar, 2000; Attitudes About Work, Employers, and Government Survey, May, 2000; Washington Post/Kaiser/Harvard Education Survey, May, 2000; NBC News/Wall Street Journal Poll, Aug, 2000; PSRA/Newsweek Poll, Jun, 2000; Washington Post/Kaiser/Harvard 2000 Election Values Survey, Sep, 2000; Gallup Poll, Oct, 2000; Gallup/CNN/USA Today Poll, Jan, 2001; Harris Poll, Feb, 2001; Washington Post/Kaiser/Harvard Racial Attitudes Survey, Mar, 2001; CBS News/New York Times Poll, Mar, 2001; Education Survey, May, 2001; Attitudes Toward the Public Schools Survey, May, 2001; Education Survey, May, 2002; Associated Press Poll, Jul, 2002; Washington Post/Kaiser/Harvard University Politics and Policy Survey, Aug, 2002; Faith and Family In America Survey, Jul, 2005; Princeton Survey Research Associates International/Newsweek Poll, Nov, 2006; Associated Press/Stanford University Poll, Sep, 2010; Resurgent Republic Survey, Jun, 2010.

polls asked the question, "Please tell me if you agree or disagree with the following statement: Parents should get tax-funded vouchers they can use to help pay tuition for their children to attend private or religious schools instead of public schools?"[69] Responses were relatively consistent, with support for vouchers ranging from forty-five to forty-nine percent. During this same period of time, other questions were reporting support of thirty-one to sixty-seven percent.

The wording of the question also appeared to affect the results of a 2001 Gallup poll that reported a fourteen percent difference in response to two questions that were asking what appeared to be the same question.[70] When asked, "Would you vote for or against a system giving parents government funded school vouchers to pay for tuition at a private school," forty-eight percent (a plurality) favored the vouchers. However, support increased to sixty-two percent when the same respondents were asked, "Would you vote for or against a system giving parents the option of using government funded school vouchers to pay for tuition at the public, private, or religious school of their choice?"

While these examples indicate that the wording of the question had an affect on the level of support for vouchers, the results are not as significant when reviewed on a larger scale. When all of the questions that asked about opinion related to vouchers used at private or religious school are compared to questions that asked about vouchers used at "the public, private, or religious school" of the parents' choice, on average support for vouchers increased by just over six percent when the question included "public, private, or religious school" of the parents' choice. This slight increase of support for vouchers

[69] ABC News Poll, Sep. 1996; CBS News/New York Times Poll, Oct. 1996; CBS News/New York Times Poll, Sep. 2000; CBS News/New York Times Poll, Mar. 2001; Faith and Family In America Survey, Jul. 2005.

[70] Gallup/CNN/USA Today Poll, Jan. 2001.

when public schools are included in the question is consistent with a 1992 poll, to which a plurality of respondents favored allowing "parents to choose among different public schools but would not provide vouchers for use in parochial or private schools."[71]

While not as significant as the 2001 poll might otherwise indicate, it does appear that public opinion is affected by the idea of parent choice. Higher rates of approval were reported in 1992, 1997, and 2001 in response to questions that began by statements about parents having more power to choose the school their child attends, and then asking the respondent's opinion about vouchers. In addition, four of the five poll questions reporting levels of support for vouchers in excess of sixty percent included an expression of parent "choice."

There also seems to be a slightly negative effect on the level of support for vouchers when the source of funding is described as "tax" money. When the question makes it clear that the source of voucher funds is tax money, public opinion averages just under forty-six percent in favor of vouchers. When the question does not use the word "tax," but refers to "government" funding, public opinion is a bit higher, averaging just over fifty percent in favor of vouchers. When the funding method is not mentioned in the question (the question just refers to parents being given the aid), public opinion averages almost fifty-two percent in favor of vouchers.

It is difficult to determine if the wording of the question affected the level of support reported for a voucher program, or if other factors were involved. Knowledge levels may have played a role. In 2003, respondents were asked their opinion about vouchers and, in addition to the traditional "favor" and "oppose" options, they were given

[71] Los Angeles Times Poll, Oct, 1992

the option, "haven't heard enough" to have an opinion.[72] A plurality of forty percent of the respondents answered they hadn't heard enough, compared to thirty-seven percent in favor and twenty-four percent opposed to vouchers. In 2000, when respondents were asked if they had followed the news on the issue of school vouchers, sixty-seven percent reported they had (twenty-nine percent very closely and thirty-eight percent somewhat closely).[73]

When respondents were asked if they favored or opposed vouchers, support was inconsistent, and respondents reported opposing the idea almost as often as they reported favoring the idea. However, between 1998 and 2005 respondents were asked additional questions that provided them with more flexibility in expressing their opinions about funding for education, and respondents did not express support for vouchers in response to any of these poll questions. In 1998, when given various options for improving education, vouchers received the lowest level of support, with only twenty-two percent of respondents favoring vouchers.[74] In 1999, when respondents were asked how they would vote in a hypothetical school board election, only sixteen percent reported support for vouchers.[75] A similar question in 2005 mirrored these results, with only nineteen percent favoring vouchers.[76]

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[72] Pew/Kaiser National Survey of Latinos: Education, Aug. 2003.

[73] Gallup Poll, Oct. 2000.

[74] Active Center Holds Survey, Jul. 1998. Forty-four percent supported spending more on public schools, and thirty-three percent favored charter schools.

[75] On Thin Ice Survey, Jun. 1999. A plurality of respondents (forty-seven percent) chose the candidate who believed in higher standards for public schools.

[76] Reality Check 2006 Survey, Oct. 2005. The highest level of support (forty-five percent) was given to providing more money and smaller classes to the public schools.

In 2001, respondents were given seven different statements to choose from in order to express their opinion about vouchers, and respondents could select as many options as they liked.[77] The only statement to receive a majority support, with fifty-eight percent, was, "You would rather see more money go toward the public schools than go to a voucher program." Another poll in 2001 also reported low levels of support for vouchers, with only twenty percent of respondents answering that vouchers would be the best way to improve student performance in America's schools; this was the lowest level of support among the three different options.[78]

Finally, when respondents in 2002 and 2003 were given ten options to choose from in order to express their opinion about improving public education, only five percent and three percent, respectively, chose the option, "Give students taxpayer money to leave a failing public school for a private school."[79] These questions are particularly significant for purposes of comparing to the Supreme Court's opinion because it was a failing school system at issue in *Zelman v. Simmons-Harris*.

Since 1992 public support for vouchers has been inconsistent. However, incredibly low levels of support for vouchers have been reported in polls that gave respondents an opportunity to express more fully their views regarding funding for education. In response to each question, respondents favored alternate methods of funding education, with vouchers receiving the lowest support in each instance. While it seems clear that the Court's decision was consistent with public opinion when it ruled

[77] Education Survey, May 2001.

[78] Decisive Center: Keys to Victory in 2000 Survey, Jan. 2000.

[79] Accountability For All: What Voters Want From Education Candidates, Jan. 2002; Demanding Quality Education In Tough Economic Times Survey, Jan. 2003.

that a voucher program was not a violation of the Establishment Clause, it does not appear that Americans want their state governments to actually fund education through a voucher system. This is also consistent with public opinion expressions that have supported educational decisions to be made at the state and local levels, as opposed to the national level.[80]

Government Aid to Religious Institutions of Higher Education

The Court has been much more consistent in permitting government aid to religious institutions of higher education, particularly for the construction of buildings to be used for non-sectarian purposes. These aid programs began in 1963 in response to the nationwide shortage of college and university classrooms.[81] The Court has viewed these programs differently from those involving elementary and secondary religious schools, due to the Court's belief that religion did not play as large a role in the education function at a religious institution of higher education as it did in elementary and secondary religious schools. The Court stated that there is less danger in religious institutions of higher education than in church-related primary and secondary schools "…dealing with impressionable children that religion will permeate the area of secular education, since

[80] Between 1973 and 2000, Americans have expressed support for state and local governments being the primary decision-makers regarding public education. Support for the federal government having primary responsibility for education decisions ranged from only eleven to twenty-three percent. See Harris Survey, Apr, 1973; Citizens Views and Concerns About Urban Life, Dec, 1977; Private Initiatives & Public Values, Nov, 1981; NBC News/Wall Street Journal Poll, Dec, 1994; Reader's Digest/Institute for Social Inquiry Poll, Feb, 1995; Council for Excellence in Government Poll, Mar, 1995; Washington Post/Kaiser/Harvard Education Survey, May, 2000. However, in response to questions asking specifically about creationism and prayer in public school, a plurality of respondents in three separate polls supported these education decisions to be made at the national level. See Pew Forum on Religion & Public Life/Pew Research Center for the People & the Press Survey, Jul, 2006; 1996 Survey of American Political Culture, Jan, 1996; Parents Magazine Poll (Wave 8), Jan, 1989.

[81] Eugene Eidenberg and Roy D. Morey, *An Act of Congress: The Legislative Process and the Making of Education Policy* (New York: W.W. Norton & Company, Inc., 1969), 16; *Tilton v. Richardson*, 403 U.S. 672, 675 (1971).

religious indoctrination is not a substantial purpose or activity of these church-related colleges."[82]

In 1971, the Court, in a 5-4 decision in *Tilton v. Richardson,* upheld The Higher Education Facilities Act of 1963,[83] and its use in Connecticut for projects (two library buildings; a music, drama, and arts building; a science building; and a language laboratory) at religious institutions of higher education.[84] Just as the Court in 1899 had upheld a federal construction grant to a hospital, the Court in *Tilton* upheld federal construction grants to colleges and universities. By a vote of 6-3, the Court then upheld the South Carolina Educational Facilities Authority Act and a "proposed financing transaction involving the issuance of revenue bonds benefiting a Baptist controlled college."[85] Finally, in 1976, the Court, by a vote of 5-4, upheld a state subsidy program to private institutions of higher education within the state, as long the funds were not used for sectarian purposes.[86]

Public opinion related to construction of religious school buildings was captured in 1961, prior to the passage of each of the policies reviewed by the Court. In response to the question, "Some members of Congress believe that the government should give Catholic schools long-term loans at low interest to build more school buildings. Would you approve or disapprove of this," forty-two percent approved and forty-five percent

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[82] *Tilton v. Richardson*, 403 U.S. 672, 673 (1971).

[83] *Higher Education Facilities Act of 1963*, Public Law 88-204, 88th Cong. (December 16, 1963). The law states, ""to authorize assistance to public and other nonprofit institutions of higher education in financing the construction, rehabilitation, or improvement of needed academic and related facilities in undergraduate and graduate institutions."

[84] *Tilton v. Richardson*, 403 U.S. 672 (1971).

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

[86] *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976).

disapproved, with twelve percent answering "no opinion."[87] In 1950, sixty percent of respondents disagreed when asked if federal money should be given to schools run by churches to help pay for new school buildings.[88] However, based on the questions asked before and after these questions in the polls, it appears likely that respondents believed they were providing their opinion to new elementary and secondary religious school buildings, not the type of programs (higher education facilities) involved in these cases. Public opinion data is sparse for this issue, the polls that exist were conducted decades prior to the Court's rulings, and it is not clear that respondents were answering questions related to the issues reviewed by the Court. The polls that do exist, however, indicate public disapproval of government aid for facilities at religious schools. In the end, the ability to make a statement about the relationship between the Supreme Court's opinion and public opinion on the issue is severely limited.

Government Aid for Social Services

Government aid to non-school religious organizations has not received as much attention by the Supreme Court. In general, the Court has maintained that religious organizations could be eligible for government funding for purposes of providing social services. Traditionally, religious organizations that have received federal funding for social services have removed their sectarian functions from the delivery of the services. As such, the Court in 1899 upheld federal funding to a hospital run by the Roman Catholic Church.[89] The Court also upheld, by a vote of 5-4 in 1988, the Adolescent

[87] Gallup Poll (AIPO), Mar. 1961.

[88] Roper Commercial Survey, Jul. 1950.

[89] *Bradfield v. Roberts,* 175 U.S. 291 (1899).

Family Life Act of 1981 and its involvement with religious organizations for purposes of developing programs to help delay sexual activity for adolescents and provide social services for pregnant and parent adolescents.[90]

As illustrated by Figure 5.4, public opinion has generally supported the idea of using federal funds at religious organizations to provide social services.[91] While public opinion appeared to decrease slightly after 1999, the more recent polls in 2008 and 2009, showing support in excess of sixty-five percent, make this determination uncertain. Future opinion poll data will provide a more clear understanding of the trend regarding public support for social services provided by religious organizations.

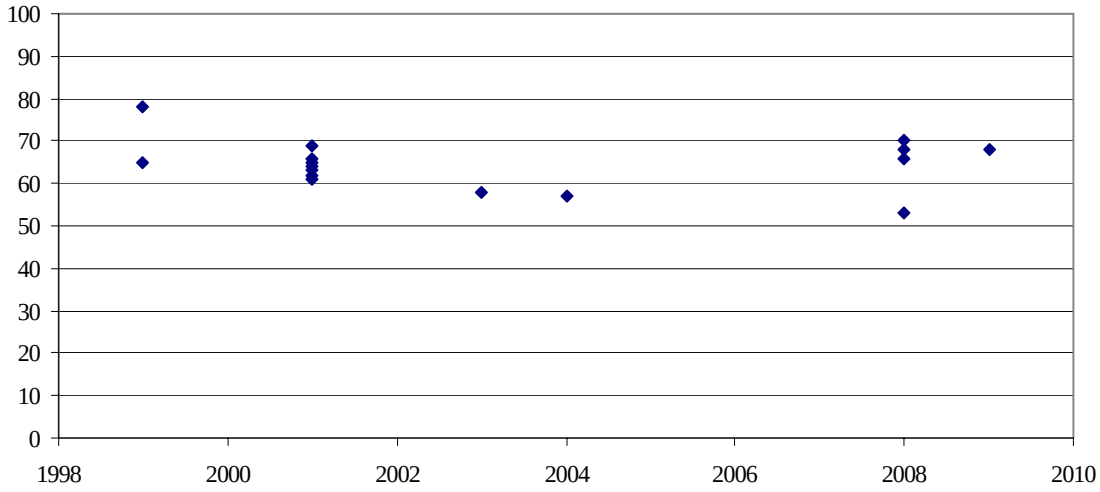

Figure 5.4. Support for funding religious organizations to provide social services, 1999-2009

[90] *Bowen v. Kendrick*, 487 U.S. 589 (1988).

[91] Community Consensus Survey, Feb. 1999, CBS News Poll, Jul. 1999; PSRA/Newsweek Poll, Feb. 2001; CBS News Poll, Feb. 2001; BAMPAC 2001 National Survey, Mar. 2001; BAMPAC 2001 National Survey, Mar. 2001; CBS News/New York Times Poll, Mar. 2001; Fox News/Opinion Dynamics Poll, Jul. 2001; Los Angeles Times Poll, Jan. 2003; CBS News/New York Times Poll, Nov. 2004; Quinnipiac University Poll, Jul. 2008; Princeton Survey Research Associates International/Newsweek Poll, Jul. 2008; Associated Press/National Constitution Center Poll, Aug. 2008; Pew Research Center for the People & the Press / Pew Forum on Religion & Public Life Religion &Public Life Survey, Jul, 2008; Pew Research Center for the People & the Press / Pew Forum on Religion & Public Life Religion &Public Life Survey, Aug, 2009.

In the late twentieth century, the term "charitable choice" was used to describe an initiative directed at increasing the presence of religious organizations as federally funded social service providers. In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act. Section 104 of the Act provided states with the ability to "…administer and provide services under the programs… through contracts with charitable, religious, or private organizations; and… provide beneficiaries of assistance under the programs… with certificates, vouchers, or other forms of disbursement which are redeemable with such organizations." Included was a restriction that, "No funds provided directly to institutions or organizations to provide services and administer programs… shall be expended for sectarian worship, instruction, or proselytization."[92] However, the organizations were allowed to maintain hiring policies based on their religious beliefs, religious symbolism on the premises where the services were provided, and the ability to control the "definition, development, practice, and expression, of its religious beliefs."[93] Thus, the act gave states the authority to administer federal funds for social services provided by overtly sectarian organizations.

In 2001, President Bush created the Office of Faith-Based and Community Initiatives, an office within the Executive Office of the President, to increase the presence of religious organizations as federally funded social service providers. As stated in his executive order, the office was created for the purpose of expanding opportunities for

[92] *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Public Law 104-193, 104th Cong. (August 22, 1966).

[93] Mark Chaves, "Religious Congregations and Welfare Reform: Who Will Take Advantage of "Charitable Choice"?, *American Sociological Review* 64 (December 1999): 836; Sheila Suess Kennedy and Wolfgang Bielefeld, "Government Shekels without Government Shackles? The Administrative Challenges of Charitable Choice," *Public Administration Review* 62 (Jan.-Feb., 2002): 4.

faith-based and community groups, in an effort to increase their role in providing social services.[94]

In 2007, in *Hein v. Freedom From Religion Foundation, Inc*., the Supreme Court reviewed an Establishment Clause challenge involving conventions held by the Office of Faith-Based and Community Initiatives that "praised the efficacy of faith-based programs in delivering social services."[95] However, the Court ruled that the respondents lacked standing to bring suit in federal Court. Since the office was not established by Congress, and since funds used to run the office were not appropriated directly for that purpose by Congress, the Court ruled that the general ability of an interested tax-payer to have standing for Establishment Clause cases did not apply. Writing the decision of the Court, Justice Alito explained that *Flast* had carved out a narrow exception for the ability of taxpayers to bring suit: first, a taxpayer may only challenge congressional acts of taxing and spending; and second, the taxpayer must show the enactment exceeds specific constitutional limitations imposed on the congressional taxing and spending power. Since neither of these applied in *Hein*, the respondents lacked standing. The policy result of the Court's 2007 ruling was to uphold the actions of the Office of Faith-Based and Community Initiatives.

In 2001, sixty-five percent of respondents answered that they supported the creation of the office of President Bush's that would enable religious organizations to receive government funds to provide services to the poor.[96] And yet, also in 2001, a

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[94] *Federal Register* 66, Executive Order 13199 of January 29, 2001, "Establishment of White House Office of Faith-Based and Community Initiatives," (January 31, 2001): 8499-8500.

[95] *Hein v. Freedom From Religion Foundation, Inc*., 551 U.S. ___ (2007). Docket No. 06-157.

[96] Los Angeles Times Poll, Mar. 2001.

majority of respondents reported they were concerned that providing public funding to religious groups for social services violated the constitutional principle of separation of church and state.[97] Of course, in that same poll, respondents reported having heard very little about the newly created Office of Faith-Based and Community Initiatives.[98] And when respondents were asked in 2008 if presidential candidate Barack Obama's position on faith-based initiatives would make them more or less likely to vote for him, seventy-one percent answered that it did not "make much difference either way."[99]

However, public opinion has expressed disapproval of federal funding for religious organizations that promote their religious beliefs while providing social services. In 2001, respondents were asked, "(Recently, President (George W.) Bush established the Office of Faith-Based and Community Initiatives, which is encouraging Congress to allow religious groups to apply for government funding for social services such as drug and alcohol abuse counseling, mentoring, help for pregnant teens and feeding the homeless.) Do you favor or oppose allowing religious groups that receive government funding to also include their own religious message along with the program?"[100] A plurality, thirty-three percent, of respondents answered they strongly opposed. When combined with the eighteen percent that "somewhat" opposed, a majority (fifty-one percent) reported opposing the ability of religious groups to include their own religious message while providing federally funded social services. Similar

[97] State of the First Amendment 2001 Survey, May 2001. Twenty-two percent reported being very concerned, with an additional twenty-nine percent answering they were somewhat concerned.

[98] Forty percent reported they had heard nothing, twenty-four percent "a little," twenty-one percent "some," and fifteen percent "a lot."

[99] Princeton Survey Research Associates International/Newsweek Poll, Jul. 2008.

[100] State of the First Amendment 2001 Survey, May 2001.

results were reported in 2008. After asking, "Do you favor or oppose allowing the government to give money to religious organizations to help them provide social services like education and aid to homeless people," respondents were asked, "What if those religious organizations promote their religious beliefs while providing social services? Would you favor or oppose allowing the government to give money to such organizations?"[101] Once again a plurality, thirty-seven percent, strongly opposed. When combined with the eighteen percent that somewhat opposed, a majority of fifty-five percent opposed giving federal funds to religious groups that promote their religious beliefs while providing social services.

Respondents in 2009 were asked to provide their opinion to the following: "Here are a few reasons why some people oppose the idea of allowing churches and other houses of worship to use government money to provide social services. Please tell me whether each one is an important concern of yours, or not....This would interfere with the separation between church and state."[102] Fifty-two percent responded this was an important concern for them. It appears that public opinion supported the more traditional approach of having religious groups provide social services in a non-sectarian manner, as opposed to the methods supported by charitable choice and faith-based initiatives. In fact, when asked if they would still support the federal funding if it was given to religious organizations such as The Nation of Islam, The Church of Scientology, and the Hare Krishnas, sixty-four percent answered no.[103] This perhaps highlights the discomfort

[101] Associated Press/National Constitution Center Poll, Aug, 2008.

[102] Pew Research Center for the People, Aug, 2009.

[103] CBS News/New York Times Poll, Mar. 2001. In a 1979 poll, only nine percent of respondents identified Hare Krishnas as a church or religion; fifty-two percent identified the group as a cult. In 1993, fifty-five percent of respondents reported having a "very unfavorable" opinion of members of religious

Americans have with government funded social services provided by religious groups that promote views of religion different from their own.

Tax Policy and Religion

An alternate form of assistance to help lessen financial costs is through tax policy. Not only have both the national and state governments provided tax exempt status to religious organizations and activities, but they have also created tax credits and deductions for individuals to help defray costs associated with religious organizations and services. The federal government has granted tax exempt status to religious organizations throughout its history, and the Supreme Court has shown general approval as far back as 1886.[104]

Tax credits, deductions, and exemptions differ from direct government expenditures in that they are not direct appropriations of public funds; instead, they are exemptions from taxes that would otherwise be due to government. The idea that tax policy should be handled in a manner similar to direct spending (appropriations) policy has not always received acceptance by the Court. According to codified law, tax expenditures are defined as "…those revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability."[105] In order to understand tax exemptions as a form of government spending,

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cults, with an additional thirty-one percent reporting a mostly unfavorable opinion. These results can be found in Gallup Poll (AIPO), Jan, 1979; and Gallup/CNN/USA Today Poll, Mar, 1993.

[104] John Whitehead, "Tax Exemption and Churches: A Historical and Constitutional Analysis," *Cumberland Law Review* 22 (1992): 551. The case cited was *Gibbons v. District of Columbia*, 116 U.S. 404 (1886).

[105] 2 U.S.C. 622, http://codes.lp.findlaw.com/uscode/2/17A/622 (accessed September 4, 2011).

one must adopt the idea that government "spends" money both through direct expenditures as well as through indirect expenditures (lost revenue, referred to here as tax expenditures). Whereas direct expenditures occur as a result of the legislative appropriations process, tax expenditures are granted through the tax code, in the form of exemptions, deductions, and credits.[106] As such, tax expenditures, as well as direct expenditures, can be viewed as methods of governmental financial assistance.

Justices of the Supreme Court, however, do not seem to have a consistent approach when dealing with tax policy. The Court has treated direct spending and tax expenditures the same in some areas of law, such as in its Free Speech jurisprudence, but tends to not consistently equate the two types of policies in Establishment Clause cases.[107] Most recently, in 2011, the Court ruled that the two were not comparable.[108]

In 1886, the Supreme Court stated that, "Congress, like any state legislature unrestricted by constitutional provisions, may at its discretion, wholly exempt certain classes of property from taxation or may tax them at a lower rate than other property."[109] The Court in 1943 then indicated that government was permitted to apply income, sales, and property taxes as applicable to religious individuals and organizations.[110] Thus, the Court has taken the position that tax exemptions for religious organizations as part of larger classes of tax exempt organizations are not violations of the Establishment Clause,

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[106] Donna D. Adler, "The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making," *Wake Forest Law Review* 28 (1993): 856.

[107] Adler, 857; Edward A. Zelinsky, "Are Tax 'Benefits' Constitutionally Equivalent to Direct Expenditures?" *Harvard Law Review* 112 (1998): 389.

[108] *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. ___ (2011).

[109] *Gibbons v. District of Columbia*, 116 U.S. 404, 408 (1886).

[110] *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105 (1943).

and generally applicable tax laws that also tax religious organizations are not a violation of the Free Exercise Clause.[111]

Walz v. Tax Commission of City of New York (1970)

The Court in 1970 applied this understanding in its first major case for state tax policy dealing with religious organizations. By a vote of 7-1, the Court upheld a New York City policy that granted tax exemptions to church property, as part of a larger group of non-profit charitable organizations eligible for tax exempt status.[112] The state provided the exemption to this broad class of non-profit organizations, considering them as "beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest."[113] The Court determined that the state could provide the tax exempt status for religious organizations, as part of this broader group of charitable organizations, without violating the Establishment Clause.[114]

As shown in Figure 5.5, public opinion has also supported tax exempt status for the non-profit functions of religious organizations.[115] The one exception was in 1987, when forty-eight percent (a plurality) reported that churches should have to pay taxes on all of their property. However, the wording of the question is vague and, as shown in the

[111] This chapter, focusing on government aid to religion, will focus on only those cases reviewed by the Court as Establishment Clause challenges to existing tax exemptions and credits. Cases involving Free Exercise challenges to be eligible for government tax exemptions will be reviewed in Chapter 6.

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

[113] *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 673 (1970).

[114] *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970). Consistent with its 1940 opinion, the Court in *Walz* did not explicitly declare that the First Amendment required government to grant tax exempt status to religious entities.

[115] Religion and the American People Survey, 1952, Jun. 1952; Religious Life In America, Nov. 1965; A National Study of Philanthropy Survey, Jun. 1974; A National Study of Philanthropy Survey, Jun. 1974; Religion And Public Life, Dec. 1987.

next section, public opinion is not as supportive of tax exemptions for religious property that generates profit. Thus, while it appears that the level of public support has reduced since 1952, it is likely that opinion has not decreased to the extent reflected in Figure 5.5. Additional polling would be helpful to more accurately assess public opinion on the issue of tax exemptions for property used for non-profit religious activity.

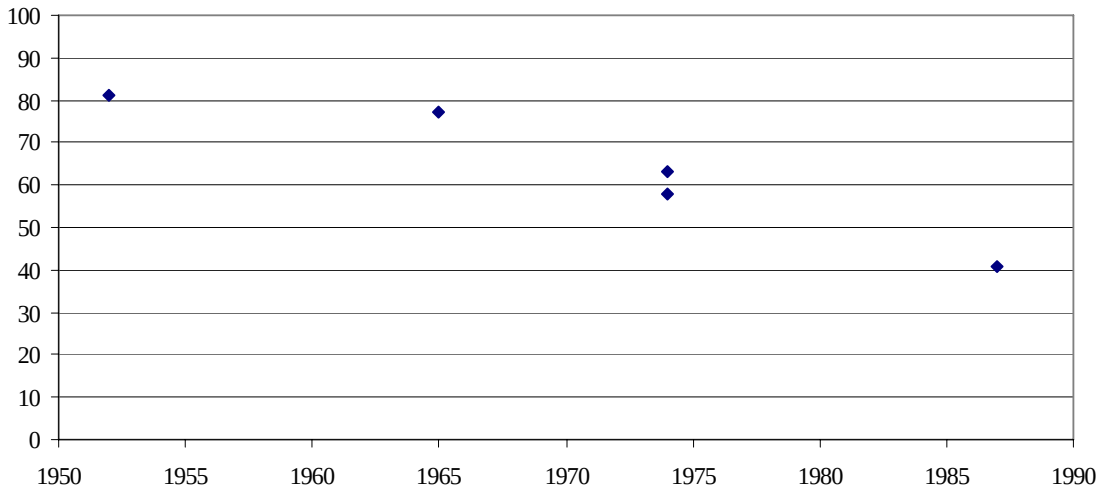

Figure 5.5. Support for property tax exemption for non-profit religious activity, 1952-1987

Texas Monthly v. Bullock (1989)

The Supreme Court has also reviewed state tax policies applied to for-profit religious activities. In 1989 the Court struck down, by a vote of 6-3, a Texas statute that granted sales tax exemptions to periodicals published or distributed by a religious faith and consisting of religious writings "promulgating the teaching of the faith," without providing the same exempt status to non-religious publications.[116] According to the Court, if a state provides tax exempt status to religious organizations, it must apply its tax

[116] *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 5 (1989).

policy equally to similar types of organizations (*i.e.*, non-profit and charitable), without regard to religious affiliation, in order to not violate the Establishment Clause.

Public opinion on the issue is not up to date and the polls that do exist do not provide a clear indication of opinion on the matter. Whereas forty-nine percent of respondents in 1952 answered they thought church property that was for-profit should be taxed, fifty-five percent of respondents in 1965 reported that it should not be taxed.[117] This is an area in which contemporary public opinion polls are needed in order to provide a more accurate and updated measure of public opinion on the issue. Since these tax policies still exist, it seems relevant to continue to capture public opinion on the issue and to continue to assess the relationship between the Court's opinion and public opinion on tax policies dealing with the for-profit functions of religious organizations.

Mueller v. Allen (1983)

State governments have also developed tax policies in order to lessen parents' financial costs associated with private education. As with other types of aid for religious schools and education, the Court began with an opinion that assistance associated with the religious education function was unconstitutional, and has since shifted to an opinion that it is acceptable. In 1973, just as the Court ruled against a tuition reimbursement program, it also determined a state income tax deduction for taxpayers with children at nonpublic schools to be a violation of the Establishment Clause. The Court ruled that, "…insofar as such benefits render assistance to parents who send their children to

[117] Religion and the American People Survey, 1952, Jun. 1952; Religious Life In America, Nov. 1965.

sectarian schools, their purpose and inevitable effects are to aid and advance those religious institutions."[118]

The Court then changed its interpretation in 1983, when the Court, divided by a 5-4 vote, ruled in favor of a Minnesota state tax deduction for tuition, textbooks, and transportation costs associated with attending elementary or secondary school.[119] In *Mueller v. Allen* the Court determined the tax deductions to be for a secular purpose, based on the understanding that, "An educated populace is essential to the political and economic health of any community, and a State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well educated."[120] Minnesota's state constitution does explain the necessity of a system of education, referring to "The stability of a republican form of government depending mainly upon the intelligence of the people."[121] However, it also prohibits the state legislature from aiding sectarian schools "wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught."[122] However, the Supreme Court was not reviewing the legality of the policy according to the state's constitution.

In 1986, three years after the Court's decision, a public opinion poll asked respondents whether they agreed, disagreed, or had no opinion about the statement, "Parents who send their children to schools run by religious organizations should receive

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[118] *Committee for Public Education v. Nyquist*, 413 U.S. 756, 793 (1973).

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

[120] *Mueller v. Allen*, 463 U.S. 388, 395 (1983).

[121] *Constitution of the State of Minnesota*, Art. XIII, sec. 1.

[122] *Constitution of the State of Minnesota*, Art. XIII, sec. 2.

a tax credit for the cost of their education."[123] Forty-three percent of the respondents agreed with the statement. However, fifty-three percent disagreed. Therefore, the Court's opinion in 1983 appears to be inconsistent with public opinion on the issue.

In 2004 and 2011, two other cases reached the Court challenging an Arizona law that provided state tax credits for contributions to school tuition organizations, where the school would then use the contributions to pay for scholarships to the students attending the private school.[124] However, in neither case did the Court rule on the constitutionality of the program based on the First Amendment's Establishment Clause. The effect of the Court's ruling in the 2011 case, however, could be significant for future Establishment Clause cases. In the Opinion of the Court, Justice Kennedy wrote that the respondent, lacking real injury from the policy, also lacked "taxpayer standing" that the Court had established in *Flast*. According to the Court, the tax credit was not an act of legislative spending, and therefore did not fit the requirement for standing for an interested taxpayer. While not ruling on Establishment Clause grounds, the Court's ruling had the impact of upholding the state tax credit policy.

While initially at odds with the Court's shift in opinion in 1983, public opinion appears to have come into alignment with the Court's opinion on this issue. While very few polls have asked specific questions about tax credits and deductions for parents incurring expenses associated with religious education, the questions that do exist reflect a shift in public opinion.[125] As shown in Figure 5.6, public opinion initially opposed tax

[123] ABC News/Washington Post Poll, Mar, 1986.

[124] *Hibbs v. Winn*, 542 U.S. 88 (2004); *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. ___ (2011).

[125] ABC News/Harris Survey, Sep. 1979; ABC News/Washington Post Poll, Mar. 1986; NBC News/Wall Street Journal Poll, May 1991; NBC News/Wall Street Journal Poll, Mar. 1997; Gallup/PDK

credits associated with religious education. However, approval increased over time and appears to be in agreement with the Court's decision on the matter. In 1998 and 1999 two questions were asked about tax credits that would allow parents to recover tuition paid for private or church-related schools. A majority of respondents supported the tax credits, with sixty-six and sixty-five percent, respectively, reporting they supported the tax credits to recover part of the tuition paid, and fifty-six and fifty-seven percent, respectively, reporting they supported tax credits to recover all of the tuition paid.

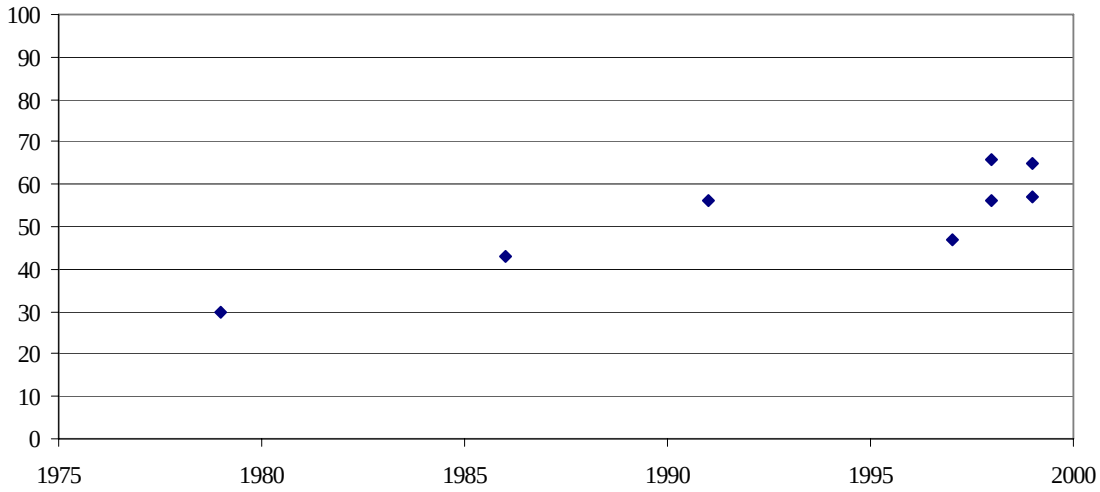

Figure 5.6. Approval of tax credits and deductions for religious education, 1979-1999

Public opinion appears to have mirrored the Court's shift in opinion, albeit in a delayed manner, with regard to tax credits for costs associated with religious education. Prior to 1983, both the Court and public opinion opposed a tax credit policy. However, the Court changed its opinion in 1983, and public opinion during the 1990's appears to have done the same.

Poll of Public Attitudes Toward the Public Schools 1998, Jun. 1998; Gallup/PDK Poll of Public Attitudes Toward the Public Schools 1999, May 1999.

Discussion and Conclusion

During the course of the mid-to-late twentieth century, the Court shifted its Establishment Clause jurisprudence from a more separationist position (allowing for indirect aid for a secular purpose when used in a secular manner), to a more accommodationist position (allowing for direct, as well as indirect, aid that has a general secular purpose but that can be used in a religious manner). Using the pair-wise method for cases reviewed in this chapter that could be matched with an opinion poll conducted within five years of the ruling, it appears that the Court issued opinions that were consistent with public opinion approximately fifty-nine percent of the time. Thus, as depicted in Table 5.2, the Court was in general agreement with public opinion on issues dealing with public aid to religion.

Table 5.2. Measure of congruence for cases dealing with public aid for religion

				Relationship	
Case	Date of Decision	Policy	Public Opinion (%)	agree	disagree
Everson v. Board of Education	1947	upheld	53		x
Board of Education v. Allen	1968	upheld	48	x	
Walz v. Tax Commission of City of New York	1970	upheld	61	x	
Lemon v. Kurtzman	1971	struck down	51		x
Committee for Public Education v. Nyquist - aid to religious schools	1973	struck down	53		x
Committee for Public Education v. Nyquist - tuition reimbursement	1973	struck down	44	x	
Levitt v. Committee for Public Education and Religious Liberty	1973	struck down	53		x

(Table 5.2. Continued)

Case	Date of Decision	Policy	Public Opinion (%)	Relationship	
				agree	disagree
Sloan v. Lemon - tuition reimbursement	1973	struck down	44	x	
Meek v. Pittenger - textbooks	1975	upheld	53	x	
Meek v. Pittenger - aid to religious schools	1975	struck down	53		x
Wolman v. Walter - textbooks	1977	upheld	47	x	
Wolman v. Walter - aid to religious schools	1977	struck down	47		x
Mueller v. Allen	1983	upheld	53		x
Aguilar v. Felton	1985	struck down	61	x	
Grand Rapids Sch. Dist. v. Ball	1985	struck down	61	x	
Agostini v. Felton	1997	upheld	48	x	
Mitchell v. Helms	2000	upheld	49		x
Zelman v. Simmons-Harris	2002	upheld	49	x	

With regard to government aid associated with religious education, the Court began by issuing an opinion contrary to public opinion when it upheld transportation reimbursements for students attending parochial schools. The Court continued, in 2000, to rule in a manner inconsistent with public opinion by allowing for additional aid to religious schools for secular aspects of their education functions. Generally speaking, public support of government aid to religious schools, between 1950 and 2008, was consistently less than fifty-percent. Even though public opinion gradually increased its level of approval, public opinion polls rarely reported support above fifty percent. Thus, the Court's shift to accommodationism can not be viewed as consistent with public sentiment on the issue of public aid for religious education.

However, in a series of cases between 1971 and 1977 the Court struck down policies that provided aid to religious schools and, as shown in Table 5.2, the rulings were not in agreement with public opinion. One the one hand, this seems inconsistent with the general trend of public opinion that has shown consistent disapproval for public aid to religious schools. However, these opinions were issued during a time when public opinion polls were reporting support for this type of aid. For instance, in 1974 fifty-three percent of respondents reported they would be in favor of a constitutional amendment to permit government financial aid to parochial schools.

Public support for voucher programs, was, on average, just over five percent higher than support reported for government funding in general for religious schools. However, as illustrated in Figure 5.7, the increased support for vouchers, reported between 1970 and 2010, fits into the overall upward trend of support for government assistance to religious schools more generally. Public opinion is still divided on the issue, but it is less clearly in opposition to government aid to religious schools as it was prior to 1990.

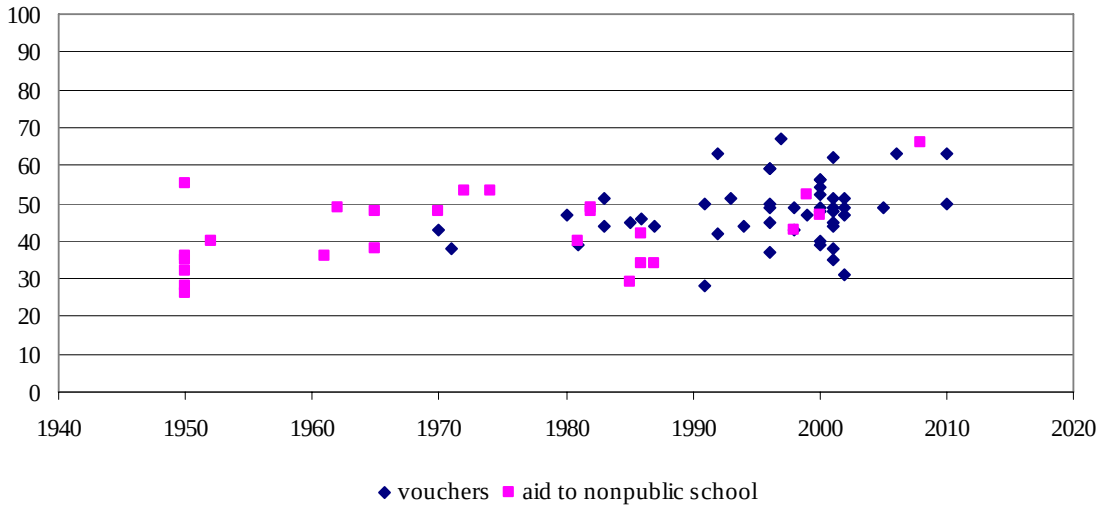

Figure 5.7. Support for government aid, including vouchers, for religious schools, 1950-2010

A majority of Americans have consistently expressed approval of government funding associated with social services provided by religious organizations. However, less clear is the public's approval of the newer faith-based initiatives, whereby these services can be provided with the sectarian message of the religious organization intact. Public opinion has expressed opposition to this.

The Court's opinion on tax policy appears to be generally consistent with public opinion. Even though no public opinion polls were reported within five years of each of the Court's decisions, trends in public opinion indicate that the Court's opinion was most likely consistent with public opinion with regard to tax exempt status for the non-profit functions of religious organizations and tax credits for costs associated with religious education. Prior to 1983 the Court had ruled against a policy of tax credits, and public opinion similarly expressed disapproval of the policy. The Court then upheld a tax credit policy in 1983, and public opinion has steadily increased its level of support to the point where, between 1991 and 1999, in all but one poll a majority of respondents supported giving tax credits for the costs associated with religious education.

While public support for tax credits for religious education had increased, however, support for tax-exempt status for religious organizations had decreased. As noted in Figure 5.8, support for property tax exemptions for religious organizations decreased between 1952 and 1987. Between 1979 and 1999, however, support increased for tax credits provided to individuals for costs associated with education at religious schools.

Since these tax policies still exist, continued polling on both of these issues would provide useful information for understanding the long-term trend of public opinion on the

issue of tax policies associated with religious organizations. In addition, the Court has reviewed recent cases dealing with tax policy concerning religious organizations. With continued polling, further analysis can be performed on the relationship between the Court's decisions and public opinion on tax policy.

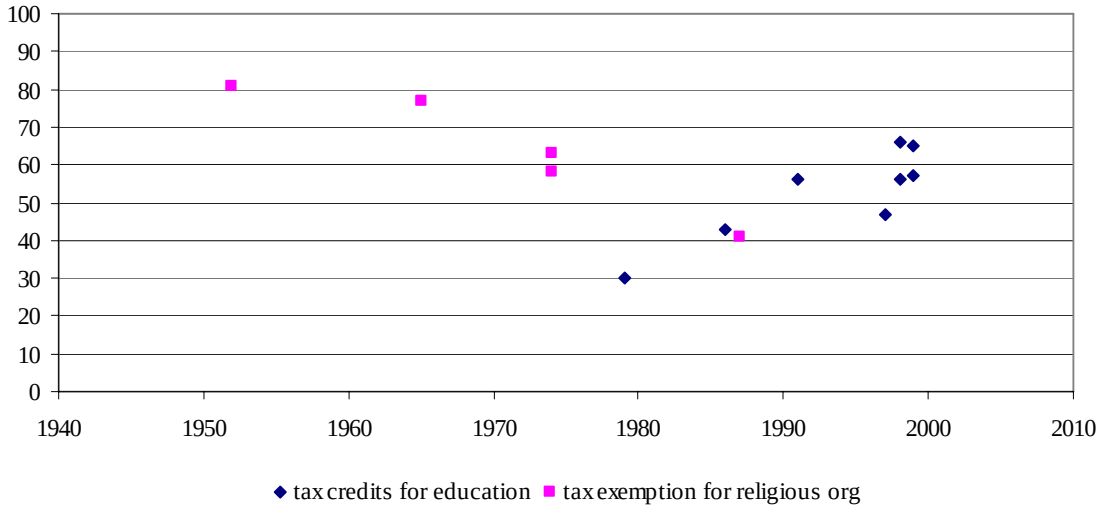

Figure 5.8. Support for tax credits for religious education and tax exemptions for religious organizations

The chapter dealing with religion in public school revealed that, compared to the Supreme Court, Americans have favored a greater presence of religion in public schools. However, this level of support does not translate into support for government aid to religious schools. Of course, this is consistent with another aspect of opinion discovered in the religion in public school chapter. As reported, between the years 1950 and 1999, Americans disapproved of religious instruction in public schools. It appears that public opinion is opposed to government funding of religious instruction at religious schools, as well. Of course, if future opinion polls show a continued upward trend of support, public opinion may soon begin expressing consistent support in favor of government aid for religious schools. If public opinion does continue to increase its level of support, and if

the Court continues with its current jurisprudence on the issue, then public opinion will be more clearly in agreement with the Court's opinion.

CHAPTER SIX

Free Exercise

Introduction

The First Amendment's religion clauses can be viewed as an eighteenth century political expression of a classic liberal view of religious liberty, meant to guide the actions of the United States government. Congress went through several versions before approving the final wording, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." While it seems clear that the intent was to provide a protection against having all members of society legally bound to a single religion, less clear is specifically what laws Congress may or may not pass that prevent an individual from exercising his/her religion. As with the Bill of Rights in general, it is understood that the Free Exercise Clause serves as a general guide for purposes of restricting government actions with regard to the rights of the people. It is also well established that the language does not represent a complete prohibition from government action. Thus, the language that serves to protect individual rights by limiting the actions of government does not serve to bar all government action that has a result of limited actions based on religious belief.

The First Amendment was almost one hundred years old before the Supreme Court provided an interpretation to the Free Exercise Clause. When a member of the Mormon faith, following the guidelines set forth by his religion, was arrested for having more than one wife, the Court was asked to review a federal anti-bigamy law that

prohibited a married person from marrying another person.[1] In making its determination as to whether the law was a violation of the Free Exercise Clause, Chief Justice Waite declared, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[2] Thus, he made a distinction between religious belief and actions based on religious belief. While the former was protected, the latter could be limited by Congress in its duties to pass laws for purposes of promoting and securing the public good. Recognizing that polygamy was traditionally viewed as "an offense against society," the Court ruled that Congress had a right to enact such legislation, and that the Free Exercise Clause did not exempt an individual from complying with the law. According to the Chief Justice, to rule otherwise would "…make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[3]

In general, when the Court has reviewed cases dealing with the Free Exercise Clause, it has had to balance an individual's religious liberty on the one hand with the government's right to limit it on the other. As expressed by Justice Frankfurter in 1940, "In all these cases the general laws in question, upheld in their application to those who refused obedience from religious conviction, were manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable."[4] What

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[1] *Reynolds v. U.S.*, 98 U.S. 145 (1878).

[2] *Reynolds v. U.S.*, 98 U.S. 145, 164 (1878).

[3] *Reynolds v. U.S.*, 98 U.S. 145, 167 (1878).

[4] *Minersville School District v. Gobitis*, 310 U.S. 586, 595 (1940).

has changed over time, in constitutional law dealing with the Free Exercise Clause, is the ease with which government may limit religious actions without violating the Free Exercise Clause. In other words, what has changed over time is the amount of weight that must be placed on either side of the legal scale. The belief/action distinction expressed by the Court in the late nineteenth century *Reynolds* case was the precedent for most of the Court's early Free Exercise litigation.[5]

By the mid-twentieth century, however, the Court had increased its protection of religious minorities' rights in cases dealing with issues, such as religious canvassing, public school flag salutes, and conscientious objectors to military engagement.[6] Also of significance was the expanded scope of the Free Exercise Clause. The Court in 1940 deemed the Free Exercise Clause to be one of the fundamental rights "incorporated" into the Fourteenth Amendment's Due Process Clause and therefore applicable to actions of the states.[7] Thus, just as Congress is constitutionally limited from prohibiting the free exercise of religion, so too are the states. In 1963 the Court further increased protections for religious liberties by establishing a formal guideline that would serve to heighten government's burden of proof in Free Exercise cases.[8] Even with the bar raised, the Court determined in several cases that government was able to show a compelling interest for limiting the free exercise of religion.[9]

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[5] Thomas F. Powers, "The Act/Belief Doctrine and the Limits of Lockean Religious Liberty," *Perspectives on Political Science* 36 (Spring2007): 73-83.

[6] Powers.

[7] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[8] *Sherbert v. Verner*, 374 U.S. 398 (1963).

[9] For example, *Jehovah's Witnesses v. King County Hospital*, 390 U.S. 598 (1968); *Unites States v. Christian Echoes Ministry*, 404 U.S. 561 (1972); *United States v. Lee*, 455 U.S. 252 (1982); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Tony & Susan Alamo Foundation v. Secretary of Labor*,

Then, in 1990 the Court repealed its heightened scrutiny standard (compelling interest test), reverting back to a basic protection of belief and a less rigorous standard of scrutiny for government actions that had the effect of limiting actions based on religious belief.[10] Of course, the Supreme Court's opinions represent guidelines for national and state governments on what the United States Constitution requires for purposes of protecting individual religious liberties. Each individual state has the capacity, both constitutionally and politically, to protect religious liberties to a greater extent, but not less, than what is required by the national standards enunciated by the Court.

Similarly, Congress has the ability to pass legislation that imposes more stringent guidelines on its actions with regard to religious liberties. In fact, in response to the Supreme Court's 1990 decision, Congress attempted to re-implement a version of the "compelling interest test" through its Fourteenth Amendment authority to enforce the due process clause that applied to the states.[11] In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA), by a vote of 97-3 in the U.S. Senate and by voice vote in the U.S. House.[12] However, in 1997 the Court invalidated provisions of RFRA that applied to the states.[13] Congress ultimately, by a unanimous vote, responded with passage of the Religious Land Use and Institutionalized Persons Act of 2000

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471 U.S. 290 (1985); *Bowen v. Roy*, 476 U.S. 693 (1986); *Goldman v. Weinberger*, 475 U.S. 503 (1986); and *Lyng v. Northwest Indian Cemetery Protective Association*, 475 U.S. 503 (1986).

[10] *Employment Division v. Smith*, 494 U.S. 872 (1990).

[11] Jerold L. Waltman, *Religious Free Exercise and Contemporary American Politics: The Saga of the Religious Land Use and Institutionalized Persons Act of 2000* (New York: Continuum, 2011), 35-37.

[12] *Religious Freedom Restoration Act of 1993*, 103rd Cong., Public Law 103-141 (November 16, 1993).

[13] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

(RLUIPA).[14] Of course, as one author has noted, RLUIPA, as a result of efforts to stay consistent with the Court's rulings, "touched no ordinary individual."[15] Therefore, it is the Court's ruling in *Smith* that provides the constitutional interpretation of religious liberty that guides a state's dealings with most individuals within society.

Between 1997 and 2009, a State of the First Amendment survey asked Americans, "Even though the US (United States) Constitution guarantees freedom of religion, government has placed some restrictions on it. Overall, do you think Americans have too much religious freedom, too little religious freedom, or is the amount of religious freedom people have about right?"[16] As illustrated in Figure 6.1, public opinion has remained somewhat constant, with between sixty and seventy-one percent of the public answering that Americans have about the right amount of religious freedom.

Thus, even though there has been significant academic and political debate over the nature of Free Exercise protections, most Americans appear generally content with the status of religious liberties within the United States. In addition, seventy-seven percent of respondents in 2005 reported that "the first amendment right of freedom of religion" is still important.[17] Thirty-eight percent responded that it is as important today as it was when the Constitution was ratified, and thirty-nine percent reported that it is more important today.

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[14] Waltman, 99.

[15] Waltman, 112.

[16] State Of The First Amendment Survey, Jul, 1997; Americans Attitudes About the First Amendment Survey, Feb, 1999; State of the First Amendment Survey, Apr, 2000; State of the First Amendment 2001 Survey, May, 2001; State Of The First Amendment 2002 Survey, Jun, 2002; State Of The First Amendment Survey 2003, Jun, 2003; State Of The First Amendment Survey 2004, May, 2004; State Of The First Amendment Survey, May, 2005; State Of The First Amendment Survey, Aug, 2007; State Of The First Amendment Survey, Jul, 2008; State Of The First Amendment Survey, Jul, 2009.

[17] Council for America's First Freedom Survey, Jul, 2005.

Between 1997 and 2011, respondents were also asked the following question: "Do you feel that freedom to worship as one pleases... applies to all religious groups regardless of how extreme their beliefs are, or was never meant to apply to religious groups that the majority of people consider extreme or on the fringe?" As shown in Figure 6.2,[18] a majority of respondents have consistently reported that the freedom to worship applies to all religious groups.

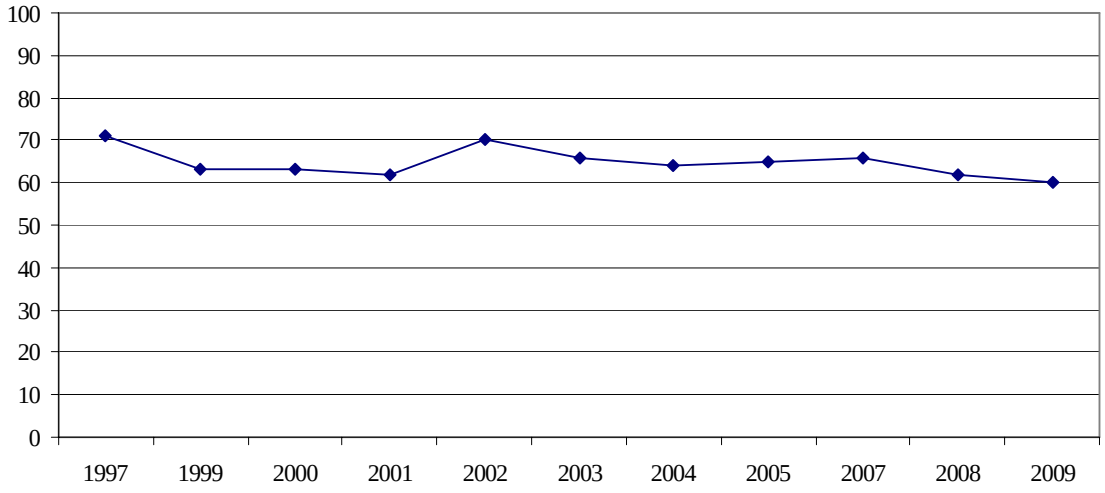

Figure 6.1. Belief that Americans have about the right amount of religious freedom, 1997-2009

The highest level of support, at eighty-eight percent, was in response to different wording of the question: "(Now, as I read a few statements please tell me if you completely agree, mostly agree, mostly disagree or completely disagree with each one.)...America was founded on the idea of religious freedom for everyone, including

[18] State Of The First Amendment Survey, Jul, 1997; State of the First Amendment Survey, Apr, 2000; State Of The First Amendment Survey, Aug, 2007; State Of The First Amendment Survey, Jul, 2008; State Of The First Amendment Survey, Jul, 2010; State Of The First Amendment Survey, Jun, 2011; Public Religion Research Institute Pluralism, Immigration, and Civic Integration Survey, Aug, 2011.

religious groups that are unpopular."[19] Fifty-six percent reported they completely agreed, with an additional thirty-two percent reporting they mostly agreed.

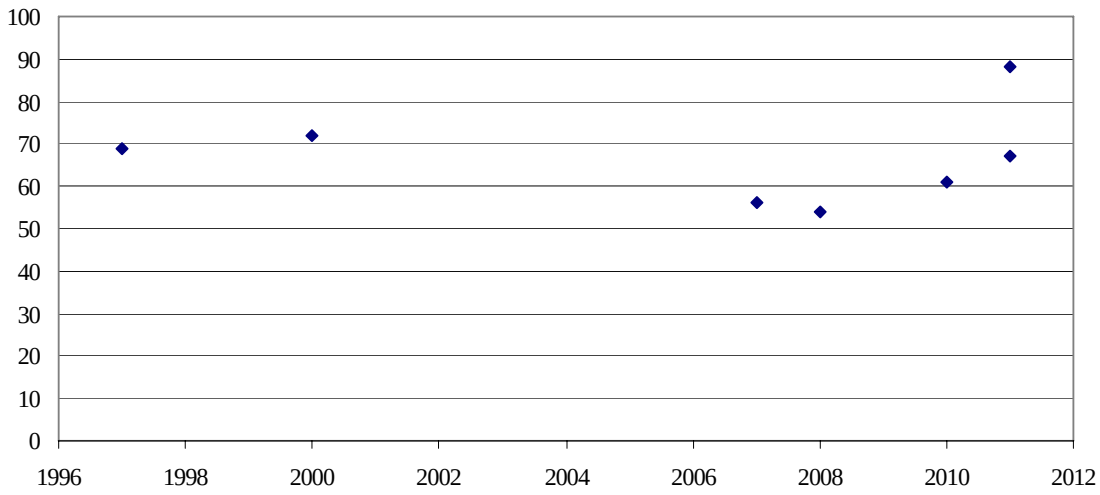

Figure 6.2. Belief that freedom to worship applies to all religious groups

However, one author has noted that while some groups support the abstract principle of religious free exercise, these groups do not show the same level of support in response to concrete applications of law.[20] Public opinion has demonstrated consistent levels of support for the broad principle of religious liberty. This chapter will look at specific policy issues related to the free exercise of religion and determine the Court's opinion, public opinion, and the relationship between the two. As a result, this chapter will also reveal whether support for the abstract principle of religious liberty maintains for specific Free Exercise issues.

[19] Public Religion Research Institute Pluralism, Immigration, and Civic Integration Survey, Aug, 2011.

[20] Ted Jelen, "Dimensions of Religious Free Exercise: Abstract Beliefs and Concrete Applications," *Review of Religious Research* 40 (Jun 1999): 349-358.

Pledge of Allegiance

In 1940, the Supreme Court ruled on its first case dealing with the Pledge of Allegiance in public schools. In *Minersville School District v. Gobitis*, the Court, by an 8-1 vote, determined that, "National unity [as promoted by a mandatory flag salute] is the basis of national security," and therefore the Free Exercise Clause was not being violated by a policy requiring school children to salute to the national flag.[21] Three years later, in *West Virginia State Board of Education v. Barnette*, the Court revisited the issue of the flag salute and, by a vote of 6-3, reversed its opinion.[22] According to Justice Jackson, "The Court [in *Gobitis*] only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy [in this case] is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution."[23] Thus, whereas review of the issue under Free Exercise scrutiny had not resulted in protection for the individuals involved, review of the issue as a form of symbolic, and therefore political, speech warranted a different outcome. The Court struck down the mandatory flag salute with the conclusion that, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[24]

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[21] *Minersville School District v. Gobitis*, 310 U.S. 586, 595 (1940).

[22] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

[23] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 635-636 (1943).

[24] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

No public opinion polls addressing the flag salute issue of the 1940's were located for this study. However, there have been opinion poll questions asked in reference to a newer challenge to the flag salute in public schools. The more recent challenge is based on a change to the Pledge itself. In 1954, the phrase "under God" was added to the pledge to the flag.[25] At a time of bi-polar international relations during the Cold War, when it seemed critical to highlight the differences between "us" (the United States) and "them" (the Soviet Union), religion was one important distinction between a Godly country (us) and an atheist country (them). As such, religious symbols became important national symbols. In 1953, prior to the adoption of the words, "under God," sixty-nine percent of Americans reported favoring the addition of the words to the oath.[26]

The Pledge of Allegiance in public schools has been the focus of renewed constitutional interest, this time challenging the words, "under God," as a violation of the Establishment Clause. In June 2002 a federal circuit court of appeals determined that the words, "under God," in the Pledge violated the Establishment Clause.[27] Four public opinion polls conducted that same month, and in response to the appellate court's decision, reported public opinion in clear disagreement with the decision. Between seventy-seven and eighty-seven percent of respondents reported opposition to the ruling.[28]

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[25] Paul Blanshard, *God and Man in Washington* (Boston: Beacon Press, 1960), 28. In addition to adding the words "under God" to the pledge of allegiance, in 1955 the phrase "In God We Trust" was made mandatory for all currency (it had been used on coins since 1865), and by a unanimous vote in Congress, "in God We Trust" was adopted as the motto of the United States.

[26] Gallup Poll (AIPO), Mar. 1953.

[27] *Newdow v. US Congress EGUSD SCUSD*, Ninth Circuit Court of Appeals, No. 00-16423 (June 26, 2002).

[28] Princeton Survey Research Associates/Newsweek Poll, Jun. 2002; ABC News/Washington Post Poll, Jun. 2002; Fox News/Opinion Dynamics Poll, Jun. 2002; Gallup/CNN/USA Today Poll, Jun. 2002.

The Supreme Court then heard the case on appeal in 2004. However, instead of providing a ruling on the Establishment Clause issue, the Court determined that the plaintiff lacked standing to bring the suit in federal court.[29] There was no judicial determination about whether the words, "under God," violated the Establishment Clause, and the policy result was to leave intact the public school practice of reciting the Pledge, with the words "under God."

In 2004, just prior to the issuance of the Supreme Court's opinion, two separate opinion polls reported between eighty-seven and ninety-one percent of Americans wanting the Supreme Court to keep the pledge "as-is."[30] A couple of months after the Court issued its opinion, seventy percent of respondents answered that they did not believe it was a violation of the constitution to have public schools lead voluntary recitations of the pledge.[31] The policy effect of the Court's decision was in clear agreement with public opinion on the issue.

As depicted in Figure 6.3, public opinion has reported exceptionally high levels of support for the policy outcome of the Court's decision, which was to allow for the continued recitation in public schools of the Pledge of Allegiance, including the words "under God." The two lower levels of support, reported in 2002 and 2003 at sixty-eight percent and seventy percent, respectively, were in response to questions that asked respondents if they believed the school practice violated "the constitutional principle of

[29] *Newdow v. United States Congress, Elk Grove Unified School District, et al*., 542 U.S. 1 (2004).

[30] Gallup/CNN/USA Today Poll, Mar. 2004; Associated Press/Ipsos-Public Affairs Poll, Mar. 2004.

[31] State Of The First Amendment Survey 2004, May 2004.

separation of church and state."[32] Even though mention of the constitutional principle noticeably decreased the level of support, public opinion still expressed significant levels of approval for the words, "under God," in the Pledge. Since the resulting policy outcome is considered when determining if the Court's decision is consistent with public opinion, the decision by the court in 2004 is considered to be consistent with public opinion on the matter.

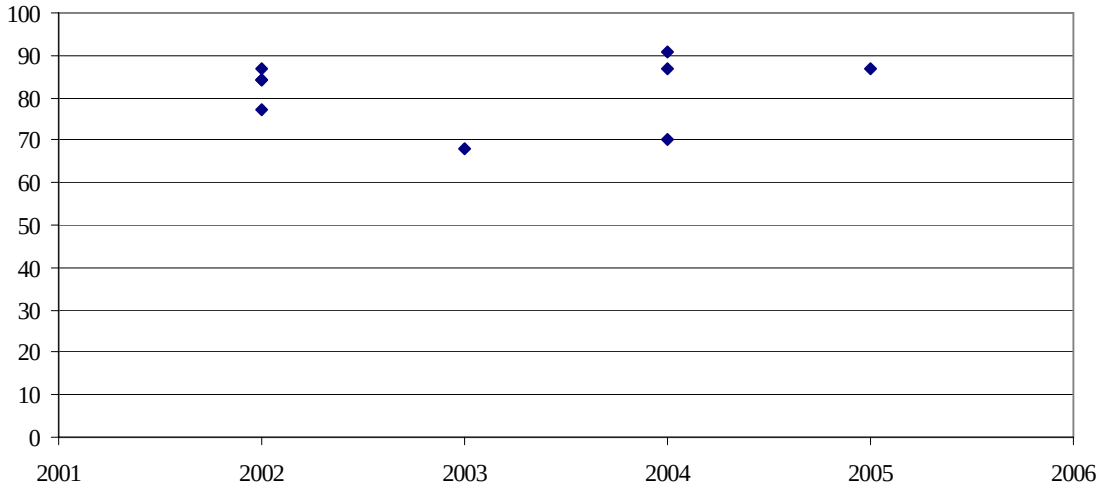

Figure 6.3. Support for the words, "under God," in the Pledge of Allegiance, 2002-2005

In 1962, Alexander Bickel concluded that there are times when it is important for the Court to use its "passive virtues" (techniques of evasion) in order to avoid a constitutional decision.[33] It would appear that the Court in this case, by ruling that the petitioner did not have standing to bring suit, was able to use one of its passive virtues and maintain consistency with public opinion on the issue of the reference to God in the pledge to the flag.

[32] State Of The First Amendment Survey 2004, May, 2004; State Of The First Amendment Survey 2003, Jun, 2003.

[33] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics, Second Edition* (New Haven: Yale University Press, 1986).

Religious Tests for Office

Adding the words "under God" to the pledge underscored a deeper understanding that the United States was, and always had been, a religious country. As one author has noted, "…all of the thirteen original colonies required an attestation of religious belief or affiliation as a prerequisite for holding public office."[34] Even as the delegates at the Philadelphia Convention were approving a provision that "…no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States,"[35] all but two state constitutions did impose some type of religious test as a qualification for holding state offices.[36] Thus, whereas the Articles of Confederation was silent on the matter, the United States Constitution of 1787 implemented a rare proscription for religious tests for public office.

Torcaso v. Watkins (1961)

While the United States Constitution prohibited religious tests for federal office, some states retained the oath requirement for state office. It was not until 1961 that the Supreme Court issued an opinion on the matter. In *Torcaso v. Watkins*, a unanimous Supreme Court struck down a provision of the Maryland Constitution that required officeholders within the state to declare a "belief in the existence of God."[37]

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[34] Derek H. Davis, *Religion and the Continental Congress 1774-1789: Contributions to Original Intent* (New York: Oxford University Press, 2000), 34.

[35] U.S. Constitution, Art. VI.

[36] Leonard W. Levy, *Original Intent and the Framers' Constitution* (New York: Macmillan Publishing Company, 1988), 152; Davis, 34.

[37] *Torcaso v. Watkins*, 367 U.S. 488 (1961).

An opinion poll about this specific issue was not located; however, existing poll questions can provide some indication of opinion on the matter. For instance, in 1964 Americans were asked, "Suppose a man admitted in public that he did not believe in God.... Should he be allowed to hold public office?"[38] Fifty-three percent answered no. The same question was asked again in 1981, but this time seventy percent answered that the person should be allowed to hold public office.[39] Based on these two polls, it would appear that public opinion changed significantly on the issue.

In 1991 and 2003, Americans were asked if they favored or opposed "…removing references to God from all oaths of public office."[40] Seventy-four and seventy-seven percent, respectively, opposed the idea of removing references to God in public oaths. However, in 1991 respondents were asked if they agreed or disagreed that "Politicians who do not believe in God are unfit for public office."[41] A plurality of forty percent reported they disagreed, with an additional twenty-seven percent neither agreeing nor disagreeing. Further, as identified in Figure 6.4, there has been a significant increase in the percent of Americans who say they would be willing to vote for their political party's presidential nominee if that person happened to be an atheist.[42] In fact, in 2011 a

[38] Anti-Semitism in the United States Survey, 1964, Oct. 1964.

[39] Anti-Semitism in the United States Survey, 1981, Jan, 1981.

[40] Time/CNN/Yankelovich Clancy Shulman Poll, Oct. 1991; Time/CNN/Harris Interactive Poll, Sep. 2003.

[41] General Social Survey ISSP Module 1991, Feb. 1991.

[42] Gallup Poll (AIPO), Jul. 1958; Gallup Poll (AIPO), Sep. 1958; Gallup Poll (AIPO), Dec. 1959; Gallup Poll (AIPO), Jul. 1978; Gallup Report, Apr. 1983; Religion And Public Life, Dec. 1987; Washington Post/Kaiser Family Foundation/Harvard Values Survey, Nov. 1998; Gallup Poll, Feb. 1999; Pew Forum on Religion & Public Life/Pew Research Center for the People & the Press Survey, Jun. 2003; Gallup/USA Today Poll, Feb. 2007; Gallup/USA Today Poll, Mar. 2007; Gallup Poll, Dec. 2007; Princeton Survey Research Associates International/Newsweek Poll, Jul. 2008; Gallup Poll, Jun. 2011; Gallup/USA Today Poll, Aug, 2011.

majority of Americans for the first time reported they would be willing to vote for a "well-qualified person for president who happened to be an atheist."[43]

Based on the public opinion polls that exist, it would appear that the Court's 1961 decision was inconsistent with contemporary public opinion. However, it also appears that public opinion has shifted over time and might be in agreement with the Court's opinion that someone should not be required to declare a belief in God in order to be eligible to hold public office. It seems logical that if Americans support the election of an atheist to office, then they would not support a requirement that the individual declare a belief in the existence of God. Of course, the questions that have been asked do not provide for a direct comparison. Asking respondents if they would vote for a candidate who is an atheist is not quite the same as asking if there should be a religious test to prohibit atheists from holding public office.

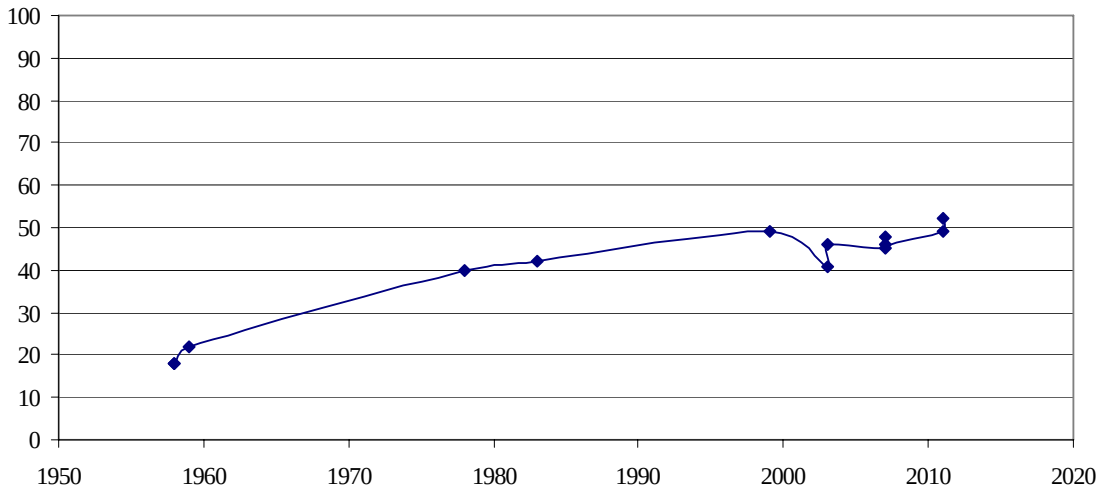

Figure 6.4. Percent of Americans willing to vote for an atheist for president, 1958-2011

[43] Gallup/USA Today Poll, Aug, 2011.

McDaniel v. Paty (1978)

While religious oaths as a requirement to hold public office were prevalent during the founding era, members of the clergy were prohibited from holding many state offices. One aspect of religious liberty central to American philosophy was an understanding that, while religion was important for providing a good and moral citizenry, the institutions of government and religion should be separate.[44] As such, many states prohibited clergy from holding state offices.[45] Therefore, while religious tests were quite common in states during the founding era in order to ensure an officeholder was a person of faith and, therefore, trustworthy, actual members of the clergy were often prohibited from official service.

Tennessee was one of only two states that during the nineteenth century did not remove the ban on clergy from holding state office.[46] In 1978, the Court reviewed a Tennessee statute, based on a 1796 state constitutional provision, prohibiting ministers from serving as state legislators.[47] Again by a unanimous vote, the Court ruled that the Tennessee statute barring "Minister[s] of the Gospel, or priest[s] of any denomination whatever" from serving as delegates to the State's limited constitutional convention was a violation of the Free Exercise of the United States Constitution.[48] According to Chief Justice Burger, "Tennessee has failed to demonstrate that its views of the dangers of

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[44] John Witte, Jr., *Religion and the American Constitutional Experiment, second edition* (Boulder, CO: Westview Press, 2005), 23-33.

[45] James E. Wood, Jr., "Introduction: Religion and Public Policy," in *The Role of Religion in the Making of Public Policy*, ed. James E. Wood, Jr. and Derek Davis (Waco, Tx: Baylor University Press, 1991), 6.

[46] Wood, Jr., 6

[47] *McDaniel v. Paty*, 435 U.S. 618, 621 (1978).

[48] *McDaniel v. Paty*, 435 U.S. 618 (1978).

clergy participation in the political process have not lost whatever validity they may once have enjoyed."[49]

Eight years later, public opinion expressed agreement that the constitution does protect the liberty of a member of the clergy to serve in public office: seventy-two percent of Americans in 1986 reported that the U.S. Constitution should not be "interpreted to prohibit members of the clergy from holding public office."[50] However, even though Americans agreed that a constitutional right existed, they did not express support for religious leaders exercising that right. In 1986, respondents answered that they disapproved of "clergymen who run for public office."[51]

Then, in 1988, respondents were asked, "(I am going to read you some statements about religion and politics, and for each one I'd like you to tell me whether you completely agree with it, mostly agree with it, mostly disagree with it, or completely disagree with it.)... Electing a minister or clergyman would create tension between religious groups in society." Sixty-seven percent answered they agreed.[52] In fact, that same poll asked respondents, "(People give us different reasons for supporting or opposing the idea of a clergyman or minister running for President of the United States. I am going to read you some statements about religion and politics, and for each one I'd like you to tell me whether you completely agree with it, mostly agree with it, mostly

[49] *McDaniel v. Paty*, 435 U.S. 618 (1978).

[50] Knowledge Of The U.S. Constitution, Oct. 1986.

[51] Los Angeles Times Poll, Jul. 1986. Of the six options provided, a plurality reported they disapproved strongly: twenty-seven percent disapproved strongly, fifteen percent disapproved somewhat (forty two percent disapproval rate), eleven percent approved strongly, twenty-three percent approved somewhat (thirty-four percent approval), seventeen percent answered they hadn't heard enough, and the remaining seven percent either did not answer or answered they were unsure.

[52] People, The Press, Jan. 1988.

disagree with it, or completely disagree with it.)... In our system of government, church and state should be separated." Forty-eight percent answered they "completely agreed," and an additional twenty-nine percent answering they "mostly agreed." Thus, seventy-seven percent of respondents answered that, in the context of a religious leader running for President, church and state should be separated.

Public opinion polls indicate that the Supreme Court issued an opinion that is consistent with the opinion of a large majority of Americans, that religious leaders should have a right to run for, and hold, public office. Just as apparent, however, is that Americans do not support religious leaders actually running for office. Thus, the Court and public opinion agree that the constitution protects against government creating religious tests that would prevent religious leaders from holding public office. Americans have expressed through public opinion polls, however, that they are less likely to support these individuals if they actually run for office.

Tax Exempt Status

The distinction between religious leaders' rights to participate and their actual participation is also evident in polls reporting opinion about religious leaders and organizations being involved in politics, generally speaking. This is illustrated by a 1987 Religion and Public Life poll.[53] Sixty-eight percent of respondents agreed with the statement, "Religious groups should have a legal right to get involved in politics." However, fifty-seven percent responded that they would "personally like to see organized religious groups stay out of politics." Eighty-three percent of respondents in 2004 answered that they believed religious leaders "have as much right as anyone else to

[53] Religion And Public Life, Dec. 1987.

participate in the political process."[54] However, as depicted in Figure 6.5, Americans have not shown high levels of support for actual political involvement of religious leaders and groups.[55]

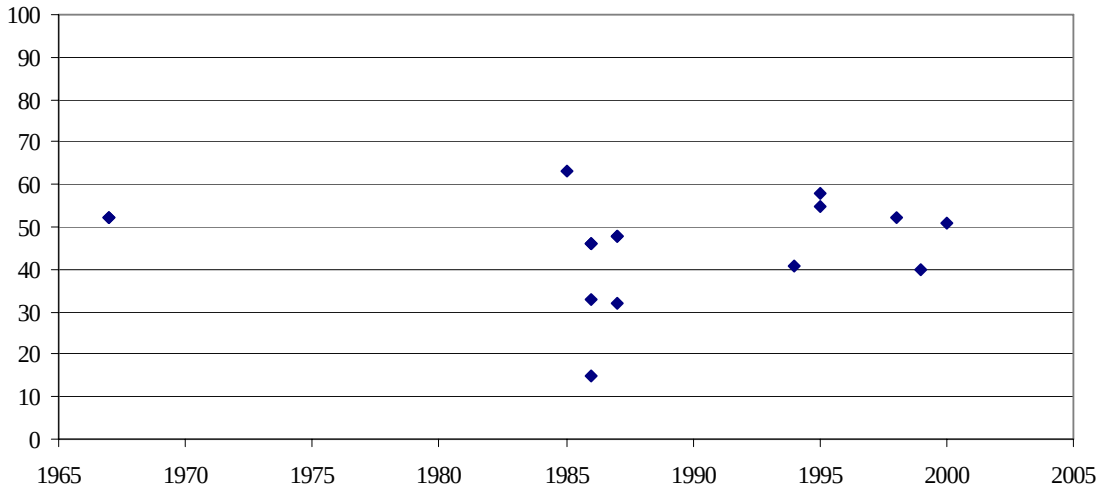

Figure 6.5. Support for religious leaders' involvement in politics, 1967-2000.

The polls conducted in 1998, 1999, and 2000 posed similarly worded questions: "Religion has had an increasing impact on the political views of many Americans. Which of the following two statements comes closer to your view? Organized religious groups of all kinds should stay out of politics. It is important for organized religious groups to stand up for their belief in politics." Support for religious groups to stand up for their political beliefs was fifty-two percent, forty percent, and fifty-one percent, respectively. The poll reporting the lowest level of support was in 1986, in response to the question,

[54] Religion And Public Life Survey, Jul. 2004.

[55] Religion and Civil Rights, Jan, 1967; Los Angeles Times Poll, Jul, 1986; ABC News/Washington Post Poll, Mar. 1986; ABC News Poll, Aug. 1987; Religion And Public Life, Dec. 1987; NBC News/Wall Street Journal Poll, Jul. 1994; Washington Post/Kaiser Family Foundation/Harvard Americans on Values Survey 1998, Jul. 1998; Washington Post/Kaiser/Harvard University Latinos Survey, Jun. 1999; Washington Post/Kaiser/Harvard 2000 Election Values Survey, Sep. 2000.

"Generally speaking, do you approve or disapprove of clergymen who preach political views in their sermons - or haven't you heard enough about that yet to say?"[56] Only fifteen percent of respondents reported approval, with sixty-two percent answering they disapproved, and seventeen percent reporting they hadn't heard enough. Support increased to thirty-three percent in the same poll when the wording of the question was changed to ask respondents if they approved or disapproved of "clergymen who take public stands on political issues."

In response to specific policy issues, however, a majority of Americans have expressed support for political involvement of religious leaders. For instance, as shown in Figure 6.5, in 1985 sixty-three percent of respondents answered that they thought it was appropriate for leaders of their religion "to take a public position on the issue of nuclear weapons and arms control."[57] Similarly, in 1995, fifty-five and fifty-eight percent, respectively, responded that it was appropriate for religious leaders to take a public position on abortion and government policies for the poor.

Recognizing the difference in opinion between the right of religious leaders and officials to be politically active, and support for their political activity, is an important distinction for purposes of comparing public opinion to the Court's decisions regarding the tax code. The Supreme Court has upheld tax policies that deny tax exempt status to religious groups that show excessive political activity; this opinion is consistent with public opinion, which generally does not support politically engaged religious leaders and groups.

[56] Los Angeles Times Poll, Jul, 1986.
[57] CBS News/New York Times Poll, Nov, 1985.

The Internal Revenue Service is responsible for implementing the federal tax code. Beginning in 1934, and by further amendment in 1954, Congress has limited tax benefits to groups that engage in specified lobbying and electioneering (campaign) activities.[58] Currently, section 501(c)(3) of the Internal Revenue Code states:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes … no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation … and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office, it is able to claim tax exemption and allow its donors to deduct their contributions. In return, it must not attempt to influence legislation, or participate or intervene in any political campaigns.[59]

Accordingly, religious organizations are eligible for exemption from federal taxation, provided they refrain from lobbying and electioneering activities.

United States v. Christian Echoes National Ministry, Inc. (1972)

In 1972, the Supreme Court ruled that it lacked appropriate appellate jurisdiction in a case involving the Internal Revenue Service's (IRS's) decision to revoke the tax exempt status of a religious organization that had participated in lobbying and electioneering activities.[60] As a result of the Supreme Court's decision to vacate and remand the case, the Second Circuit Court of Appeals heard the case in 1973 and ruled to

[58] Derek Davis, "The Supreme Court, Public Policy, and the Advocacy Rights of Churches," in *The Role of Religion in the Making of Public Policy*, ed. James E. Wood, Jr. and Derek Davis (Waco, Tx: Baylor University Press, 1991), 104; Internal Revenue Service, "Charities, Churches and Politics," http://www.irs.gov/newsroom/article/0,,id=161131,00.html (accessed September 23, 2011).

[59] 26 U.S.C. 501; available from http://codes.lp.findlaw.com/uscode/26/A/1/F/I/501 (accessed September 5, 2011).

[60] *Unites States v. Christian Echoes Ministry*, 404 U.S. 561 (1972).

uphold the decision of the IRS.[61] In a separate case a decade later, the Supreme Court upheld the constitutionality of the tax code's prohibition of lobbying.[62] In this 1983 decision, the Court stated that, "Section 501(c)(3) does not violate the First Amendment. Congress has not infringed any First Amendment rights or regulated any First Amendment activity but has simply chosen not to subsidize…lobbying out of public funds."[63]

As one scholar noted, these restrictions remain highly controversial for religious groups precisely because the Court has not reviewed them for consistency with the religion clauses of the First Amendment.[64] In other words, religious organizations are unique in that they have First Amendment Free Exercise protections that would not have applied to the non-religious group under review in the *Regan* case.[65] In fact, there has been action by religious leaders in recent years to challenge these political restrictions. By acting in direct non-compliance with the IRS rules, some religious leaders have endorsed candidates from the pulpit with the hope that the IRS will withdraw their tax exempt status, thereby giving them the legal opportunity (*i.e.*, standing) to challenge the policy.[66]

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[61] *Christian Echoes National Ministry, Inc., Plaintiff-Appellee, v. United States of America, Defendant-Appellant.*, 470 F.2d 849 (1973).

[62] *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983). This case dealt with a non-religious non-profit corporation.

[63] *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983).

[64] Davis, "The Supreme Court, Public Policy, and the Advocacy Rights of Churches," 103.

[65] In addition, the Court appears to view tax policy for religion cases differently than it does when reviewing cases not involving the religion clauses (see chapter 5).

[66] Russell Goldman, "Pastors Challenge Law, Endorse Candidates From Pulpit," *ABC News*, June 20, 2008, http://abcnews.go.com/Politics/Vote2008/story?id=5198068&page=1 (accessed September 23, 2011); Laurie Goodstein, "Church and State: Challenging the I.R.S.," *The New York Times*, June 24, 2008, http://query.nytimes.com/gst/fullpage.html?res=9F02E3D81731F937A15755C0A96E9C8B63&scp=3&sq

As shown in Figure 6.6, public opinion between 1981 and 2008 generally opposed the idea of religious groups and leaders engaging in lobbying and electioneering functions.[67] Americans have expressed consistently high levels of opposition to religious leaders or groups attempting to influence government decisions (lobbying), or working toward getting a candidate elected to office (electioneering).

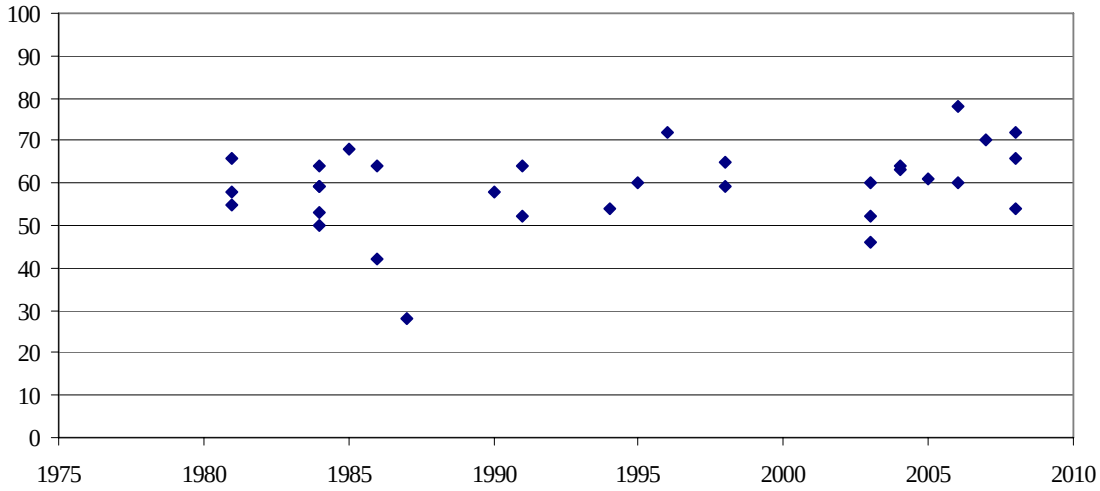

Figure 6.6. Opposition to lobbying and electioneering by religious groups and officials, 1981-2008

When large fluctuations existed, such as between 1986 and 1987, the difference was most likely due to the other questions being asked in the opinion poll. For instance,

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=pastors+endorse+candidates&st=nyt (accessed September 23, 2011); Russell Goldman, "Seeking Change in Law, Pastors to Endorse Candidates," *ABC News*, Sept. 25, 2008, http://abcnews.go.com/Politics/Vote2008/story?id=5886446&page=1 (accessed September 23, 2011).

[67] NBC News/Associated Press Poll, Aug. 1981; Cambridge Reports National Omnibus Survey, Jan, 1981; Cambridge Reports National Omnibus Survey, Oct, 1981; Gordon Black/USA Today Poll, Sep, 1984; Cambridge Reports National Omnibus Survey, Oct, 1984; ABC News/Washington Post Poll, May. 1984; Time/Yankelovich, Skelly, Sep. 1984; Time/Yankelovich, Skelly, Oct. 1984; CBS News/New York Times Poll, Nov, 1985; Los Angeles Times Poll, Jul, 1986; NBC News/Wall Street Journal Poll, Jul. 1986; Religion And Public Life, Dec, 1987; Associated Press Poll, Nov, 1990; General Social Survey ISSP Module 1991, Feb, 1991; NBC News/Wall Street Journal Poll, Jul. 1994; CBS News/New York Times Poll, Sep, 1995; CBS News/New York Times Poll, May, 1996; General Social Survey 1998, Feb, 1998; Gallup/CNN/USA Today Poll, Sep, 2003; CBS News Poll, May, 2004; ABC News/Washington Post Poll, May, 2004; Associated Press/Ipsos-Public Affairs Poll, May, 2005; Center for American Values in Public Life 2006 American Values Survey, Aug. 2006; Faith Matters Survey 2006, Jun, 2006; CBS News Poll, Jun, 2007; General Social Survey 2008, Apr, 2008; State Of The First Amendment Survey, Jul. 2008.

in 1986, when respondents were asked if "churches and members of the clergy should be involved in politics, like backing a candidate for public office," sixty-four percent reported they should not.[68] However, in 1987, only twenty-eight percent of respondents answered that it was not proper "for religious leaders to publicly support political candidates who are running for office."[69] In 1986, the question was preceded by: (1) a question about support for Pat Robinson, (2) a question about support for a candidate "who says he is a 'prophet of God' and who says he gets direct instructions from God about how to conduct his political career," and (3) a question about support for a candidate who says "he would not be bound by Supreme Court decisions." These questions most likely affected the high level of opposition. The 1987 question, by contrast, was the first question in the poll and was followed by more general questions about the ability of religious leaders to participate in various politic topics.

The one question that was most closely related to the issue involved in the court case was asked in a 2008 poll: "Religious leaders should be allowed to openly endorse political candidates from the pulpit without endangering the tax-exempt status of their organizations."[70] Fifty-four percent responded that religious leaders should not be able to endorse candidates without endangering their tax exempt status. Thus, decades after the Court's ruling on the issue, public opinion is in agreement with the policy outcome of the Court's decision, namely that it is acceptable to withhold tax exempt status from religious groups and leaders when they engage in lobbying and electioneering activities

[68] NBC News/Wall Street Journal Poll, Jul, 1986. Sixty-four percent reported that it was proper.

[69] Religion And Public Life, Dec, 1987.

[70] State Of The First Amendment Survey, Jul, 2008.

In 1984, two separate polls asked a "likely voter" population several questions about electioneering activities of religious leaders. Due to the restricted poll populations, these results were not included in Figure 6.6. However, they provide conclusions similar to those reported above. The polls included multiple questions that asked whether respondents thought it was proper for a preacher to urge members of their churches to vote for candidates who followed their stands on the following policy issues: a constitutional amendment to require daily prayer to be recited in public school classrooms, passage of the Equal Rights Amendment, the federal government giving tax exemptions to schools that segregate whites and blacks, and a constitutional amendment to ban abortions. In response to each question, a majority of respondents, ranging from sixty-five percent to eighty-one percent, answered that it was not proper for preachers to urge members of their church to vote for political candidates.[71] This is also consistent with a 1980 poll which reported that sixty-six percent of likely voters did not think "…churches and members of the clergy should be involved in politics, like backing a candidate for public office."[72]

This sample of "likely voters" did clarify, however, that they do not mind religious leaders taking a stand on political issues. For instance, the 1984 Harris poll reported that fifty percent of respondents thought it was "fitting and proper" for religious leaders to "Take stands on issues such as banning abortion and requiring school prayer." However, when asked what they thought about religious leaders urging "their church members to vote for specific candidates who follow their stands on issues such as

[71] Business Week/Harris Poll, Sep. 1984; Harris Survey, Sep. 1984.

[72] NBC News/Associated Press Poll, Oct. 1980.

banning abortion and requiring school prayer," seventy percent of the respondents answered that it was not fitting and proper.[73]

Thus, respondents reported disapproval of electioneering activities by religious leaders, both generally speaking and in response to specific policy issues. When respondents were asked their opinion about general political activity (not specifically related to lobbying and electioneering), as shown in Figure 6.5, the level of support increased when specific policies were mentioned. However, when questions asked specifically about the political activity of electioneering, public opinion maintained its disapproval of the activity in response to questions about specific policy issues. What appears evident is that Americans support the right of religious leaders to be politically active as individuals but not to use their official positions to urge the members of their religious organizations to support their political views.

This general trend is consistent with findings from one report, which found that while public opinion did not support clergy discussing political candidates or issues from the pulpit, opinion was reversed when the question dealt with church members merely expressing their views on current social matters.[74] Thus, according to the authors, while Americans are "supportive of a role for religion in politics and society…they are skeptical of organized campaigns by religious leaders or church movements to take over the electoral or political process."[75] However, the study also claimed that public opinion polls had shown an increasing number of people accepting lobbying and electioneering

[73] Harris Survey, Sep, 1984.

[74] Mariana Servín-González and Oscar Torres-Reyna, "Religion and Politics," *The Public Opinion Quarterly* 63 (Winter 1999): 592-621.

[75] Servín-González and Torres-Reyna, 598.

activities by religious leaders, from seventy percent opposition in 1952 to only fifty-nine percent opposition by 1998. It appears that the authors were using data from polls that asked the question, "Do you think it is ever right for clergymen to discuss political candidates or issues from the pulpit?" Figure 6.7 shows that in response to the five times that this question was asked between 1952 and 2000, public opinion did appear to decrease slightly.[76] However, while the two percentages reported by the study (in 1952 and 1998) are correct, they fail to provide a more comprehensive picture of public opinion in response to political involvement of religious leaders. As illustrated by Figure 6.5, it would be misleading to report that Americans have reduced their opposition to lobbying and electioneering by religious groups and officials.

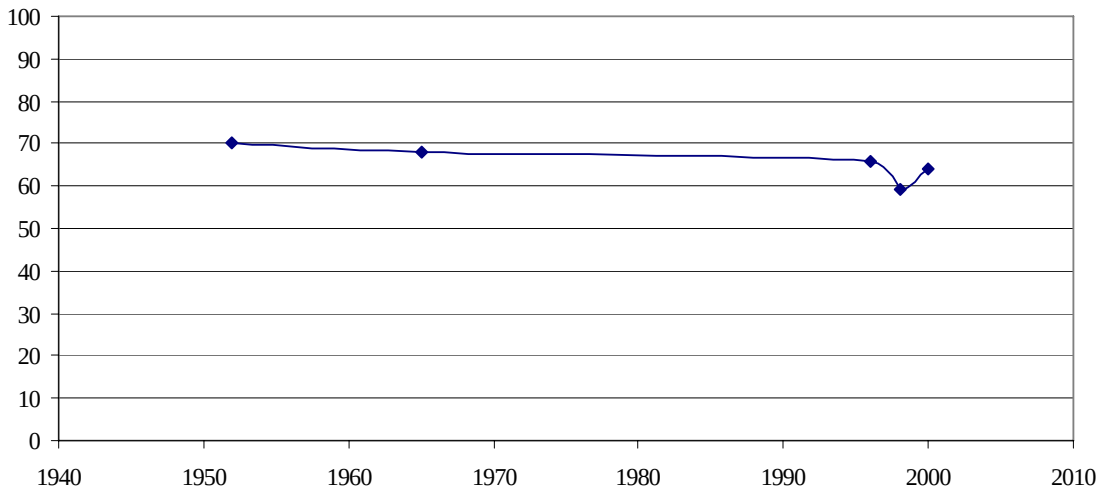

Figure 6.7. Disapproval of clergymen discussing politics from the pulpit

When the questions about lobbying and electioneering are separated, as demonstrated in Figures 6.8 and 6.9, public opinion has expressed a higher level of

[76] Religion and the American People Survey, 1952, Jun, 1952; Religious Life in America, Nov, 1965; Pew Research Center for the People & the Press American Churches, Politics Poll, May, 1996; Washington Post/Kaiser Family Foundation / Harvard Values Survey, Nov, 1998; Pew Research Center for the People & the Press Campaign Typology Poll, Aug, 2000.

opposition to electioneering practices. Thus, while Americans express an overall disapproval of direct political activity of religious leaders, the rate is higher for electioneering activities than for lobbying activities. Also evident is the slight increase in opposition, to both electioneering and lobbying, between 1981 and 2008. Thus, not only was the Court's opinion consistent with public opinion, but the level of agreement has been increasing.

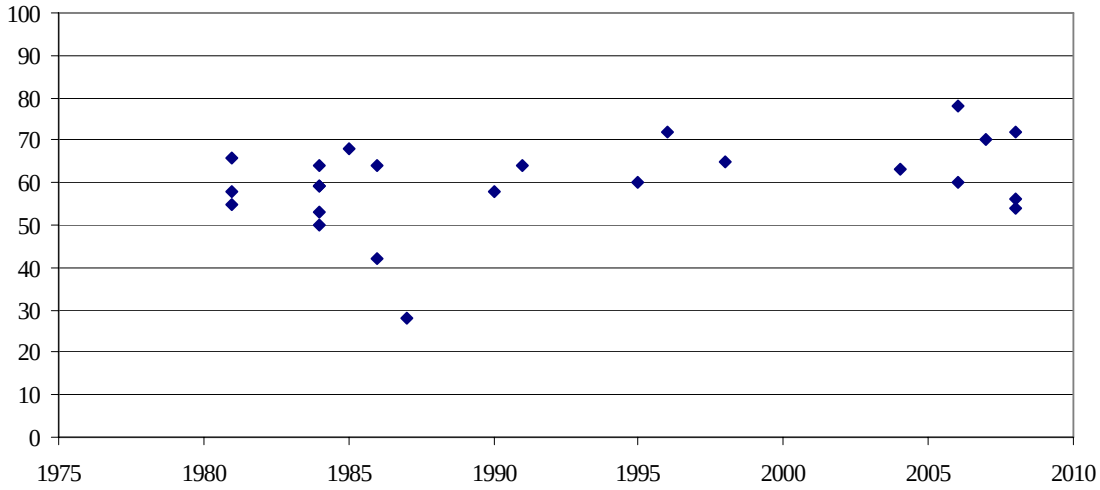

Figure 6.8. Opposition to electioneering by religious leaders and organizations, 1981-2008

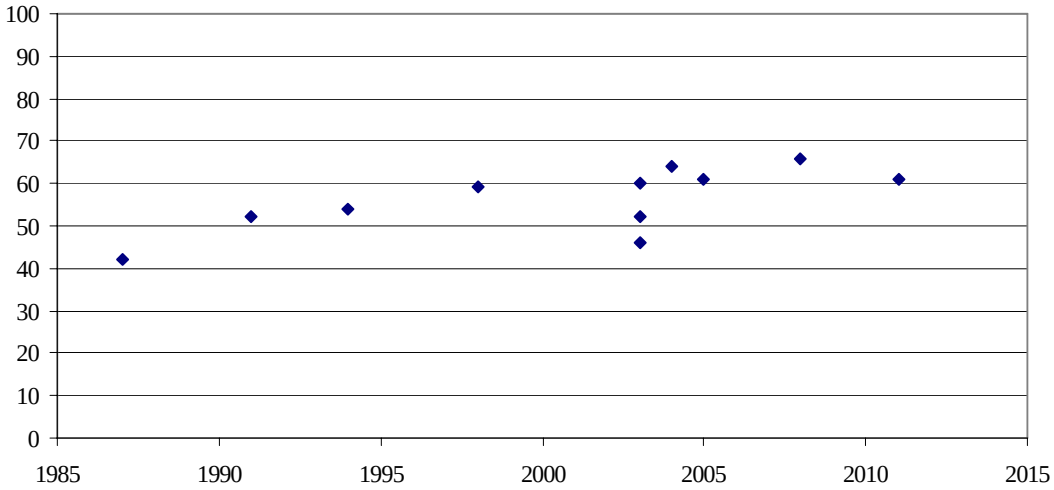

Figure 6.9. Opposition to lobbying by religious leaders and organizations, 1981-2011

Bob Jones University v. United States (1983)

In 1970, the IRS announced that it would withhold tax exempt status from schools that discriminated on the basis of race.[77] The Supreme Court in 1983 reviewed a case involving the IRS's determination to revoke the tax exempt status of a private religious university on the basis that it practiced racial discrimination. Due to a belief that the Bible forbids interracial dating and marriage, the University had gone through various policies: (1) refusal to admit blacks until 1971; (2) acceptance of applications from blacks married within their race from 1971 to 1975; and (3) beginning in 1975, acceptance of applications from unmarried blacks, who would then be enrolled under a policy that prohibited interracial dating and marriage.[78] The Court, by a vote of 8-1, upheld the determination of the IRS, stating that, "The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest…. [and] the government interest at stake here is compelling… eradicating racial discrimination in education."[79]

The Court's opinion was consistent with public opinion on the matter. In addition to the public opinion polls reported in the previous chapter that showed general public agreement with tax exemptions for religious organizations, a series of questions asked specifically about tax exempt status for religious organizations that discriminate based on race. As illustrated in Figure 6.10, public opinion polls on the question are very limited,

[77] Sharon Worthing, "The State and the Church School: The Conflict Over Social Policy," in *Religion, the State, and Education*, ed. James E. Wood, Jr. (Waco, Tx: Baylor University Press, 1984): 88.

[78] *Bob Jones University v. United States*, 461 U.S. 574, 580 (1983).

[79] *Bob Jones University v. United States*, 461 U.S. 574, 603-604 (1983).

as public opinion on the issue was only captured between 1982 and 1984.[80] However, the polls that do exist show a clear message of public opinion: religious schools that segregate whites and blacks, or prohibit racial integration, should not be eligible for tax exemptions.

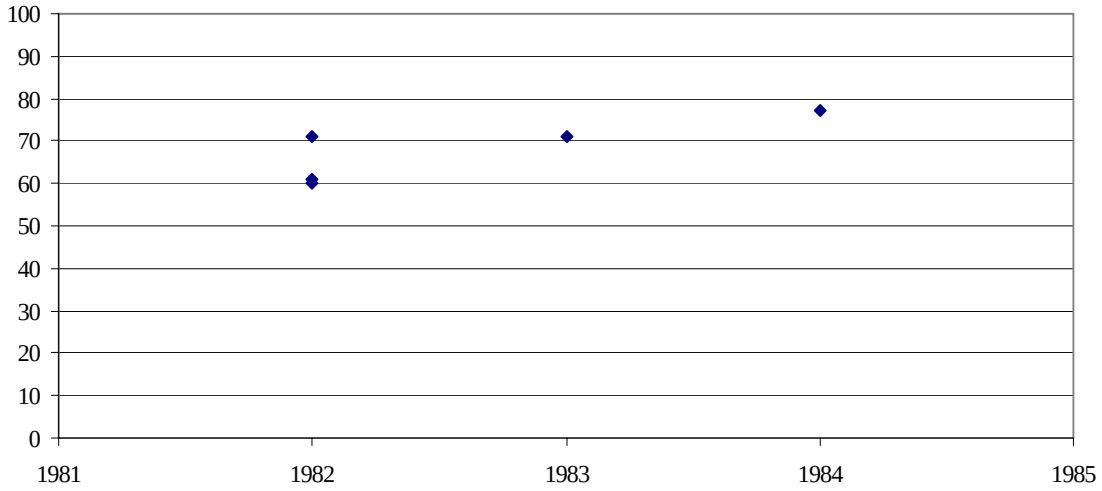

Figure 6.10. Public support for withholding tax exempt status from schools that discriminate based on race

With such limited public opinion data on the specific issue, it is helpful to view a broader trend of public opinion on the issue of interracial relationships. In 1967, the Supreme Court unanimously ruled against a Virginia state law that banned inter-racial marriages.[81] As one author has reported, public opinion over time embraced the

[80] The Harris Survey, "Big Shift in Single-Issue Voting Expected This Fall," March 11, 1982, in the Harris Interactive Vault, http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-BIGr-SHIFT-IN-SINGLE-ISSUE-VOTING-EXPECTED-THIS-FALL-1982-03.pdf (April 2, 2011); Roper Report 82-3, Feb. 1982; The Harris Survey, "Black Voting the Key to Outcome in 1984," July 21, 1983, in the Harris Interactive Vault, http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-BLACK-VOTING-THE-KEY-TO-OUTCOME-IN-1984-1983-07.pdf. (April 2, 2011); The Harris Survey, "Moral Majority's Impact Diminishes," May 14, 1984, in the Harris Interactive Vault, http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-MORAL-MAJORITYS-IMPACT-DIMINISHES-1984-05.pdf. (April 2, 2011).

[81] *Loving v. Virginia*, 388 U.S. 1 (1967).

decision.[82] This statement is supported by public opinion poll data. From 1968 to 2008, in thirteen different years, respondents were asked if they approved or disapproved of marriage between blacks and whites.[83] In 1968, only twenty percent reported approval, with seventy-three percent disapproving. Support steadily increased over the years, with seventy-one percent reporting approval by 2008.

When asked about the legal right to marry, respondents reported an even higher rate of approval.[84] Even though views in favor of interracial marriage were still hovering just below the fifty percent level in the 1980's, support was much higher in response to questions about whether laws should allow interracial marriage. In 1989, a General Social Survey asked, "Do you think the law should forbid marriage between blacks and whites?" Another questions asked, "Do you think the law should allow marriage between blacks and whites?[85] Support was reported as seventy-eight percent and sixty-five percent, respectively, in favor of a legal structure allowing for marriage between blacks and whites.

Thus, the Court's opinion in 1983 to uphold the denial of tax exempt status to a private university based on its policy of racial discrimination was consistent with public opinion about whether or not religious schools with racial discrimination policies should

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[82] Melvin I. Urofsky, *The Public Debate Over Controversial Supreme Court Cases* (CQ Press, 2005), 258.

[83] Gallup Poll (AIPO), Jun. 1968; Gallup Poll (AIPO), Oct. 1972; Gallup Poll (AIPO), Jul. 1978; Gallup Report, Apr. 1983; ABC News/Washington Post Poll, Jan. 1986; Racial Attitudes And Consciousness Exam, Aug. 1989; Gallup Poll, Jun. 1991; PSRA/Newsweek Poll, Feb. 1995; Race Relations Poll, Jan. 1997; Gallup Poll, Jun. 2002; Civil Rights And Race Relations Survey 2004, Nov. 2003; Gallup Poll, Jun. 2007; Gallup/USA Today Poll, Sep. 2007; Princeton Survey Research Associates International/Newsweek Poll, May 2008.

[84] General Social Survey 1989, Feb. 1989; Harris Survey, Feb. 1971; Gallup/USA Today Poll, May 2008.

[85] General Social Survey 1989, Feb. 1989.

be eligible for tax exemptions. In addition, the Court's opinion can be seen as consistent with a broader public sentiment that has increasingly not only approved of interracial relationships, but disapproved of legal restrictions barring interracial relationships.

Swaggart v. Calif. Board of Equalization (1990)

In another Free Exercise challenge to a tax policy, the Court in 1990 unanimously upheld California's sales tax law, under which the state applied the general sales tax to those sales made as part of an "evangelistic crusade."[86] According to the Court, a state may tax a religious organization without violating the Free Exercise Clause, as long as it does so under a generally applicable, religiously neutral law.

As discussed in the previous chapter, public opinion polls on the issue of tax exemption are old and often not useful for providing a measure of public opinion on the matter. The only poll question that relates to the for-profit activity of churches was a 1952 question, which asked, "Do you think church property which brings rent or profit to the church should be taxed, or not?"[87] A plurality of forty-nine percent answered "yes." Updated polling information is needed in order to determine whether the Court's opinion is consistent with public opinion on the issue of taxation of the for-profit functions of religious organizations.

Exemptions from General Laws

When the Supreme Court "incorporated" the Free Exercise Clause, thereby applying it to states, it reiterated the Court's previous distinction between an individual's

[86] *Swaggart Ministries v. California Board of Equalization*, 493 U.S. 378 (1990).

[87] Religion and the American People Survey, 1952, Jun. 1952.

freedom to believe and the freedom to act based on those beliefs. As Justice Roberts wrote, "The first is absolute but, in the nature of things, the second cannot be."[88] At various times during the history of the United States, government regulations, implemented through the majority-rule legislative decision-making process, have restricted the religious practices of minority religious groups. When these cases have reached the Supreme Court, the Court has had to determine whether the restrictions were an appropriate use of government authority, or whether government violated the First Amendment of the United States Constitution.

Jehovah's Witnesses, St., Washington v. King Cty. Hosp. (1968)

In 1968, the Supreme Court affirmed a 1967 decision of the United States District Court for the Western District, which had ruled that a Washington state law requiring blood transfusions for children of Jehovah's Witnesses was not a violation of the Free Exercise Clause.[89] In upholding the district court's decision, the Supreme Court referenced its 1944 ruling that "…the family itself is not beyond regulation in the public interest, as against a claim of religious liberty…The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."[90]

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[88] *Cantwell v. State of Connecticut*, 310 U.S. 296, 303-304 (1940).

[89] *Jehovah's Witnesses, St., Washington v. King Cty. Hosp.*, 390 U.S. 598 (1968); *Jehovah's Witnesses in State of Wash. v. King County Hosp.*, 278 F.Supp. 488 (1967).

[90] *Prince v. Massachusetts*, 321 U.S. 158, 166-167 (1944). In this case the Court reviewed whether the Free Exercise Clause exempted a Jehovah's Witness from a Massachusetts's child labor law that prohibited, among other things, the sale of magazines in public places by minors. Public opinion polls regarding child labor do not appear until the late 1990's, and there are no questions about religious exemptions from the laws. However, opinion expressed in polls conducted between 1997 and 2005 showed public opinion clearly in opposition to child labor. Not only did Americans show a willingness to pay more for products that were not made with child labor (Associated Press Poll, Nov, 1997; Consumers and the 21st Century Survey, Apr, 1999), but seventy-five percent of Americans in 2005 stated that "child labor laws

No public opinion polls were found about the specific issue of blood transfusions or in reference to rights of Jehovah's Witnesses to be exempt from state laws for purposes of medical treatment of their children. However, an opinion poll question in 1985 addressed a similar set of circumstances. Respondents were asked, "(Sometimes public authorities intervene with parents in raising their children. Please indicate in each of the following cases how far you think public authorities should go in dealing with a 10 year old child and his or her parents.)... The parents refuse essential medical treatment for the child because of their religious beliefs."[91] Fifty-two percent of the respondents answered that the child should be taken from the parents.[92]

Even though this opinion was captured almost twenty years after the Supreme Court's decision regarding the rights of Jehovah's Witnesses to be exempt from state mandated medical treatment for minor children, the facts of the case are similar to the circumstances described in the question. In the Jehovah's Witness case, the children were declared wards of the court because the parents declined to accept blood transfusions for them. Assuming that this one poll is an accurate depiction of public opinion on the issue, and assuming that opinion did not change over the twenty year span of time, one can speculate that the Court issued an opinion that was consistent with public opinion on the matter.

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should apply equally to all working youth in the United States, regardless of whether the work is in agriculture or in some other industry" (Child Labor Survey, Feb, 2005).

[91] General Social Survey 1985, Feb. 1985.

[92] Thirty-four percent answered that government should "give warnings or counseling," six percent answered that government should "take no action," and nine percent reported they couldn't choose from the options provided.

Further, in 1991 respondents were asked their opinion regarding parents that do not believe in modern medical care, and specifically how government should have responded to an outbreak of German Measles in this group.[93] Sixty-one percent responded that government should step in and provide care, with twenty-six percent reporting that government should stay out of it. When the wording of the question was changed to mention that some of the children had died, those in favor of government providing the healthcare to the children rose to seventy-three percent, with those opposed to government intervention falling to seventeen percent. Again, public opinion appears to support government limiting the free exercise rights of individuals in order to protect the health of children.

Religious Solicitation on Government Property

The Supreme Court has reviewed two cases involving the International Society for Krishna Consciousness, Inc., both involving government regulations that limited the ability of members to exercise their religion on government property. The International Society for Krishna Consciousness, Inc. is one of many alternative religious groups that appeared in the United States in the mid-twentieth century. One religious ritual performed by the group is referred to as *sankirtan*, a practice which, as described by the Court, "…enjoins its members to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion."[94]

As illustrated by a 1976 opinion poll, these new religious groups were not always perceived as a positive addition to the religious landscape. In response to the question,

[93] Great American TV Poll #5, Feb. 1991.

[94] *Heffron v. Int'l Soc. for Krishna Consc.*, 452 U.S. 640, 648 (1981).

"In recent years there has been a growth in various types of different and unusual religious sects that seem to be appealing to youth--the Reverend Sun Moon's group, the Hari Krishna group, etc. Generally speaking, do you think these movements are a good thing because they give young people something to believe in, or a bad thing because they give young people wrong ideas," sixty-four percent answered it was a "bad thing."[95] In fact, in 1979 Americans identified the group as a "cult," rather than as a church or a religion.[96]

In 1981, the Supreme Court reviewed a regulation established by a public corporation that had been authorized to establish rules associated with operating an annual state fair. The rule under review required any "distribution, sales, and solicitation activities" to be confined to a fixed location; the locations were available on a first-come, first-served basis.[97] The International Society for Krishna Consciousness, Inc. argued that the restriction would "suppress the practice of Sankirtan." However, the Court ruled that the regulation in question was an appropriate "time, place, and manner" restriction. In making this determination the Court used a precedent established in a 1940 case, involving a similar set of circumstances, in which the Court held that "…a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting… without unconstitutionally invading the liberties protected by the Fourteenth Amendment."[98] Using this legal principle, along with its Free Exercise equal access precedent, the Court determined that, since the regulation did not restrict access

[95] Roper Report 76-8, Aug. 1976.

[96] Gallup Poll (AIPO), Jan, 1979.

[97] *Heffron v. Int'l Soc. for Krishna Consc*., 452 U.S. 640 (1981).

[98] *Cantwell v. State of Connecticut,* 310 U.S. 296, 304 (1940).

"based upon either the content or subject matter of speech,"[99] then it was not a violation of the Free Exercise Clause.

In another case involving a government regulation that restricted the free exercise of religion for members of the Krishna group, the Court in 1992 reviewed a Port Authority of New York and New Jersey regulation that, within airport terminals, prohibited "the repetitive solicitation of money or distribution of literature."[100] Under this rule, members of the Krishna group were prohibited from performing their religious practice of *sankirtan*.[101] The Supreme Court upheld the prohibition of solicitation, with the explanation that the airport terminal was not a public forum and, as such, the Port Authority did not need to provide a compelling interest for restricting use of the facility for solicitation purposes.[102]

In 1987, respondents were asked if they agreed or disagreed that, "There should be laws to prevent groups like Hare Krishna from asking people for money at airports." Fifty-seven percent agreed, with thirty-four percent in disagreement. Although captured five years prior to the Court's decision on the issue, it appears that the Court's opinion was consistent with public opinion, that public airports should not be required to allow members of the group, the International Society for Krishna Consciousness, Inc., to solicit within airport terminals.

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[99] *Heffron v. Int'l Soc. for Krishna Consc*., 452 U.S. 640, 648 (1981).

[100] *Int. Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 675 (1992).

[101] *Int. Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 675 (1992).

[102] *Int. Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 690 (1992). While the Court determined the regulation against solicitation to be reasonable, it did not find the restriction against "leafletting" to be reasonable, and it therefore struck down the portion of the rule that restricted the distribution of literature. See *Lee v. Int. Soc. for Krishna Consciousness*, 505 U.S. 830 (1992).

It is also possible that respondents were providing an opinion specific to the members of the Krishna group. In 2005, fifty-two percent of respondents supported "soliciting donations to support your religion in public places" as a right that is "protected by the constitutional guarantee of freedom of religion."[103] This could illustrate the distinction between public support for the principle of religious liberty in general, versus support for a specific application of religious liberty, particularly when the group in question is viewed as an unpopular religious sect.

Discussion and Conclusion

As noted previously, Americans have expressed support for the principle of religious free exercise, and the idea that this principle applies to minority religions as well as mainstream religions. However, as the results of this chapter have revealed, public opinion has not supported exemptions from public policy in order to maintain the religious liberties of some individuals in certain circumstances. For the free exercise issues included in this chapter, with the exception of the cases dealing with religious tests for office, the Court upheld policies that did not provide religious exemptions for minority religious groups. In each of those decisions, the Court's ruling was in agreement with public opinion on the matter

Generally speaking, the Court's opinions regarding religious tests for office are consistent with current public opinion on the issue. While the Court's 1961 ruling to strike down a requirement that officeholders declare a belief in God was not consistent with public opinion at the time, public opinion had changed by 1981. In addition, overall acceptance of public officeholders who do not believe in God has increased steadily over

[103] Council for America's First Freedom Survey, Jul. 2005.

the past fifty years, to the point where Americans are evenly divided on the issue, with just as many supporting as opposing the idea that people who do not believe in God are fit for public office. While a pair-wise comparison cannot be performed for the Court's 1978 decision to strike down a prohibition that banned clergy from holding office, the trend of public opinion on the issue appears to support the Court's decision. When public opinion was captured on the matter, Americans showed support, at a rate of seventy-two percent, for a member of the clergy to have a right to hold public office. As such, it appears that the public's support for the abstract principle of religious liberty maintains for the specific issue of religious tests for office; public opinion supports a person's right to hold public office without religious disqualification.

At the same time, public opinion has shown general disapproval of the idea that religious leaders and organizations might engage in lobbying and electioneering activities. Therefore, the Court's allowance of the IRS policy to remove the tax exempt status from a religious organization that participated in political activity was consistent with public opinion. Also consistent with public opinion was the Court's decision to uphold the IRS's revocation of the tax exempt status of a religious university that practiced racial discrimination. Generally speaking, the Court's opinions regarding tax policy for religious organizations have been consistent with public opinion.

In each of the cases covered in this chapter dealing with tax policy, a religious organization was unsuccessful in securing Free Exercise protections from a governmental policy, and the Court's decision was consistent with public opinion. Therefore, in each of these cases, Americans did not express support for the idea that the tax exemptions in these specific situations were necessary in order to maintain overall religious liberties.

This trend continues in cases involving the rights of Jehovah's Witnesses to be exempt from medical treatment laws, and for Hare Krishnas to be exempt from general solicitation laws. Public opinion in each instance supported the government's limitation of the free exercise capabilities of members of these minority religious groups. Thus, even though Americans expressed general support of the concept that religious liberties apply just as significantly to minority religious groups as to mainstream religious groups, public opinion has not supported this expression in the specific instances reviewed in this chapter.

Limited public opinion polling data for religious free exercise cases has severely restricted the ability to compare the Court's decisions with public opinion. For instance, the Supreme Court has issued opinions in two cases dealing with the Free Exercise rights of members of the Amish religion; in one case the Court upheld their Free Exercise challenge to a generally applicable state compulsory school-attendance law,[104] and in the other case the Court upheld, against a Free Exercise challenge, the applicability of the social security tax assessment.[105] However, no public opinion polls were located dealing with these issues, or this religious group, that could be used to provide for a comparison between the Court's opinions and public opinion. Similarly, Native Americans have been involved in several Free Exercise challenges,[106] yet no public opinion polls were found

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

[105] *United States v. Lee*, 455 U.S. 252 (1982).

[106] *Bowen v. Roy*, 476 U.S. 693 (1986), the Court upheld the government's requirement for a child to have a social security number in order to be eligible for state benefits; *Lyng v. Northwest Indian Cemetery Prot. Assn*., 485 U.S. 439 (1988), the Court upheld government's decision to create a road through area used by American Indians for religious rituals; *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990), the Court upheld the prohibition of peyote for sacramental purposes, and therefore the withholding of unemployment benefits.

involving these issues, either. Thus, the ability to compare public opinion and the Supreme Court's decisions on Free Exercise cases is quite limited.

From the polling data that is available, it would appear that minority religious practices do not receive public support in favor of exemptions from public policy, to the extent that might be expected from the public support of the principle of free exercise of religion. However, public opinion polling data on a variety of other issues that have been addressed by the Court, and involving additional minority religions, would provide a better understanding of the relationship between the Court's opinion and public opinion on free exercise issues.

CHAPTER SEVEN

Conclusion

After a half-century of Supreme Court decisions dealing with the First Amendment's religion clauses, and a similarly lengthy period of asking Americans their opinions on those issues, there appear to be some significant areas of agreement, as well as disagreement. It has often been noted that the Court issues opinions that are inconsistent with public opinion when it comes to policies related to prayer and religious devotion in public schools. Amidst this perception of disagreement, however, an important area of agreement has been overlooked. Both the Supreme Court and the American public agree that prayer not be incorporated into the daily public school program through a policy of organized spoken prayer led by school officials. Instead, public opinion polls report that Americans prefer a moment of silence, and it appears that the Supreme Court supports this type of policy, as long as the stated purpose of the policy is not specifically for prayer.

This study has shown that the relationship between Supreme Court decisions and public opinion is much more complex than what has been previously reported. The Court has not issued a single opinion dealing with government policies that relate to religion. Rather, it has issued many opinions, each addressing a different set of circumstances. Therefore, instead of looking at a single case in order to determine the Court's opinion on the issue of religion in public schools, it is more constructive to review the more than one dozen cases in which the Court has clarified its opinion on the proper role of religion in public schools. Thus, an understanding of the Court's opinion with regard to religion in

public schools is not formed solely by the Court's 1962 ruling in *Engel v. Vitale*, but rather on the many cases in which the Court has issued an opinion on the issue, and therefore represented by the aggregate of individual Court opinions related to the issue. In addition, it is important to understand not just the Court's ruling (upholding or striking down the policy under review), but also the Court's opinion, where the Court voices important distinctions to its perspective of the proper role for religion in public schools.

When this approach is taken, we are left with an understanding that the Supreme Court's perspective, as made clear in its decisions from 1948 through 2004, is that public schools may not make a determination about religion that exposes public school students to a prescription of religion. Public schools may accommodate voluntary religious activity, through policies that allow for released time programs and use of school facilities by religious groups, as long as the school is not putting students in the position of having to be part of a school-sponsored religious program. The Court has struck down public school policies that included officially organized spoken prayer, recitation of Bible verses, stand-alone displays of the Ten Commandments, moments of silence for purposes of prayer, and the required teaching of creationism. However, the Court has not ruled against individual voluntary prayer, reading the Bible as part of broader academic studies, released time for religious study, moments of silence for purposes not stated as religious, or reference to God in the Pledge of Allegiance.

Studying public opinion on issues related to government and religion is similarly complex. Just as the Court is limited by the circumstances involved in individual cases, the public is limited by the availability of questions, the way in which questions are worded, and the variety of responses for expressing their opinion. Just as the Court has

provided its opinion to many different scenarios regarding the relationship between government and religion, the public has expressed its opinion to many different sets of circumstances posed by opinion poll questions over the years. The questions have been worded in many different ways and have offered a variety of different response options. As such, our understanding of public opinion regarding the proper relationship between government and religion is based not solely on one poll, or one series of polls, but on the many different polls that have asked a variety of questions over the years.

Public opinion polls related to the issue of religion in public schools indicate an American public that does not favor religious instruction in public schools, but that does support posting the Ten Commandments and the teaching of creationism (when taught along with evolution). Further, while public opinion has expressed support for Bible reading, the level of support has declined over the years and Americans appear to be currently divided on the issue. Likewise, public disagreement with the Court's 1962 decision on prayer in public schools has declined and, currently, more people support a moment of silence as the method of including prayer in public schools, as opposed to organized spoken prayer. However, public opinion shows strong support for organized spoken prayers at official school events, such as graduation ceremonies and football games.

Studies researching the linkage between Supreme Court decisions and public opinion have found a positive relationship between the two. Thomas Marshall reported that, since 1935, the Court has issued decisions in agreement with public opinion approximately three-fifths of the time.[1] This study identified thirty-eight decisions that

[1] Thomas R. Marshall, *Public Opinion and the Rehnquist Court* (Albany: State University of New York Press, 2008); Thomas Marshall, *Public Opinion and the Supreme Court* (New York: Longman,

the Supreme Court issued related to the First Amendment's religion clauses that could be linked to at least one public opinion poll reported within five years of the Court's ruling, and in which opinion was in favor of one position over the other. As detailed in Table 7.1, approximately fifty-eight percent of the Court's decisions were consistent with public opinion.[2]

Table 7.1. Measure of congruence between Supreme Court decisions and public opinion

					Relationship	
Case	Clause	Date of Decision	Policy Decision	Public Opinion (%)	agree	disagree
Everson v. Board of Education	EC	1947	upheld	53		x
Zorach v. Clauson	EC	1952	upheld	54	x	
Torcaso v. Watkins	FE	1961	struck down	53		x
Engel v. Vitale	EC	1962	struck down	77		x
Board of Education v. Allen	EC	1968	upheld	48	x	
Walz v. Tax Commission	EC	1970	upheld	61	x	
Lemon v. Kurtzman	EC	1971	struck down	51		x
Committee v. Nyquist - aid to religious schools	EC	1973	struck down	53		x

1989); Of the 146 matches that he found between Supreme Court cases and public opinion polls between 1935 and 1985, only four dealt with "religion." This study found nineteen cases during that same period of time that could be compared to a contemporary public opinion poll.

[2] In some cases, the Court issued decisions on more than one aspect of a particular policy or action. When these distinctions were evident in public opinion polls, then they were represented as separate Court decisions and each was compared to public opinion. In order to be included in Table 7.1, a clear opinion in favor of one side over the other had to be determined. For those issues with multiple opinion polls, the following steps were taken. Opinion polls reported the same year as the Court's decision were used for determining agreement with the Court's opinion. If more than one opinion poll was reported the same year as the Court's opinion, then the average of opinion in agreement was compared to the average of opinion in disagreement, and the higher of the two percentages was used as an aggregate expression of opinion. For decisions that did not align with an opinion poll reported the same year as the Court's decision, but did align with polls conducted within five years of the Court's decision, the aggregate expression of opinion (compiled as explained above, but for polls within the five year time period) was used. If the average opinion in agreement was within one percent of the average opinion in disagreement, then no clear preference was noted and the decision was not included in Table 7.1.

(Table 7.1. Continued)

Case	Clause	Date of Decision	Policy Decision	Public Opinion (%)	Relationship	
					agree	disagree
Committee v. Nyquist - tuition reimbursement	EC	1973	struck down	44	x	
Sloan v. Lemon - tuition reimbursement	EC	1973	struck down	44	x	
Levitt v. Committee for Public Education	EC	1973	struck down	53		x
Franchise Tax Board v. United Americans	EC	1974	struck down	64	x	
Meek v. Pittenger - textbooks	EC	1975	upheld	53	x	
Meek v. Pittenger - aid to religious schools	EC	1975	struck down	53		x
Wolman v. Walter - textbooks and testing	EC	1977	upheld	47	x	
Wolman v. Walter - instructional material, equipment, field trips	EC	1977	struck down	47		x
Widmar v. Vincent	FE	1981	struck down	77	x	
Mueller v. Allen	EC	1983	upheld	53		x
Bob Jones University v. U.S.	FE	1983	upheld	68	x	
Lynch v. Donnelly	EC	1984	upheld	80	x	
Village of Scarsdale v. McCreary	EC	1985	upheld	80	x	
Wallace v. Jaffree	EC	1985	struck down	75		x
Aguilar v. Felton	EC	1985	struck down	61	x	
Grand Rapids Sch. Dist. v. Ball	EC	1985	struck down	61	x	
Edwards v. Aguillard	EC	1987	struck down	61		x
Allegheny County v. ACLU - creche	EC	1989	struck down	74		x

(Table 7.1. Continued)

Case	Clause	Date of Decision	Policy Decision	Public Opinion (%)	Relationship: agree	Relationship: disagree
Allegheny County v. ACLU - broad holiday display	EC	1989	upheld	74	x	
Westside v. Mergens	FE	1990	struck down	74	x	
Lee v. Weisman	EC	1992	struck down	70		x
Int. Society for Krishna Consciousness v. Lee	FE	1992	upheld	57	x	
Agostini v. Felton	EC	1997	upheld	48	x	
Santa Fe ISD v. Doe	EC	2000	struck down	66		x
Mitchell v. Helms	EC	2000	upheld	49		x
Good News Club v. Milford Central School	FE	2001	struck down	75	x	
Zelman v. Simmons-Harris	EC	2002	upheld	49	x	
Elk Grove USD v. Newdow	EC	2004	upheld	83	x	
McCreary County v. ACLU	EC	2005	struck down	76		x
Van Orden v. Perry	EC	2005	upheld	76	x	
					22 58%	16 42%

In another study, Mishler and Sheehan concluded that, while the Court had responded in a deliberate fashion to public opinion prior to 1981, it had been less responsive since then.[3] However, when Marshall added the Rehnquist Court to his study, his overall conclusion did not change: since 1935, the Court has been in agreement with public opinion approximately three-fifths of the time. If the findings from this research

[3] William Mishler and Reginald S. Sheehan, "The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions," *The American Political Science Review* 87 (Mar., 1993): 87-101. This study assessed the relationship by measuring the liberalism of the Court (by calculating a composite measure of the overall ideological tenor of the Court's decisions each year) and comparing that to the liberalism of public opinion (by using Stimson's "public mood" index) for each year.

are any indication, then the difference between the two reports is most likely due to the different starting points for each study. For instance, the results of this research show that, for cases that could be compared to a clear expression of contemporary opinion, the Burger Court was consistent with public opinion approximately sixty-three percent of the time, compared to courts before and after having lower rates of consistency. Since Marshall's study dated back to 1935, but Mishler and Sheehan's only back to 1956, Mishler and Sheehan were mainly comparing the Rehnquist Court (1986-2005) to the Burger Court (1969-1986), in addition to much of the Warren Court (1953-1969). Therefore, the results reported by Mishler and Sheehan are consistent with this study, in that the Rehnquist Court did agree with public opinion at a lower rate than the period of time between 1956 and 1985. Another way to express this, however, would be that the Burger Court had a higher rate of congruence with public opinion than any other Court within the time studied.

The distinction becomes more apparent when Establishment Clause and Free Exercise Clause cases are reported separately. Thirty-two of the decisions referenced in Table 7.1 were for Establishment Clause issues. For these Establishment Clause decisions, the Court was consistent with public opinion approximately fifty-three percent of the time. While the Burger Court was consistent with public opinion approximately fifty-nine percent of the time, the Rehnquist Court was consistent with public opinion only about forty-five percent of the time in its Establishment Clause decisions.

Unfortunately, very few opinion polls were available to compare with the Court's Free Exercise cases. Thus, of the thirty-eight decisions that could be matched with contemporary public opinion poll questions, only six were decisions related to the Free

Exercise Clause. In five of the six decisions, the Court issued an opinion that was consistent with public opinion. Whereas an eighty-three percent rate of consistency is striking, the limited number of decisions this is based on makes it very difficult to make a broader statement about the Court's decisions regarding the Free Exercise Clause.

The relationship between Supreme Court decisions and public opinion can be further clarified by reducing the comparison to those issues for which public opinion appeared to show a clear majority opinion. When limiting the analysis to those issues for which public opinion expressed an opinion of at least fifty-five percent, twenty-one decisions can be compared to public opinion. For those issues where at least fifty-five percent of respondents agreed on an opinion, as illustrated in Table 7.2, the Court issued a decision that was consistent with public opinion approximately sixty-seven percent of the time. This included an eighty-nine percent level of agreement by the Burger Court, and a fifty-five percent rate of congruence for the Rehnquist Court.

Table 7.2. Measure of congruence when public opinion is at least fifty-five percent

					Relationship	
Case	Clause	Date of Decision	Policy Decision	Public Opinion (%)	agree	disagree
Engel v. Vitale	EC	1962	struck down	77		x
Walz v. Tax Commission	EC	1970	upheld	61	x	
Franchise Tax Board v. United Americans	EC	1974	struck down	64	x	
Widmar v. Vincent	FE	1981	struck down	77	x	
Bob Jones University v. U.S.	FE	1983	upheld	68	x	
Lynch v. Donnelly	EC	1984	upheld	80	x	
Village of Scarsdale v. McCreary	EC	1985	upheld	80	x	
Wallace v. Jaffree	EC	1985	struck down	75		x

(Table 7.2. Continued)

Case	Clause	Date of Decision	Policy Decision	Public Opinion (%)	Relationship	
					agree	disagree
Aguilar v. Felton	EC	1985	struck down	61	x	
Grand Rapids v. Ball	EC	1985	struck down	61	x	
Edwards v. Aguillard	EC	1987	struck down	61		x
Allegheny County v. ACLU - creche	EC	1989	struck down	74		x
Allegheny County v. ACLU - broad holiday display	EC	1989	upheld	74	x	
Westside Community Bd. of Ed. v. Mergens	FE	1990	struck down	74	x	
Lee v. Weisman	EC	1992	struck down	70		x
Int. Society for Krishna Consciousness v. Lee	FE	1992	upheld	57	x	
Santa Fe Independent School District v. Doe	EC	2000	struck down	66		x
Good News Club et al. v. Milford Central School	FE	2001	struck down	75	x	
Elk Grove Unified School District v. Newdow	EC	2004	upheld	83	x	
McCreary County v. ACLU	EC	2005	struck down	76		x
Van Orden v. Perry	EC	2005	upheld	76	x	
					14	7
					67%	33%

Thus, if we place this study within the broader field of research that has assessed the relationship between Supreme Court decisions and public opinion, we are left with similar conclusions. The Supreme Court has issued opinions that have been consistent with public opinion approximately three-fifths of the time. Whereas the Burger Court appeared to have a higher rate of consistency with public opinion, the rate of agreement between the Rehnquist Court and public opinion declined. However, when we remove

from the population those issues where public opinion appears quite divided on the issue (opinion that is less than fifty-five percent), the rate of congruence increases by almost ten percent. For those issues where public opinion reports a clear consensus in favor of one position over another, the Court's decisions are consistent with public opinion approximately sixty-seven percent of the time (fourteen of the twenty-one decisions were consistent with public opinion and seven were not).

In five of the seven cases for which the Court issued a decision that was inconsistent with public opinion, the Court struck down an aspect of religion as part of the official public school program (school prayer, moment of silence for purposes of prayer, teaching creationism along with evolution, prayer at graduation ceremonies, and prayer at football games). In the two other cases that the Court issued an opinion contrary to public opinion, the Court struck down a stand-alone holiday display of a creche and a display of the Ten Commandments in a county courthouse. These are issues for which the Supreme Court is at odds with a large majority of the American population, and yet the Court has maintained its principled objection. Thomas Marshall concluded that unpopular decisions, and decisions made by a split Court, are less likely to endure than decisions for which the Court was unanimous and agreed with popular sentiment.[4] The Court was divided, 5-4, on the two religious display cases that were referenced above as not consistent with public opinion. According to Marshall's hypothesis, it is less likely that these decisions will endure. Perhaps the Court intimated a shift in its opinion in 2005 when it upheld one of the two Ten Commandments cases it reviewed. This may indicate the beginning of a change to an unpopular opinion by the Court.

[4] Marshall, *Public Opinion and the Supreme Court*, 167-181.

Thomas Marshall also concluded that the Supreme Court exercised judicial restraint when dealing with federal laws. In other words, when dealing with federal policies and actions, the Court upheld the policy more often than it struck down the policy. Only one of the thirty-three decisions that could be linked to a contemporary public opinion poll for this study dealt with a federal policy. The case involved the revocation of a religious organization's tax exempt status. In its decision, the Supreme Court upheld the decision of the IRS, and the decision was in agreement with public opinion.

In addition, Marshall noted that, when dealing with state and local policies, a "direct and unmediated linkage" existed between Supreme Court rulings and nationwide public opinion[5] This study reported similar results. The remaining thirty-seven decisions that could be linked with contemporary expressions of public opinion involved state and local policies and actions. A majority of the time, the Supreme Court issued opinions that were consistent with public opinion. However, the Court's rate of consistency was higher when it upheld the policy than when it ruled the policy unconstitutional. The Supreme Court ruled against the state or local policy in twenty-one decisions, or about fifty-seven percent of the time. Only eight, or thirty-eight percent, of those decisions were consistent with public opinion. Therefore, a majority of the time, when the Supreme Court struck down a state or local government policy or action, the Court issued an opinion that was inconsistent with national public opinion. Further study in this area could provide important insight for this statistic.

[5] Marshall, *Public Opinion and the Supreme Court*, 187.

Analyzing results based on the various category divisions in this study revealed that public opinion has consistently supported religion in public school, whether as part of the official school program or as part of a voluntary group using school facilities. Therefore, as shown in Table 7.3, the Court was consistent with public opinion when it ruled in a manner that allowed for religion in public schools and was inconsistent with public opinion when it determined the presence of religion in the public school was unconstitutional. The Court was in agreement with public opinion only about forty-four percent of the time when ruling on policies dealing with religion in public schools.

Table 7.3. Measure of congruence for cases dealing with religion in public schools

					Relationship	
Case	Clause	Date of Decision	Policy Decision	Public Opinion (%)	agree	disagree
Engel v. Vitale	EC	1962	struck down	77		x
Widmar v. Vincent	FE	1981	struck down	77	x	
Wallace v. Jaffree	EC	1985	struck down	75		x
Edwards v. Aguillard	EC	1987	struck down	61		x
Westside Community Bd. of Ed. v. Mergens	FE	1990	struck down	74	x	
Lee v. Weisman	EC	1992	struck down	70		x
Santa Fe ISD v. Doe	EC	2000	struck down	66		x
Good News Club v. Milford Central School	FE	2001	struck down	75	x	
Elk Grove v. Newdow	EC	2004	upheld	83	x	

The Court has been consistent, about seventy-five percent of the time, with public opinion for cases dealing with tax policy. As shown in Table 7.4, the one exception was in 1983 when the Court shifted its opinion on the matter, and allowed for tax deductions

for expenses related to education at religious schools. Public opinion was in the process of a similar shift in opinion, and at the time of the Court's decision public opinion was around the fifty percent mark. As public opinion continued to increase its support for the policy, the Court's opinion became congruent with public opinion on the matter.

Similarly, public opinion has shown support for government displays of religious symbols. Each time the Court has issued an opinion on the matter, it has been in agreement with public opinion whenever it has upheld the display, and has been in disagreement whenever it has ruled a display as unconstitutional. Unlike the cases involving religion in public school, however, the Court has been divided, either by a vote of 5-4 or 4-4, in each of the cases included in this study that included a government display of a religious holiday symbol or the Ten Commandments. Continued study in this area could test Marshall's hypothesis that these unpopular decisions do not stand the test of time.

Table 7.4. Measure of congruence for cases dealing with tax policy

					Relationship	
Case	Clause	Date of Decision	Policy Decision	Public Opinion (%)	agree	disagree
Walz v. Tax Commission	EC	1970	upheld	61	x	
Franchise Tax Board v. United Americans	EC	1974	struck down	64	x	
Mueller v. Allen	EC	1983	upheld	53		x
Bob Jones University v. U.S.	FE	1983	upheld	68	x	

Unfortunately, the cases included in this study represent only about half of the Court's cases dealing with the First Amendment's religion clauses since the 1940's. The cases that can be matched with contemporary public opinion polls, to be included in the

overall measure of congruence, are even fewer. For instance, the notorious Bible reading cases from the early 1960's, while included in the study (Chapter 3), were not included in the overall calculation of congruence due to the fact that it was not until 1971 that opinion polls specifically asked about Bible reading in public schools.

Thus, while the calculated rate of congruence is useful, trend analysis also provides important insight. As noted above, the Court issued an opinion that was consistent with public opinion approximately fifty-eight percent of the time. Results of the trend analysis, however, can be used to argue in favor of a higher rate of congruence between Supreme Court decisions and public opinion for cases dealing with the First Amendment's religion clauses. For instance, a blunt measure of the relationship between the Court's opinion and public opinion for the 1985 case, *Wallace v. Jaffree*, would be to identify the relationship as inconsistent; sixty-three percent of respondents in 1985 reported they favored a moment of silence in schools in which students are encouraged to pray. However, over the years respondents have also reported that they support moments of silence when the stated purpose is not for prayer. Since the Court's opinion seemed to indicate that a moment of silence would be acceptable if the stated purpose was not for prayer, then one could argue that the Court's overall opinion on the policy issue is an opinion that is acceptable to the general public.

In addition, the Court's rulings regarding organized spoken prayer during the daily public school program have been noted as inconsistent with public opinion. However, public opinion over the past forty years has reflected a decreased level of opposition to the Court's decision, and currently rests at a point where almost as many report agreement as disagreement with the Court's decision. When combined with the

polls in which respondents show support for a moment of silence, and not spoken prayer in public schools, one can reach the conclusion that Americans are currently in agreement with the Court's 1962 decision (but, of course, not with its decisions regarding prayer at graduation ceremonies and football games).

Cases involving government aid to religious schools can also be cast in a slightly different light through trend analysis. Between 1971 and 1977, the Court issued decisions in five cases dealing with government aid to religious schools that, as shown in Figure 7.1, were inconsistent with public opinion for the measure of overall congruence between the Court's decisions and public opinion. However, the data reported in Figures 5.2 and 5.7, showing the trend of public support for government aid to religious schools, convey a slightly different message. While opinion polls reported in 1972 and 1974 do report a majority of Americans expressing support for government aid to religious schools, they are surrounded by expressions of public opinion that, between 1950 and 2000, show consistent disapproval of such aid. Therefore, one could question the conclusion that the Court's opinion was inconsistent with public opinion in these cases. If the reporting of congruence for these four cases is subsequently changed, then the overall level of agreement between Court decisions and public opinion would increase by about ten percent.[6]

Opinion regarding a voucher program can similarly be misleading. While it seems appropriate to make a statement that the Court's opinion was in agreement with public opinion in 2002, it would not be accurate to conclude that Americans support

[6] Of course, due to the fact the public opinion on the issue was less than fifty-five percent, these polls were omitted from the measure of congruence reported in Table 7.2, and the overall result was a level of agreement close to seventy percent.

voucher programs. Opinion polls seem to indicate that the Court was consistent with public opinion that vouchers are not a violation of the Establishment Clause. However, Americans have expressed in many different ways that they do not actually support implementation of a voucher program.

There were other Court decisions that were included in the study, but not in the calculation to measure the congruence between Court's decisions and public opinion due to the fact that an opinion poll within five years of the decision was not located. However, when analyzing the trend of opinion on the issue, one can make a reasonable conclusion about the relationship between the Court's opinion and public opinion. For instance, in 1973 the Court struck down a provision that allowed a tax deduction for expenses related to education at a religious school. Whereas public opinion polling on the issue did not begin until 1979, the trend reported in Figure 5.6 shows that, most likely, the Court issued an opinion that was consistent with public opinion.

Similarly, in 1980 the Court ruled as unconstitutional a display of the Ten Commandments at a public school. Public opinion polling specifically referencing the Ten Commandments did not begin until 1999. However, due to the especially high and consistent rate of support that has been reported for displays of the Ten Commandments, both on and off public school property, it is likely that the Court's decision was inconsistent with public opinion in 1980. It is also possible to speculate about the Court's 1993 decision to strike down a public school prohibition that disallowed the use of public school facilities by religious groups. Public opinion gathered the decade before and the decade after the decision showed high levels of support for use of public school facilities

by religious groups. Thus, it is likely that the Court's opinion was consistent with public opinion at the time.

Clearly, the ability to compare Supreme Court decisions with public opinion is contingent on the Supreme Court issuing opinions on cases dealing with First Amendment religion liberties, and public opinion polls asking questions related specifically to those issues. However, the ability to measure congruence is also dependent on how one interprets the public opinion reported in these polls. The wording of the question plays an important role in how one can understand public opinion on a particular issue. For example, it has long been reported that the Court was inconsistent with public opinion when it issued its 1962 and 1963 decisions regarding prayer and Bible reading in public schools. However, some studies use a 1962 opinion poll as the basis for this conclusion. In response to the question, "Do you approve or disapprove of religious observances in public schools," seventy-nine percent of respondents answered they approved.[7] The polling was conducted one month after the Court issued its opinion in *Engle v. Vitale*, and it is probable that the issue of organized school prayer was in the minds of most respondents when they answered. However, using this poll to assess the relationship between the Court's opinion and public opinion in relation to the 1963 case dealing with the reading of Bible verses becomes more difficult. It was not until 1971 that opinion polls began to include questions specifically about Bible reading, and these were questions that asked about "reading of the Lord's Prayer or Bible verses in public schools." Therefore, making a determination about the relationship between the Court's decision and public opinion regarding Bible reading is really based on a perception of

[7] Gallup Poll (AIPO), Jul, 1962.

what one believes the opinion polls actually report. There is no way to determine that the opinion in these polls was directed at the Bible reading and prayer components of the question equally.

Similarly, it was not until polls began asking respondents their opinion about prayer in school by providing them with a different set of options that it became clear that Americans do not support a policy of organized verbal (spoken) prayer in public schools. When given various options for including prayer in public schools, respondents have not chosen spoken prayer as their preference (see Table 3.7 and Table 3.8). There is no way to determine if public opinion in the 1960's would have been any different than what polling results show (that they disagreed with the Court's opinion), but it is more difficult to assess exactly when public preference shifted away from organized spoken prayer to a moment of silence. It is probable that such a shift was tied to state legislatures incorporating moments of silence into their public school programs. In any event, it would be misleading to report public opinion at the turn of the twenty-first century to be at odds with the Court's 1962 decision, which is the precedent still constitutionally controlling the issue.

Finally, due to limited availability of public opinion poll data on issues that directly relate to the specific policies reviewed by the Court, this study is limited to reporting on the relationship between Supreme Court decisions and public opinion for those issues that national polling organizations deemed relevant for study. While the conclusions of this research add considerably to the existing scholarship assessing the relationship between the Supreme Court and public opinion, they do not provide the ability to make a clear statement about the level of agreement between the Supreme

Court's decisions and public opinion concerning the First Amendment's religion clauses more generally. For instance, this study was able to identify six Supreme Court cases dealing with the First Amendment's Free Exercise clause that could be linked to at least one contemporary public opinion poll directly relating to the issue, and the Court's opinion was consistent with public opinion in all but one instance. However, there is no ability to extrapolate this eighty-three percent rate of congruence to the general population of Free Exercise cases.

The results of this study are that, for those cases that could be included in the measure of congruence, a majority of the time the Supreme Court issued an opinion that was consistent with public opinion. Further, when there was clear majority public sentiment on the issue, the Court's rate of agreement with public opinion reached almost seventy percent. However, lack of opinion polling data for much of the Court's work has severely limited the ability to report the relationship between the Court's decisions with public opinion. Therefore, due to the limited number of cases that could be included in the overall measure of congruence, this study cannot report more generally on the relationship between the Supreme Court's decisions and public opinion for First Amendment religious liberty issues.

This study has clearly identified the need for further work. Additional public opinion polling and research, particularly related to Free Exercise cases and tax policy, is needed in order to build a more comprehensive understanding of the relationship between the Supreme Court's decisions and public opinion for issues relating to First Amendment religion clauses. The trend analysis can be used to speculate that the overall rate of

agreement between the Supreme Court and public opinion is indeed closer to seventy percent. However, more data is needed in order to justify that conclusion.

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