

**Exploring Legal Change on the
U. S. Supreme Court:
A Preliminary Report on Winners and Losers***

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The current controversy surrounding the retirement of Justice Brennan and his proposed replacement with Judge David Souter is, in part, a result of the hopes and fears about legal change harbored by many of the Supreme Court's constituencies. Some elements of its constituency hope that this personnel change will cement a rightward judicial drift that found its origination in the winds blowing out of the Nixon White House. Others fear that this drift will curtail (or reverse) law developed by the Burger Court as well as that which traces its lineage to earlier judicial times. The debate over Souter's nomination will be a conversation between these various constituencies, both in their individual and organizational manifestations.

In a sense, this current debate assumes its conclusions: changes in Court personnel yield changes in constitutional interpretation. This, of course, can happen. Franklin Roosevelt finalized his victory over Court-based opponents of his New Deal when he replaced the "Conservative Four Horsemen" with justices committed to his vision of federal-state relations (Jackson, 1941). Richard Nixon had similar success in the criminal process area when he appointed four new justices to the Court during his first term as President (Levy, 1974). This said, however, it is important to note that the Court does not always chart new and immediately predictable directions as the result of the appointment process. Mr. Nixon did not get "his" Court on questions of abortion and executive privilege, for example. Neither did President Reagan completely redraw the legal map in elevating his choices to the Supreme Court. Yet, legal change, prompted from the bench of the Supreme Court, *did* occur during their presidencies-- some of it not to their liking. This change cannot, at least in total, be attributed to personnel changes.

This suggests that shifts in the composition of the Supreme Court, though they can bring about legal change, do not necessarily produce it. Students of the judiciary tend to fix on personnel changes as the explanatory factor in this area because much of what has been written on the courts in the recent past has fixed on the behavior of individual justices who, it is assumed, act as

ideologically motivated goal maximizers. In some cases, no question, they are, but in others their decisions can be influenced by factors external to their individual ideological make up.

Insofar as this is the case, legal change can be the result of a broad range of factors. It can be understood, for example, as the product of the motive force of evolving doctrine, the climate of the times in which cases are decided, the issues thrust upon the Court, and/or the configuration of actors (e.g., interest groups) pressing claims on the Court. Thus, to come to grips with the ebb and flow of legal and judicial processes, it is necessary to explore the variety of forces working on legal change. To understand the *dynamics* of legal change, it is necessary to identify and explain the relationship of these legal and political factors to the emerging law articulated by the Supreme Court, and to examine their operation over an extended period of time.

This forms the animating perspective of our study. We are using a comparative case-study approach to assess the relative impact of Court-based, environment-based, and group-based factors in conditioning the fluidity of the law in four highly contentious and unstable areas of recent Supreme Court litigation: death penalty, church-state, abortion, and federal-state governmental relations. In each, the Court either reversed or substantially changed its course over a relatively short period of time. Our question is why such reversals occur.

Through close analysis of the background, context, and resolution of the dominant cases in these areas, we seek to identify, isolate, and analyze the configuration and relationship of the legal and extra-legal factors that contribute to *legal change*; those factors which condition and promote shifting constitutional interpretations at the level of the Supreme Court of the United States. In short, we hope to account for and explain the dynamics of the process by which one-time legal “winners” become “losers,” and *vice versa*. More generally, what are the forces that drive and condition significant alterations in judicial interpretations of the law? We think that identification and integration of these factors will provide for a more comprehensive approach to the description and analysis of the important, but still little understood, phenomenon of legal change.

We are still conducting the research which forms the basis of this study. What we report here is incomplete and tentative. Nonetheless, it does provide a picture of our approach to the

problem of legal change, describes the present state of our efforts, and is suggestive of the findings toward which the larger study will point.

Analyzing Legal Change: A Research Strategy

The phenomenon of legal change is a complex and not easily amenable to scholarly analysis. Though a variety of strategies may exist to study it, we have decided to invoke a comparative case-study approach. This design has its inherent flaws, but it allows for in-depth analysis of the legal, contextual, and environmental factors contributing to interpretational dynamism. As such, this approach permits us to create testable hypotheses, which in turn facilitate the development of richer explanations for the process of legal change.

Our case study approach, however, differs fundamentally from those undertaken in the past. Rather than focus exclusively on one litigation campaign, we selected three dyads and one triad of cases for comparative analysis.

1. *Furman v. Georgia* (1972)

***Gregg v. Georgia* (1976)**

***McCleskey v. Kemp* (1987)**

2. *National League of Cities v. Usery* (1976)

***Garcia v. San Antonio Metro Transit Authority* (1985)**

3. *Lynch v. Donnelly* (1984)

***Allegheny County v. ACLU* (1989)**

4. *Roe v. Wade* (1973)

***Webster v. Reproductive Health Services* (1989)**

The cases contained in each grouping are remarkably similar on several dimensions. First, they presented very similar stimuli to the Court. *Furman*, *Gregg*, and *McCleskey* all raised questions about Georgia's procedures for implementing the death penalty; *National League of Cities* and *Garcia* asked the Court to construe Congress' power over state and local governments under the commerce clause; *Lynch* and *Allegheny County* raised questions about publicly sponsored seasonal religious displays; and *Roe* and *Webster* treated the constitutional status of the abortion choice. Second, as we depict in Appendix A, each case was supported by significant numbers of organized interests, participating as *amici curiae* and as sponsors.

More significant, however, is the fact that each area is characterized by a sudden shift in legal result; the Court changed its position on the common questions presented in each case grouping and did so rather quickly, with no more than a 16 year lag between resolution A and resolution B.¹ In each of these areas, one set of organized interests “won” their cases at time A only to see this victory, in part or in total, reversed at time B. A pointed question is thus raised within each grouping: Why do one-time legal “winners” subsequently become “losers” at the hands of the Supreme Court? Close examination of these case groupings should yield insight into the factors that conditioned the interpretational shifts they manifest. Further, addressing this question, we believe, will also shed light on a related but more fundamental query: What role do the forces of the Court, the political environment, and organized litigators play in conditioning the dynamics of Court-driven legal change?

Explanations of Legal Change

Why does the law, as interpreted by the Supreme Court, occasionally experience abrupt changes? Based on the wide-ranging research on the Court and the factors conditioning its decisions, we offer three possible explanations.

Court-Based Explanations

The most obvious explanations of legal change, as we alluded in our introduction, lie within the Court itself. Here, we locate three possibilities: one is found in the traditional understanding of legal change, the other two are more behaviorally defined.

First, it is possible that doctrinal evolution accounts for the differential outcomes. This, of course, is the explanation suggested by the traditional “legal model.” From this perspective, changes in the law are driven by case-by-case modification of governing doctrine. The Court’s decisions on state-appointed defense counsel provide an example of such evolution. As Lewis (1966) chronicled, and as Black’s majority opinion in *Gideon v. Wainwright* (1963) makes clear, the “special circumstances” doctrine of *Betts v. Brady* (1942) became-- as applied in subsequent

¹*Roe and Webster*. In the other groups, the time frame for change is substantially more constrained: *Furman and Gregg* (4 years), *National League of Cities and Garcia* (9 years), and *Lynch and Donnelly* (5 years).

cases-- increasingly exception ridden and unwieldy. Thus, by 1963, a unanimous Supreme Court reversed itself and the prevailing doctrine controlling this Sixth Amendment question. This kind of legal evolution is akin to that described by Benjamin Cardozo in his classic *The Nature of the Judicial Process* (1921): when legal rules lose their utility, they must give way to new formulations.

Traditional understandings of the process of legal change could explain, at least in part, the changes we observe in many legal areas. Note the death penalty sequence of *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976); it is conceivable that the Court's shift was driven by its reaction to the legislative response of the states to the opinions in the former case. Similarly, the reversal of *National League of Cities v. Usery* (1976) by *Garcia v. San Antonio Metropolitan Authority* (1985) could have been the result of the Justices' reaction-- particularly, Harry Blackmun's-- to confusion created in the lower courts over *NLC*'s appropriate application. Finally, the Court's historically tortured interpretations of the establishment clause may have led to the legal gyrations manifest in the *Lynch v. Donnelly* (1984) and *Allegheny County v. ACLU* (1989) dyad. Serious analysis of legal change must, *at a minimum*, consider such jurisprudentially-framed forces.

As noted earlier, however, scholars working from a behaviorally-defined perspective have shown that the traditional legal model cannot explain all aspects of the judicial process. Empirical political science has demonstrated that forces other than legal evolution, traditionally understood, bring legal change. Primary among these non-legal factors are the periodic changes in the membership of the Court. Indeed, one scholar has gone so far as to state, "[m]embership change is probably the primary source of policy change on the Court..." (Baum, 1985, p.142). This appointment-change dynamic occurs when Presidents succeed in replacing justices of one philosophical stripe with those committed to another. In some instances, that change need only involve the replacement of one Justice as was the case when Tom Clark replaced Frank Murphy or when Arthur Goldberg filled the vacancy left by Felix Frankfurter. In others, it might require wholesale personnel changes; note the Nixon and Reagan strategies of appointment. Furthermore, even when replacers are of similar ilk as their replacees, shifts in the overall balance of the Court can oc-

cur. For instance, after O'Connor joined the Court, "Blackmun's movement away from Burger accelerated" (Wasby, 1988, p.251; Kobylka, 1985-6;1989).

At first blush, such changes might have affected the disposition of several of our cases. Compare, for example, the Court's composition at the time *Roe v. Wade* (1973) was decided with that of *Webster v. Reproductive Health Services* (1989); between the two, it experienced a turnover in four-ninths of its membership. Similarly, between its decisions in *Lynch* and *Allegheny County*, Scalia and Kennedy replaced Burger and Powell. Further, the bulk of the appointments during this sixteen year period were made by a President (Reagan) with a vocal and well-established hostility to the precedent governing these areas of law. Thus, carefully thought out appointments to the Court could have altered the decisions it rendered and fomented the profound legal change manifest in our case groupings.

A related possibility is a major behavioral or attitudinal change of one or more existing members of the Court-- a change that affected our pairs and all other like cases. Behavioral studies of judicial decision making usually assume an attitudinal consistency among individual Justices, but we know that this assumption does not always hold. For example, Ulmer found (1979) that both Black and Douglas altered their views over the course of their careers. Such shifts can affect the product of the Court. Looking at our case groupings, one might hypothesize that the Court shift between *National League of Cities* and *Garcia* was the result of Blackmun's change of heart on this question (see Kobylka, 1985-86),² that between *Furman* and *Gregg* was a function of Stewart and White's altered perspective, and that between *Lynch* and *Allegheny County* was caused by O'Connor's uncertain accommodationism.

These kinds of attitudinal shifts are difficult to assess systematically. The methodology of behavioralism would suggest the use of cumulative scales and continuums to assess both sets of changes. These are useful tools to the extent that they convey information about actual voting patterns and alterations in votes. Given our concern with explaining, and not just predicting, deci-

²Blackmun wrote a separate opinion concurring in Rehnquist's majority opinion in *National League of Cities* only to reverse his ground and write for the majority in *Garcia*.

sions, we also look closely at doctrinal developments in each area of the law from the time the Court decided the first case through the second. This approach provides a more complete picture as to why the alteration occurred, and not merely at “how” it did.

Environmentally-Based Factors

With the demise of the myth that the Court is an apolitical body composed of neutral, non-partisan decision makers, analysts have explored a range of environmental factors that may affect judicial decisions. Two emerge as particularly significant. The first is public opinion: Does the Court consider or mirror the views of the public in rendering its judgments? Recent research by Marshall (1989, p.97) suggests that it does. He found that

Most modern Court decisions reflect public opinion. When a clear cut poll majority or plurality exists, over three-fifths of the Court’s decisions reflect the polls. By all arguable evidence the modern Supreme Court appears to reflect public opinion as accurately as other policy makers.

This finding confirms work by many others (see Cook, 1972; Casper, 1972; and Baum, 1985).

Given the legal issues raised by our cases-- some highly salient to the public-- we must consider public opinion as a potentially significant factor in the Court’s decision-making process. Note, for example, the death penalty. Not only does the Court view public opinion as a relevant factor in deciding these cases, but, according to research by Weissberg (1976), its opinions in this area closely track the public’s views. Much the same may be true of the federalism, abortion, and church-state areas.

A second factor is a change in the environment of other political actors, both institutional and organizational. Changes in political institutions can affect the resolution of judicial cases. For example, Epstein, Walker, and Dixon (1989) demonstrated that, in its criminal justice decisions, the Supreme Court was particularly sensitive to changes in the party of the President, supporting the defendants’ claims more frequently when a Democrat occupied the White House. Similarly, repeated legislative or litigious-- state *or* federal-- efforts to circumvent judicial decisions can send messages to the Court that its resolutions have not set comfortably in the larger political environment, and that some modification is in order. Indeed, in all of the areas under study here, institu-

tional backlash to Supreme Court decisions-- from the elections of President Reagan to the persistent efforts to accommodate religion, frustrate abortion, promote capital punishment, and minimize federal regulation-- is manifest and pronounced.

Other research has shown that important institutionalized actors in the legal system, such as attorneys and interest groups, are responsive to changes in the political environment. Literature on organizational use of the judiciary (see Cortner, 1968; Kobylka, 1987, 1990) suggests that groups contemplate their objectives vis-a-vis the existing social and political contexts, contexts defined by governmental institutions (especially the federal judiciary), organizations with related interests, and public opinion.

Their perception of the configuration of these factors can affect group behavior in a number of ways. Consider, first, the posture of governmental institutions, and of the U.S. Supreme Court in particular. As the Bork confirmation proceedings demonstrated, groups are clearly cognizant of the relationship between Court personnel and their ability to advance their judicial agenda. A Court composed largely of Nixon-Reagan appointees, while exceedingly attractive for conservative interests like the Pacific and Washington Legal Foundations, is a less-than-appealing forum for the ACLU, NAACP LDF, and so forth. These perceptions not only affect the way they frame their legal arguments, but may lead them to avoid the Supreme Court altogether and confine their activities to other courts or governmental institutions. Indeed, under such circumstances, if they do end up in the Supreme Court, it may be because they are forced to defend lower court victories, rather than to etch policy into law. And, as Cortner (1968) argues, a world of difference exists between taking offensive versus defensive postures in Court: groups have far more difficulty defending, rather than challenging, lower court rulings.³

Again, this might provide, in some measure, a reasonable explanation for the disparities between cases within our groupings. Consider *National League of Cities* and *Garcia*: In the first, groups arguing for the state's position were on the defense; in *Garcia* they were on the offense.

³Since the Supreme Court generally takes cases to reverse (see Wasby, 1988), their probability of success is even further minimized.

The same was true for groups in the *Lynch-Allegheny County* dyad. A similar, but opposite, context was present in *Roe-Webster* and *Furman-Gregg*.

By the same token, groups also are affected by other pressures populating the specific legal area. In today's legal system, groups have become all too aware of the fact that their arguments will be countered by groups with opposing interests. Such was not the case when the ACLU, NAACP LDF, and others first turned to the judiciary. This rise of ideological warfare has, in turn, affected group behavior in a number of ways. For one, groups know that they will face skilled opponents, opponents who have just as much expertise in particular legal areas as do they. Second, and relatedly, they will have to develop arguments to counter their organized opposition, and not simply to advocate their particular causes.

The increasingly pluralistic environment in which the Court operates is evident within our case groupings. In *Furman*, for example, the ratio of *amicus curiae* briefs opposing and supporting Georgia's position was 4:1; fifteen years later, in *McCleskey*, it was 2:1. Furthermore, this level of group activity is not an anomaly; comparable group participation is present in the other three areas under consideration here. If group participation in litigation means *anything*-- be it in the arguments presented or the configuration of political forces it conveys-- then their contribution to the Court's decision-making environment must be assessed in a systematic evaluation of judicially articulated legal change.

Group-Based Factors

Contrary to the articulated expectations of the constitutional founders, litigation has become increasingly political over time. Manifestations of this can be seen in our discussion of the Court- and environmentally-based factors associated with legal change, but they are present elsewhere as well. Perhaps the most obvious manifestation of this politicization is the increasing incursion of groups into the judicial process. Indeed, the claims brought to bear by interest groups form an important part of the political environment in which the judiciary works, one unforeseen by those who constructed the institution.

The systematic study of group litigation is of rather recent scholarly interest. Traditional legal models find the subject incomprehensible and cannot provide an analytical framework for its examination: *individuals* bring cases to courts, and courts decide these cases through applications of *law to fact*. Early behavioral approaches, in focusing on the political preferences and characteristics of the *justices* deciding these cases, left little room for consideration of the effect of external factors on the resolution of judicial questions. Thus, both traditional and behavioral approaches to legal study long neglected group pressure, as exerted through the courts, for want of adequate focus and conceptual categorization. With the advent of the pluralist paradigm, however, it was only a question of time before the judicial activity of groups was unearthed and investigated.

Because it focuses on groups as the unit of analysis, the pluralist perspective invites close examination of organizational involvement in the courts. Arthur Bentley contended in his path-breaking study, *The Process of Government*, that there were “numerous instances of the same group pressures which operate through executives and legislatures, operating through supreme courts” (1908, p.338). This important insight suffered through an extended period of scholarly dormancy until it was resurrected by David Truman in *The Governmental Process* (1951; 1971). Although he did not examine the phenomenon empirically, Truman held that the group activity which animated American politics extended into the judiciary.

Relations between interest groups and judges are not identical with those between groups and legislators or executive officials, but the difference is rather one of degree than of kind. For various reasons organized groups are not so continuously concerned with courts and court decisions as they are with the functions of the other branches of government, but the impact of diverse interests upon judicial behavior is no less marked (1971, p.479).

Not only does the pluralist paradigm invite investigation of the courts as a part of the larger political system, but it also suggests that the litigation subsystem would mirror the dynamics of politics, more generally understood. Gradually, students of the judiciary heeded Truman's call to investigate the linkages between groups and the courts. Still, because the group perspective is the “youngest” of our explanations of legal change, we will consider it in some detail. Two aspects of

that perspective have considerable bearing on our research: literature on groups as successful litigators and the bases and justification of that literature.

The “Conventional Wisdom” on Interest Groups. As scholarly focus settled on group linkages to the courts, a “conventional wisdom” developed: groups use the courts to press their goals and they are usually “winners”-- successful participants in the judicial game. The roots of this wisdom lie in a number of sources, but foremost are the case studies. Clement Vose’s *Caucasians Only* (1959), an exploration of the restrictive covenant suits, was the first in a long series of treatments of successful litigation campaigns waged by interest groups. His pain-staking study of the NAACP’s successful quest to end racially-based housing discrimination stirred our imaginations and set the tone for later analyses. Though the scope of their inquiries has broadened considerably, most scholars working in this field begin and end with Vose’s basic proposition that group-sponsored litigation is more successful than non-group litigation; in short, group litigants are winners whose efforts prompt significant legal change. Vose’s analysis was soon followed by those of Cortner (1964, 1968, 1970a, 1970b, 1975, 1980, 1988), Manwaring (1962), and Kluger (1976), Cowan (1976), to name just a few.

The list of group litigation studies is long and the analytical commonalities are evident. First, the *modus operandi* always is the same. Analysts choose a particular Supreme Court case for investigation, inevitably a suit that resulted in an organizational “win.” Then, in the style of Vose, they explicate factors affecting the Court’s ultimate ruling: the contextual ones of group decision-making processes and dynamics, the legal ones of precedent and doctrine, and the environmental ones of public opinion and political climate. This is usually followed by some assessment of what went right for the organizational litigant.

Cortner’s (1988) recent work, *A Mob Intent on Violence*, is illustrative of this approach. Using Vose’s treatise as a template, he seeks to explain the NAACP’s victory in the landmark case of *Moore v. Dempsey* (1923). The book itself is just as thought provoking as *Caucasians Only*; indeed, we learn a great deal about the NAACP during its early years and how the organization

evolved into a premiere litigating group. Moreover, like most studies of its genre, the story is told in minute detail, supported by meticulous documentation of theretofore unmined sources.

In short, Cortner's study-- and the many others of its type-- added a great deal to our knowledge about group litigation. However, to some extent, they distorted it as well. By focusing exclusively on successful campaigns, we see only the joys of victory, never the agonies of defeat; we see little that is *dynamic* in group litigation-- and, hence, the relationship of it to legal change more generally-- *because we look for little that is dynamic*. Because of this, we have little sense of the factors affecting group losses and how groups respond to those defeats because implicit in the literature is the conclusion that group involvement prompts legal victory.

Case studies are not the only source of conventional wisdom concerning group success. More broad-based treatments of group participation in a range of legal areas also have added to our store of knowledge. In general, these studies select a particular area of the law for investigation (*e.g.*, race discrimination, free speech) or a specific organization (*e.g.*, ACLU, LDF) for in-depth analysis. Using "success scores," the ratios of group wins to participations, they seek to reach conclusions about the efficacy of organizational litigation. Inevitably, such studies find that groups have higher success scores than organized litigants.

Exemplary of this approach is Lawrence's (1989) study of the Legal Services Program (LSP). She examined the relative success of LSP attorneys in Supreme Court litigation involving the gamut of poverty law issues. Based on the finding that LSP attorneys won 62 percent of their cases, she concluded that: "The LSP's appellate advocacy...gave the poor a voice in the Supreme Court's policymaking and doctrinal development" (p.270). Consider also O'Connor and Epstein's (1983) analysis of group involvement in gender-based discrimination cases. After reporting that the Women's Rights Project of the ACLU won 66 percent of its cases, they concluded that: "while women's rights groups' efforts often have been frustrated in legislative forums, the Supreme Court has served as a source of expanded rights. Women's rights groups have used this forum effectively..." (p.143).

Such conclusions are not necessarily misplaced: success scores do tell something about an organization's ability to win cases over the long haul. What these and so many other authors miss, of course, is the fact that groups do not win all of their cases. In Lawrence's study LSP attorneys lost nearly 40 percent; in O'Connor and Epstein's-- about a third. Yet, because they won more than other counsel or more than the average in that particular legal area, scholars conclude they are successful. They, then, seek to explain that success. But, again, we ask: what about the failures, group losses? How can we explain those? What is their effect on legal change? Little, if any, attention is ever given to them.⁴

Despite these problems, scholars have deduced from these works specific sets of factors that seem to explain group success. Combining those enumerated by Vose, Cortner, and others, this list emerges.

Longevity: continued and repeated use of the judicial process to achieve policy ends (see Vose, 1972; O'Connor, 1980; Kluger, 1976; Galanter, 1974; Yale Law Journal, 1949; Greenberg, 1977).

Expert Staff Attorneys: attorneys committed to organizational goals and who are well-versed in areas of interest to the group (see Sorauf, 1976; Meltsner, 1973; Manwaring, 1962; Greenberg, 1974; Epstein, 1985).

Sharp Issue Focus: legal concentration in but a handful of issues (see O'Connor, 1980; Cowan, 1976; Wasby, 1983).

Financial Resources: funds necessary to carry out litigation strategy (see Belton, 1976; Sorauf, 1976; Gelb and Palley, 1982).

Technical Data: social scientific evidence presenting proofs of legal arguments (Vose, 1957, 1972; O'Connor, 1980; O'Connor and Epstein, 1982).

Legal Publicity: usually in the form of law review articles (see Vose, 1959; Greenberg, 1977; Newland, 1959).

Coordination with Other Organizations: assistance with legal strategy, supplemental funds, the filing of supporting *amicus curiae* briefs (see Sorauf, 1976; Baker and Stewart, 1982; O'Connor and Epstein, 1983; Kluger, 1976; Handler, 1978; Kobylka, 1987).

⁴Two other studies of interest group litigation success recently have been conducted. To assess the influence *amicus curiae* briefs may have on the Court's decision to grant certiorari, Caldeira and Wright (1988) developed a model designed to control for the decisional propensities of the Justices. Stewart and Sheffield (1987) explored the impact of litigation sponsored by civil rights groups on the political activities of blacks in Mississippi. Both studies found that groups "do matter;" yet, neither explored their effect on decisions on the merits.

Support from the Solicitor General: assistance in the form of supporting *amicus curiae* briefs (see Krislov, 1963; Vose, 1972; Scigliano, 1971, Puro, 1971).

Others, in turn, have integrated these factors (and other views of the Supreme Court's role in American society) in an attempt to develop more broad-based inferences about groups and courts. Galanter's (1974) repeat player-one shotter view and Ulmer's (1978) upperdog-underdog distinction both attempt to put group victories into some larger perspective (see Caldeira and Wright, 1989). Taken together, they provide a coherent explanation as to why groups win in judicial arenas: organizations like the ACLU and NAACP LDF are viewed as repeat players who use their underdog status to prey upon the judiciary's institutionalized inclination to protect minority interests. While coherent, however, this explanation ignores both the use-- successful and not-- of the courts by upper-dog groups and the fact that these underdogs do not always win their cases at law. Regardless, the "conventional wisdom"-- groups win when they turn to the courts-- is further entrenched. Implicitly embedded in this "wisdom" is the conclusion that group involvement pushes the law forward in the desired direction.

That we continue to confirm this basic conclusion is hardly surprising: since scholars tend to look only at winning campaigns, we are perpetuating a self-fulfilling prophecy. Used in this way, the basic methodology of Vose, *et al.*, virtually ensures the inevitability of finding that groups are nearly infallible litigants and that their involvement in litigation fosters legal change that flows in a consistent and predictable direction.

The fundamental flaw of this approach would be less problematic if we did not base so much of our knowledge about group litigation around it. Since we begin with the proposition that groups win, we expend a great deal of energy explaining why they do. And, indeed, we have developed a laundry list of reasons as to why this is so. Although this tells us a great deal about the successes of organizational use of the judiciary, it only describes a portion of the group litigation system. It also constrains our understanding of the role played by organized litigants in the process of legal change. If groups can *win* through the courts, so, too, can they *lose*.

Indeed, a number of examples of group losses exist. Consider *Bowen v. Kendrick* (1988), in which the ACLU mounted an unsuccessful First Amendment challenge to the Adolescent

Family Life Act. Why did the ACLU lose this case? Because the prevailing doctrine was unfavorable? Because it lacked expert counsel? Because it failed to garner support from other organizations? Or, did other factors, such as the composition of the Court, the climate of the times, or the group's strategy come into play? We simply do not know because we have yet to explore this side, the darker, less sexy side, of group litigation. To understand the broader dynamics of organizational use of the courts, and to evaluate their ramifications on the process of legal change, we need to plow this fertile field.

Challenges to the Conventional Wisdom. Though the conventional wisdom about group activity in Court is well-entrenched-- and, to some extent, well-justified-- four challenges have emerged. One was a quantitative investigation designed to test the assumptions noted above. This study used a precision matching approach, that is, it paired cases presenting the same legal stimuli to the same judge during the same year; the only difference between the two was that one was sponsored by an organization, the other brought by private counsel. The authors found no significant differences between the group-sponsored suits and those brought by non-group attorneys (Epstein and Rowland, 1986;1989).

Flowing from this research are two other challenges, both centering on the idea that what we think we *know* and what we *observe* occasionally fail to converge. For one thing, we think we know that groups are winners, but we also know that this is not always so. Again note the ACLU's challenge to the Adolescent Family Life Act. In this instance we observed a known repeat player, an organization with great expertise in religious establishment clause litigation (see Sorauf, 1976; Morgan, 1968;1972; Walker, 1990) and substantial resources, lose a case of some significance to it. The same year also saw the NAACP LDF go down in defeat in *City of St. Louis v. Praprotnik* (1988), involving a constitutional challenge to the city's lay-off plan. Are these isolated instances? Perhaps. But, even if they are, we cannot *know* this without systematic investigation of these occasionally occurring phenomena.

For another, as we know, *most* groups regularly resorting to litigation characterize themselves as "liberal" (see O'Connor and Epstein, 1989). Yet, as we also recognize, the Burger and

now Rehnquist Courts, at the minimum, sought to contain the expansion of rights and liberties (see Blasi, 1983; Schwartz, 1987). If those Courts were capping rights, as many have suggested, how can groups, such as the ACLU and LDF, contemporaneously be achieving their objectives? Further, does this altered judicial setting promote a corresponding extension of the litigation reach of “conservative” groups whose views are, presumably, compatible with those of recent Supreme Courts? What are the organizational dynamics and strategies here? With but a few exceptions (e.g., Kobyłka, 1987;1990), we simply do not have the data to say.

Finally, how does group litigation-- in light of changes in Court personnel and doctrine, and the larger socio-political environment in which cases are brought and arguments made-- relate to changes in the substance of the law pronounced by the judiciary? Put another way, how does group litigation factor into the larger process of legal change? Previous studies have largely assumed their conclusion: group litigation leads to legal change in the direction sought by the group. Yet, as groups 1) form an important set of litigators and 2) at least occasionally lose the cases they bring to Court, the full dimensions of group litigation, and its relationship to legal change, are at best incompletely understood.

Conceptualizing the Role of Groups as Agents of Legal Change. Despite the questions and qualms we raise, we do think that as groups enter the litigation fray, they assume the responsibility-- by selecting the issues, cases, and argumentational strategy and goals they will pursue-- for providing courts the stimuli that can prompt legal change. Sometimes organizations emerge as winners-- successful in their efforts to secure favorable rulings and doctrine-- some times as losers. In either event, assuming that group efforts are relevant to judicial outcomes, the groups themselves can be considered a factor conditioning the process of legal change. From previous studies of this phenomenon, we can infer a number of group-based explanations for the ultimate success/failure of their litigation campaigns and their corresponding effect on the path of the law. Two such seem especially relevant: changes in the focus, personnel, and resources of a group and alteration in its strategic approach to the courts.

A major internal alteration can hamper or enhance a group's litigation efforts. Vose's (1972) analysis of the National Consumers' League's (NCL) quest to obtain judicial validation of progressive legislation provides a prime example of the significance of such changes. After winning *Muller v. Oregon* (1908), in which the Court upheld maximum hour work laws, the NCL sought to secure minimum wage legislation. Indeed, *Muller* was such an astounding victory that the organization was confident it could reach this objective. But such was not to be-- in *Adkins v. Children's Hospital* (1923) it failed to convince the Court of the constitutional permissibility of such laws.

Vose's analysis of the NCL's loss in *Adkins* considers a number of explanations for this defeat. Among the most important was the group's change in legal counsel. Louis Brandeis had conducted the litigation campaign leading to *Muller*. After he became a Supreme Court Justice, Felix Frankfurter replaced him as NCL counsel. Though Frankfurter was a more-than-competent attorney, he was preoccupied with his professorial responsibilities at Harvard and, thus, a less-than-committed NCL lawyer.

Neier's (1979) examination of the ACLU's involvement in *National Socialist Party v. Skokie* provides another example of how internal alterations can affect litigation. In this instance, the ACLU actually won the litigation battle-- the Court ruled that Skokie's attempts to bar the Nazi's from marching violated the Constitution-- but it was scarred from the war. From the time the group agreed to represent the Nazis in 1977 through the Court's decision, it lost over 60,000 members, breaking a well-established trend of organizational growth.⁵ The resulting loss of membership dues caused the Union to restrict its activities, reevaluate priorities, and so forth.

From these and other studies of internal, organizational dynamics, we can conclude that those factors that enhance prospects for group success in litigation (see pp.12-13) can also work to inhibit it. Thus, in examining the forces working on legal change, we will pay particular attention to the internal characteristics of the litigating groups.

⁵With but two exceptions, the ACLU's membership had increased every year between 1920 and 1977.

Another group-based factor emerges from Kobylka's (1987;1990) work on obscenity litigation. Here, he seeks to explain how a fundamental change in the law (in this instance the Court's ruling in *Miller v. California*, 1973) affected the behavior of organizational litigants. What he found was that different kinds of libertarian-- those opposed to the enforcement of obscenity laws-- groups reacted in different ways to the policy shift. In general, political/purposive organizations (see Clark and Wilson, 1961; Wilson, 1973; Moe, 1980;1981)-- the ACLU, in particular-- deemphasized obscenity litigation; conversely, material organizations (see Olson, 1965; Salisbury, 1969)-- both professional and commercial-- "mobilized to become the pre-eminent litigators, filling the void" left by political groups. In the final analysis, this was an important shift in group representation of the libertarian position because the goals, strategies and legal arguments of material groups differed substantially from those of their political/purposive allies.

Kobylka's work generates a number of propositions about the ability of groups to promote, guide, or constrain legal change. For one thing, it suggests a need to be sensitive to the types of groups involved in a litigation arena. The groups that participated in the cases we have selected for analysis represent a broad range of organizational types, ranging from the eminently political ACLU and Legal Foundation of America to the more materially oriented National Institute of Municipal Law Officers and American College of Obstetricians and Gynecologists. Because groups framed around political interests are likely, even when litigating the same specific legal issue, to present very different sorts of legal stimuli to the Court than those with material concerns, this may affect the Court's response. This dynamic-- the give and take of group litigation strategies in a volatile legal environment-- lies at the heart of group court interactions and must be examined when analyzing the process of legal change.⁶

Some Preliminary Findings: Winners and Losers

⁶Measuring group-based changes and gathering the data to assess them are challenging, though not impossible, tasks. Vose and Kobylka both used a mixed-research strategy and a multi-source data collection approach, relying on court and group records and archival data. Kobylka also interviewed leading participants to garner a sense of the kinds of internal changes that might have occurred. Additionally, there exists a rich secondary literature on many of the groups and issue areas under examination here. These sorts of data provide the insight into group decision making necessary to evaluate explanations of organizational dynamics as determinants of judicial outcomes.

The overall goal of our project is to examine the three factors articulated in general terms above (the Court, the environment, and the groups) and to investigate their utility in helping us explain the legal change occurring in our four pairs of cases. Our exploration of legal change is far from complete; to date we have reported results on but one case pairing, capital punishment (see Epstein and Kobylka, 1990). However, we have gained sufficient insight from our examinations of the other areas to offer some tentative conclusions about the relative weight of the court, the political environment, and interest groups as producers of legal change.

The Court

Earlier, we suggested that three forces within the Court could produce legal change: doctrinal shifts, personnel alterations, and individual “changes of heart.” To greater and lesser degrees, all three help to explain the observed changes in some of our case pairings.

Perhaps the most obvious instance of on-bench forces leading to a legal shift is the Court’s differential treatment of the issues presented in *National League of Cities* (1976) and *Garcia* (1985). In the latter, the Court took away what it had granted in the former-- a promise of judicially-enforced federalism. Recall that *NLC* marked the first time since the 1930s that the Court read the Tenth Amendment to provide a judicially enforceable limit on the regulatory powers of the national government.⁷ This decision, penned in somewhat expansive and vague language, was written by Justice Rehnquist for a 5-4 majority with Justices White, Marshall, and Stevens joining Brennan in dissent. Given his separate opinion concurring in the majority’s reasoning, Blackmun looked to be the weakest link in its Nixon-dominated coalition.

Blackmun’s concurrence noted that he was “not untroubled by certain possible implications of the Court’s opinion-- some of them suggested the dissenting opinion” (426 U.S., p.856).

However, he read Rehnquist’s murky opinion to “adopt a balancing approach” that would soften

⁷*NLC*’s precursors were cases like *U.S. v. E.C. Knight* (1895), *Hammer v. Dagenhart* (1918), *Schechter Poultry Corporation v. U.S.* (1935), and *Carter v. Carter Coal* (1936). This line of case doctrine, however, was seemingly terminated by *NLRB v Jones & Laughlin Steel* (1937) and *U.S. v. Darby* (1941), the latter declaring that the Tenth “Amendment states but a truism” (312 U.S., p.124).

the overextension of federal power while at the same time allow its use “Where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential” (426 U.S., p.856).

By the time *Gracia* reached the Court, two things had become clear. First, the “doctrine” articulated by *NLC* was so unclear that lower federal courts were unable to identify and apply “principled constitutional limitations on the scope of Congress’ Commerce Clause powers over the States” (105 S.Ct.1016). This led to widely inconsistent case results and a good deal of legal confusion. Second, Blackmun’s 1976 interpretation of Rehnquist’s *NLC* opinion turned out to be in error. Indeed, in his *Garcia* dissent, Rehnquist noted that “reference to the ‘balancing test’ approved in *NLC* is not identical with the language in that case.... Nor is [it] precisely congruent with Justice Blackmun’s views in 1976” (105 S.Ct., p.1033). In short, Blackmun and Rehnquist, although agreeing to the same opinion in *NLC*, actually disagreed over its meaning; Blackmun was wrong about the substance and scope of the *NLC* approach from the beginning.⁸

Blackmun’s opinion for the Court in *Garcia*-- an opinion explicitly reversing *NLC*-- is an instance legal change prompted by a Justice changing his vote in a context where *his* reversal alone was sufficient to cause an interpretational shift. In the *Roe-Webster* dyad we see legal change resulting from changes not in the perspective of individual Justices, but in the membership of the Court itself. President Reagan, a pronounced *Roe* foe, transformed the Court on this question by replacing *Roe* proponents (Stewart, Burger,⁹ and Powell) with new justices (O’Connor, Scalia, and Kennedy) who were substantially less enthused by its logic and precedential value. Indeed, only O’Connor’s attachment to the “unduly burdensome” approach she initially articulated in *Akron v. Akron Center for Reproductive Health* (1983) has kept the Court from terminating the

⁸Kobylka (1985-86) supplements this discussion by arguing that Blackmun’s change in this area was part of a larger jurisprudential shift. This broader shift can be traced to his authorship of the *Roe* opinion and the growing liberalism that opinion stimulated in him, and his concern with the increasingly right-ward direction taken by the Court as President Reagan appointed new justices (Kobylka, 1989).

⁹Burger’s attachment to *Roe*, while never strong, was renounced in his dissenting opinion in *Thornburgh v. American College of Obstetricians and Gynecologists* (1986).

abortion right.¹⁰ If Judge Souter is confirmed, and if he turns out to favor the reversal of *Roe*, O'Connor's ambivalence on abortion will be rendered irrelevant. In this scenario, we will see legal change *prompted solely* by adroit political appointments to the Court-- a situation paralleling that of the ultimate judicial acceptance of the New Deal and federal regulatory state.

One might expect to see the same kind of appointment-induced, Court-driven judicial meandering in the church-state area. The context is roughly the same. Like abortion, we have an issue of high public salience especially dear to the heart of an appointing President and his core constituency. Moreover, whereas the doctrinal pedigree of the abortion decision is clear and strong,¹¹ lineage of establishment clause doctrine is, at best, confused. From the Court's first foray into this interpretive realm in *Everson v. Board of Education* (1947), the law has weaved back and forth between public accommodation of religious practices and symbolism¹² and strict separation between church and state.¹³ Given this context, Justice-driven legal change would not come as a monumental surprise. The Court's decision in *Lynch v. Donnelly* (1984) is consistent with this presumption, but its holding in *Allegheny County v. ACLU* (1989) is not. Why it is not tells us a good deal about the constraints imposed on legal change by the formal norms of traditional approaches to legal decision making.

Although the Supreme Court's treatment of church-state issues had a cloudy past, the skies seemed to be clearing in the late 1970s and early 1980s. Up until this time, the Court was divided into three distinct factions on establishment questions: separationists who consistently opposed state aid to or acknowledgement of religion (Brennan, Marshall, and Stevens), accommodationists who favored such aid and acknowledgement (White, Burger, and Rehnquist), and moderates who

¹⁰See her opinions in *Webster* (1989), *Ohio v. Akron Center for Reproductive Health* (1990) and *Hodgson v. Minnesota* (1990).

¹¹Whatever else one may say about the *Roe* decision, it was supported by a strong initial seven-justice majority and it is grounded on a precedent (*Griswold v. Connecticut*, 1965) that dealt with the related issue of procreative freedom.

¹²See, for example, *Zorach v. Clausen* (1952), *McGowan v. Maryland* (1961), *Board of Education v. Allen* (1968), *Walz v. New York* (1970), *Committee for Public Education and Religious Liberty (CPERL) v. Regan* (1980), *Mueller v. Allen* (1983), and *Marsh v. Chambers* (1983).

¹³See, for example, *McCullum v. Board of Education* (1948), *Engel v. Vitale* (1962), *Abington School District v. Schempp* (1963), *Lemon v. Kurtzman* (1973), *Committee for Public Education and Religious Liberty (CPERL) v. Nyquist* (1973), and *Stone v. Graham* (1980).

mixed separationist and accommodationist votes and reasoning (Stewart, Blackmun, and Powell). Given these divisions, the moderates determined the direction of the Court's decisions in this area (Kobylka, 1989). This coalitional structure began to tear apart in *Wolman v. Walter* (1977) when Powell broke with Blackmun and Stewart and began an eight-year flirtation with the accommodationists. Stewart left next, casting the deciding vote in *CPEL v. Regan* (1980)-- the first case in which the Court sustained direct payment of state funds to sectarian schools (Note, 1980, p.418). From the unusual position of a dissenter, Blackmun blasted the majority in this case for retreating from the "settled law" of the 1970s.

Regan was Stewart's last significant establishment case, as upon his retirement in 1981 he was replaced with Sandra Day O'Connor. The new Justice assumed the position of the old in this area, and the Court continued to go with the flow of the rising accommodationist tide. In *Mueler v. Allen* (1983) it sustained a Minnesota statute providing parents a tax deduction for tuition, book, and transportation expenses incurred when sending their children to any (public or private) school. In so doing, the 5-4 majority "radically altered the constitutional law of the matter" (Levy, 1986, p.134) and undermined the ten-year old *Nyquist* precedent. The same term, the a 6-3 majority (Blackmun breaking with the separationists) upheld the practice of a state-paid legislative chaplain in *Marsh v. Chambers* (1983). Significantly, the majority did not feel compelled to apply the established "purpose, effect, entanglement" test of *Lemon v. Kurtzman* (1971)-- not even the weakened version used in *Regan* and *Mueller* in reaching this result.

With constitutional doctrine moving toward increasing accommodationism, perhaps it was not surprising when, the next term, a 5-4 majority upheld public sponsorship of a Christmas scene which included a creche surrounded by figures of the Christian Bible against the ACLU's claim that such a display violated the Establishment Clause (see generally, Swanson, 1990). In *Lynch v. Donnelly* (1984), Burger's majority opinion held that the Pawtucket display had a secular purpose (celebrating a national holiday), did not have a primary effect which impermissibly advanced or inhibited religion (the creche "merely happens to coincide or harmonize with the tenets of some religions"), and did not excessively entangle church and state (no strong administrative links or polit-

ical divisiveness). In the context of the larger display-- the opinion was unclear as to whether this was the holiday season itself or the other figures (Santa, reindeers, talking wishing wells)-- their was no constitutional violation.

Perhaps as significant as Burger's majority opinion was O'Connor's separate concurrence to it.¹⁴ Here she suggested that a more coherent view of the purpose and effect prongs of the *Lemon* test would combine them into a single "endorsement" prong, one which forbids government to express favor or disapproval with a particular sectarian perspective. Like the majority she joined, she felt that the creche in the Pawtucket display did not endorse Christianity but merely "celebrates a public holiday." Brennan, Marshall, Blackmun, and Stevens, dissenting on the stronger version of the *Lemon* test, did not agree.

Five years later in *Allegheny County* (1989), the Court was once again confronted with a creche case, although this time a Hanukah Menorah was included in the county's holiday display. The county argued that because a creche was constitutional, surely a display combining symbols from both Jewish and Christian seasonal holidays would pass muster. The Court, with Scalia and Kennedy sitting in place of the accommodationist minded Burger and Powell, rejected this contention and on a tortuously divided vote upheld the exhibition of the Menorah (it was surrounded by secular symbols held to be constitutionally akin to the plastic Santa in *Lynch*) but struck that of the creche (no sufficiently secular supporting symbols).

Writing for himself, O'Connor in part, and two different coalitions of Justices (Brennan, Marshall, and Stevens in striking; Rehnquist, White, Scalia, and Kennedy when upholding), Blackmun sought to reconcile the *Lynch* holding with the *Allegheny* result by contending that the "wall of separation" *Everson* found the Establishment Clause to erect could live with *Lynch* if the religious symbols of a public display did not dominate the display itself. This was a distinction without constitutional difference for the Justices of the accommodationist and separationist blocs

¹⁴The litigants in *Allegheny County v. ACLU* (1989) clearly thought O'Connor's *Lynch* concurrence was significant. Each set aside a portion of their briefs to explain why her approach favored disposition of the issue in their favor.

who would have, respectively, upheld and struck the display in its entirety. O'Connor, again plying her endorsement test, went along with the decisional compromise struck by Blackmun.

The result in *Allegheny County*, while inelegant and seemingly unprecedented, is not really that hard to explain. O'Connor was obviously serious about her "endorsement" approach, and the physical setting of the religious symbols at issue here-- a factor unclearly elucidated in *Lynch*-- was such that the one embedded in other symbols of seasonal celebration (the Menorah) was permissible while the other (the creche), standing largely unadorned, was not. Elsewhere, Kobylka (1985) has demonstrated that Blackmun is no arch separationist; rather, he seeks to hold the establishment line at the point drawn in *Meek v. Pittenger* (1975) against the tugs of the Court's extremes. With the Court moving right, this has more-often-than-not lumped him with the separationists, but his votes in *Marsh* and *Allegheny County* suggest that he continues to steer to his stars of legal precedent. No litigant before the Court-- either the parties themselves or those participating as *amicus curiae*-- presented an argument even remotely similar to that upon which Blackmun and O'Connor lit. Thus, it seems that doctrinal considerations led them to the conclusion they reached in this case and both facilitated the legal change it authored and constrained its possible accommodationist extension that political factors (general public support for Christmas observances) and personnel factors (the increasing statist tendencies of recent appointments) might otherwise have engendered.

Although a variety of Court-based factors help to account for the legal changes in federalism, abortion, and church-state questions, we also have learned that such explanations often can be misleading. This we found to be true, for example, in the area of capital punishment. In our quest to explain the "discrepancy" between *Furman* and *Gregg*, we obviously needed to consider the Court: without its shift, the change in death penalty policy would not have occurred. But, our interest lied a bit deeper; that is, the relevant question is not whether the Court facilitated the failure of abolitionism, but whether it *accounts for* it.

Was *Gregg* was a "winnable" case, given the composition of the 1976 Court? On one hand, we know that a personnel change occurred, and that it was not a positive one from the van-

tage point of those seeking abolition.¹⁵ In *Furman*, they had a clear vote for abolition in Justice Douglas; in Stevens an unknown commodity. This personnel shift could have conditioned a judicial backslide. On the other hand, were this a wholly satisfactory explanation, *Gregg* should have been decided by a slim majority of five with Stevens the swing vote, yet seven Justices voted to uphold capital punishment, two of whom-- White and Stewart-- shifted from their *Furman* positions. Thus, the addition of Stevens did not cause the change from *Furman* to *Gregg*.

Had abolitionists been able to “hold” White and Stewart, would they have won *Gregg*? Mathematically speaking, no: the vote would have been 5-4 against their position. Yet, as we think our investigation of capital punishment made clear (Epstein and Kobyłka, 1990), logic and math seem to have little place in this area of litigation. This was, in the late 1960s and early 1970s, a legal area of substantial fluidity. Before *Furman* was decided, we saw 8-1 anti-death penalty majorities suddenly become 6-3 pro-capital punishment coalitions, and so forth.¹⁶ In short, this seems to have been an area of the law in which *some* Justices were open to persuasion from their colleagues and attorneys.

We emphasize “some” because, indeed, there were a few Justices who were both more flexible in their views and, in essence, more significant than were others. It is clear, for instance, that Rehnquist was a lost cause for abolitionists, just as Brennan was for state attorneys. Conversely, White and, especially, Stewart were key players before and after *Furman*. Not only were their votes critical to any successful litigation campaign (on either side), but their views seemed to carry a great deal of weight with the others, as well. In a case prior to *Furman*, *Maxwell v. Bishop* (1969), eight Justices voted to reverse on both grounds of standardless juries and unitary trials. In response to a strongly-worded Douglas opinion, however, Stewart and White wrote a concur-

¹⁵Voting to strike the penalty as unconstitutional in *Furman* were Douglas, Brennan, Stewart, White, and Marshall. Burger, Blackmun, Powell, and Rehnquist voted to uphold its constitutionality.

¹⁶Note, for example, the ambivalence suggested by the differential dispositions of *U.S. v. Jackson* (1968), *Witherspoon v. Illinois* (1968), and *Boykin v. Alabama* (1969) and *McGautha v. California* (1971) and *Crampton v. Ohio* (1971).

rence, disposing of the case on *Witherspoon* grounds.¹⁷ Two years later, this “concurring” opinion became the majority’s position.

Thus, it seems that the course of *Maxwell* and many other cases depended on the votes *and* postures of Stewart and White. Put simply, with them the groups fighting against the death penalty won their cases; without them-- they failed. Extending that logic to *Gregg*, had abolitionists been able to hold White and Stewart, as they had in *Furman*, the 1976 cases would have had a different resolution, one far more favorable to abolitionist goals.¹⁸

We could, in fact, imagine several different scenarios, with the most likely one involving Stevens. It would be almost foolhardy, in retrospect, to believe that Stevens would not have been a “gettable” vote, if Stewart and/or White had “pushed” him in that direction. Surely, given his death penalty record since *Gregg*, we have every reason to suspect that the Ford appointee was (and is) sympathetic to the abolitionist cause. With a little lobbying from his senior colleagues, he might have been a fifth vote to strike the capital laws, not a seventh to uphold.

We recognize that this is conjecture, but it is conjecture based on an analysis of virtually every legal development occurring before and since *Furman*. If we follow the logic of that examination we are inevitably led to the follow conclusions: 1)based on their positions in *Furman*, White and Stewart were possible (if not probable) votes to strike the capital laws at issue in *Gregg*; 2) if they had been inclined to cast their votes in that direction, they might have been able to persuade others (most likely, Stevens) to follow their lead; and 3) in a 5-4 vote the Court would have overturned the new capital laws.

To summarize, we have found that an array of Court-based factors contributed to the legal changes we observe in the federalism, abortion and church-state areas. Only in the first two areas can we say that they were determinative-- Blackmun’s shift and Reagan’s appointments clearly oc-

¹⁷*Witherspoon* struck, on constitutional grounds, the imposition of the death penalty by “death qualified” juries.

¹⁸The post-*Gregg* period did not see a quick reversion to massive executions. In this sense, one can say that abolitionist goals *were* advanced even by this decision. However, *Gregg* set in motion the machinery which led to the reimposition-- after a ten year hiatus won through the NAACP/LDF’s “moratorium” strategy-- of capital punishment. Since this is exactly what the abolitionists sought to avoid, *Gregg* was a clear loss for them. Indeed, since 1977, more than 120 people have been put to death by state governments.

casioned the judicial alterations there. The story of creches, menorahs, and the Establishment Clause seems incompletely captured by a Court-based explanation, although such factors are clearly relevant to its plot. Death penalty litigation is a different matter, as these factors cannot account for the broad swing from *Furman* to *Gregg*. Something else, another factor or set of factors, is needed to fill out its picture. To lesser and greater extents, we could raise similar objections about the utility of Court-based explanations in the other legal areas. Although it is obviously true that without the Court legal change would not have occurred, what we are finding is that exclusive analytical reliance on this factor often explains too much and, hence, too little; it often masks the contribution of other factors which more directly condition the observed legal dynamism.

The Political Environment

Our research, to date, also reveals that the political environment-- the other governmental institutions (federal, state, and local) and the citizenry-- has played a significant role in generating legal change. But, again, we see substantial differences among our pairs.

The litigation of church-state questions has taken place in a rather well-defined political climate, one not generally supportive of separationist claims. Ever since President Nixon's election in 1968, the overtly political branches of federal government have generally pursued accommodationist goals in the legislation they sponsor. Indeed, the Supreme Court has been something of an anomaly on the federal scene because, even with its ambivalent gyrations on these issues, it has stood against the press of public opinion and state legislation urging a more accommodationist stance on church-state issues.

It is difficult to get a good read on public opinion on Establishment Clause questions. The most direct indicators we have, survey data, are incomplete and often difficult to compare because of alternative phrasings of questions over time. In this issue area, the data we have are especially paltry; polls are infrequent and often taken after significant and potentially divisive Court decisions. In addition, we have been unable to get survey data directly germane to the creche question. All this noted, however, use of Gallup poll results do allow us to get a rough feel for the climate of public opinion.

Gallup periodically queries Americans on religious issues. Most relevant to our study are its questions addressing prayer in schools and governmental aid to sectarian education (parochaid). Figure 1 reports the available data on these issues. It shows that public support for school prayer has stayed remarkably consistent since 1962;¹⁹ this is the case, despite the fact that subsequent polls were taken at times well removed from the Court's primary decisions in this area and suggests that the Court has long been working at variance with public preferences on this topic. The data on parochaid are more volatile over time, but consistently show a lower level of public support for expenditure of tax dollars to assist sectarian education.²⁰

(FIGURE 1 HERE)

Although these data do not speak directly to the issue of state-sponsored holiday displays with religious content, they do suggest that, at least when large expenditures are not involved, the American public is highly tolerant of governmental accommodation of religion. Indeed, Justice Blackmun, in his dissent in *Regan* (1980), charged that the Court's increasing accommodationism was, in part, a reaction to the press of public opinion. Implicitly referring to the shift of Stewart and Powell, he wrote: "I am able to attribute this defection only to a concern about the continuing and emotional controversy and to a persuasion that a good-faith attempt on the part of a state legislature is worth a nod of approval" (444 U.S., p.664). Marshall (1989) has shown that the Court's decisions are sensitive to the prevailing climate of public opinion, and its late 1970s and early 1980s shift-- a shift which culminated with *Lynch*-- may support that finding. Governments *did* continue to pass laws supporting, in one way or another, religion (see Morgan, 1968;1972; Pfeffer, 1975;1984; Sorauf, 1976), and the Court *did* for a brief period, become constitutionally tolerant of such efforts. This noted, however, it remains that such an explanation for the Court's religious odyssey does not hold for the occasions since *Lynch* when it struck programs similar in

¹⁹The 1962 poll was conducted immediately after the *Engel* decision. After the *Schempp* decision in 1963, Gallup found that only 24% of its respondents approved of the Court's treatment of the school prayer question. The phrasing of the questions put by Gallup was framed in one of two ways: support for "religious observances in public schools (1962, 1984) or support for an amendment specifically allowing such prayers (1975, 1980, 1982, 1983).

²⁰As with its prayer questions, the Gallup queries on parochaid are phrased in one of two ways: support for federal aid (1941, 1961, 1963, 1965, 1986) or support for an amendment specifically allowing such aid (1975, 1980, 1985).

intent and design to those they previously upheld. In this latter camp is its decision in *Allegheny County* (1989).²¹

Although the press of public opinion and continued legislative activity are not the only environmental pressures working on the Court in this area: the election of Ronald Reagan brought a committed accommodationist to the White House and a vigorous advocates of relaxed separation to the Solicitor General's office (Caplan, 1987). In embracing the agenda of the "new" or "religious" right, Reagan promised to do something to reverse what he saw to be the excessive separation between church and state. To this end, his Solicitor Generals-- Rex Lee and Charles Fried-- argued for accommodationist interpretations in 13 Establishment Clause cases (72% of the 18 decided by the Court during this period), arguing eight (five as an intervenor)²² and filing as *amicus curiae* in five.²³ In many of these cases-- *Lynch* and *Allegheny County*, for example-- the legal interest of the United States was highly attenuated. In *Lynch* the government cited the fact that it "has in past years sponsored Christmas pagents that included nativity scenes," but it was also more open about its larger and more clearly political interests: "More broadly, the federal government has, from the earliest days of the Republic to the present, felt free to acknowledge and recognize that religion is a part of our heritage and should continue to be an element in our public life and public occasions."

Scholars have long noted the significance of the participation of the Office of the Solicitor General in Supreme Court litigation; it has been an unusually successful litigant before the Court. Indeed, our research has found then Solicitor General Bork's participation in the 1975 Term death penalty cases to have been highly important in blunting the promise *Furman*. It is conceivable that the weight of the office's presence in the church-state realm helped lead the Court's majority to

²¹Other instances include *Wallace v. Jaffree* (1985), *Grand Rapids v. Ball* (1985), *Aguilar v. Felton* (1985), and *Edwards v. Aguillard* (1987).

²²The Solicitor General argued *Alamo Federation v. Secretary of Labor* (1985), *Corp. of Presiding Bishop v. Amos* (1988), *Hernandez v. C.I.R.* (1989), and intervened in *Lynch v. Donnelly* (1984), *Wallace v. Jaffree* (1985), *Grand Rapids v. Ball* (1985), *Aguilar v. Felton* (1985), and *Bowen v. Kendrick* (1988).

²³*Mueller v. Allen* (1983), *Marsh v. Chambers* (1983), *Thorton v. Caldor* (1985), *Witters v. Washington* (1986), and *Allegheny County v. ACLU* (1989).

reshape the doctrine governing this realm and bend it to greater accommodationism. This explanation, like that of the press of public opinion, cannot be wholly accurate. If the presence and argument of the Solicitor General was decisive in moving the Court to resolve *Mueller, Marsh, and Lynch*, how can it be that this influence could not finish the job in *Jaffree, Grand Rapids, Aguilar, and Allegheny County*? Its failure in the latter case, given *Lynch*, is particularly hard to explain if it was a preeminent factor in shaping constitutional interpretation in this area of law.

Capital punishment also provides an interesting example of the utility and limits of the political environment as an explanation of legal change. The great bulk of the NAACP LDF's (and ACLU's) campaign against the death penalty was waged, except for a period in the mid 1960s, in a general climate of political hostility to the abolitionist goal of ending state-sanctioned executions. Indeed, as the NAACP LDF's litigation reached the Supreme Court in the late 1960s, many environmental indicators pointed away from favorable-- from its perspective-- judicial resolution of the issue. Public opinion was swinging away from its abolitionist high point of 1966. Murders of public figures (e.g., King and Kennedy) reinforced legislation already on the books and prompted new efforts at its extension. The Nixon administration came out, foursquare, in favor of the appropriateness of capital punishment. In fact, the Supreme Court, once a promising port for LDF arguments, was transformed by four early Nixon appointees. It was in this politically inhospitable environment, where myriad factors pointed against their goals, that the organizational interests, led by the NAACP LDF, brought their most important capital cases before the Supreme Court.

Against this tide, however, the LDF continued its campaign. Fortified by its successes in the later Warren years-- *U.S. v. Jackson* (1968), *Witherspoon v. Illinois* (1968), *Boykin v. Alabama* (1969)-- and undeterred by its early Burger period losses-- *McGautha v. California* (1971) and *Crampton v. Ohio* (1971)-- it continued to press its unpopular position through the federal courts. With its stunning victory in *Furman v. Georgia* (1972), it seemed to have climbed to the top of the judicial mountain: for the first time in its history, the Supreme Court struck death penalty legislation on grounds sufficiently broad to portend its ultimate legal demise. The group, the quintessential underdog working in an area of extreme disadvantage, had used the courts to secure its policy

goal in spite of a generally unfavorable political environment.. Or so it thought. The Court's dramatic shift in *Gregg v. Georgia* (1976) demonstrated otherwise. Despite the LDF's procedural victories in a host of post-*Gregg* cases, the *McCleskey v. Kemp* (1987) decision made clear that, from a legal perspective, the organization had "lost" the war.²⁴

Just as it is tempting to cede responsibility for this turn of events to the change in the Supreme Court's membership wrought by Douglas' departure, so too it is tempting to explain the LDF's loss in terms of the unfavorable political environment in which it brought its cases to the Court. This environment was clearly and unrelentingly hostile to the organization's goals. The *Furman* backlash was loud, quick, and broad-based. Public opinion, generally supportive of capital punishment before June of 1972, became even more so in the immediate aftermath of the decision. State legislatures across the country, and not just in the south, could barely wait to reconvene and pass new laws which, given the *Furman* majority and informed commentary on it (see Epstein and Kobyłka, 1990), were of dubious constitutionality.

Even the national government, hardly the primary definer and enforcer of criminal law in America, got into the act. The day after *Furman* came down, President Nixon seized on Burger's dissent in noting that the Court had not completely ruled out capital punishment. He subsequently sent to Congress a bill calling for the death penalty for certain federal crimes, a law modelled on an American Law Institute proposal of the late 1950s. After careful deliberation, the Senate approved the legislation and sent it to the House, where a segment of it was passed in 1974.

More significant, however, was the new aggressiveness shown by the Justice Department on this issue. Though Nixon's first Solicitor General, Erwin Griswold, argued for the constitutional permissibility of capital punishment in *McGautha* and *Crampton* as *amicus curiae* (at the invitation of the Court), the administration was not involved in *Furman*. Robert Bork, Nixon's last Solicitor General and the man who held that office during the Ford Presidency, took on the abolitionists

²⁴ This is not to say, that the legal battle over the death penalty has ended; it has not, as the LDF continues to marshal its efforts. It is to suggest, however, that the larger questions that would provide vehicles for broad-based attacks on capital punishment have, for the time being, been addressed and addressed in a way profoundly unfavorable to the LDF perspective.

with a vengeance, with a characteristically well-developed and biting critique in *Fowler v. North Carolina* (1976) and *Gregg, et al.*. Instead of meeting state attorneys general with minimal experience before the Supreme Court, the LDF now had to deal with a crafty and skillful advocate of the position they assailed.

Thus, it was tempting to explain the *Gregg* shift as the Court's reaction to a political environment clearly hostile to pushing ahead with the abolitionist implications of *Furman*. But such an explanation, at least on its own, once again proves both *too much* and *too little*. If environmental factors caused the Court to shift here, why did they not cause it to change its approach to other controversial issues of the day (e.g., abortion, church-state relations, racial discrimination)? Indeed, why was the environment at the time of *Gregg* perceived to be more relevant than that four years earlier when *Furman* was decided? Politically, the contexts of *Furman* and *Gregg* were really not that different. In 1972, as in 1976, public opinion, state legislation, and the national administration clearly supported capital punishment. Yet, the Court did strike the imposition of death *even in that context*. While the political environment probably contributed to the resolution of *Gregg*, it cannot be treated as determinative of it; it alone cannot explain the Court's about face on the question of death.

Although we observed legal change in areas of religious symbolism and capital punishment, factors relating to the political environment do not seem to explain that change with any clarity. Given the distribution of public opinion on religious accommodationism and the dogged support of local, state, and national governments for accommodationist legislation, it would be expected that the Court, were it influenced by these factors, would move to appease them in their decisions. Yet, save for the late 1970s and early 1980s, this did not seem to happen. Indeed, the decision in *Allegheny County* runs directly contrary to this relationship. The change it represents seems more a function of the doctrinal attachments of Blackmun and O'Connor than any other factor. The confusion in organized separationist ranks may have provided the Court mixed cues in this area, but it seems (for the present at least) not to have undone the unsteady balance between accommodationist and separationist concerns that have characterized this area of law since 1947.

Similarly, public opinion and group configuration do little to explain the Court's shift on the constitutionality of the death penalty; the former was consistently hostile to NAACP LDF goals and the latter did not change appreciably between the two decisions. The environmental factor most influential here was the intervention of Solicitor General Bork. But even this, alone, does not fully explain the *Gregg* shift. Bork did not argue in a vacuum, and it is conceivable that his position could have been effectively countered. It was not, and this leads us to the final factor we think relevant to explaining legal change.

The Groups

All four of our pairs generated tremendous interest among pressure groups (see Appendix A). Indeed, organizations sponsored all nine cases; *amici curiae* were also quite visible. The question, thus is posed: Did the group pressure environment provide the context, between Case A and Case B, to create legal change of the magnitude observed?

Perhaps the most convincing example of the role organized interests can play in generating legal change is that of the NAACP LDF's involvement in capital punishment litigation. Indeed, we argue that, to some extent, the organization-- having, in large part, won its case in *Furman*-- set the stage for its own defeat²⁵ in *Gregg*. This was not the result of a change in its staff, for one attorney, Anthony Amsterdam, guided the LDF litigation throughout this period. Nor was it a function of a transfer of organizational resources away from the capital punishment campaign: while never receiving a majority share of the organization's budget, the funding of this litigation did not decrease after the victory in *Furman*. Nor was the *Gregg* defeat the result of insufficient legislative lobbying. Though the ACLU clearly did not, as it had pledged to do, carry the ball in this area, the *Furman* win was not predicated on legislative lobbying. Something other than these group-specific

²⁵In saying "defeat" we do not mean to imply that the LDF has irretrievably lost the chance to mold this area of law in ways favorable to its goals. Indeed, in some senses, it has been successful even in the post-*Gregg* period in-so-far as it has slowed the expected execution onslaught. However, what was within its grasp after *Furman*, and what was always its preeminent litigation goal in this area-- decisive judicial rejection of the death penalty as a constitutionally permissible penalty-- was rejected, and decisively so, in *Gregg*. In this sense, the organization suffered a substantial "defeat" at the hands of the Court.

factors contributed to squelching the promise of *Furman*. This was the strategy the LDF used in its effort to capitalize on its 1972 victory.

The strategic deficiencies start with the LDF attorneys' understanding of the *Furman* majority. Simply put, they over read the degree of their victory, treating the majority vote as if were something of a monolith. It clearly was not. Although Brennan, Marshall, and Douglas (before his resignation) were solid votes to strike any capital law, White and Stewart were not. This fact was not completely lost on Amsterdam and his cohorts. Indeed, the research they commissioned on the application and deterrence of the death penalty was, in part, designed to reinforce the concerns these two justices expressed in their concurring opinions in *Furman*.

LDF attorneys, however, assumed that the presence of White and Stewart in the majority meant that their difficulties with the *Furman* statute-- infrequency of application eliminating its deterrent value and arbitrariness in application, respectively-- were rooted in the same basic concern as the more abolitionist justices-- that "death was different" and, as a result, statutes imposing it had to be held to a higher than normal standard of review. In this, the LDF attorneys were not alone; the brunt of the scholarly legal community felt this way as well.

Nowhere is Amsterdam's assumption more obvious than in his oral presentation in *Jurek v. Texas* (1976) and *Roberts v. Louisiana* (1976), companion cases to *Gregg*. In response to questioning from Stewart, he said: "Our argument is essentially that death is different. If you don't accept the view that for constitutional purposes death is different, we lose that case, let me make that very clear." The kicker is that Amsterdam apparently thought that this was *exactly what White and Stewart thought*; this is how *he* made sense of their 1972 opinions. He was, as *Gregg, et al.* demonstrated, wrong in this assumption. White and Stewart were concerned with the procedures and processes used in assessing the death penalty, but their concern was more one of due process than of cruel and unusual punishment. If their votes were to be gotten, Amsterdam had to capture them on the former rather than the latter grounds; statistical data and social science studies could be used to play to their due process concerns, but they could not be used to convince them that "death was different." By blasting the discretion inherent in the capital process, and by explicitly linking

it to cruel and unusual punishment concerns grounded in notion that “death is different,” he lost the two justices he needed the most. Once he lost on the due process argument-- *and, amazingly, he told the justices that this was precisely the case*-- the only arrow he had left in his quiver was the “evolving standards of decency.” This could get the votes of Brennan and Marshall, but not those of Stewart and White.

One of the LDF’s primary courtroom opponents, Solicitor General Bork, seemed to understand this, or least his arguments-- both oral and briefed-- read as if he understood it. His argument was as brilliant as it was simple. First, death is not different, or at least not constitutionally so. It is explicitly and implicitly endorsed in the text of the Constitution and the body of constitutional history and practice. Only an act of supreme judicial activism could make death constitutionally different. Second, he emphasized that public opinion, in the aggregate, supported the death penalty. And, even though the social scientific studies went on to explain that, when disaggregated, the data ultimately told a different story, Bork urged on the justices the “common sense” of the matter, that general public opinion and legislative action gave lie to the conclusions wrought by sophisticated statistical techniques. Finally, Bork leaned on a social science study by Isaac Ehrlich study to argue that the death penalty did have a deterrent effect or, at a minimum, it could be plausibly understood by legislators to have such an effect. Even if only the latter were true, judicial restraint would counsel deference to the states.

Bork’s argument, and Amsterdam’s inability to counter it beyond the assertion that “death is different,” brought Stewart and White over in support of the general concept of capital punishment. Does this suggest that Amsterdam’s position was inherently a losing one? Not necessarily. His mistake seems to be that he thought *Furman* itself held that “death was different,”²⁶ and he framed the LDF’s post-*Furman* strategy on that assumption. Although Amsterdam did not believe that *Furman* ended the war, he clearly thought it won it. What remained was a legislative and judicial clean-up campaign to stave off the onslaught of new legislation and maintain the moratorium begun

²⁶Indeed, recall his response to the gloom felt by some at the California conference on Proposition 17, shortly after *Furman* came down: “This groups has me seriously wondering whether winning *Furman* was a good thing after all.”

in the late 1960s; success here would allow the death penalty to die of its own weight. He announced the LDF's three-fold strategy-- lobbying (by the ACLU), litigation, and scholarship on the effect of the death penalty-- at the 1972 LDF Conference at Columbia University. What this post-*Furman* approach lacked was a clearly articulated *legal* strategy beyond challenging new legislation on *Furman*. This begged an important question, though one Amsterdam had apparently resolved in his own mind: what did *Furman* mean?

Had Amsterdam been more critical of the LDF's success in *Furman*, had he been less assured of his optimistic or maximalist interpretation of that decision's meaning, had he been more open to the real concerns and worries of others,²⁷ he might have developed a multi-leveled litigation strategy more diversified than the "death is different"/"evolving standards of decency" argument he took to the Supreme Court in 1975. Such a layered argumentational strategy, while continuing to employ the "death is different" line of analysis, would not have treated it as the sole basis of the organization's legal appeal. Indeed, had more stress been placed on the kinds of practical, due process-based arguments that characterized the LDF's pre-*Furman* litigation, it is conceivable that Stewart and White would have been less inclined to jump ship in *Gregg, et al.* Had the underlying principles of moratorium been maintained as a plausible line of judicial attack-- had the bodies on death row been allowed to continue to mount-- these justices, and perhaps others like Stevens, Powell, and Blackmun-- who time and further litigation showed to be sympathetic to some LDF concerns-- may have been less inclined to replugin the electric chair that had been unplugged, de facto, since 1967 and by law since *Furman*.

²⁷ It is interesting to note, for example, the differences between Amsterdam's use of LDF conferences and that of Thurgood Marshall in the period leading up to *Brown*. Under Marshall these events were more like open forums where various strategies were bandied about and different argumentational tacts were discussed and debated. This was not the case for Amsterdam. He used conferences to deploy his forces in light of his understanding of the strategic needs of the organization. In a sense, he saw their utility to be more instrumental than creative. At the Columbia conference, for example, he simply arranged for systemic social science research; he did not canvass the participants as to the *kinds of legal arguments* that might fly in the post-*Furman* context to advance LDF policy goals in future litigation. Indeed, he ignored the concerns of those in the trenches in California at the Proposition 17 conference, treating them as irrelevant given *Furman*. A more open leadership style, similar to the one employed by Marshall in the 1940s and 1950s, might have led him to foresee prospective legal difficulties and develop a litigation strategy-- and not just a general political strategy-- to deal with them.

Such a layered litigation strategy, a strategy that did not place primary or near exclusive emphasis on the absolute and immediate eradication of the death penalty, would have left LDF attorneys with more argumentational room before the Supreme Court. It would have allowed them to offer the justices, especially those committed to the constitutionality of the death penalty but leery of its actual operation, a way to strike laws or their application without confronting their essential acceptance of the punishment as, *per se*, constitutional. It would also have given the LDF a way to avoid the problem that all organizations using the courts to advance general policy concerns must face-- the tension between the cause and the client.²⁸ In the realm of the death penalty, this tension-- given the nature of the punishment-- is especially acute. A litigation strategy that made use of a broadly based constitutional argument (the Eighth Amendment), but which also strongly urged less grand grounds of reversal has the added utility of protecting, as best they can in the group litigation context, the interests of both the organization and the client.

Use of such a strategy might elongate the time frame required to achieve organizational goals (and, not inconsequentially, increase the costs of the group in the pursuit of those goals), but it would provide a more varied pallet to offer the justices and minimize the effects of adverse decisions. Given the badly splintered majority in *Furman*, such a strategy-- by giving the middle justices something less global than complete abolition on which to grab-- might have furthered LDF goals more readily than the "all or nothing" approach which Amsterdam presented the Court in *Gregg, et al.*. At a minimum, it seems that such a strategy merits discussion among group leaders. Because Amsterdam and his colleagues over read *Furman*, though, this is a strategy that they did not even seem to ponder. This may well have proved a fatal flaw in their effort to end capital punishment once and for all.

There is, of course, no guarantee that a layered argumentational strategy would have won *Gregg, et al.* for the LDF. The *Furman* backlash was immense, the *Furman* majority was tenuous,

²⁸ Recall the conundrum faced by Amsterdam when he argued *Maxwell v. Bishop*: does he urge the Court to remand the case in light of *Witherspoon* (thus saving the life of Maxwell but sacrificing, after much organizational expense, the broader goals of the group), or does he ask it to avoid remand to deal with the still unresolved, and from the LDF perspective crucial, questions of standardless sentencing and unitary trials (thus putting Maxwell at a capital risk he need not face, but potentially furthering the organization's policy concerns).

and the Court had undergone an important change in personnel. However, given a political environment supportive of capital punishment at the time *Furman* was handed down, given the fact that Stewart and White were sufficiently leery of the death penalty to oppose it in 1972, and given that Stevens, though no Douglas, was no Rehnquist, either, *Gregg, et al.* were not lost causes from the start. These are cases that *could have been won*.

Winning them, however, would have required the LDF to mount an adroit post-*Furman* litigation strategy that made use of carefully constructed and layered arguments that could have spoken to all members of a favorable majority. This it did not do. Its loss in *Gregg, et al.* paved the way for a further extended litigation campaign, one that time, the resumption of executions, and subsequent personnel changes on the federal courts rendered more arduous and problematic. In the end, it led to *McCleskey*, the frustration of the LDF's policy goals, and a revitalization of the death penalty as a constitutionally permissible punishment.

Group litigation of religious establishment provides another example of organizational pressure on the Court. An array of organizational participants were drawn to this litigation arena. The breadth and depth of this involvement, at least as it extended into the early 1970s has been well chronicled (see Morgan, 1968;1972; Sorauf, 1976). From the separationist perspective, it began with the ACLU consulting with the plaintiffs (Morgan, 1968, p.77) and filing an *amicus curiae* brief in *Everson v. Board of Education* (1947), and snowballed after that.²⁹ The group again filed as an *amicus* in the "released-time" case *McCollum v. Board of Education* (1948), and was closely involved with the American Jewish Congress (AJCong) in selecting the plaintiffs in the next released-time case *Zorach v. Clausen* (1952) and the Court's initial tilt with school prayer in *Engle v. Vitale* (1962) (Sorauf, 1976, p.43f; Pfeffer, 1975, p.199). Indeed, the ACLU and the AJCong are, by volume-- the former has participated in 23 of the 36 (64%) Supreme Court establishment

²⁹Walker traces the ACLU's involvement in this area to the "Scopes monkey case" in Tennessee in 1925 (1990, pp.72-77), but this case was more about academic freedom than establishment questions. Indeed, Walker later notes that it was not until the group announced that the separation of church and state was "fundamental," and even then this pronouncement was made by its Academic Freedom Committee (1990, p.77). The group's involvement in *Everson* and *McCollum v. Board of Education* (1948) really ushered in the current phase of its participation in this area of law.

Clause decisions since 1970, the latter in 22 (61%)-- and expertise, the preeminent separationist litigators.

The linkages between the ACLU and the AJCong cannot be overstated. Once the church-state was taken to the courts, these groups pursued a close and coordinated approach designed to erect and maintain a high “wall of separation.” Indeed, scholars have pointed to the AJCong’s Leo Pfeffer as “one of the most knowledgeable and experienced church-state lawyers in the country” (Morgan, 1968, p.55); we have no reason to dispute this claim.³⁰ He is as close to the historical architect and guide of the legal separationist position as can be imagined.

The ACLU and AJCong, while the most prominent of the separationist group litigators, are not the only organized presence on this side of the constitutional ball. Protestants and Other Americans United for the Separation of Church and State (subsequently renamed simply Americans United, AU) formed in the immediate aftermath of the Court’s decision in *Everson*. Since 1970, it has participated in 21 (58%) of the Court’s church-state decisions. Where the ACLU approaches these issues from the perspective of secular humanism and the AJCong from that of mainstream Jewish thought, AU is decidedly more conservative, protestant, and, at least historically, anti-Catholic in its position. The former two groups approach these issues from a distinctly secular perspective: protection of the individual and the state from churches. AU, on the other hand, seeks to protect churches (and protestant believers) from state intervention. These differences, in addition to those arising from organizational leadership and style (see Sorauf, 1976; Morgan, 1968;1978), have distinguished AU from the other major separationist litigators in two senses. First, AU’s approach to litigation and constitutional argument is, by common agreement, “reckless and substandard,” and has led it to be held in “relatively low esteem” by its nominal allies (Sorauf, 1976, p.81). Second, it is, in argument and case selection, less separationist and general-

³⁰Pfeffer’s reach is amazing. Not only was he active with the AJCong, but he also served on the church-state committee of the ACLU, founded and directed the Coalition for Public Education and Religious Liberty, wrote briefs for other separationist interests (e.g., American Association of School Administrators, Baptist Joint Committee on Public Affairs, Synagogue Council), appeared in untold numbers of cases as a plaintiff attorney, and authored several books and articles on the constitutional status of religious freedom.

ist in approach. Perhaps stemming from some latent hostility to Catholicism, it seems to activate most usually when state aid to education is in question.

The ACLU, AJCong, and AU are the dominant separationist forces, but they are not alone. Other groups have projected themselves into the judicial dimensions of the church-state debate, although they do not have the litigation record or expertise of the “Big Three.” Of these, the American Jewish Committee (AJCom) (42%),³¹ the Anti-Defamation League of the B’nai B’rith (42%), Pfeffer’s Coalition for Public Education and Religious Liberty (CPERL) (42%), and the Baptist Joint Committee on Public Affairs (BJC) (22%). Of these groups, only CPERL has sponsored litigation before the Supreme Court; the other groups have participated only as *amicus curiae*, and much of their participation has come through joining the *amicus* briefs of one another.³²

Traditionally, the accommodationist bar has been substantially less organized and aggressive than its separationist counterpart. Indeed, through the 1960s, with the exception of occasional *amicus* participation of the U.S. Catholic Conference (USCC). So paltry was the organized accommodationist support for governments defending legislation which advanced religious goals that Sorauf and Morgan, the best chroniclers of the pre-1970 period, could point to little concerted group presence in this area. The most they could find was a determined group of Catholic attorneys (e.g., William Ball, Porter Chandler, Edward Bennett Williams) who donated their time and were occasionally dispatched by the hierarchy of the American Catholic Church to aid local attorneys defend accommodationist policies.

This state of affairs changed after 1970. As that decade wore on, groups advancing accommodationist arguments increased their involvement in litigation. Foremost here is the National Jewish Committee on Public Affairs (NJCPA) and its counsel Nathan Lewin. In its *amicus* brief in *Lemon* (1971), Lewin described the group as “a voluntary association organized to combat all

³¹As above, the baseline for this percentage are the 36 cases decided between the 1969 and 1989 Terms.

³²Other separationist groups that have presented *amicus* briefs to the Supreme Court include the National Council of Churches of Christ (6 cases), the National Education Association (5 cases), the Synagogue Council of America (5 cases), the General Conference of Seventh Day Adventists (4 cases), People for the American Way (3 cases), United Americans for Public Schools (3 cases), and the American Association of School Administrators (2 cases).

forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community on matters of public concern.” Beginning with the tax exemption case *Walz* (1970), the NJCPA has filed accommodationist briefs in nine Supreme Court cases. Lewin also presented oral argument to the Court in *Levitt v. CPERL* (1973), *Regan* (1980), and *Thorton v. Caldor* (1985). This represents involvement in 33% of the Court’s cases during this period and acts as a counter to the separationist arguments of the AJCong and AJCom.³³

This fractionalization of the “Jewish position” presented to the Supreme Court has its parallel on the protestant side. As noted, the Catholic Church and agencies associated with it have pressed accommodationist arguments in this area since *Everson*, but the National Council of Christian Churches, the BJC, and AU presented a relatively solid protestant-Christian separationist bloc. Starting in 1979, three explicitly religious groups have entered the Court’s establishment fray: the Center for Law and Religion of the Christian Legal Society (CLS) (22%), the Catholic League for Religious and Civil Rights (17%), and the Freedom Council’s Coalition for Religious Liberty (6%). The legal expertise of the CLS was enhanced when it added Michael W. McConnell, formerly a member of the Solicitor General’s staff under Rex Lee, to its staff in 1987. These groups, accommodationist counterparts to the NCC, BJC, and AU, perform a function similar to that of the NJCPA for the Court-- they make the Justices pointedly aware of the diversity of the religious community on church-state issues.

In addition to these religious groups, other new accommodationist groups have sprung into action. Pat Robertson’s National Legal Foundation filed *amicus* briefs in both *Allegheny County and Board of Education v. Mergens* (1990), last term’s decision upholding the Equal Access Act. Concerned Women of America (CWA), identified in its *amicus* brief in *Bowen v. Hendricks* (1988) as group “extremely concerned with government programs which deprive individuals and institutions of benefits because of their religious motivations or affiliations,” has participated as *amicus* in four cases since 1986 (50% of the Court’s cases), and argued for a blind theology stu-

³³Indeed, during this period, the NJCPA has been involved in more Supreme Court litigation than the USCC.

dent denied state tuition aid in *Witters v. Washington* (1986). The Rutherford Institute, which “undertakes to assist litigants and to participate in significant cases relating to the protection and safeguarding of religious liberties,” filed *amicus* briefs in four recent cases. Beyond these organizations, others-- e.g., Citizens for Educational Freedom (3 cases), Parent’s Rights, Inc. (2 cases), Legal Foundation of America (2 cases), and Washington Legal Foundation (1 case)-- have also presented *amicus* arguments to the Court.

With the recent creation and activation of these groups, accommodationists, for the first time in the long history of church-state litigation, have been able to counter the organized separationist perspective that previously enjoyed near monolithic status before the Court. Added to this newly developed pluralism is the fact that some fissures-- at least on some issues-- have formed in the separationist front. In a sense, these fissures find their genesis in the different perspectives-- secular and religious-- to which we alluded earlier. At the level of the Supreme Court, they first became apparent in *Walz*, where AU filed an *amicus* brief urging the Court to sustain tax exemptions extended to church property. This put it in opposition to the ACLU position in the case. The AJC, unable to come to a position, did not participate at all. This dissension, however, looked to be anomalous, as these groups stayed together on the parochial issues that dominated the 1970s.

The 1980s brought some of the cracks in the separationist coalition once again to the fore. In a number of cases, traditionally separationist groups joined their usual opponents in urging on the Supreme Court an accommodationist interpretation of the Establishment Clause. A prime example of this is found in *Thorton v. Caldor* (1986). Here, a man who resigned from his job rather than work on his Sabbath filed a grievance with the Connecticut Board of Mediation and Arbitration against his previous employer for violating a state statute that provided; “No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee’s refusal to work on his Sabbath shall not constitute grounds for his dismissal.” The store from which Thorton resigned rather than accept a demotion or transfer argued that the Connecticut statute violated the *Lemon* test and the Establishment Clause by providing Sabbath observers an absolute right not to work on their Sabbath.

The Court agreed with the store and struck the statute by a vote of 8-1. This decision, no doubt, pleased the groups-- the AFL-CIO, the Connecticut Retail Merchants Association, and the Equal Employment Advisory Council-- that filed *amicus* briefs urging separation. It did not please the attorneys for Thorton, the NJCPA's Lewin and Marc D. Stern of the AJCong. Nor was the AJCong the only separationist group urging an accommodationist result in this case. Filing *amicus* briefs on behalf of Thorton were the Seventh Day Adventists, the Anti-Defamation League of B'Nai B'rith, and AU. Their accommodationism in this case was grounded in advancement of Free Exercise values, and this lumped them with groups whose claims they usually oppose and the Office of the Solicitor General of the United States. Similar separationist slippage was present in *Witters* (1986) (AJCom, AJCong), *Corporation of the Presiding Bishop v. Amos* (1988) (BJC, AJCong, AU, Seventh Day Adventists), *Hernandez v. C.I.R.* (1989) (AU), and *Mergens* (1990) (BJC, NCC).

These cases pitted allies against one another and presented the Court a confused configuration of groups. As noted, the splits among the separationists largely occurred over Free Exercise concerns, but accommodationist groups regularly use that part of the First Amendment against the usual Establishment Clause contentions of separationists. Indeed, this was a featured argument of the Washington Legal Foundation and the Legal Foundation of America in *Lynch*, and of CWA and the National Legal Foundation in *Allegheny County*; it was also implicit in the arguments of the United States in these cases.

At any rate, when the separationists split on the questions that come before the Court, the Justices are confronted with mixed cues from groups which previously spoke with one voice. This fractionalization changes the political field on which the Court confronts these issues, and can do little to advance the core separationist values that brought these groups to the courts in the first place. Although we are not suggesting that this fractionalization contributed directly to the legal

change between *Lynch* and *Allegheny County*,³⁴ it clearly undermines the ability of these groups to promote precedents favorable to their essentially separationist concerns.

Group specific forces seem to have had less to do with the Court's shift from *Lynch* to *Allegheny County* than the contextual factors discussed above. After *Lynch* accommodationists simply sought to preserve the gains that decision and those in *Regan*, *Mueller*, and *Marsh* had made. In essence, their argument in *Allegheny County* was that the creche-menorah context was no different than the Pawtucket fact setting, and that the *Lynch* precedent controlled. The only new argument they advanced concerned the *Lynch* treatment of context. Recall that Burger's opinion there said that no establishment problems were raised by the creche in the context of the display. What was not clear was whether the relevant context was the physical layout of the display-- inclusion of the creche with secular symbols-- or the general context of a nationally recognized holiday. Accommodationists-- Chabad, the Solicitor General, the National Legal Foundation, and the Concerned Women of America-- held that the latter was *Lynch*'s holding. As summarized by the U.S.'s *amicus* brief, this position held that "[o]ur nation is not secular, but pluralistic, and there is nothing wrong with the government attempting to recognize and commemorate the impact of religion in America's historical traditions and cultural heritage." If accepted by the Court, this would insulate all sectarian elements of public displays celebrating otherwise religious holidays.

Separationists shifted their legal goals in their *Allegheny* arguments. With the exception of the *amicus* brief of the AJCong (joined by NCC and AU), none of these groups-- including, significantly, the ACLU which argued the case-- called on the Court to reverse *Lynch*. This decision, apparently grounded in the realization that the former majority remained intact, led them to accept *Lynch*, but argue that its contextual elements should be read as closely tied and bound to the specific fact setting that case presented. While these groups argued that both the creche and the menorah displays fell short of this understanding of *Lynch*-- unlike Blackmun and O'Connor, they did

³⁴The Blackmun/O'Connor "split the difference" position is reminiscent of what we describe here, but none of the groups participating in this case directly offered this type of a resolution. It is conceivable, however, that the factionalization of the group positions presented to the Court indirectly conditioned the somewhat odd result in *Allegheny County*.

not see the “Salute to Liberty” banner and Christmas tree that comprised the rest of the menorah display to save it-- their scaled down goals and the doctrinal argument that flowed from them clearly influenced the two justices (Blackmun and O’Connor) they needed to salvage a partial victory in a case that had to look like a potential loser as it made its way to the Court.

Thus, save for the possible influence of the separationist’s strategic acceptance of *Lynch* in their *Allegheny County* arguments, group specific factors seemed to have little effect on the legal shift on the question of the constitutional permissibility of public display of seasonal religious symbols. None of the groups involved in this litigation underwent a significant change in resource commitment, personnel, or issue focus that could arguably explain the Court’s shift.

Further, unlike the capital punishment case, none of the groups made the strategic error of assuming that *Lynch* absolutely settled the question before the Court; even the accommodationists, who held a broad view of the contextual dimension of that decision’s holding and trivialized the physical context approach as tantamount to “reindeer counting” (*amicus* brief of the U.S.), said that there were sufficient secular objects in the display to save it under the more restrictive approach urged by the ACLU and its fellows. Indeed, Blackmun and O’Connor endorsed this logic, at least as it applied to the menorah. Thus, neither side burned argumentational bridges here as the NAACP LDF had done in *Gregg*.

Conclusion

Why do one-time legal “winners” subsequently become “losers” at the hands of the Supreme Court? Why does the law occasionally experience abrupt alterations? Addressing these questions constitutes the primary enterprise of our continuing investigation into the factors conditioning legal change.

To date, we have made some headway: we have a reasonably firm grasp on the possible explanations of legal change (the Court, the political environment, and interest groups) and we have seen their utility in helping us to understand the processes at work in several areas of the law.

But, many questions remain: why do court-based explanations have greater applicability for some of our pairs, but not for others?; why do groups seem to “make a difference” in certain legal areas, but not in others?; and, why is the “political environment” an important influence sometimes, but not all the time? Addressing these and many other questions, though a challenging task, will ultimately provide us with the fodder to understand and explain the enigmatic phenomenon of legal change.

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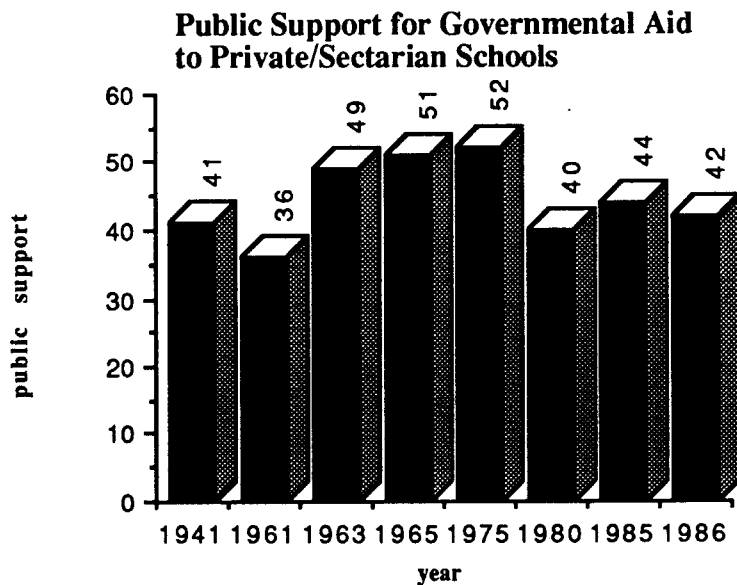
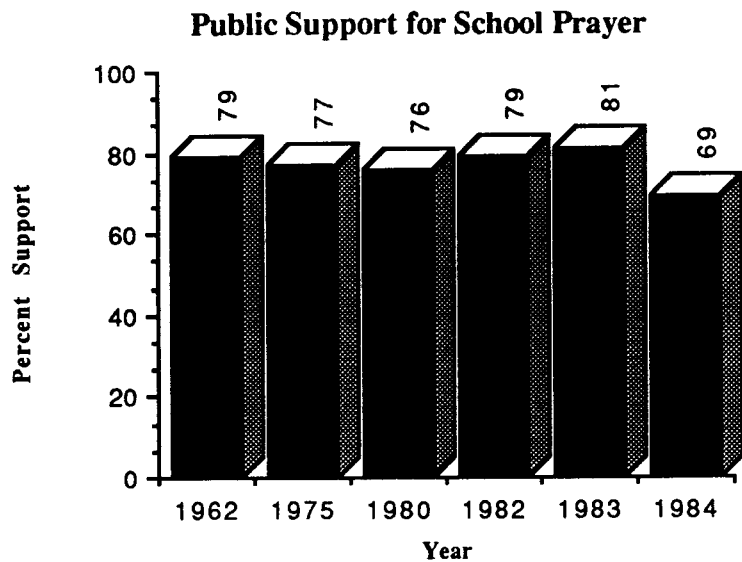
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Figure 1
Public Support for Religious Accommodation
in Public Schools



Data drawn from *The Gallup Poll, Annual Reports*.

Appendix A Profiles of Case Pairs

***Furman v. Georgia*^a**
(408 U.S. 238, 1972)

Legal Question: Do Georgia's procedures for implementing the death penalty violate Constitutional guarantees?

Court's Response: Yes
Majority: Douglas, Brennan, Stewart, White, Marshall

Dissent: Burger, Blackmun, Powell, Rehnquist

Attorney for Appellant:
Jack Greenberg (LDF)

Attorney for Appellee:
Dorothy Beasley
(Assistant Attorney General)

Amicus Curiae to Reverse:

1. ACLU
2. NAACP, National Urban League, Southern Christian Leadership Conference, Mexican American LDF, National Council of Negro Women
3. Committee of Psychiatrists for Evaluation of the Death Penalty
4. National Council of Churches of Christ of the U.S.A., American Friends Service Committee, Board of the Ministry of Lutheran Church of America, Church of Brethren General Board, Council for Christian Social Action of the United Church of Christ, Department of Church in Society of the Christian Church, The Presiding Bishop of the Episcopal Church in the U.S., General Board of Christian Social Concerns of the United Methodist Church, Greek Orthodox Archdiocese of North and South America, United Presbyterian Church in the U.S.A., National Catholic Conference for Interracial Justice, National Coalition of American Nuns
5. Synagogue Council (for its 6 constituent members), the American Jewish Congress
6. 4 Individuals
7. Alaska

***Gregg v. Georgia*^b**
(428 U.S. 153, 1976)

Legal Question: Do Georgia's procedures for implementing the death penalty violate Constitutional guarantees?

Court's Response: No
Majority: Powell, Stewart, White, Burger, Rehnquist
Dissent: Brennan, Marshall

Attorney for Appellant:
G. Harrison (court-appointed)

Attorney for Appellee:
G. Thomas Davis
(Assistant Attorney General)

Amicus Curiae to Reverse:^d

1. NAACP LDF
2. Amnesty International

***McCleskey v. Kemp*^c**
(107 S.Ct. 1756, 1987)

Legal Question: Do Georgia's procedures for implementing the death penalty violate Constitutional guarantees?

Court's Response: No
Majority: Powell, Rehnquist, O'Connor, White, Scalia
Dissent: Brennan, Marshall, Stevens, Blackmun

Attorney for Appellant:
Julius Chambers (LDF)

Attorney for Appellee:
Mary Beth Westminster
(Assistant Attorney General)

Amicus Curiae to Reverse:

1. International Human Rights Law Group
2. Congressional Black Caucus
3. 2 Professors
4. Congressional Black Caucus, NAACP, Lawyers' Committee for Civil Rights Under Law

8. West Virginia Council of Churches, Christian Church
in West Virginia, United Methodist Church (W.Va.)

Amicus Curiae to Affirm
1. Indiana

Amicus Curiae to Affirm
1. United States
2. California

Amicus Curiae to Affirm
1. Washington Legal
Foundation, Allied
Educational Foundation
2. California, Los Angeles

^aData obtained from Kurland and Casper (1975)

^bData obtained from Kurland and Casper (1975)

^cData obtained from BNA microfiche briefs, Docket No. 84-681

^dSome of these briefs were filed jointly in *Gregg* and the four other capital punishment cases of 1976: *Jurek v. Texas*, *Woodson v. North Carolina*, *Profitt v. Florida*, and *Roberts v. Louisiana*. Those filed in one of these, but not in *Gregg*, are not listed.

***National League of Cities v. Usery*^a**
(426 U.S. 833, 1976)

Legal Question: Does the Commerce Clause empower Congress to enforce minimum wage and other provisions of the FLSA against the states?

Court's Response: No

Majority: Rehnquist, Burger, Stewart, Blackmun, Powell

Dissent: Brennan, White Marshall, Stevens

Attorneys for Appellant:

Charles S. Rhyne

J. Keith Dysart (Council of State Governments)

Attorneys from:

National League of Cities, National Governors Council, 4 cities, 20 states

Attorney for Appellee:

Robert Bork (Solicitor General)

Amicus Curiae to Reverse

1. Virginia, NY, Virginia Municipal League, Virginia Association of Counties
2. Public Service Research Council

Amicus Curiae to Affirm

1. International Conference of Police Associations
2. Florida Police Benevolent Association
3. Alabama, Colorado, Michigan
4. Coalition of American Public Employees (includes 5 unions/associations)
5. Two Senators

***Garcia v. San Antonio Metro Transit Authority, et al.*^b**
(469 U.S. 528, 1985)

Legal Question: Does the Commerce Clause empower Congress to enforce minimum wage and other provisions of the FLSA against the states?

Court's Response: Yes

Majority: Blackmun, Brennan, White, Marshall, Stevens

Dissent: Powell, Burger, Rehnquist, O'Connor

Attorneys for Appellants:

Lawrence Gold (AFL-CIO)

Rex E. Lee (Solicitor General)

Attorney for Appellee:

William T. Coleman

Robert Batchelder (American Public Transit Association)

Amicus Curiae to Reverse

(none)

Amicus Curiae to Affirm

1. National Institute of Municipal Law Officers
2. Legal Foundation of America
3. California, Connecticut, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, Pennsylvania, South Carolina, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming
4. Colorado Public Employees Retirement Association
5. National Public Employer Labor Relations, 12 of its state affiliates, Eugene, Oregon

^aData obtained from the BNA microfiche briefs, Docket No. 74-878.

^bData obtained from the BNA microfiche briefs, Docket No. 82-1913

Lynch v. Donnelly^a
(465 U.S. 668, 1984)

Legal Question: Does the Religious Establishment Clause prohibit the erection of a state-supported creche?

Court's Response: No

Majority: Rehnquist, Burger, O'Connor, White, Powell

Dissent: Brennan, Blackmun, Marshall, Stevens

Attorneys for Appellant:

William F. McMahon

Spencer W. Vines (City Solicitor)

Attorney for Appellee:

Amato A. DeLuca

Burt Neuborne (ACLU Foundation)

***Amicus Curiae* to Reverse**

1. Coalition for Religious Liberty and the Freedom Council (written by the Rutherford Institute)
2. Legal Foundation of America
3. Washington Legal Foundation
4. United States

***Amicus Curiae* to Affirm**

1. American Jewish Committee (AJCom) and National Council of Churches of Christ (NCC)
2. Anti-Defamation League of B'nai B'rith and American Jewish Congress

Allegheny County v. ACLU^b
(109 S.Ct. 3086, 1989)

Legal Question: Does the Religious Establishment Clause prohibit the erection of a state-supported creche and menorah?

Court's Response: Yes and no

Majority: Blackmun and O'Connor with to strike: Brennan, Marshall, Stevens

to uphold: White, Rehnquist, Scalia, Kennedy

Attorneys for Appellants:

George M. Janocsko (City Solicitor)

Nathan Lewin (Petitioner Chabad)

Attorney for Appellee:

Roslyn M. Litman (Pitts. Chap. ACLU)

John A. Powell (ACLU Foundation)

***Amicus Curiae* to Reverse**

1. United States
2. City of Warren Michigan
3. National Legal Foundation
4. Concerned Women of America

***Amicus Curiae* to Affirm**

1. AJCom, NCC, Union of Am. Hebrew Congregations, Council on Religious Freedom, Americans United
2. American Jewish Congress

^aData obtained from BNA microfiche briefs, Docket No. 82-1256.

^bData obtained from BNA microfiche briefs, Docket No. 87-2050, 88-90, 88-96

Roe v. Wade^a
(410 U.S. 113, 1973)

Legal Question: Can states proscribe or abortions?

Court's Response: Not fundamentally
Majority: Blackmun, Powell, Brennan,
Marshall, Douglas, Burger, Stewart
Dissent: White, Rehnquist

Attorneys for Appellants:
Roy Lucas (James Madison Law Institute)
Norman Dorsen (NYU Law School)
Linda Coffee
Sarah Weddington

Attorney for Appellee:
Henry Wade (District Attorney)
Crawford Martin (Attorney General)

Amicus Curiae to Reverse

1. By CCR: New Women Lawyers, Women's Health and Abortion Project, National Abortion Action Coalition
2. American University Women, National Board of the YWCA, NOW, National Women's Conference of the American Ethical Union, Professional Women's Caucus, Unitarian Universalists Women's Federation, Women's Alliance of First Unitarian Church of Dallas, and 46 individuals.
3. Planned Parenthood, American Association of Planned Parenthood Physicians
4. American Ethical Union, American Friends Service Committee, American Humanist Association, American Jewish Congress, Episcopal Diocese of New York, New York State Council of Churches, Union of American Hebrew Congregations, Unitarian Universalists Association, United Church of Christ, Board of Christian Social Concerns of the United Methodist Church
5. National Legal Program on Health Problems for the Poor, National Welfare Rights Organization, American Public Health Association
6. American College of Obstetricians and Gynecologists, American Psychiatric Association, American Medical Women's Asso., New York Academy of Medicine and 178 doctors
7. California Committee to Legalize Abortion, South Bay Chapter of NOW, Zero Population Growth, and two women

Webster v. Reproductive Health Services^b
(---- U.S.----, 1989)

Legal Question: Can states proscribe or restrict abortions?

Court's Response: Yes
Majority: O'Connor, Rehnquist, Scalia, Kennedy, White
Dissent: Marshall, Blackmun, Brennan, Stevens

Attorney for Appellants:
William Webster (Attorney General)

Attorney for Appellee:
Frank Susman (Reproductive Health Services)

Amicus Curiae to Reverse

1. ACLU, et al.
2. 281 American Historians
3. American Jewish Congress, et al.
4. American Library Association and Freedom to Read Foundation
5. American Medical Association, et al.
6. American Nurses Association, et al.
7. American Public Health Association, et al.
8. American Psychological Association
9. Americans for Democratic Action, et al.
10. Americans United for Sep. of Church & St.
11. Asso. of Reproductive Health Profess., et al.
12. AGS of CA, CO, MA, NY, TX, VT
13. Bioethicists for Privacy.
14. CA NOW, et al.
15. Canadian Women's Organizations, et al.
16. Catholics for a Free Choice, et al.
17. Center for Population Options, et al.
18. 140 Members of Congress
19. 3 Committees of the Bar of NYC
20. 167 Scientists and Physicians
21. Group of American Law Professors
22. International Women's Health Orgs., et al.
23. Nat'l Asso. of Public Hospitals
24. National Asso. of Women Lawyers, et al.
25. Nat'l Coal. Against Domestic Violence
26. Nat'l Council of Negro Women, et al.
27. Nat'l Family Planning, et al.
28. NOW
29. 77 Organizations Committed to Equality
30. Pop.-Environmental Balance, et al.
31. 608 St. Legislators

Amicus Curiae to Affirm

1. Women for the Unborn, Celebrate Life, Women Concerned for the Unborn, Minnesota Citizens for Life, New York State Columbiettes, 87 nurses and 55 doctors
 2. Americans United for Life
 3. Certain physicians and fellows of the American College of Ob-Gyns
 4. Arizona, Connecticut, Kentucky, Nebraska, Utah
 5. Georgia
 32. 2887 Women who had abortions, et al.
- Amicus Curiae to Affirm*
1. Agudeth Israel of America
 2. Alabama Lawyers for Unborn Children
 3. Edward Allen
 4. Am. Academy of Medical Ethics
 5. Am. Asso. of Pro-Life OB-GYNs, et al.
 6. Am. Collegians for Life, et al.
 7. Am. Family Association
 8. Am. Life League
 9. Asso. for Public Justice, et al.
 10. AGs of LA, AZ, ID, PA, WI
 11. Birthright, Inc.
 12. Catholic Health Asso. of the U.S.
 13. Catholics United for Life, et al.
 14. Ctr. for Judicial Studies and 56 MCs
 15. 250 St. Legislators
 16. 69 Members of PA General Assembly
 17. Christian Advocates Serving Evangelism
 18. Covenant House and Good Counsel
 19. Doctors for life, et al.
 20. Feminists for Life, et al.
 21. Focus on Family, et al.
 22. Free Speech Advocates
 23. Holy Orthodox Church
 24. Human Life International
 25. Int'l Rt. to Life Federations
 26. Larry Joyce
 27. Knights of Columbus
 28. Lutheran Church-Missouri Synod
 29. James Joseph Lynch, Jr.
 30. Paul Marx
 31. 127 Members of MO General Assembly
 32. MO Catholic Conference
 33. Bernard Nathanson, M.D.
 34. Nat'l Legal Foundation
 35. Nat'l Right to Life Committee
 36. New England Christian Action Council
 37. Right to Life Advocates
 38. Rt. to Life League of So. CA.
 39. Rutherford Institute, et al.
 40. 53 Members of Congress
 41. Southern Ctr. for Law and Ethics
 42. Southwest Life and Law Center
 43. United States
 44. U.S. Catholic Conference
 45. Austin Vaughn and Crusade for Life

^aData obtained from BNA microfiche briefs, Docket No. 70-18.

^bData obtained from BNA microfiche briefs, Docket No. 88-605 and Behuniak-Long, 1989.