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COMPROMISE AND INTERPRETATION: A CASE STUDY OF THE BURGER COURT AND THE RELIGION CLAUSES

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I. INTRODUCTION

"[T]he great difficulty of all group action, of course, is when and what concession to make."[1]

Since *Marbury v. Madison*,[2] the Supreme Court has assumed the mantle of the final interpreter of the Constitution. Although its success in that role has been criticized, all of the Court's critics would probably agree that the task of constitutional interpretation is not an easy one. Much of the language of the Constitution is imprecise. Historical evidence of the intent of the Framers is often inconclusive or of debatable relevance. In addition, since the interpretive enterprise is difficult for any single judge, it is especially formidable for a group of nine.

In interpreting the Constitution, the Supreme Court is constrained by the institutional requirement that at least five of the nine members of the Court agree both on the outcome of a case and on the rationale for that outcome.[3] Although individual Justices are free to write separate

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1. A. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 18 (1975) (quoting Justice Brandeis).

2. 5 U.S. (1 Cranch) 137 (1803).

3. The Supreme Court at first followed the English tradition of issuing seriatim opinions. *See, e.g.*, Bas v. Tingy, 4 U.S. (4 Dallas) 37 (1800). Beginning with the tenure of Chief Justice Marshall, however, the Court began to issue a single opinion for the majority of the Court. *See generally* ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 192-93 (1959). Of course, the Court is not always able to build a five-member majority. For a discussion of the precedential value, as well as the potential harmful and beneficial consequences of plurality decisions, see Comment, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981); Comment, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756 (1980).

concurring or dissenting opinions,[4] in order to obtain the majority opinion, a Justice must have the agreement of at least four other Justices. The requirement of a five member majority necessitates compromise in constitutional interpretation. Compromise, in turn, has its costs in doctrinal purity and interpretive method.

An evaluation of constitutional interpretation requires an understanding of the process of compromise. The evaluation which follows includes a synopsis of the debate over constitutional interpretation and a case study of the Burger Court's interpretation of the religion clauses of the first amendment. This case study illustrates how compromise affects various methods of constitutional interpretation. Although some interpretive methods adapt easily to the pressures of compromise, other methods can be manipulated and distorted by the process of compromise. In particular, theories of interpretation which allow flexibility in constitutional interpretation perform well under the effects of compromise. On the other hand, those interpretive approaches which are more rigid, such as those requiring strict adherence to the original intent of the Framers or to certain neutral principles, are more susceptible to manipulation.

II. THE INTERPRETIVE DEBATE

During the past several decades, there has been an increasingly vigorous debate over the proper bases and methods of constitutional interpretation.[5] The various theories of interpretation can be divided into two distinct groups. The first set of interpretive theories focuses on the significance of the original intent of the Framers of the Constitution. The second group of interpretive theories is predicated on the existence of certain judicial norms or principles that serve to restrain interpretation.

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4. *See generally* Brennan, *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986) (discussing the importance of dissents); Rehnquist, *"All Discord, Harmony Not Understood": The Performance of the Supreme Court of the United States*, 22 ARIZ. L. REV. 973, 986 (1980) (suggesting that dissenting and concurring opinions are part of the checks and balances of the constitutional system). Chief Justice Hughes wrote:

> When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort. . . . [W]hile it may be regrettable that [Justices] cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice.

C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 67-68 (1928).

5. Much of the commentary comes in the wake of the expansive interpretations of the Warren and early Burger Courts. *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

A. *The Controversy Over Original Intent*

Much of the recent debate over constitutional interpretation has centered on the proper role of the Framers' intent in the interpretive enterprise. The competing theories in the controversy over original intent include originalism and nonoriginalism.[6] Originalism places the focus of constitutional interpretation on the Framers' intent. Nonoriginalism, on the other hand, places little or no emphasis on original intent. Beyond this distinction, there is no sharp dichotomy between originalism and nonoriginalism. Rather, strict originalism and strict nonoriginalism serve as the endpoints on a spectrum of theories for constitutional interpretation.

1. Originalist Interpretation

The most common justification for originalism is that it is consistent with democratic theory. Judicial review, originalists observe, is antimajoritarian. Judges, acting in the name of the Constitution, can reverse the actions of the democratically elected branches of government. Because of the violence that it can do to the actions of elected officials judicial review must be restrained by intelligible limitations that justify the intrusion on majoritarian rule.[7] Originalists argue that the only appropriate limits are those discoverable in the document itself, and in the intentions of those who drafted, proposed, and ratified the Constitution. They contend that the use of the Framers' intent as an interpretive guideline, prevents judges from improperly intruding on the realm of the representative branches.[8]

A second common justification of originalism finds its support in the nature of constitutional government. A fixed written constitution aims at creating a limited government. Effective limitations on government must

6. The terms "originalism" and "nonoriginalism" were first used by Paul Brest. *See* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980). Others have used "interpretivism" and "noninterpretivism" to refer to essentially the same types of interpretive theories. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1-14 (1980); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 10-11 (1982). Thomas Grey, who coined these latter two terms, *see* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975), has since recanted and claims preference for "textualist" and "supplementer." *See* Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984). Although these various sets of terms refer to more or less the same types of interpretive approaches, this article retains the originalist/nonoriginalist language because of its reference to original intent.

7. *See* Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 825 (1986).

8. *Id.* at 826-27. *See also* Berger, *Some Reflections on Interpretivism*, 55 GEO. WASH. L. REV. 1, 5 (1986); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2-4 (1971).

be predicated on objective standards, external to those standards held by the persons enforcing them. In constitutional interpretation, judges must follow standards established before the decision in a particular case. The only external standards for the interpretation of constitutional provisions, according to originalists, are the Framers' intentions.[9] Therefore, original intent is "indispensible to realizing the idea of government limited by law."[10]

The use of original intent as a guide for interpretation often varies for different originalist theorists. Strict originalists maintain that the only legitimate source of meaning for interpreting a constitutional provision beyond the words of the Constitution[11] is the intent of the Framers.[12] By contrast, "moderate" originalists argue that although the original intent of the Framers is the primary basis of interpretation, other sources of meaning, such as historical developments since the time of the Framers, and precedent[13] might be relevant. The principal difference between strict and moderate originalists, however, lies in their differing resolutions of the problem of changing circumstances and in their respective tolerance of abstraction from the principles expressed in the Framers' intentions.

The ease or difficulty of determining original intent for purposes of constitutional interpretation depends on whether or not the Framers knew of or could have reasonably foreseen the challenged practice. Originalist interpretation of constitutional provisions operates relatively easily when a court confronts a practice or condition that the Framers specifically had in mind when enacting the particular provision.[14] For

9. Kay, Book Review, 10 CONN. L. REV. 801, 805-06 (1978); Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 253-54 (1972); Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383 (1985).

10. Kay, *supra* note 9, at 806. Professor Kay notes that the historical inquiry required for originalist interpretation may not always be easy or produce clear answers. Yet, "[s]ome answers will be more clearly correct or incorrect than others." *Id.* at 807. *See also* Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U.L. REV. 811 (1983); Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMM. 43 (1987).

11. Strict textualism is a close cousin of strict originalism. A textualist, however, would argue that the text itself is the principal, if not the only source of constitutional meaning. For an interesting textualist approach, see Laycock, Book Review, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343 (1981). For a critique of textualism, see Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683 (1985).

12. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 383 (1981); Brest, *supra* note 6, at 204, 222-23.

13. *See generally* Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979).

14. This assumes, of course, that the historical sources make clear the Framers' intentions. *See infra* note 23 and accompanying text.

example, most would agree that in adopting the establishment clause of the first amendment, the Framers intended to prohibit the creation of a national church.[15] If Congress enacted legislation creating a national church, the application of original intent would be straightforward for either the moderate or the strict originalist. On the other hand, problems arise for the originalist when circumstances or conditions arise that could not possibly have been foreseen by the Framers. It becomes impossible to ascertain the Framers' intent on issues beyond the Framers' realm of knowledge.

Strict and moderate originalists respond differently to the problem of changing circumstances. Whereas strict originalists place severe limitations on the generalization of the principles expressed in the Framers' intentions, moderate originalists allow a greater degree of abstraction of these principles.

Comparing the views of Raoul Berger with those of Judge Robert Bork illustrates two different approaches to strict originalist interpretation. On the one hand, Raoul Berger, a noted strict originalist, warns against the overgeneralization of the principles expressed in the Framers' intentions. According to Professor Berger, the basic rule to constitutional interpretation is that "a clear expression of intention by draftsmen must be given effect."[16] To abstract from the Framers' intentions a principle more general in application than that which the Framers had intended alters the intent of the Framers. According to Professor Berger, abstraction of this sort is the cardinal sin of constitutional interpretation.[17] On the other hand, Robert Bork, also a prominent originalist, takes a slightly different tack to the problem of generalization. Judge Bork notes that the meaning of the Constitution cannot be limited to the specific conditions contemplated by the Framers. Therefore, some level of abstraction of the principles articulated in the original intent is necessary. However, Judge Bork would allow abstraction only to the extent that "the words, structure, and history of the Constitution fairly support."[18]

In contrast with the views of strict originalists, moderate originalists allow a greater degree of abstraction of the Framers' principles. Ronald

15. *See* R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); Wallace v. Jaffree, 472 U.S. 38, 91-93 (1985) (Rehnquist, J., dissenting).

16. Berger, *supra* note 8, at 5. *See also* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 2-3 (1977).

17. Berger, *supra* note 8, at 6-9.

18. Bork, *supra* note 7, at 828.

Dworkin, for example, has drawn the distinction between "conceptions," which include the Framers' intentions regarding specific circumstances, and "concepts," which include the generalized principles that can be abstracted from the specific intentions of the Framers.[19]

The distinctions between these three views on generalization of the Framers' specific intent are best illustrated by comparing how each would interpret the equal protection clause of the fourteenth amendment. For example, Professor Berger has concluded that the equal protection clause was intended only to constitutionalize the Civil Rights Act of 1866, thus limiting its protections to the right to contract, to hold property, and to sue in court, and was not intended to proscribe racial segregation.[20] By contrast, Judge Bork views the equal protection clause as prohibiting all forms of racial discrimination by the states, but not other types of discrimination.[21] Finally, Professor Dworkin, a nonoriginalist, has a broader "concept" of equality, which would include proscriptions against governmental gender and sexual preference discrimination.[22]

2. Nonoriginalist Interpretation

At the other end of the spectrum from the strict originalists, nonoriginalists, although not eschewing entirely the importance of the Framers' intent, contend that original intent is neither the only nor the most appropriate source of constitutional meaning. In light of the passage of time and of new developments and circumstances, nonoriginalist interpreters look to sources other than original intent to give meaning to constitutional provisions.

Nonoriginalists contend that originalism cannot provide the type of restraint on judges that originalists suggest is required for an effective theory of interpretation. Originalist interpretation requires the ability to determine the Framers' intentions and how these intentions relate to the

19. R. DWORKIN, TAKING RIGHTS SERIOUSLY 134-36 (1977). For a Dworkinian interpretation of the establishment clause, see Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 741-43 (1986) (distinguishing between Framers' "conception" of nonestablishment as the prohibition of a national church and the "concept" of equal religious liberty).

20. R. BERGER, *supra* note 16, at 117-33, 166-92. *See also generally* R. BERGER, DEATH PENALTIES (1982); Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981); Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980).

21. Bork, *supra* note 8, at 14-15.

22. Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 477-78, 513-14 (1981). *See also* Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1037-41 (1977).

constitutional issues confronted by the interpreting judge. Many critics of originalism argue, however, that determining the original intent may be difficult, if not impossible. First, as James Hutson has recently demonstrated, there is a significant dirth of reliable documentary sources of the Framers' intentions.[23] Even assuming an adequate historical record, nonoriginalists still contend that originalism faces many insurmountable problems. For example, it is difficult to determine whose intent comprises that of the "Framers." Judges could take the views of the most prominent members of the Convention or of the authors of the *Federalist Papers* to represent that of the Framers. Moreover, whether one takes a broad or narrow view of who is included in the category of the "Framers," there remains the issue of how to reconcile the conflicting views expressed by different Framers on the same constitutional provision. Finally, one must decide how to interpret the Framers' silences, when little or nothing was said about a particular constitutional provision.[24]

Beyond the problems of determining what the Framers' intentions might have been in 1787 or 1868, nonoriginalists argue that original intent cannot provide an adequate guide to interpretation because of time and changing circumstances. Most obvious is the problem of entirely new circumstances that simply could not have been envisioned by the Framers.[25] Similarly, nonoriginalists contend, one cannot tear particular intentions of the Framers from their historical context and intelligibly translate these intentions into the present modern social and political context without distorting their meaning.[26]

A somewhat different attack against originalism is that the use of original intent fails according to its own terms. Under originalist theory, if constitutional interpretation proceeds from the Framers' intentions, it follows that the Framers' views on the rules governing interpretation

23. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986). Hutson, who is head of the Manuscript Division of the Library of Congress and who is preparing a supplement to Farrand's edition of the records of the Constitutional Convention, *see* M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. 1937), recently made news by discovering a heretofore unknown record of the proceedings of the Constitutional Convention made by Roger Sherman that may call into question the current understanding of the Framers' intent. *See* Mitgang, *Handwritten Draft of a Bill of Rights Found*, N.Y. Times, July 29, 1987, at 1, col. 4.

24. *See* Dworkin, *supra* note 22, at 482-88; Brest, *supra* note 6, at 212-15.

25. For the originalist response to this problem, see *supra* notes 11-15 and accompanying text.

26. *See* Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 796-97 (1983). *See generally* Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482 (1985).

should control originalist interpretation. H. Jefferson Powell, in a careful study of the Framers' understanding of the appropriate methods of constitutional interpretation, concluded that the Framers themselves did not intend the Constitution to be interpreted using originalist techniques.[27] According to Powell, instead of having support in the Framers' intentions, originalism first developed as a theory of constitutional interpretation much later in the nineteenth century.[28] Because the Framers themselves did not intend the Constitution to be interpreted from an originalist perspective, originalism fails to meet its own criteria of adherence to the original intent of the Framers.

Finally, nonoriginalists maintain that adherence to originalism would result in a loss of much of the best that the Supreme Court has produced.[29] Maintaining originalism would require changes so constitutionally cataclysmic, that even originalists would rather avoid them. Thus, according to nonoriginalists, originalist interpretation is an unacceptable approach to constitutional adjudication because of the inability to determine to a sufficient degree the Framers' intentions, the difficulty in applying those intentions in the changing circumstances of the modern world, the failure to justify itself in its own terms, and the unsatisfactory results that originalist interpretation produces.

Although nonoriginalists have gone to great lengths to expose the weaknesses of originalism, they have expressed no widely accepted rationale for nonoriginalist interpretation. For example, Harry Wellington has suggested that "conventional morality" could guide constitutional interpretation. Wellington defines "conventional morality" as judicially elaborated standards of conduct, widely shared in a particular society.[30]

27. Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 902-21 (1985).

28. *Id.* at 944-48. *See also* Dworkin, *supra* note 22, at 493-97; Brest, *supra* note 6, at 215-17. *See generally* Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856) (early use of originalist interpretation by the Supreme Court).

29. *See* Grey, *supra* note 6, at 710-13. *See generally* Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2, 4-5 (1987) (stating that "the wisdom, foresight, and sense of justice exhibited by the Framers" was not particularly profound, and that the defects in the document they drafted, especially with regard to blacks and women, took a civil war and social upheaval to repair).

30. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 244 (1973) (quoting Professor H.L.A. Hart). Michael Perry also embraced a theory of conventional morality, *see* Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689, 731 (1976), but later rejected that position. *See* M. PERRY, *supra* note 6.

Dean Wellington's conventional morality approach, however, has received criticism from originalists and nonoriginalists alike.[31] Thomas Grey, on the other hand, has suggested that the Framers worked in a natural rights tradition, in which "unwritten higher law principles had constitutional status."[32] However, the notion of an "Unwritten Constitution," serving as the basis of nonoriginalist interpretation, has gained little currency.[33]

Michael Perry, who emphasizes the prophetic nature of judicial review, has expressed one of the more persuasive rationales for nonoriginalist interpretation. The Constitution, he suggests, is similar to a religious text because it "disturbs," calling us to respond to the aspirations embodied in the words and traditions of the text.[34] In interpreting the constitutional text, a court should not focus on the past and the original meaning of the text as understood by the Framers, but instead on the future and the potential for realizing the aspirations of the Framers and those which have followed them.[35] Although he notes that the text and the tradition provide some constraints on nonoriginalist interpretation, Professor Perry contends that the ultimate restraint is the authority of Congress to restrict the appellate jurisdiction of the federal courts, which also makes nonoriginalism democratically accountable.[36]

B. *Neutral Principles and Judicial Norms*

The second group of theories, those predicated on the presence or development of judicial norms or principles, is not primarily concerned with the debate over the role of original intent. Of central importance for these theories is that the interpretive method employed conforms with certain norms or principles of adjudication. For instance, Herber Wechsler maintains that judges must decide cases, and therefore must interpret the Constitution in both a principled and neutral manner.[37] A principle, a generalized rule with force beyond the present case, must guide the

31. *See, e.g.*, Bork, *supra* note 9, at 386-90; Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1068-71 (1981); J. ELY, *supra* note 6, at 63-69.

32. Grey, *supra* note 6, at 717. *See also* Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

33. *See* J. ELY, *supra* note 6, at 48-49.

34. Perry, *The Authority of the Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551, 559-64 (1985); M. PERRY, *supra* note 6, at 97-98.

35. Perry, *supra* note 34, at 563-64, 569; M. PERRY, *supra* note 6, at 100-02, 111-12.

36. *See* Perry, *supra* note 34, at 572-83, M. PERRY, *supra* note 6, at 128-34. *See* U.S. CONST. art. III, § 2, cl. 2.

37. *See* Wechsler, *supra* note 5.

judges' interpretations. Under the neutral principles approach, an interpretation is not principled if it can be used solely as the basis of one particular decision. Furthermore, judges must apply the principle in a neutral fashion, so that in a second case, the application of the principle is consistent with the application of the principle in the first case.[38] At this level at least, the neutral principles approach is less a method of interpretation than a requirement for constitutional interpretation.[39]

John Hart Ely, in his book *Democracy and Distrust*,[40] has developed a theory of constitutional interpretation based on the neutral principle of "representation-reinforcement." Professor Ely has built his theory on Justice Stone's famous fourth footnote in *United States v. Carolene Products Co.*,[41] which justified judicial review of legislation that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" or that reflects "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities. . . ."[42] Thus, for Ely, constitutional interpretation must be guided by the neutral principle of judicial reinforcement of the processes of democratic representation. Ely distinguished representation-reinforcement judicial review from nonoriginalist interpretation by suggesting that his approach, unlike nonoriginalism, is consistent with representative democracy by "policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent."[43] Although he derives the principle of representation-reinforcement in part from both the constitutional text and original intent, Professor Ely is neither an originalist nor a nonoriginalist. On the one hand, judicial review under his approach would not be limited by the understanding of the Framers. For example, he approved of the voting rights cases,[44] despite evidence that the Thirty-Ninth Congress did not intend the fourteenth amendment to protect the right to vote.[45] On the other hand, Professor Ely rejected the fundamental rights cases that were not grounded on the principle of representation-reinforcement.[46]

38. *Id.* at 15, 19. *See also* Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978).
39. *See* Greenawalt, *supra* note 38, at 1004-05, 1013-20.
40. J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
41. 304 U.S. 144, 152-53 n.4 (1938).
42. *Id.*
43. J. ELY, *supra* note 40, at 101-02.
44. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
45. R. BERGER, *supra* note 16, at 52-68; J. ELY, *supra* note 40, at 120-23.
46. J. ELY, *supra* note 40, at 44-70. For a critique of Professor Ely's approach, see Brest, *The*

Unlike Ely's theory, Owen Fiss' alternative approach to constitutional interpretation does not rely on neutral principles. Instead, his theory assumes that judicial norms, which define and regulate adjudication, are adequate restraints on judicial interpretation. Professor Fiss proposes that "[a]djudication is the social process by which judges give meaning to our public values."[47] In the adjudicative process, the judge is to interpret "the legal text, not morality or public opinion."[48] Fiss claims that because the adjudicative process imposes certain judicial norms, such "objective" interpretation is possible.[49] For example, the adjudicative process requires that judges explain and give reasons for their interpretations. Other judicial norms might also require that judges take into account the original intent of the Framers.[50] These disciplinary rules, supported by an interpretive community that recognizes such judicial norms as authoritative, prevent judges from imposing their personal views while allowing them to interpret the Constitution within the limits set by those norms.[51]

The preceeding discussion of the interpretive debate is purposely cursory. The debate has developed around the issues of what role the Framers' intent should play in constitutional interpretation and whether judicially developed norms or principles can restrain and guide constitutional interpretation. With regard to the Framers' intent, strict originalists give great, if not presumptive, weight to original intent. On the other hand, moderate originalists and nonoriginalists place less weight on the Framers' views in interpreting constitutional provisions. With regard to judicial norms, original intent plays a secondary role to that of judicial rules which require judges to objectively interpret constitutional provisions and give reasons for their interpretations to the public.

Despite the richness and variety of the debate, the process of compromise and its influence on constitutional interpretation has often been overlooked in the debate. The members of the Supreme Court are sometimes faced with the necessity of having to compromise on their interpretive positions in order to decide a case. The cost of compromise is the

Substance of Process, 42 OHIO ST. L.J. 131 (1981); Dworkin, *supra* note 22, at 500-16; M. PERRY, *supra* note 6, at 77-88.

47. Fiss, *The Supreme Court, 1978 Term—Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

48. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 740 (1982).

49. *Id.* at 748-49.

50. *Id.* at 747-49, 754-55.

51. *Id.* at 744-46. For a critique of Professor Fiss' position, see Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982); Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984); M. PERRY, *supra* note 6, at 123.

modification and possible distortion of interpretive approaches. The following case study of the Burger Court's interpretation of the religion clauses illustrates how compromise shapes constitutional interpretation.

III. COMPROMISE AND INTERPRETATION OF THE RELIGION CLAUSE DOCTRINE IN THE BURGER COURT

The cases in which the Burger Court has interpreted the religion clauses of the first amendment[52] illustrate the effect of compromise on constitutional interpretation. During the tenure of the Burger Court, litigation under the religion clauses increased dramatically.[53] Although religion clause doctrine underwent significant development during this period, this doctrinal development within the Burger Court was hindered by disagreement among the Justices. At several junctures, the Court fractured on the difficult issues presented by the church-state cases.[54] Indeed, the Burger Court's final term came to a close with the Court entering another period of disunity.[55] Therefore, a review of the Burger Court's religion clause cases illuminates the process of compromise and its impact on interpretation in the Supreme Court.

Obviously, the Burger Court was not a single, unchanging entity.[56] Because of the shifting composition of the Burger Court, it is difficult, if not inappropriate, to make broad generalizations about the Court and its

52. The first amendment provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I. The religion clauses have been applied to the states by way of the due process clause of the fourteenth amendment. *See* Everson v. Board of Educ., 330 U.S. 1 (1947) (establishment clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause).

53. The Burger Court decided forty-six church-state cases. *See infra* Appendix.

54. The Burger Court split incomprehensively over the issues of state aid to religious schools. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

55. Of the five cases involving religion clause claims decided by the Burger Court in its final term, two were decided on grounds other than on the merits. *See* Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) (decided under the *Younger* doctrine); Bender v. Williamsport School Dist., 475 U.S. 534 (1986) (decided on standing grounds). Of the remaining cases, the Court was significantly split on the merits. *See* Bowen v. Roy, 476 U.S. 693 (1986); Goldman v. Weinberger, 475 U.S. 503 (1986). The Court's avoidance of deciding cases on the merits and the substantial division in other cases reflect the possibility that the Court's doctrine is under reconsideration and that certain Justices may be shifting their positions.

56. During the seventeen years of Chief Justice Burger's tenure, as many as thirteen different Justices were members of the Court at one time or another. The thirteen members of the Burger Court and their respective tenures included: Warren Burger (1969-86); Hugo Black (1937-70); William Douglas (1939-75); John Marshall Harlan (1955-70); William Brennan (1956-present); Potter Stewart (1958-81); Byron White (1962-present); Thurgood Marshall (1967-present); Harry Blackmun (1970-present); Lewis Powell (1972-87); William Rehnquist (1972-present); John Paul Stevens (1975-present); Sandra Day O'Connor (1981-present).

constitutional doctrine under the leadership of Chief Justice Burger. However, using the tenure of Chief Justice Burger as a time period for study is justified, not because of certain identifiable characteristics of the Burger Court, but rather because the tenure of Warren Burger as Chief Justice provides clear starting and ending points for a case study. The case study reveals that, over time, certain members of the Court adjusted their positions and interpretive approaches in response to shifts within the Court. Moreover, voting blocs developed and reformed in conjunction with these shifts and adjustments of the Court's members. Because the process of compromise so greatly affects constitutional interpretation, a theory of interpretation must be flexible to withstand the pressures accompanying this process.

The case study has three components. First, a model is developed for examining the process of compromise on the Court. Second, the voting and opinion-writing patterns of the Burger Court in religion clause cases are discussed. Third, the Court's interpretations of the religion clauses are reviewed.

A. *A Theoretical Model for Viewing Interpretation in the Context of Compromise*

The process of compromise on the Supreme Court, and its influence on constitutional interpretation, is a difficult object of study. The internal discussions of the members of the Court and the preparation of opinions are largely hidden from outside view. Therefore, the examination of judicial compromise requires the construction of a model that sheds some light on the Court's activities.[57]

1. The Factors Influencing Judicial Compromise

Four factors influence the process of the Supreme Court's interpretation of constitutional provisions and create the necessity for compromise. The first factor is the requirement of majority agreement for a decision to have full force. The second is the Court's role as guide for the lower courts. The third factor is the changing nature of the Court and its doctrine. Finally, the fourth factor is that the Court's decisions are subject to public scrutiny.

The first factor, that the Supreme Court achieve majority agreement

57. The model's purpose is neither predictive nor explanatory. Instead, it is descriptive, offering a background against which a study of a particular area of constitutional interpretation and doctrine may be done.

for an outcome to have full force, is an institutional requirement, resulting from the structure and process of the Court itself. The requirement of a majority necessitates that the Justices occasionally compromise on their divergent views in order to decide a case.[58] The achievement of a majority is likely only if some doctrinal concessions are made.

The second factor involves the Court's role vis-a-vis other courts. The Supreme Court provides guidance on constitutional issues to both the lower federal courts and the state courts. For example, a Justice could either encourage or discourage the inducement of a doctrinal concession by emphasizing the need for clarity in the Court's directions to the lower courts. Particularly in critical cases, appeals to the integrity of the institution might produce compromise where it would not otherwise be obtainable.[59]

The third factor is that neither the Court nor its constitutional doctrine is static. The changing nature of the Court and its doctrine raises two possibilities that shape the extent to which members of the Court may compromise. First, there is the possibility of logrolling. One Justice, for example, might concede on an issue in one case in order to obtain a similar concession in a later case. Second, there is the possibility that a dissenting or concurring opinion might later become the majority view. Because the force of *stare decisis* is considerably weaker in constitutional adjudication before the Supreme Court,[60] in several cases, the Court has been willing to change its previously followed course.[61] The first possibility, logrolling, enhances the likelihood of compromise. On the other hand, the second possibility, that a minority opinion may later become the majority view, can make a minority Justice less willing to compromise.

The fourth and final factor influencing compromise occurs because the interpretations of the Court are subject to public scrutiny. Although observers are not privy to the internal discussions of the Court, the Court must nevertheless explain its decisions and therefore its interpretations as

58. *See* W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 23-24 (1964).

59. *Id.* at 46-47.

60. *See* Brennan, *supra* note 4, at 436-37.

61. For examples of when the Court overruled precedent and adopted the view of an earlier dissent, see Brown v. Board of Educ., 347 U.S. 483 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)); West Virginia State Bd. Educ. v. Barnette, 319 U.S. 624 (1943) (overruling Minerville School Dist. v. Gobitis, 310 U.S. 586 (1940)); United States v. Darby, 312 U.S. 100 (1941) (overruling Hammer v. Dagenhart, 247 U.S. 251 (1918)).

well.[62] In doing so, the Court has many audiences: Congress, the states, the parties to the specific case, lawyers, scholars, and the general citizenry. All can have a particular interest in the words of the Supreme Court. Moreover, they all can take certain actions in response to those words. The potential impact of these responses on the authority of the Court, for example, public outcry against a decision, the refusal of state officials to cooperate,[63] or Congressional attempts to restrict the jurisdiction of the Court,[64] might influence the process of compromise on the Court. In particular, the Court may anticipate such reactions and seek either a stronger majority or unanimity. Under such circumstances, the Court faces the concomitant need to compromise to achieve such broad agreement.[65]

The four factors above, the requirement of a majority agreement, the necessity of guidance to the lower courts, the temporal nature of the Court's existence, and the public aspects of the Court's activities, all fuel the effects of compromise on the interpretive process. Compromise, however, is still difficult to bring about. It is costly both to those who seek compromise and to those who accept it. Therefore, the members of the Court must muster their resources to direct or withstand the pressures of compromise.

2. The Justice as Accommodation-Minimizer and Influence-Maximizer

Because of the constitutional requirement of a majority of five, a Justice who wants to influence the decision in a case must build such a majority.[66] Bringing other Justices into the fold can require that the majority-building Justice either accommodate the views of other Justices or

62. *See* Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L.J. 433, 433-34 (1986).

63. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958).

64. *See generally* Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 GEO. L.J. 839 (1976).

65. Such was the concern, for example, in the school segregation cases. *See* Brown v. Board of Educ. (*Brown I*), 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Board of Educ. (*Brown II*), 349 U.S. 294 (1955). *See also* R. KLUGER, SIMPLE JUSTICE 682-99 (1976). However, the threat of substantial negative public reactions may sway the Court to avoid difficult issues. Shortly after the school segregation cases, the Supreme Court avoided hearing a challenge to a state miscegenation statute. *See* Naim v. Naim, 350 U.S. 891 (1955). The miscegenation statute was ultimately struck down about a decade later in another unanimous decision, albeit with a brief concurrence by Justice Stewart. *See* Loving v. Virginia, 388 U.S. 1 (1967).

66. Of course, different Justices may play the "game" of majority building differently or better than others. Justice Brennan, for example, appears to be a highly skilled player. In contrast, Justice Douglas appears to have refused to play the game altogether. This does not necessarily mean that

exert whatever influence the Justice might have over the other Justices. Accommodation and influence are costly, limited resources. On the one hand, accommodation exacts a cost in doctrinal purity. On the other hand, the use of influence is limited by time, energy, and the Justice's personal resources. At some point, the cost of accommodating or influencing another Justice exceeds the benefit of obtaining an additional Justice's vote. Therefore, a Justice seeking to build a majority will attempt to minimize the accommodation and maximize the effect of the influence needed to gain the votes of other members of the Court.

The degree to which a majority-building Justice is willing to accommodate other Justices will depend on the distance between the two positions of the Justices and the number of votes still needed to obtain a majority. Of course, a majority-building Justice will be more willing to make doctrinal concessions to a Justice whose position is closer to his own position than to other Justices' positions. Smaller accommodations will be made before larger ones. Moreover, in an ordinary case, a majority-building Justice will be willing to accept a relatively high level of accommodation to obtain the first four votes of other Justices. Beyond those four votes, however, the gain of each additional vote is, at best, of marginal value. Thus, the degree of accommodation that a Justice will accept is much less.[67] In extraordinary cases requiring a larger majority, if not a unanimous Court, a majority-building Justice has to accommodate a much broader range of views.[68]

In addition to doctrinal accommodation, a majority-building Justice has other resources with which he can influence other Justices to join an opinion: judicial ability and legal craftsmanship,[69] personal and professional esteem,[70]authority,[71] and internal sanctions.[72] Nevertheless, a Justice's influence is limited and must be used to maximize its effect.

Douglas played the game poorly, but rather that he held other values, such as doctrinal purity or aloofness, more important than winning the game of majority building.

67. *See* W. MURPHY, *supra* note 58, at 65. The degree to which a Justice would accommodate other Justices increases as the Justice nears achieving a majority. However, once the Justice successfully builds a five-member majority, the marginal value of each additional Justice's vote drops off significantly. Although the marginal value of additional votes beyond the five-member majority is not nugatory, it is not worth a significant amount of additional accommodation to the majority-building Justice.

68. *See* W. MURPHY, *supra* note 58, at 66. *See also supra* note 65 and accompanying text.

69. Not all Justices are created equal. Over the history of the Court, several Justices, including Justices Story, Holmes, Brandeis, and Frankfurter, have been recognized for their superior judicial abilities. *See generally* L. BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY (1984); F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT (1961); R. NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985).

70. Some Justices have been known for their interpersonal skills and their ensuing ability to

Therefore, a majority-building Justice will use these resources where they will most likely achieve the goal of building a majority.

3. Coping With Minority Status

Because accommodation and influence are not always sufficient to build a majority, a majority-building Justice can easily find himself in the minority. Faced with the possibility of minority status, a Justice has several options: he may join the majority, he may dissent, or he may create a voting bloc.

First, the Justice can attempt to join the majority to influence the contours of the majority opinion and thereby minimize its effect on the Justice's original doctrinal position. This option is obviously open only if the majority is willing to accommodate the Justice and to compromise on those issues that the Justice would like to modify in exchange for a vote.[73] This alternative is most promising if the Justice represents a swing vote, needed to create a majority. However, if the Justice represents only an additional vote beyond the five-member majority, the Justice's influence on the majority's opinion is significantly restricted.[74]

An alternative to joining the majority is simply to dissent. The advantage of a dissent is its low cost in terms of doctrinal purity to the Justice. The disadvantage is that the dissent and its doctrinal purity might be forgotten in the dusty pages of the *U.S. Reports* and a few law

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influence other Justices. Chief Justice Taft was particularly skilled in this area. *See* A. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 198-212 (1964).

71. Because each Justice has a vote equal to the other eight Justices, there is little difference in terms of authority between the members of the Court. Nevertheless, the Chief Justice has somewhat greater authority than the other Justices, which can be a source of influence. The power to select the author of the majority opinions, for example, can be a significant power. Furthermore, the Chief Justice may select areas over which he may want to have a special influence by writing many of the majority opinions himself. Similarly, in conference, the Chief Justice speaks first but votes last on a case, a situation that he might manipulate to influence the other Justices. *See generally* R. STEAMER, CHIEF JUSTICE: LEADERSHIP AND THE SUPREME COURT (1986). Seniority may also provide some level of authority. For example, when the Chief Justice is not a member of the majority, the most senior member of the majority may select the author of the majority opinion.

72. Justices have various sanctions that they may use or threaten to use against another Justice. A vote or separate opinions can be employed as sanctions. *See* W. MURPHY, *supra* note 58, at 54. More drastic sanctions include extrajudicial acts, such as cutting off social relations or airing a dispute publicly. *Id.* at 55. In an unusual example of judicial indiscretion, the feud between Justices Black and Jackson eventually entered the public arena. *See* G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 224-49 (1977); E. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 235-77 (1958).

73. *See* W. MURPHY, *supra* note 58, at 78.

74. *See supra* note 67 and accompanying text.

review articles.[75] Nevertheless, a forceful dissent may provide the doctrinal underpinning for a later majority opinion.[76]

Another possibility open to a minority Justice is to create a voting bloc. A minority voting bloc is comprised of two to four Justices who cooperate to achieve shared goals over time.[77] The formation of a voting bloc entails many of the same tasks as majority building. A bloc-building Justice must make some accommodations to the other minority Justices but also must exert influence over them in order to make a cohesive bloc. Forming a voting bloc may improve the chances for the members of the bloc to obtain majority status in future cases. However, maintaining the cohesiveness of a minority voting bloc can be difficult, and can require a greater cost in terms of accommodation and influence than acting without a voting bloc.[78]

B. *Voting Patterns of the Burger Court in Religion Clause Cases*

The following tables[79] reveal the voting patterns in religion clause cases within the Court.

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75. *E.g.*, Griswold v. Connecticut, 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring) (construing the ninth amendment).

76. For example, in a stinging dissent, Justice Blackmun expressed the hope that the Supreme Court would soon reverse itself on the issue of the constitutionality of sodomy laws. Bowers v. Hardwick, 106 S. Ct. 2841, 2856 (1986). (Blackmun, J., dissenting). *See also supra* notes 58-59 and accompanying text.

77. *See* W. MURPHY, *supra* note 58, at 78-82.

78. *Id.* at 79, 81.

79. The statistical analysis of the voting patterns of the members of the Court, presented in Tables 1-6, was collected by the author from the religion clause cases listed in the Appendix, *infra*. The information in these tables covers all of Section B.

Table 1: Percent of Cases Joining in the Same Opinion (1969-1986)

	Burg.	Black.	Bren.	Marsh.	O'Con.	Pow.	Rehn.	Stew.	Stev.
Blackmun	50.0								
Brennan	29.5	61.4							
Marshall	31.8	61.4	81.8						
O'Connor	73.7	47.4	42.1	47.4					
Powell	63.2	55.3	44.7	42.1	57.9				
Rehnquist	63.2	34.2	18.4	18.4	63.2	44.7			
Stewart	56.0	64.0	36.0	52.0	—	68.4	42.1		
Stevens	31.3	50.0	59.4	53.1	31.6	40.6	25.0	23.1	
White	61.4	29.5	31.8	29.5	57.9	47.4	52.6	40.0	28.1

Table 2: Percent of Cases Joining in the Same Opinion (1969-1977)

	Burg.	Black.	Bren.	Doug.	Marsh.	Pow.	Rehn.	Stew.	Stev.
Blackmun	61.1								
Brennan	22.2	33.3							
Douglas	16.7	25.0	41.7						
Marshall	33.3	44.4	72.2	58.3					
Powell	41.7	83.3	50.0	33.3	50.0				
Rehnquist	50.0	33.3	8.3	0.0	8.3	16.7			
Stewart	44.4	83.3	44.4	25.0	44.4	66.7	33.3		
Stevens	16.7	16.7	33.3	—	33.3	33.3	16.7	16.7	
White	55.6	27.8	27.8	8.3	27.8	25.0	66.7	38.9	16.7

Table 3: Percent of Cases Joining in the Same Opinion (1978-1986)

	Burg.	Black.	Bren.	Marsh.	O'Con.	Pow.	Rehn.	Stew.	Stev.
Blackmun	42.3								
Brennan	34.6	80.8							
Marshall	30.8	73.1	88.5						
O'Connor	73.7	47.4	42.1	47.4					
Powell	73.1	42.3	42.3	38.5	57.9				
Rehnquist	69.2	34.6	23.1	23.1	63.2	57.7			
Stewart	85.7	14.3	14.3	28.6	—	71.4	57.1		
Stevens	38.5	57.7	65.4	57.7	31.6	42.3	26.9	28.6	
White	65.4	30.8	34.6	30.8	57.9	57.7	46.2	42.9	30.8

Table 4: Voting Blocs—Percent of Cases Joining in the Same Opinion

Bloc Members	1969-77	1978-86	1969-86
Blackmun-Powell-Stewart	66.7	—	—
Brennan-Marshall-Blackmun	33.3	76.9	59.1
Brennan-Marshall-Blackmun-Stevens	—	46.2	—

Table 5: Voting Blocs—Percent of Cases Voting for Same Outcome

Bloc Members	1969-77	1978-86	1969-86
Brennan-Marshall	100.0	100.0	100.0
Brennan-Marshall-Blackmun	66.7	92.3	81.8
Brennan-Marshall-Blackmun-Stevens	—	84.6	—

Table 6: Opinion Writing

Justice	Majority opinions	Concurring opinions	Dissenting opinions	Concurring in part and dissenting in part	Total cases participated in as member
Burger	16	0	4	3	44
Brennan	5	5	9	2	44
Powell	4	5	2	1	38
Rehnquist	4	1	12	1	38
Stewart	3	2	2	0	25
Marshall	2	2	2	1	44
Stevens	2	7	5	1	32
White	2	7	10	2	44
Blackmun	1	2	4	0	44
Douglas	0	2	5	0	12
O'Connor	0	3	2	2	19
Black	0	1	0	0	5
Harlan	0	1	0	0	5

An examination of the voting patterns shows that several voting blocs developed within the Burger Court. In addition, the analysis of the separate and majority opinions written by the Justices reveals the extent to which the Justices were either accommodating or influential.

1. The Development of Voting Blocs

An analysis of the voting patterns of the Court yields insight into the patterns of compromise within the Court.[80] In particular, examining the Court's voting patterns reveals that several voting blocs existed and developed with regard to religion clause cases. As illustrated in Table 1, The strongest and most durable bloc included Justices Brennan and Marshall. These two Justices joined in the same opinion in over eighty percent of the religion clause cases during Chief Justice Burger's tenure.[81] Although several other voting blocs existed in the Burger Court, they tended to shift in strength and composition over time.

The most significant shift in voting patterns involved Justice Blackmun. As shown in Table 4, from 1969-1977, Blackmun joined in the same opinion as Justices Powell and Stewart in about sixty percent of the cases. In the same time period, Blackmun joined in the same opinions with Justices Brennan and Marshall in only one-third of the religion clause cases. By contrast, as Table 4 further illustrates, from 1978-1986, Blackmun joined with Brennan and Marshall in the same opinion in over seventy percent of the cases.[82] With the breakup of the centrist Blackmun-Powell-Stewart bloc as Blackmun shifted to a bloc with Brennan and Marshall, Justice Powell moved closer to Chief Justice Burger and the conservative wing of the Court. For example, as illustrated in Table 2, from 1969-1977, Powell joined with Burger in only about forty percent of the religion clause cases, and with Justice White in only one fourth of the cases. However, as shown in Table 3, in 1978-1986, Powell joined in the same opinion as the Chief Justice in over seventy percent of the cases and in the same opinion as Justice White in almost sixty percent of the cases.

A similar shift occured when Justice O'Connor was appointed to the Court in 1981, replacing Justice Stewart. Unlike Justice Stewart, who

80. For a similar discussion of the Burger Court, see Galloway, *The Burger Court (1969-1986)*, 27 SANTA CLARA L. REV. 31 (1987).

81. Moreover, Brennan and Marshall voted for the same outcome in every one of the Burger Court's religion clause cases.

82. Furthermore, Justice Blackmun voted for the same outcome as Justices Brennan and Marshall in over ninety percent of the cases in the period from 1978 to 1986. *See* Table 5.

had voted with the centrist voting bloc that included himself, Justice Blackmun, and Justice Powell, Justice O'Connor tended to vote more often with the Chief Justice and Justice Rehnquist, evidencing the further development of a sharply divided Court.[83]

The formation of the Brennan-Marshall-Blackmun bloc coincided roughly with the appointment of Justice Stevens who replaced Justice Douglas in 1975.[84] Like Douglas, Justice Stevens tended to assert a degree of independence. As shown in Table 5, from 1978 to 1986, Stevens voted with the Brennan-Marshall-Blackmun bloc in over eighty percent of the cases. However, during that time period, he joined the same opinion with those three Justices in less than half of the religion clause cases. Thus, Stevens was not a fully-committed member of the Brennan-Marshall-Blackmun minority voting bloc. Although he voted with the bloc, he often wrote separate opinions expressing a slightly different perspective on the issues presented by the cases.[85]

2. Patterns in Opinion Writing

The formation of the strong Brennan-Marshall-Blackmun bloc with Justice Stevens as an occasional fellow traveler, appears to be largely the result of successful efforts by Justice Brennan. The evidence of Brennan's leadership in the formation of the bloc is threefold. First, Brennan was the Justice with whom Blackmun, Marshall, and Stevens joined in the same opinion most often during the period from 1978 to 1986. Second, of the members of the bloc, Brennan was the principal opinion writer.[86] Finally, Brennan was one of the most significant members of the bloc in the development of religion clause doctrine.[87]

In addition to the conclusions drawn from analyzing the Burger Court's voting patterns in religion clause cases, the patterns in opinion writing by the Court provide additional evidence of the process of compromise. Table 6, above, compares the number of majority opinions written by the Justices with the number of separate opinions they wrote.

83. *See* Table 3.

84. Justice Douglas was most noteworthy for his independence from the rest of the members of the Court. Douglas joined in the same opinion more than fifty percent of the time with only one Justice, Marshall. In fact, he joined in the same opinion as Justice White in less than ten percent of the cases. His voting patterns reinforce the conclusion that Douglas had little interest in accommodation and compromise in constitutional adjudication.

85. *See, e.g.*, Goldman v. Weinburger, 475 U.S. 503, 510-12 (1986) (Stevens, J., concurring); United States v. Lee, 455 U.S. 252, 261-64 (1986) (Stevens, J., concurring).

86. *See* Table 6.

87. *See infra* notes 165-71 and accompanying text.

An examination of how many majority opinions each Justice wrote can indicate how influential he or she was. On the other hand, an analysis of the separate opinions reflects the extent to which individual Justices were both accommodating and accommodated.

As illustrated in Table 6 above, Chief Justice Burger, who wrote sixteen of the forty majority opinions, was a highly influential member of the Court. The fact that Burger wrote forty percent of the majority opinions in religion clause cases during his tenure reflects more than his personal interest in the area. First, it illustrates the use of his authority as Chief Justice. By appointing himself as the author of the majority opinions,[88] he was able to have a strong hand in shaping the direction of the Court's interpretation of the religion clauses. Second, it demonstrates his success, if not in forging the majorities himself, at least in participating in them. If authorship of majority opinions can be taken as a rough measure of a Justice's influence, then Justices Burger, Brennan, Powell, and Rehnquist were relatively influential Justices in religion clause cases. On the other hand, Justices Marshall, Stevens, White, Blackmun, O'Connor, and Douglas were relatively uninfluential in these cases.

Additional insights can be gleaned from the examination of the number of separate opinions written by the Justices. In particular, a Justice's separate opinion exposes that Justice's individual doctrinal and interpretive views. Also, the presence of a separate opinion reflects disagreement among the court's members and the potential failure of the process of compromise. Justice White was the most prolific separate opinion writer, having written nineteen such opinions. Justice Brennan wrote sixteen separate opinions, Justice Rehnquist fourteen, and Justice Stevens thirteen. Similarly, Justice Douglas was the author of seven separate opinions, even though he sat on the Court in only twelve cases, and Justice O'Connor also wrote seven separate opinions, although she was part of the Court in only nineteen cases.

More interesting than the aggregate number of separate opinions is the breakdown of these opinions into concurrences and dissents. For instance, Justice Rehnquist wrote twelve dissenting opinions and only one concurring opinion. Similarly, Justice Brennan had nine dissents, but five concurrences. Justice Douglas wrote five dissents, over forty percent of the cases he participated in, and only two concurrences. Justice White had a more balanced division, with ten dissents and seven concurrences.

88. *See supra* note 71.

By contrast, Justice Stevens wrote seven concurrences and only five dissents.

Concurrences and dissents have different purposes and convey different messages, depending on whether one takes a doctrinal perspective, or whether one looks at them from the viewpoint of the decision making process. From a doctrinal perspective, a concurrence expresses general agreement with respect to the outcome of a case, but suggests an additional factor to consider or an alternate approach required to reach the same result. A dissent, however, often registers disagreement, both with the outcome and the approach of the majority. By contrast, from the viewpoint of the decision making process, a concurring opinion reflects a situation in which the Justice, despite the fact that he voted with the majority, was unaccommodated by the majority. Another possibility is that a concurring Justice, hoping to influence a future majority, uses the present concurrence as a springboard.[89] Dissents can also expose two possible developments in the process of compromise. On the one hand, a dissenting Justice may be one whom the majority refused to accommodate, or who failed to influence at least four other Justices. On the other hand, a dissenting Justice might not have hoped to influence the members of the opposing majority at all. More likely, such a Justice might try to induce other dissenting Justices to form a minority bloc,[90] with the possibility of capturing additional votes to gain a future majority.

The extent to which the Justices were accommodating or influential is illustrated by the number of concurrences, dissents and majority opinions they wrote. Justice Douglas would appear to be the best example of a Justice whose positions were often not accommodated. This is because he probably neither sought to be accommodated nor sought to accommodate others. The fact that Justice Rehnquist had a high number of dissents compared to his few concurrences might illustrate that his views were not quickly accommodated by majority-building Justices. However, the relatively high number of majority opinions that he wrote demonstrates that he did retain some influence in the Court. The same might be said to a lesser degree about Justice Brennan. Brennan appears either to have been more accommodating or more influential than Rehnquist, in light of the fact that he wrote fewer dissents, more concurrences, and only several majority opinions. Justice White appears to have been less

89. *See supra* notes 60-61 and accompanying text.

90. *See supra* notes 76-77 and accompanying text.

successful than Brennan in accommodating and influencing other Justices, since White wrote a large number of concurring and dissenting opinions and relatively few majority opinions. Meanwhile, Justices Stevens and O'Connor appear, at least on the basis that they wrote more concurring opinions than dissenting, to have hoped to influence doctrinal developments but were not accommodated by majority-building Justices.

The study of the raw data of opinion and voting patterns shows that several voting blocs developed within the Burger Court with regard to the religion clause cases. Initially, a centrist bloc included Justices Blackmun, Powell, and Stewart. Midway through the Burger Court's tenure, that bloc disintegrated. Justice Blackmun joined a minority bloc with Justices Brennan and Marshall, and Justice Powell became more closely tied to the Chief Justice and Justice Rehnquist. Similarly, upon succeeding Justice Stewart, Justice O'Connor moved closer to Burger and Rehnquist than her predecessor had been.

The review of opinion patterns also demonstrates that the Chief Justice had a significant voice in the interpretation of the religion clauses and appears to have been a fairly successful majority builder. Justice White was far less successful. Justices Brennan and Rehnquist both occasionally found that the majority was unwilling to accommodate them. Nevertheless, both were relatively successful in accommodating and influencing others and in majority building. Of the two, Brennan had greater success, resulting from his ability to fashion an effective minority voting bloc. In short, Brennan seemed to be a consummate player of the compromise game.

C. *The Burger Court and the Interpretation of the Religion Clauses*

Although the constitutional doctrine of the religion clauses was relatively undeveloped at the time Burger took over as Chief Justice,[91] an increased volume of litigation involving the religion clauses provided the Burger Court many opportunities to interpret and reinterpret the clauses. Nevertheless, because the members of the Burger Court held widely divergent views on the proper interpretation of the establishment and free

91. For the principal pre-Burger Court establishment clause cases, see Board of Educ. v. Allen, 392 U.S. 236 (1968); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); Zorach v. Clauson, 343 U.S. 306 (1952); Everson v. Board of Educ., 330 U.S. 1 (1947). For the principal pre-Burger Court, free exercise cases, see Sherbert v. Verner, 374 U.S. 398 (1963); McGowan v. Maryland, 366 U.S. 420 (1961); West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Reynolds v. United States, 98 U.S. 145 (1878).

exercise clauses, the Burger Court's religion clause doctrine was often in a state of flux and received sharp criticism from within and without the Court. In order to understand the Justices' individual interpretations of the religion clauses, it is useful to review the Court's doctrine as was followed by at least a majority of the Court.[92]

Following the approach of earlier cases, the Burger Court developed a bifurcated analysis of the religion clauses, assuming that each of the two clauses represented distinct values. On the one hand, the establishment clause reflected the need to prevent the "sponsorship, financial support, and the active involvement of the sovereign in religious activity."[93] On the other hand, the free exercise clause aimed at restraining state interference with religious activity. For each clause, therefore, a separate analysis was necessary.[94]

In *Lemon v. Kurtzman*,[95] the Court announced a three part "test" for establishment clause claims. First, the statute had to have a secular legislative purpose. Second, its primary effect had to be one that neither advanced nor inhibited religion. Third, the statute could not foster an "excessive entanglement with religion."[96] Thus, under the first prong of the *Lemon* test, a statute would be struck down if it had a purely religious purpose or goal.[97] Even if the purpose was secular, the statute would violate the establishment clause under the second prong of the test if its primary effect was religious.[98] Finally, under the third prong, a statute could still be unconstitutional despite a secular purpose and effect, if it resulted in "excessive entanglement" between church and state. The entanglement prong was to prohibit "comprehensive, discriminating, and continuing state surveillance" of religious activities.[99] The Court

92. *See generally* L. PFEFFER, RELIGION, STATE, AND THE BURGER COURT (1984); Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U.L. REV. 1 (1984); Redlich, *Separation of Church and State: The Burger Court's Tortuous Journey*, 60 NOTRE DAME L. REV. 1094 (1985).

93. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

94. Although the Court's bifurcated approach has been criticized by commentators, *see, e.g.*, Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961), the members of the Court have all continued to follow it.

95. 403 U.S. 602 (1971).

96. *Id.* at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

97. *See* Wallace v. Jaffree, 472 U.S. 38 (1985) (statute providing for a "moment of silence" in public school had an invalid religious purpose).

98. *Compare* Estate of Thornton v. Caldor Inc., 472 U.S. 703 (1985) (statute giving employees an absolute right not to work on their chosen Sabbath had a primary effect of advancing religion) *with* Widmar v. Vincent, 454 U.S. 263 (1981) (suggesting that a school's policy of equal access including religious groups did not have a primary effect of advancing religion).

99. Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

also struck down statutes that raised the potential for political entanglement between church and state if the challenged governmental assistance to religious entities could cause political divisiveness along religious lines.[100] A potentially overwhelming exception to the *Lemon* test developed later in the Burger Court's tenure. Twice in the early 1980's, the Court rejected establishment clause challenges to activities that had long-standing historical acceptance.[101] Although some commentators prophesied the downfall of the *Lemon* standard after the historical-acceptance cases,[102] the *Lemon* test received a reaffirmation shortly thereafter.[103]

In the free exercise clause cases, the Burger Court continued to employ an interest-balancing test developed in earlier cases.[104] Under this balancing test, the Court must first determine whether a state action burdens the exercise of religious beliefs or practices. Therefore, the inquiry must initially determine whether the asserted belief is indeed a religious one, rather than one merely grounded in philosophy or personal preference,[105] and whether the belief is sincere.[106] Assuming that the belief is religious, the balancing test then requires the Court to find that the state action coerces an individual to modify or to forgo the belief or practice in order to comply with the state action.[107] Of course, a compelling governmental interest may justify burdening the individual's free exercise rights,[108] but only if failure to enforce the statute or regulation would undermine the governmental interest, and the government has employed the least burdensome means to achieve the interest.[109]

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100. *Id.* at 622-23 (aid to religious schools was likely to set off divisive political activity along religious lines).

101. *See* Marsh v. Chambers, 463 U.S. 783 (1983) (legislative chaplain did not violate the establishment clause because of the long history of such practices; no *Lemon* test applied); Lynch v. Donnelly, 465 U.S. 668 (1984) (municipal Christmas nativity scenes did not violate the establishment clause because of the historical acceptance of similar practices; *Lemon* test applied as well).

102. *See, e.g.*, L. PFEFFER, *supra* note 92, at xiii-xiv; Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770 (1984).

103. *See* Aguilar v. Felton, 473 U.S. 402 (1985); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Wallace v. Jaffree, 472 U.S. 38 (1985).

104. The modern free exercise clause analysis was established in Sherbert v. Verner, 374 U.S. 398 (1963).

105. Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972).

106. Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981).

107. *Id.* at 716-17 (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

108. United States v. Lee, 455 U.S. 252, 257-58 (1982).

109. *Yoder*, 406 U.S. at 221-23; *Thomas*, 450 U.S. at 718. Two cases in the Burger Court's final term suggest that various levels of scrutiny might be employed in different contexts. For example, a highly deferential standard was used in judging a free-exercise challenge to military uniform regulations. *See* Goldman v. Weinberger, 475 U.S. 503, 507-08 (1986). Also, a three-member plurality in Bowen v. Roy, 476 U.S. 693 (1986), suggested that in cases in which a government regulation only

The Court's retention of separate analyses for establishment and free exercise clause claims created tension between the two clauses. For example, a statute intended to protect the free exercise rights of an individual could violate the establishment clause's proscriptions against governmental support of religion.[110] Similarly, a judicially created exemption from a general statutory requirement on free exercise grounds might also impinge on establishment concerns.[111] The Burger Court did little to resolve this tension, except to note its existence and to seek a neutral path between the two clauses.[112]

Although the doctrine of the religion clauses remained relatively consistent during the tenure of the Burger Court, the results that this doctrine produced seemed somewhat inconsistent.[113] Moreover, the interpretations of various Justices not only differed from one another, but these interpretations also changed over time and in different circumstances. Therefore, it is difficult to draw conclusions about interpretive approaches of the Justices, especially since the principal source of insight into interpretation is their written opinions, which may only illuminate part of the interpretive process.

Although the Justices agreed on few issues, they all agreed that the words of the religion clauses do not have a plain meaning. As the Chief Justice suggested in *Lemon*, the language of the religion clauses is "at

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indirectly or incidentally requires a choice between obtaining a government benefit and following religious beliefs, is facially neutral, and evidences no intent to discriminate, the regulation is justified by a showing that it is "a reasonable means of promoting a legitimate public interest." *Id.* at 708. *But see id.* at 727 (O'Connor, J., concurring in part, dissenting in part).

110. *Compare* Estate of Thornton v. Caldor Inc., 472 U.S. 703 (1985) (striking down a state statute that granted employees an absolute right not to work on their chosen Sabbath) *with* TWA v. Hardison, 432 U.S. 63 (1977) (construing the provisions of Title VII of the Civil Rights Act, requiring reasonable accommodation of employee religious beliefs and practices by employers, to mean only *de minimis* accommodation).

111. Such were the charges made in response to free exercise cases such as Thomas v. Review Bd., 450 U.S. 707 (1981), and Sherbert v. Verner, 374 U.S. 398 (1963). *See Sherbert*, 374 U.S. at 414-16 (Stewart, J., concurring); *Thomas*, 450 U.S. at 722-23 (Rehnquist, J., dissenting).

112. *See Thomas*, 450 U.S. at 719-20; *Walz*, 397 U.S. at 668-69. In Wisconsin v. Yoder, 406 U.S. 205 (1972), Chief Justice Burger suggested:

> The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise.

Id. at 220-21. Also, in Gillette v. United States, 401 U.S. 437 (1971), the Court noted that Congress could constitutionally create an exemption to a general legislative proscription or regulation so long as the "exemption is tailored broadly enough that it reflects valid secular purposes." *Id.* at 454.

113. *See* Wallace v. Jaffree, 472 U.S. 38, 111 (1985) (Rehnquist, J., dissenting); Wolman v. Walter, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part, dissenting in part); Lemon v. Kurtzman, 403 U.S. 602, 671 (1971) (White, J., dissenting).

best opaque,"[114] and the Justices often lamented the difficulties of interpreting the religion clauses.[115] Because the plain meaning of the words of the religion clauses provided little guidance on their own, the Justices chose methods of interpretation other than strict textualism.

1. Development of the Dominant Originalist Interpretation

In *Everson v. Board of Education*,[116] the Supreme Court's first modern establishment clause case, the Court adopted what became the dominant originalist interpretation of the religion clauses. Justice Black, writing for the Court in *Everson*, embraced the church-state separationist views of James Madison and Thomas Jefferson as reflected in Madison's *Memorial and Remonstrance Against Religious Assessments*[117] and Jefferson's *Virginia Bill for Religious Liberty*, enacted by Virginia.[118] Justice Black asserted that because Madison and Jefferson had played leading roles in the drafting and adoption of the first amendment, their views represented the intent of the Framers. Relying on Madison's and Jefferson's desire to end governmental support of the established church, the originalist analysis of *Everson* suggested that the Framers intended to prohibit all aid to all religions.[119]

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114. *Lemon*, 403 U.S. at 612.

115. Justice White, with no small degree of understatement, summed up the state of the establishment clause doctrine:

> Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States . . . produces a single, more encompassing construction of the Establishment Clause.

Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).

116. 330 U.S. 1 (1947).

117. *Id.* at 63-72 (Rutledge, J., dissenting (Appendix)).

118. *Id.* at 12-13.

119. *Id.* at 13. From this basis, Black concluded:

> 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 nonattendance. 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."

Id. at 15-16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879)). However, it should be noted that the Supreme Court never fully followed the dictates of the Madison-Jefferson originalism.

Although many criticized the meaning that this view of original intent gave to the establishment clause,[120] the view remained the dominant originalist position of the Court.[121] For example, in the Burger Court's first religion clause case, *Walz v. Tax Commission*,[122] the Chief Justice claimed that "[i]t would serve no useful purpose to review in detail the background of the Establishment and Free Exercise Clauses of the First Amendment."[123] The originalism of *Everson*, at least for the early part of the Burger years, provided a relatively uncontroverted basis for the original intent doctrine of the Court.[124]

As a form of moderate originalism, the dominant originalist view provided only a vague basis of analysis for establishment and free exercise clause challenges. Although this originalist perspective suggested two purposes of the religion clauses, separation and neutrality,[125] these broadly stated purposes offered little concrete guidance. As Chief Justice Burger often remarked, "total separation is not possible in an absolute sense."[126] Nevertheless, several Justices relied on the dominant originalist perspective to explain the political entanglement element of the *Lemon* test, asserting that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[127] Because the *Everson* originalist perspective dominated, other originalist interpretations played a minimal role in most of the majority opinions of the Burger Court.

Despite the popularity of the dominant originalist perspective, the

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In *Everson* itself, the Court allowed a state program providing reimbursement of money expended for the transportation of students to church-affiliated schools. Everson v. Board of Educ., 330 U.S. at 17-18; *Id.* at 28-29 (Rutledge, J., dissenting). *See also* Zorach v. Clauson, 343 U.S. 306, 313 (1952) (Justice Douglas noting that "We are a religious people whose institutions presuppose a Supreme Being").

120. *See generally* M. HOWE, THE GARDEN AND THE WILDERNESS (1965); R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); Bradley, *Imagining the Past and Remembering the Future: The Supreme Court's History of the Establishment Clause*, 18 CONN. L. REV. 827 (1986).

121. *See* Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 706 (1986).

122. 397 U.S. 664 (1970).

123. *Id.* at 667-68.

124. *Id. See also* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760, 770 (1973); Wisconsin v. Yoder, 406 U.S. 205, 218 n.9 (1972).

125. *See* Marsh v. Chambers, 463 U.S. 783, 803-05 (1983) (Brennan, J., dissenting); Roemer v. Board of Pub. Works, 426 U.S. 736, 745-47 (1976); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); Gillette v. United States, 401 U.S. 437, 449-50 (1971). *Cf.*, Walz v. Tax Comm'n, 397 U.S. 664, 694 (1970) (Harlan, J., concurring) (suggesting that the two goals of the establishment clause were neutrality and voluntarism).

126. *See Walz*, 403 U.S. at 670; *Lemon*, 403 U.S. at 614.

127. *Lemon*, 403 U.S. at 622.

Court often diverted from the strict separationist message of that viewpoint,[128] which prompted some Justices to restate the intent of the religion clauses attributed to Madison and Jefferson with greater force. These minority views, which adopted a more forceful conception of the strict-separationist intent of Madison and Jefferson, had limited influence on the development of the Court's religion-clause doctrine.

Justice Douglas, in particular, relied heavily on the writings of Madison to support his interpretations of the religion clauses. In Douglas' opposition to the Court's holding that tax exemptions for churches were constitutional in *Walz*, he referred to Madison as the "author and chief promoter" of the religion clauses,[129] and contended that although "[w]hat Madison would have thought of [tax exemptions for churches] no one can say with certainty," it was apparent that Madison opposed "all state subsidies to churches" of any kind.[130]

Particularly in the earlier cases of the Burger Court, Justice Brennan employed a moderate originalist justification for his interpretation of the religion clauses which has derived from an analysis developed in previous Warren Court cases. In the pre-Burger Court case of *School District of Abington v. Schempp*,[131] Brennan had undertaken an extensive inquiry into the intent of the Framers, leading him to the conclusion regarding the establishment clause, that "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."[132] His originalist inquiry, like that in *Everson*, relied heavily on the views of Madison and Jefferson.[133] Brennan claimed that "[w]hat the Framers meant to foreclose . . . are those involvements . . . which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice."[134] Nevertheless, Brennan cautioned that original intent

128. Illustrative of the Court's shift away from the strict separationist message of the Madison-Jefferson intent is Chief Justice Burger's comment that "the line of separation [between church and state], far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon*, 403 U.S. at 614.

129. *Walz*, 397 U.S. at 705-06 (Douglas, J., dissenting).

130. *Id.* at 712-13 (Douglas, J. dissenting). *See also Lemon*, 403 U.S. at 633-34 (Douglas, J., concurring); Tilton v. Richardson, 403 U.S. 672, 696-97 (1971) (Douglas, J., dissenting).

131. 374 U.S. 203 (1963).

132. *Id.* at 294 (Brennan, J., concurring).

133. *Id.* at 234-37 (Brennan, J., concurring).

134. *Id.* at 294-95 (Brennan, J., concurring).

was only a starting point, not the end of the interpretive process.[135]

Brennan relied on this moderate originalist approach in several of the early Burger Court religion clause cases.[136] For example, in *Walz*, Brennan found it significant that both Jefferson and Madison had been silent when tax exemptions were granted to churches in Washington, D.C. and Virginia.[137] He also noted that there had been no comment about tax exemptions in the congressional and ratification debates, despite the widespread existence of such exemptions for churches both during the colonial period and thereafter.[138] By contrast, although Brennan used the same approach in *Lemon*, he concluded that because public education scarcely existed at the time of the adoption of the Constitution, the Framers' intent could provide no guidance on the issue of state aid to private, religiously-affiliated schools.[139] Nevertheless, he claimed that the state subsidization of religious schools involved the " 'dangers, as much to church as to state, which the Framers feared would subvert religious liberty and the strength of a system of secular government.' "[140] Interestingly, in later cases, Brennan abandoned this originalism as a method of interpretation.[141]

The dominant originalist perspective, emphasizing the views of Madison and Jefferson, was not significantly challenged within the Burger Court until quite late in the Chief Justice's tenure. Justice Rehnquist was one of the most outspoken critics of the Court's interpretation of the

135. *Id.* at 240 (Brennan, J., concurring). Justice Brennan maintained that "[a] too literal quest for the advice of the Founding Fathers" was misguided. *Id.* at 237 (Brennan, J., concurring). Brennan noted, " 'it is [afterall] a *constitution* we are expounding.' " *Id.* at 230 (Brennan, J., concurring) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819)). Moreover, Brennan asserted, the historical record on a particular practice is often ambiguous. Although the problem uppermost in the minds of the Framers was the prevention of an American counterpart of the Church of England, the Framers, Brennan contended, surely had a broader principle of church-state separation in mind. *Id.* at 237 (Brennan, J., concurring). Finally, present-day society has changed so dramatically since 1787, that recourse to the Framers' intent alone could not provide a useful guide to resolving modern constitutional problems. *Id.* at 238-40 (Brennan, J., concurring). Thus, even when he approached religion clause problems from an originalist perspective, Brennan's originalism was at most moderate, and definitely incorporated nonoriginalist elements. *See also infra* notes 164-70 and accompanying text.

136. *See* Roemer v. Board of Pub. Works, 426 U.S. 736, 770-71 (1976) (Brennan, J., dissenting); Hunt v. McNair, 413 U.S. 734, 750 (1973) (Brennan, J., dissenting); Lemon v. Kurtzman, 403 U.S. 602, 642-43 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 680-81 (1970).

137. *Walz*, 397 U.S. at 684-85 (Brennan, J., concurring).

138. *Id.* at 682-85 (Brennan, J., concurring).

139. *Lemon*, 403 U.S. at 645 (Brennan, J., concurring).

140. *Id.* at 649 (Brennan, J., concurring) (quoting School Dist. of Abington v. Schempp, 374 U.S. 203, 295 (1963) (Brennan, J., concurring)).

141. *See infra* notes 165-71 and accompanying text.

religion clauses,[142] but his critique became an attack on the Court's description of the Framers' intent in 1985. In *Thomas v. Review Board*,[143] Rehnquist's discussion of the reasons for the apparent tension between the religion clauses foreshadowed his own strict originalist interpretation of the religion clauses. Rehnquist argued in *Thomas* that the Court had strayed from the intent of the Framers and had engaged in an "overly expansive interpretation of *both* Clauses."[144] Thus, the tension between the two clauses, of the Court's own making, could be resolved by a proper, more restrictive interpretation of the religion clauses that would be more harmonious with the original intent of the Framers.[145]

In *Wallace v. Jaffree*,[146] the Alabama "moment of silence" case, Justice Rehnquist wrote a lengthy dissent which rejected the dominant *Everson* originalism. The attack came on two levels, disputing both the method of dominant moderate originalism, which took into account other sources of meaning beyond the specific intent of the Framers, and the resulting conclusions about the Framers' intent. In particular, Rehnquist argued that the dominant originalist position was built "upon a mistaken understanding of constitutional history."[147] In Rehnquist's view, the position's principle flaw was its reliance on Madison and Jefferson as representatives of the Framers' intent.[148] After examining the congressional and ratification debates, the actions of the First Congress and the early Presidents, and the writings of Joseph Story and Thomas

142. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 395 (1975) (Rehnquist, J., concurring in part, dissenting in part).

143. 450 U.S. 707, 720 (1981) (Rehnquist, J., dissenting).

144. *Id.* at 721-22 (Rehnquist, J., dissenting). In addition, Rehnquist cited the growth of social welfare legislation and the incorporation of the first amendment into the fourteenth amendment as possible causes for the increased tension between the establishment and free exercise clauses. *Id.* at 721 (Rehnquist, J., dissenting). Ironically, Rehnquist, who would espouse a strict originalist interpretation of the establishment clause just a few years later, noted that "[b]ecause those who drafted and adopted the First Amendment could not have foreseen either the growth of social welfare legislation or the incorporation of the First Amendment into the Fourteenth Amendment, we simply do not know how they would view the scope of the two Clauses." *Id.* at 722 (Rehnquist, J., dissenting).

145. *Id.* at 722 (Rehnquist, J., dissenting).

146. 472 U.S. 38 (1985).

147. *Id.* at 91 (Rehnquist, J., dissenting). Rehnquist's revision of original intent followed closely from R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982). *See also* Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 697, 707-08 (1986).

148. Jefferson, Rehnquist noted, was in France at the time the Bill of Rights was adopted. Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting). Also, Rehnquist argued that a review of the congressional debates illustrated that Madison's views of strict separation as represented in his *Memorial and Remonstrance* were not shared by others in Congress or by those involved in ratification. *Id.* at 92-99 (Rehnquist, J., dissenting).

Cooley,[149] Rehnquist concluded that the "true meaning"[150] of the establishment clause was that "it forbade establishment of a national religion, and forbade preferences among religious sects or denominations."[151] Rehnquist added that it did not, however, require government to be "strictly neutral between religion and irreligion" nor did it "prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means."[152] According to Rehnquist, the metaphor of a "wall of separation," adopted from the dominant originalist view of Jefferson, had resulted in a "mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights," and "should be frankly and explicitly abandoned."[153]

2. The Use of History

Beyond the various forms of originalism espoused by the members of the Court, historical acceptance of a challenged practice has played an important role in religion clause doctrine. Three cases in particular, *Walz v. Tax Commission*,[154] *Marsh v. Chambers*,[155] and *Lynch v. Donnelly*[156] illustrate that a long history of acceptance of a challenged practice has weighed in favor of the practice's constitutionality. The use of the historical-acceptance justification was, however, somewhat different in *Walz* from its use in *Marsh* and *Lynch*.

Chief Justice Burger's views on the role of history compared to those of Justice Brennan in these cases, illustrates the contrast among the three cases. For example, both Burger and Brennan agreed in *Walz* that

149. Wallace v. Jaffree, 472 U.S. 38, 92-106 (1985) (Rehnquist, J., dissenting).

150. *Id.* at 113 (Rehnquist, J., dissenting).

151. *Id.* at 106 (Rehnquist, J., dissenting).

152. *Id.* at 113 (Rehnquist, J., dissenting).

153. *Id.* at 107 (Rehnquist, J., dissenting). Rehnquist added that even though the *Everson* originalism had been embraced in many opinions, its mere repetition did not make it correct. "[S]tare decisis may bind courts as to matters of law, but it cannot bind them as to matters of history." *Id.* at 99 (Rehnquist, J., dissenting). *See also generally* Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976). Justice White expressed a readiness to reevaluate the history of the religion clauses and an acceptance of Rehnquist's strict originalism. Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (White, J., dissenting). Chief Justice Burger in later cases adopted an increasingly narrower analysis of religion clause issues that was justified, at least partially, on originalist grounds similar to those of Rehnquist. *See* Bowen v. Roy, 106 S. Ct. 2147, 2154, 2156 n.17 (1986); *Wallace*, 472 U.S. at 88-91 (Burger, C.J., dissenting); Marsh v. Chambers, 463 U.S. 783, 788 (1983).

154. 397 U.S. 664 (1970).

155. 463 U.S. 783 (1983).

156. 465 U.S. 668 (1984).

the "undeviating acceptance given religious tax exemptions from our earliest days as a Nation"[157] bolstered the conclusion that such tax exemptions furthered the goals of neutrality and separation by avoiding church-state entanglement.[158] Thus, in *Walz*, historical acceptance alone supported but did not create a conclusion of constitutionality.[159] By contrast, Burger and Brennan sharply disagreed about the relevance of the pattern of historical acceptance in *Marsh* and *Lynch*. Clearly, Burger's historical-acceptance justification in *Marsh* had a distinctly originalist element. The Chief Justice, noted in *Marsh* that the same Congress which had passed the first amendment had accepted legislative chaplains for two centuries. Thus, Burger suggested that "[c]learly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment."[160] However, in *Lynch*, Burger could not point to a similar history of acceptance of the practice of erecting municipal nativity scenes. Instead, Burger noted the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."[161] This historical record, Burger contended, weighed against a rigid, or strict separationist, interpretation of the religion clauses.[162]

Brennan was highly critical of this use of history, and suggested that "absent the Court's invocation of history, there would be no question that the practice at issue was unconstitutional."[163] According to Brennan, unlike *Walz*, in which the historical experience supported an otherwise constitutional practice of tax exemptions for churches, *Marsh* and *Lynch* were examples of the use of history to constitutionalize otherwise

157. Walz v. Tax Comm'n, 397 U.S. 664, 681 (1970) (Brennan, J., concurring).

158. *Id.* at 672-74, 685-92 (Brennan, J., concurring).

159. *Id.* at 678. *See also* Lemon v. Kurtzman, 403 U.S. 602, 645-49 (1971) (Brennan, J., concurring).

160. Marsh v. Chambers, 463 U.S. 783, 788 (1983). Burger noted that Madison himself was part of the House Committee appointed to select a chaplain and voted for the bill authorizing payment of the chaplain. *Id.* at 788 n.8.

161. Lynch v. Donnelly, 465 U.S. 668, 674 (1984). Burger cited the examples of the proclamations making Thanksgiving and Christmas national holidays, the national motto of "In God We Trust," and the line in the Pledge of Allegiance, "One Nation Under God." *Id.* at 675-77.

162. *Id.* at 678. By contrast, in McDaniel v. Paty, 435 U.S. 618 (1978), in which the Court struck down a provision of the Tennessee State Constitution disqualifying ministers from serving as delegates to the state constitutional convention, the Chief Justice rejected the historical evidence that many of the Framers supported such provisions and that many states retained such provisions through the nineteenth century. *Id.* at 622-26.

163. *Marsh*, 463 U.S. at 814 (Brennan, J., dissenting). *See also Lynch*, 465 U.S. at 718 (Brennan, J., dissenting).

unconstitutional practices. Moreover, in Brennan's view, the use of history in *Lynch* was inappropriate because the Court had not limited its historical inquiry to the specific practice. Instead, the court had included governmental acknowledgments of religion in general.[164] Brennan maintained that if the historical-acceptance exception was not narrowly restricted to only the practice in question, the exception could easily swallow the *Lemon* rule.

In summary, the Burger Court experienced several developments in its use of originalist interpretation and the use of history in religion clause cases. First, the majority of the Court adopted the dominant moderate originalist view that relied on Madison and Jefferson as the principal representatives of the Framers. The acceptance of the dominant originalist perspective was accompanied by the opposing moderate originalist interpretations of Justices Douglas and Brennan who argued for a strict separationist reading of the religion clauses. Later, criticism of the dominant originalist interpretation developed, led primarily by Justice Rehnquist, and the Court began to turn to the historical-acceptance justification, promoted largely by Chief Justice Burger.

3. Nonoriginalism

Several members of the Burger Court adopted a nonoriginalist interpretive approach in response to several developments in the latter half of the Burger Court's tenure. These developments included the criticism of the dominant originalist perspective, the increased use of the historical-acceptance justification, and the general frustration and dissatisfaction expressed both inside and outside the Court with the state of religion clause jurisprudence. The leading spokesmen for this nonoriginalist position were Justices Brennan[165] and Douglas.

Justice Brennan, after discarding his earlier moderate originalist approach, advanced a forceful nonoriginalist interpretation of the religion clauses. His strongest statement on nonoriginalist interpretation of the religion clauses came in his caustic dissent in *Marsh*. In his dissent, he argued that the Constitution was not "a static document whose meaning

164. *Lynch*, 465 U.S. at 725 (Brennan, J., dissenting) (concluding that without focusing only on the particular challenged practice, "the Court is at sea, free to select random elements of America's varied history solely to suit the views of five members of this Court.") Justice Brennan also presented a nonoriginalist attack against the use of history. *See infra* notes 165-66 and accompanying text.

165. *See generally* Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986) (address at Georgetown University, October 12, 1985).

on every detail is fixed for all time by the life experience of the Framers."[166] Moreover, according to Brennan, the "inherent adaptability" of the Constitution was important for the religion clauses, given the tremendous changes in the religious makeup of the nation.[167] Brennan insisted that the Framers should not be viewed as "sacred figures whose every action must be emulated, but as authors of a document meant to last for ages."[168] Similarly, in his dissent in *Goldman v. Weinberger*,[169] Brennan spoke of the prophetic or visionary nature of the religion clauses and the Court's role to develop that vision:

> Through our Bill of Rights, we pledged ourselves to attain a level of human freedom and dignity that had no parallel in history. Our constitutional commitment to religious freedom and to acceptance of religious pluralism is one of our greatest achievements in that noble endeavor. Almost 200 years after the First Amendment was drafted, tolerance and respect for all religions still set us apart from most other countries and draws to our shores refugees from religious persecution from around the world.[170]

Furthermore, Brennan commented that one of the critical functions of the religion clauses was to protect the rights of minority religions from "quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar."[171] Thus, Brennan's nonoriginalism had two components: the prophetic goal of improving religious pluralism and toleration, and the special role of the Court as protector of minority rights.

The opinions of Justice Douglas also reflected a nonoriginalist approach to interpretation of the religion clauses. For example, in his lone dissent in *Gillette v. United States*,[172] Douglas sought to justify an interpretation of the free exercise clause that included freedom of conscience as well as religion. In demonstrating the propriety of constitutional protection of the freedom of conscience, he quoted Tolstoy on the nature of

166. Marsh v. Chambers, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting). Justice Brennan asserted that "[o]ur primary task must be to translate 'the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century. . . .'" *Id.* (Brennan, J., dissenting) (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943)). *See also* Wallace v. Jaffree, 472 U.S. 38, 67-84 (1985) (O'Connor, J., concurring).

167. *Marsh*, 463 U.S. at 817 (Brennan, J., dissenting).

168. *Id.* (Brennan, J., dissenting).

169. 475 U.S. 503 (1986).

170. *Id.* at 523 (Brennan, J., dissenting).

171. *Id.* at 524 (Brennan, J., dissenting).

172. 401 U.S. 437 (1971) (conscientious objector to military draft).

the moral compulsion of the human conscience.[173] Although "[c]onscience is often but the echo of religious faith . . . it may also be the product of travail, meditation, or sudden revelation related to a moral compulsion of the dimension of a problem."[174] Thus, in Douglas' view, the full protection of the rights of free exercise required an expansive interpretation including the freedom of conscience.

4. Neutral Principles, "Tests," and Precedent

In addition to the Burger Court's originalist and nonoriginalist interpretations of the religion clauses, the Court attempted to fashion principles for adjudicating religion clause issues in a neutral manner. In theory, the neutral principles approach requires the development of generalized rules of law that have force beyond an individual case and are consistently applied in later cases. The *Lemon* "test" is the most obvious example of an attempt to utilize neutral principles. Similarly, several Justices claimed that the precedents of the Court provided a sufficiently well-developed guide to interpretation. Nevertheless, many of the members of the Court found these constraints on interpretation wanting in several respects.

Although every member of the Court who wrote for a majority accepted the *Lemon* analysis as a binding basis for interpretation,[175] various Justices characterized the principles of the *Lemon* test differently. This raises serious questions about just how neutral these principles are in their application. Whereas some Justices applied the test loosely, considering factors such as historical acceptance of the challenged practice or the governmental interest supporting the practice, other Justices applied the test more rigidly.

Chief Justice Burger was the author of the "tripartite test." Having distilled the concept of "tests" from past cases,[176] Burger announced the

173. *Id.* at 466-67 (Douglas, J., dissenting) (quoting L. TOLSTOY, WRITINGS ON CIVIL DISOBEDIENCE AND NON-VIOLENCE 12 (1967)).

174. Id. at 465-66 (Douglas, J., dissenting).

175. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (Stevens, J); School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) (Brennan, J.); Mueller v. Allen, 463 U.S. 388 (1983) (Rehnquist, J.); Harris v. McRae, 448 U.S. 297 (1980) (Stewart, J.); Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (White, J.); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (Blackmun, J.); Lemon v. Kurtzman, 403 U.S. 602 (1971) (Burger, C.J.).

176. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970); Board of Educ. v. Allen, 392 U.S. 236 (1968).

three-part inquiry as "tests" in *Lemon*.[177] However, Burger later referred to the three criteria as "guideposts," or "signposts."[178] In several cases, Burger reproved other members of the Court for their rigid application of the *Lemon* criteria as tests.[179] Burger saw the *Lemon* "test" as a flexible investigation that did not necessarily exhaust the possible interpretive analysis.[180] The debate over whether the criteria should be applied rigidly as "tests" or flexibly as "guideposts" constituted more than just quibbling over labels; it reflected an underlying debate about the nature of the principles to be used in interpreting the religion clauses.

As the *Lemon* test was subjected to increasing criticism and certain members of the Court tried to weaken the test with the historical-acceptance exception, other Justices supported the *Lemon* test and sought its strict application. Justice Brennan was, in Burger's view, the principal member of the Court to apply the *Lemon* test rigidly. Although Brennan had originally developed his own three-part test,[181] he eventually came to embrace and apply the *Lemon* test with greater vigor than the test's author.[182] In fact, Brennan garnered a majority in two 1985 cases that rejuvenated the threatened *Lemon* analysis.[183] Similarly, in the face of a sharp attack on the *Lemon* test by Justice Rehnquist,[184] Justice Powell contended that its standards had "proved useful in analyzing case after case" and were "the only coherent test a majority of the Court has ever adopted."[185]

Unsatisfied with the analyses and the results of the *Lemon* test, Justices White and O'Connor proposed alternatives to this test. Justice White never fully accepted the *Lemon* test, and with the exception of two

177. *Lemon*, 403 U.S. at 612-13.

178. *See, e.g.*, Tilton v. Richardson, 403 U.S. 672, 678 (1971); Lynch v. Donnelly, 465 U.S. 668, 679 (1984); *Wallace*, 472 U.S. at 89 (Burger, C.J., dissenting). *See also* Meek v. Pittenger, 421 U.S. 349, 359 (1975) (Stewart J., plurality opinion); Hunt v. McNair, 413 U.S. 734, 741 (1973).

179. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 419 (1985) (Burger, C.J., dissenting); *Wallace*, 472 U.S. at 89 (Burger, C.J., dissenting).

180. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 679 (1984); *Aguilar*, 473 U.S. at 419 (Burger, C.J., dissenting).

181. *See supra* text accompanying note 132. *See also*, Walz v. Tax Comm'n, 397 U.S. at 693-96 (1970) (Brennan, J., concurring); Lemon v. Kurtzman, 403 U.S. 602, 642-43 (1971) (Brennan, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 704 n.11 (1984) (Brennan, J., dissenting).

182. *Meek*, 421 U.S. at 373-74 (Brennan, J., concurring in part, dissenting in part); Marsh v. Chambers, 463 U.S. 783, 796 (1983) (Brennan, J., dissenting); *Lynch*, 465 U.S. at 697-98 (Brennan, J., dissenting).

183. Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 473 U.S. 402 (1985).

184. Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting). *See also supra* notes 143-50 and accompanying text.

185. *Id.* at 63 (Powell, J., concurring).

cases for which he wrote the majority opinion,[186] White adopted a balancing test for the establishment clause. The result of this balancing approach in the school aid cases, for example, was that the strong state interest in promoting education would, in White's view, justify the breach of church-state separation.[187] More recently, Justice O'Connor has sought to clarify religion clause doctrine and to develop neutral principles for both the establishment clause and the free exercise clause. O'Connor has attempted to give analytical content to the purpose and effect prongs of the *Lemon* test by suggesting that a court must examine whether a statute's purpose is to endorse religion and whether its effect actually imparts a message of endorsement.[188] For free exercise cases, O'Connor has proposed a test in which the state must demonstrate that an "unusually important interest is at stake," and that granting an exemption "will do substantial harm to that interest" in order to deny a free exercise claim.[189] Nevertheless, O'Connor's clarification has not received support from other members of the Court, nor is it entirely clear that her "tests" prove to be more neutral than the existing principles.

The debate and disageement over the nature of the *Lemon* test, as well as the sometimes inconsistent results of the religion clause cases, illustrate that the Burger Court was unsuccessful in transforming its "tests" into a set of neutral principles for interpreting the language of the first amendment. Similarly, the Court's precedents provided only limited guidance in interpreting the religion clauses, as evidenced by the fractured pluralities on several issues,[190] the divergent interpretations of the precedents,[191] and the rejection of the precedents by some members of

186. *See* Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985); Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980).

187. *See, e.g., Wallace*, 472 U.S. at 90 (White, J., dissenting); New York v. Cathedral Academy, 434 U.S. 125, 135 (1977) (White J., dissenting); Roemer v. Board of Pub. Works, 426 U.S. 736, 767-70 (1976) (White, J., concurring); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 820 (1973) (White, J., dissenting); Lemon v. Kurtzman, 403 U.S. 602, 664 (1971) (White, J., concurring). *But cf.* Gillette v. United States, 401 U.S. 437, 455-62 (1971) (Court, concluding that regulation limiting conscientious objector status to only those who objected to all wars was not an establishment clause violation, stressed the importance of the interests served by the regulation).

188. *See* Aguilar v. Felton, 473 U.S. 402, 421-22 (1985) (O'Connor, J., dissenting); *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 687-92 (1984) (O'Connor, J., concurring). *See generally* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 675 (1980) ("[T]he Establishment Clause should forbid only government action whose purpose is solely religious and that is likely to impair religious freedom by coercing, compromising, or influencing religious beliefs") (emphasis omitted).

189. *See* Goldman v. Weinberger, 475 U.S. 503, 530 (1986) (O'Connor, J., dissenting); Bowen v. Roy, 106 S. Ct. 2147, 2166 (1986) (O'Connor, J., concurring in part, dissenting in part).

190. *See, e.g.*, Bowen v. Roy, 106 S. Ct. 2147 (1985); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975).

191. *Compare Lynch*, 465 U.S. at 695-96 (Brennan, J., dissenting) (referring to well-established

the Court.[192]

D. *Church and State and Compromise in the Supreme Court*

The impact of compromise on interpretation of the religion clauses is illustrated by comparing the various interpretive positions of different members of the Court when they were writing for the majority as opposed to when they wrote separately. Justice Brennan, for example, had at first adopted a moderate originalist justification for his interpretations of the religion clauses and developed a three-part test of his own. He was unable, however, to persuade other Justices to follow this view. In the early years of the Burger Court, the cost of maintaining his individual position was relatively small, since the majority reached the same result as Brennan did under his own interpretation.[193] By contrast, as the *Lemon* test came under increasing attack and faced a serious threat of being weakened if not completely rejected, Brennan abandoned his earlier analysis and adopted a nonoriginalist justification for strict application of the *Lemon* criteria. Concommitant with his consolidation of a strong minority voting bloc,[194] Brennan's new position captured a majority in several important establishment clause cases in the later years of the Burger Court.[195]

A different story can be told of Justices Rehnquist and White. Rehnquist consistently criticized the *Lemon* approach and ultimately rejected it on strict originalist grounds. Yet, on the occasion in which he spoke for a majority of the Court, he employed the *Lemon* test.[196] In doing so, he was able to damage it somewhat.[197] Similarly, Justice White consistently rejected the *Lemon* doctrine in his separate opinions, but was nonetheless willing to accommodate other members of the court in order to write a majority opinion that applied the *Lemon* test weakly.[198]

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precedent) *with* Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) (arguing that precedent was "neither principled nor unified").

192. *See, e.g., Wallace*, 472 U.S. at 110-12 (Rehnquist, J., dissenting); *Id.* at 91 (White, J., dissenting).

193. *Compare* Lemon v. Kurtzman, 403 U.S. 602 (1971) (majority opinion) *and* Walz v. Tax Comm'n, 397 U.S. 664 (1970) (majority opinion) *with Lemon*, 403 U.S. at 642 (Brennan, J., concurring) *and Walz*, 397 U.S. at 680 (Brennan, J., concurring). *See also supra* notes 134-38 and accompanying text.

194. *See supra* note 81 and accompanying text.

195. *See* Aguilar v. Felton, 473 U.S. 402 (1985); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985). *See also* Wallace v. Jaffree, 472 U.S. 38 (1985).

196. *See* Mueller v. Allen, 463 U.S. 388, 394 (1983).

197. *Id.* at 403 n.11 (suggesting that the political divisiveness element of the entanglement prong of the *Lemon* test applied only to the school aid cases).

198. *Compare* Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 654-57

Finally, it is useful to compare the opinions of Justices Douglas and O'Connor, who for the most part were unable to persuade other Justices of their respective interpretations of the religion clauses. Justice Douglas had developed a strict separationist interpretation of the religion clauses based partly on a moderate originalist approach that relied entirely on the views of Madison.[199] Unlike Brennan, who also had his own interpretation at the time Douglas was a member of the Burger Court, Douglas' independent position cost him substantially in terms of influencing a majority of the Court.[200] Justice O'Connor, who joined the Court in the later part of Burger's tenure, attempted to bring a fresh approach to an area of constitutional adjudication that had become a fierce battleground.[201] Her separate opinions spoke as much to future cases as to the other members of the Court in a particular case. Given the fracturing and disagreement on religion clause doctrine evident in the Burger Court's final term,[202] O'Connor may yet be able to influence a majority or possibly a minority bloc.[203]

IV. INTERPRETATION AFTER COMPROMISE

Evaluating the competing theories of interpretation requires close scrutiny of the theories' internal coherence or cogency, their conformity with the constitutional system, and even their potential results. The evaluation also requires inquiry into whether the interpretive methods are possible in the specific institutions and circumstances in which constitutional interpretation takes place. An important element of that context in the Supreme Court is the process of compromise. However, in proposing and advocating their theories of interpretation, few commentators have addressed this critical element. In fact, many of the proposed interpretive methods seem designed for interpretation by a single judge instead of for interpretation by a group of Justices necessarily involved in the process of compromise.

Constitutional interpretation in the context of compromise is often

(1980) (majority opinion applying *Lemon* test) *with* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 820 (1973) (White, J., dissenting) *and* Wallace v. Jaffree, 472 U.S. 38, 90-91 (1985) (White, J., dissenting) (rejecting *Lemon* test).

199. *See supra* notes 129-30 and accompanying text.

200. *See supra* text accompanying note 89.

201. *See supra* notes 188-89 and accompanying text.

202. *See supra* notes 58-59 and accompanying text.

203. *See, e.g.*, Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 107 S. Ct. 2862, 2873-75 (1987) (O'Connor, J., concurring).

difficult. The process of compromise, propelled by the institutional prerequisite of a majority, requires that the Justices have the ability to modify and to adjust their interpretations to accommodate other Court members and to obtain agreement of at least four others. The process of compromise requires agreement on an interpretation with other members of the Court, some of whom may use an entirely different method of interpretation. The concessions that a Justice may have to make in order to reach majority agreement can contradict or conflict with the conclusions from his or her chosen interpretive method, possibly to the extent of modifying or even abandoning altogether his or her own interpretive method.[204] Although the challenge of obtaining the agreement of others can improve and perfect an interpretation, it can nevertheless distort or manipulate the results of the method of interpretation.

Compromise may create difficulties for a strict originalist approach to constitutional interpretation. Strict originalism is a rigid, often formalistic method of interpretation, "inviting, if not demanding, arbitrary manipulation of sources and outcomes."[205] Lawyers make poor historians. The adversarial nature of the courtroom tends not to be conducive to historical investigation, encouraging opposing attorneys to emphasize those bits of historical evidence that support their causes and to ignore those that do not.[206] The process of compromise complicates this situation. Concessions on points of history are easier to accept than doctrinal concessions. Even assuming that Justices can agree on the appropriate sources and the requisite weight to be attached to those sources of evidence of the Framers' intent, they may reach different conclusions from the historical record. Compelled to reach majority agreement, the results of the originalist inquiry may be an easy basis for compromise. Compromise thus can undermine the integrity of the strict originalist methodology.

Unlike strict originalism, moderate originalism and nonoriginalism are flexible interpretive methods which adapt easily to the rigors of compromise. Because neither moderate originalism nor nonoriginalism requires strict adherence to the historical evidence of the Framers' specific intentions, these approaches are less likely to distort the historical record

204. A Justice can, of course, refuse to make such concessions and maintain the integrity of his or her interpretive method. *See supra* text accompanying note 36. Obtaining majority status probably is impossible without some degree of concessions, however.

205. Brest, *supra* note 31, at 1090.

206. *See* Tushnet, *supra* note 26, at 793; Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

than strict originalism. The moderate originalist or nonoriginalist is free to consider factors other than the history of the Framers' intent. The process of compromise therefore is unlikely to trample upon the interpretive methods and outcomes of the moderate originalist or nonoriginalist. In fact, the process of compromise can serve as a mechanism for tempering and perfecting the interpretation under either interpretive approach.

The quest for neutral principles of adjudication in the religion clause cases is a prime example of the difficulties facing interpretation in the context of compromise. The neutral principles approach assumes a shared method of selecting the principles for interpretation and, moreover, a shared understanding of the content of those principles. These assumptions in the context of compromise are unrealistic. Despite all the clamour among the members of the Supreme Court about "tests," established precedents, and well-grounded principles in the doctrine of the religion clauses, the Court used these principles in anything but a Wechslerian neutral fashion.[207]

Reaching a majority requires a degree of flexibility that makes the application of neutral principles practically infeasible. For example, one might hypothesize that a Justice represents a swing vote in a series of cases. In one case, the Justice might modify her interpretation, derived from her own principle, in order to form a majority with four Justices who have reached the same outcome, albeit from a different principle of interpretation. In a second case, she might join the other four Justices to form a new majority conforming with the result from her principle even though the second set of four Justices also employs a different principle of decision.[208] The failure of neutrality results neither from dishonesty nor from a lack of legal craftsmanship on the part of members of the Court. Rather, the institutional dynamics of compromise undermine the potential for neutrality.

Unlike a neutral principles approach, compromise does not necessarily undermine an interpretive theory predicated on the judicial norms of adjudication.[209] The compromise process itself provides such rules. The most obvious example is the requirement of a majority. The individual interpretations of members of the Supreme Court have little impact unless at least four others agree. Similarly, a Justice who does not comply with the norms of the interpretive community of the Court will not

207. *See generally*, Wechsler, *supra* note 5.

208. Mark Tushnet also has identified this shortcoming in the neutral principles approach. *See* Tushnet, *supra* note 26, at 808-09. *See also* Greenawalt, *supra* note 38, at 1007-08.

209. *See supra* notes 48-51 and accompanying text.

have his or her interpretations obtain majority status. Although the process of compromise can dovetail with this interpretive approach, the combination of compromise and other adjudicative rules and judicial norms may still not be an effective enough constraint on the electorally unaccountable judge to be a useful interpretive theory.[210]

Although these conclusions are drawn largely from a case study of a specific area of constitutional doctrine, their relevance is not limited to constitutional interpretation in that one area. The religion clause doctrine of the Burger Court is unique in that it represents an area of constitutional adjudication that has experienced growth, disagreement, and shifting positions. However, these peculiarities only help to expose the process of compromise and its effects on interpretation. Moreover, even if the Burger Court's experience with the religion clauses (the fracturing and shifting of the members of the Court) has accentuated the impact of compromise on the Court's interpretation unlike any other area of constitutional doctrine, these are precisely the circumstances that require an effective method of interpretation.

The problems posed by the process of compromise should not be overlooked or underestimated. It is not enough to develop a theory of interpretation without considering the context of compromise in which interpretation takes place. The impact of compromise is not felt just in the interaction among Justices in reaching the agreement of a majority. Rather, the existence of compromise influences each Justice's individual interpretations. For example, a Justice, faced with the need to compromise to obtain the status of majority, will weigh the likelihood of other Justices accepting her interpretation, will ponder the possible modifications to improve that likelihood, and then will consider the appropriate bargaining positions to take in order to promote that interpretation. A theory of interpretation must therefore contemplate the impact of the process of compromise on how Justices will use the proposed interpretive method.

V. CONCLUSION

The Supreme Court, the final interpreter of the Constitution, is comprised of nine members. Most people like to think that those men and women appointed to the Court are intelligent and able individuals, skilled in the legal craft. Occasionally, the actions of the members of the

210. *See supra* note 51.

Court serve as a reminder that Justices are still human and suffer from the same human frailties that all people do. Whether a Justice is highly skilled or merely competent, however, he or she does not perform the task of constitutional interpretation alone. A Justice needs the agreement of at least four others to have the force of a majority, and the achievement of a majority always requires some degree of compromise.

As this case study of the Burger Court's interpretation of the religion clauses illustrates, the process of compromise can have a significant impact on constitutional interpretation. Moreover, some interpretive methods adapt less successfully to this process than others. A theory of interpretation must take into consideration the context in which interpretation takes place. That context is marked by the process of compromise.

APPENDIX: RELIGION CLAUSE CASES OF THE BURGER COURT

Bender v. Williamsport School Dist., 475 U.S. 534 (1986) (student religious group meeting in public school; decided on other grounds).
Bowen v. Roy, 476 U.S. 693 (1986) (exemption from having social security number).
Goldman v. Weinberger, 475 U.S. 503 (1986) (military dress code exemption for Orthodox Jew).
Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) (application of state employment discrimination statute to religious school; decided on other grounds).
Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (financial assistance to blind student at religious college).
Aguilar v. Felton, 473 U.S. 402 (1985) (aid to religious schools).
Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) (aid to religious schools).
Estate of Thorton v. Caldor, 472 U.S. 703 (1985) (statute granting employee right not to work on chosen Sabbath).
Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) (application of Fair Labor Standards Act to religious organization).
Wallace v. Jaffree, 472 U.S. 38 (1985) ("moment of silence" in public schools).
Lynch v. Donnelly, 465 U.S. 668 (1984) (municipal nativity scene).
Marsh v. Chambers, 463 U.S. 783 (1983) (legislative chaplains).
Mueller v. Allen, 463 U.S. 388 (1983) (tax credits to parents).
Bob Jones University v. United States, 461 U.S. 574 (1983) (tax exemption denied to religious university because of racial discrimination).
Jaffree v. Board of School Comm'rs, 459 U.S. 1314 (1983) (Powell as Circuit Justice) (prayer in public schools).
Larkin v. Grendel's Den Inc., 459 U.S. 116 (1982) (state statute granting churches veto over liquor licenses).
Larson v. Valente, 456 U.S. 228 (1982) (contribution reporting requirement).
United States v. Lee, 455 U.S. 252 (1982) (social security tax and Amish).
Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) (standing under religion clauses).
Widmar v. Vincent, 454 U.S. 263 (1981) (student religious group using college facilities).

Thomas v. Review Bd., 450 U.S. 707 (1981) (denial of unemployment benefits to Jehovah's Witness).
Stone v. Graham, 449 U.S. 39 (1980) (posting of the ten commandments).
Harris v. McRae, 448 U.S. 297 (1980) (medicaid payments for abortions).
Committee for Pub. Educ., & Religious Liberty v. Regan, 444 U.S. 646 (1980) (aid to religious schools).
Jones v. Wolf, 443 U.S. 595 (1979) (church property dispute).
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (NLRB jurisdiction over religious school teachers).
General Council on Finance & Admin., United Methodist Church v. California Superior Court, 439 U.S. 1355 (1978) (Rehnquist as Circuit Justice) (church property dispute).
McDaniel v. Paty, 435 U.S. 618 (1978) (minister as delegate to state constitutional convention).
New York v. Cathedral Academy, 434 U.S. 125 (1977) (aid to religious schools).
Wolman v. Walter, 433 U.S. 229 (1977) (aid to religious schools).
Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (exemption from union contribution).
Wooley v. Maynard, 430 U.S. 705 (1977) (license plate motto).
Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (aid to private colleges and universities).
Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (church property dispute).
Meek v. Pittenger, 421 U.S. 349 (1975) (aid to religious schools).
Johnson v. Robison, 415 U.S. 361 (1974) (veterans benefits to conscientious objectors).
Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (tax credits for students attending religious schools).
Hunt v. McNair, 413 U.S. 734 (1973) (aid to religious schools).
Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973) (aid to religious schools).
Sloan v. Lemon, 413 U.S. 825 (1973) (aid to religious schools).
Wisconsin v. Yoder, 406 U.S. 205 (1972) (state compulsory school attendance law and the Amish).
Lemon v. Kurtzman, 403 U.S. 602 (1971) (aid to religious schools).
Tilton v. Richardson, 403 U.S. 672 (1971) (aid to private colleges and universities).

Gillette v. United States, 401 U.S. 437 (1971) (conscientious objectors to the draft).
Walz v. Tax Comm'n, 397 U.S. 664 (1970) (tax exemptions for churches).
Maryland & Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367 (1970) (per curiam) (church property dispute).