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## The Hallowed Hope: The School Prayer Cases and Social Change

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**THE HALLOWED HOPE:  
THE SCHOOL PRAYER CASES AND SOCIAL CHANGE<sup>1</sup>**

LAUREN MAISEL GOLDSMITH\* AND JAMES R. DILLON\*\*

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## INTRODUCTION

During the twentieth century, the United States Supreme Court came to be seen both by legal scholars and the public as the government institution most responsive to the needs of the politically alienated and disenfranchised. Decisions from the famous footnote four of *United States v. Carolene Products Co.*<sup>2</sup> to such high points of Warren Court activism as *Brown v. Board of Education*<sup>3</sup> and *Miranda v. Arizona*,<sup>4</sup> and even such twenty-first century decisions as *Lawrence v. Texas*,<sup>5</sup> cemented the public's perception of the Court as willing to challenge the political majority on behalf of disadvantaged minorities and to remake American political culture into a more egalitarian mold. But to what extent does this mythic Court—this efficacious David defending constitutional principles against the Goliath of popular prejudice—resemble the Court of historical reality? How can a Court constrained by significant institutional limitations and lacking the power to effectively enforce its decisions without the cooperation of the elected branches impose its policy preferences upon an unwilling public? In this Article, we explore those aspects of judicial power that enable the Court to achieve measurable social change even in the most politically adverse circumstances. Using the public's response to the Court's controversial decisions prohibiting prayer and Bible reading in public classrooms and extracurricular events to examine broader issues of judicial capacity, we suggest underappreciated aspects of the Court's ability to generate significant social change that necessitate substantial revisions to the prevailing scholarly conceptions of judicial power. In short, we find, contrary to the existing scholarly consensus, that the Court has a variety of mechanisms with which to compel compliance with its decisions even in the face of strong public opposition and in the absence of significant support from the other branches of government.

The academic debate surrounding the Supreme Court's ability to implement social change through the exercise of judicial power can be divided roughly between advocates of the "Constrained Court" view and advocates of the "Dynamic Court" view. The Constrained Court model denies the Court's ability to achieve substantial compliance with its directives in the absence of assistance from the elected branches, whereas the Dynamic Court model views the constraints on the Court as less restrictive and its ability to successfully intervene in matters of public policy as consequently more robust.<sup>6</sup> Though these views diverge under a variety of circumstances, they find common

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2. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

3. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

4. *Miranda v. Arizona*, 384 U.S. 436 (1966).

5. *Lawrence v. Texas*, 539 U.S. 558 (2003).

6. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 15–16, 23–25 (2d ed. 2008).

ground in their belief that the Court's capacity to achieve genuine social change through the exercise of judicial power is weakest when its decisions lack the support of the elected branches of government and face significant public opposition.

The Court's decisions enforcing a separation between public education and religious observation under the Establishment Clause of the First Amendment provide a useful context within which to test the prevailing models' predictions that the Court will be ineffectual when faced with public and governmental opposition. A historical examination of the impact of the Court's rulings in the area of devotional practice in schools reveals that both the Dynamic and Constrained Court models underestimate the degree to which the Court can effectively produce change in the most unfavorable circumstances. The Court's decisions in these cases, including *Engle v. Vitale*,<sup>7</sup> *Abington School District v. Schempp*,<sup>8</sup> *Wallace v. Jaffree*,<sup>9</sup> *Lee v. Weisman*,<sup>10</sup> and *Santa Fe Independent School District v. Doe*,<sup>11</sup> have endured sharp criticism from the elected branches and enduring opposition from the public. Thus, both the Constrained and Dynamic Court models would predict that the Court's ability to achieve compliance with these decisions would be quite limited. However, empirical evidence suggests, first, that the Court's ability to produce widespread social change through the exercise of judicial power is more potent than the Constrained Court model predicts, and, second, that the mechanisms by which the Court does so are more diverse than is accounted for by the most systematic articulation of the Dynamic Court view.

The surprising level of public compliance with the religion cases challenges basic assumptions about the institutional constraints that define the Supreme Court's role in the American political system and demonstrates the Court's ability to motivate unpopular changes in social practice. The degree to which the Court through its decisions can penetrate society is limited by both external constraints on its power, such as resistance from the elected branches, and internal or institutional limitations, such as the Justices' inability to implement their own orders.<sup>12</sup> The seemingly inexplicable degree of public

7. *Engel v. Vitale*, 370 U.S. 421 (1962).

8. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

9. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

10. *Lee v. Weisman*, 505 U.S. 577 (1992).

11. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

12. Ronald Kahn & Ken I. Kersch, *Introduction* to *THE SUPREME COURT & AMERICAN POLITICAL DEVELOPMENT* 1, 17–18 (Ronald Kahn & Ken I. Kersch eds., 2006). To be sure, the Court can impact constitutional and political development indirectly, for example, through the dynamics of path dependency and sequencing. Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Justice Activism*, in *THE SUPREME COURT & AMERICAN POLITICAL DEVELOPMENT* 138, 158–59 (Ronald Kahn & Ken I. Kersch eds., 2006).

compliance with the Court's cases concerning prayer and religious observation in public schools, however, suggests that the Court may be a more efficacious governing institution than previous scholarship has recognized.

This Article proceeds as follows. In Part I, we describe the Constrained Court and Dynamic Court models, exploring their historical origins and establishing what each model would predict with respect to the religion-in-schools cases. Part II surveys the Supreme Court's contemporary Establishment Clause and Free Exercise Clause jurisprudence. Part III summarizes the responses to the school prayer decisions,<sup>13</sup> as well as empirical studies of compliance with those rulings. In Part IV, we present our analysis of the data described in the previous section and discuss the implications of our analysis for the contemporary scholarly debate over the nature of judicial power. Through this illustration of the Court's power to generate social change, we aim to demonstrate the limitations of the prevailing models and to further the literature on the relationship between the Court and American political development. Part V identifies shortcomings in the prevailing models, particularly their inability to account for the Court's relative success in achieving compliance with the school prayer decisions, and suggests additional mechanisms of judicial power that those models ignore. Part VI concludes.

#### I. FRAMING THE DEBATE: MODELS OF JUDICIAL POWER

Americans have debated the propriety of a "supreme court" since the founding era, disagreeing primarily over whether such a court would be a weak or powerful influence in American government and, often in the same analysis, whether it would preserve or threaten the republican form of government established by the federal Constitution. Beginning with the Constitutional Convention in 1787 and continuing until the Constitution was ratified in 1789, the Federalists defended the need for a federal judiciary, arguing that the proposed Court would be of great practical importance in resolving disputes among the branches of the federal government, but of little harm to state sovereignty. The Court would be innocuous in this respect because it was weak by design. In *Federalist* 78, Alexander Hamilton famously referred to the judiciary as the "least dangerous" branch of the national government established by the proposed Constitution.<sup>14</sup> The judiciary "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever."<sup>15</sup> Wielding

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13. While this series of decisions deals with some devotional activities that do not specifically include prayer, such as Bible reading and moments of silence, we shall frequently refer to this set of decisions as "school prayer" decisions, as prayer is a recurring theme and this line of jurisprudence has been popularly known as such.

14. *THE FEDERALIST* NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

15. *Id.*

“neither force nor will, but merely judgment,” the federal courts would be dependent on the voluntary cooperation of the legislative and executive branches to enforce their edicts.<sup>16</sup>

In opposition to the Federalists’ minimalist depiction of judicial power under Article III of the proposed Constitution, Anti-Federalists such as New York Judge Robert Yates, who is generally thought to have been writing as “Brutus,”<sup>17</sup> argued that the proposed Supreme Court would be a more powerful institution than the Federalists acknowledged, and, thus, inherently dangerous to state sovereignty.<sup>18</sup> Yates argued that the Supreme Court, which would be comprised of men “tenacious of power,” would want to “give such a meaning to the constitution in all cases where it can possibly be done, as [would] enlarge the sphere of their own authority.”<sup>19</sup> Thus, the Supreme Court could be expected to sustain all federal usurpations of state power, for the Supreme Court would benefit from all federal usurpations of state power. As Brutus reasoned, “Every extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the courts; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise.”<sup>20</sup> The Justices of the Supreme Court “are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.”<sup>21</sup>

Although the days of the Federalists and Anti-Federalists are long gone, their debate about the extent of judicial power under Article III, and its capacity to undermine democracy, continues to the present day. Using empirical methods to study the impact of the Court’s decisions on society, contemporary scholars continue to debate the capacity of the Court to impose its will upon the democratically elected branches of state and federal government or upon the American public generally. Adherents of the Constrained Court view characterize the Supreme Court as “weak, ineffective, and powerless” with respect to promoting social change and protecting insulated minorities.<sup>22</sup> For that reason, Robert Dahl claimed in a seminal article that it is “somewhat naive to assume that the Supreme Court either would or could play the role of Galahad” by protecting vulnerable minorities against

16. *Id.*

17. See William Jeffrey, Jr., *The Letters of “Brutus”: A Neglected Element in the Ratification Campaign of 1787–88*, 40 U. CIN. L. REV. 643, 644–45 (1971).

18. Brutus, *Essays of Brutus No. 11*, in THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS 81, 84 (David Wootton ed., 2003).

19. *Id.* at 85.

20. *Id.*

21. Brutus, *Essays of Brutus No. 15*, in THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS 92, 93 (David Wootton ed., 2003).

22. ROSENBERG, *supra* note 6, at 3.

political elites.<sup>23</sup> This is so, Dahl argued, because Supreme Court nominees are invariably persons of high public standing whose views are subject to close scrutiny by the President and Congress during the nomination process and, therefore, can be expected to act consistently with the policy preferences of the incumbent political regime.<sup>24</sup> Moreover, historical evidence demonstrates that the Court lacks the institutional capacity to resist a determined Congress on matters of policy.<sup>25</sup> Constitutional review might permit the Court to prevail on an issue about which Congress is divided or indifferent, but Dahl's review of instances in which the Court had declared a federal statute unconstitutional indicated that Congress almost always prevails on "important" policy matters, although the Court's intervention may delay that victory by up to twenty-five years.<sup>26</sup>

While Dahl's principal skepticism was directed toward the Supreme Court's *desire* to challenge the status quo on behalf of the politically powerless, later scholars have been more skeptical of its *ability* to effect significant change. Gerald Rosenberg, the leading modern advocate of the Constrained Court view, examines the empirical effects of a number of landmark Supreme Court decisions, including *Brown v. Board of Education*,<sup>27</sup> *Roe v. Wade*,<sup>28</sup> and *Baker v. Carr*,<sup>29</sup> to determine whether the Court's constitutional directives in those cases were actually successful at achieving "significant social reform."<sup>30</sup> Rosenberg identifies three institutional constraints that must be overcome and four independently sufficient conditions, at least one of which must be met, in order for the Supreme Court to effectively produce social change.<sup>31</sup> The overall effect of these constraints

23. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 EMORY J. PUB. L. 279, 284 (1957).

24. *Id.* at 284–85.

25. *Id.* at 286, 288, 290.

26. *Id.* at 290–91.

27. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

28. *Roe v. Wade*, 410 U.S. 113 (1973).

29. *Baker v. Carr*, 369 U.S. 186 (1962).

30. ROSENBERG, *supra* note 6, at 2. Rosenberg defines "[significant] social reform" somewhat narrowly as "the broadening and equalizing of the possession and enjoyment of what are commonly perceived as basic goods in American society" at a scope sufficient to result in "policy change with nationwide impact." *Id.* at 4 (emphasis omitted).

31. *Id.* at 13, 15, 21, 33, 35. The three institutional constraints that Rosenberg identifies are: "(1) The bounded nature of constitutional rights prevents courts from hearing or effectively acting on many significant social reform claims, and lessens the chances of popular mobilization . . . . (2) The judiciary lacks the necessary independence from the other branches of the government to produce significant social reform . . . . (3) Courts lack the tools to readily develop appropriate policies and implement decisions ordering significant social reform." *Id.* at 13, 15, 21. If each of those three constraints is overcome in a particular case, Rosenberg argues that courts can become effective agents of social change only if at least one of the following four independently sufficient

and conditions is that “U.S. courts can *almost never* be effective producers of significant social reform.”<sup>32</sup>

In opposition to the Constrained Court advocates’ claim that the Supreme Court can “almost never” achieve significant social change in the absence of active assistance from the other branches of the federal government, the Dynamic Court model of judicial power views the federal courts as “powerful, vigorous, and potent proponents of change,” capable of “protecting minorities and defending liberty, in the face of opposition from the democratically elected branches.”<sup>33</sup> Proponents of this model emphasize the Court’s insulation from political pressure and resultant ability to defend the rights of unpopular or otherwise vulnerable minorities against tyrannical majorities.<sup>34</sup> Moreover, Dynamic Court adherents like Lawrence Baum and Matthew E. K. Hall have challenged the assertion that the judicial branch is subordinate by design to the policy preferences of the incumbent political regime. Lawrence Baum, for instance, notes that the unprecedented expansion of judicial power during the Warren Court era seems to call into question Dahl’s conclusion that the Court generally acts only as an agent of the dominant national lawmaking coalition:

For one thing, the Court’s role of protecting constitutional rights might make it uniquely receptive to the arguments of interests such as racial minority groups and political fringe groups. Further, conventional political power was less relevant to the Supreme Court than to other government bodies, because the Court’s relative insulation from political forces allowed it to respond more even-handedly to the quality of legal arguments.<sup>35</sup>

Further, in response to the Constrained Court model’s emphasis on the institutional constraints on the judiciary’s ability to compel compliance with its mandates, Baum suggests that Constrained Court advocates implausibly assume that the other branches of government are able to attain perfect compliance with their own dictates:

[T]he early research [on the capacity of the court to effect social change] typically treated implementation of Supreme Court decisions as a unique phenomenon. Scholarship on imperfect hierarchy elsewhere in government . . . had little impact on the judicial research. As a consequence, judicial scholars seldom considered whether noncompliance with Supreme Court decisions

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conditions is satisfied: “(1) [O]ther actors offer positive incentives to induce compliance . . . (2) [O]ther actors impose costs to induce compliance . . . (3) [J]udicial decisions can be implemented by the market . . . (4) [When courts provide] leverage, or a shield, cover, or excuse, for persons crucial to implementation who are *willing to act*.” *Id.* at 33, 35.

32. ROSENBERG, *supra* note 6, at 422 (emphasis added).

33. *Id.* at 2, 15.

34. *Id.* at 2.

35. Lawrence Baum, *The Supreme Court in American Politics*, 6 ANN. REV. POL. SCI. 161, 170 (2003).



resulted chiefly from universal imperfections in implementation rather than special weaknesses of courts.<sup>36</sup>

Likewise, Matthew E. K. Hall, the most recent expositor of the Dynamic Court view and the one who has offered the most theoretically comprehensive defense of that model, argues that courts are most effective at achieving compliance when their decisions are “popular” with the public and “vertical” (rather than “lateral”); that is, they can be implemented by lower judicial actors rather than non-judicial officials or private individuals.<sup>37</sup> Applying this model of judicial power, Hall concludes that courts are most likely to achieve compliance when their rulings immunize some group or activity from government prosecution. The core of judicial power, according to Hall, lies in “neither the sword nor the purse, but the keys” to society’s prisons.<sup>38</sup> In other words, the Court’s hierarchical control over the state and federal judicial apparatus bestows upon it the ability to categorically immunize individuals and groups from governmental prosecution, thus constraining the elected branches’ ability to regulate behavior through criminal punishment.<sup>39</sup>

Notwithstanding their deep disagreements regarding the scope of judicial power, both models agree that at least some circumstances exist in which the Court is incapable of bringing about significant social change. Adherents of both the Constrained Court and Dynamic Court models claim that the Supreme Court’s ability to achieve compliance with its decisions is at its nadir where the Court’s decision is both broadly unpopular and lacks the active support of one or both of the other branches of the federal government. Rosenberg, for example, argues that the Court is constrained by its lack of “necessary independence” from the other branches of the federal government and by its lack of policy expertise, and further that in those rare instances in which these constraints are overcome, the Court may be an effective agent of change only where (1) its decisions enjoy support from the other branches of government in the form of either offering incentives or imposing costs to induce compliance; (2) its decisions may be implemented directly by the market without governmental action; or (3) its decisions produce political “cover” for other actors who are willing to pursue the Court’s agenda.<sup>40</sup> Hall, on the other hand, emphasizes the verticality and popularity of the decision as predictive of its success.<sup>41</sup> Both Rosenberg and Hall agree, then, that a judicial decision is least likely to achieve widespread compliance where it is generally unpopular and lacks the support of the elected branches.

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36. *Id.* at 172.

37. MATTHEW E. K. HALL, THE NATURE OF SUPREME COURT POWER 156 (2011).

38. *Id.* at 156–57.

39. *Id.* at 164–65.

40. ROSENBERG, *supra* note 6, at 13, 15, 21, 33, 35.

41. HALL, *supra* note 37, at 156.

Given this point of agreement, both models would predict that the Court's decisions concerning prayer and devotional activities in public schools would be limited in their reach. As we shall see, the Court's initial decisions prohibiting prayer in the public schools were among the most controversial of the Warren Court era and have remained consistently unpopular to the present day.<sup>42</sup> Unable to rely on lower judicial officers to enforce compliance directly, the Court's decisions placed responsibility on state school officials and teachers—many of whom were personally opposed to its decisions and many others of whom had ample political incentive to defer to popular sentiment against the Court's separationist vision—to enact the policy changes necessary to implement the Court's decisions. The school prayer decisions also have never enjoyed more than minimal support from the elected branches—indeed, politicians have spent far more time criticizing the Court's decisions in this area and attempting to overrule them via constitutional amendment than speaking in their favor.<sup>43</sup> Under such circumstances, both the Constrained and Dynamic Court models would expect the Court to make little progress in its effort to alter actual religious practices in American public classrooms.

A closer examination of the response to the school prayer decisions, however, reveals a more complicated picture. Although the Court's decisions certainly did not put an immediate end to prayer and Bible reading in many of the public schools that had historically engaged in such practices, they did achieve a level of compliance that defies both models' predictions.<sup>44</sup> As Baum asks, "Was it more remarkable that so many schools maintained religious exercises prohibited by the Court or that so many others eliminated exercises that had strong public support?"<sup>45</sup> Under the prevailing views of judicial power, the answer to Baum's question is clearly the latter. None of Rosenberg's conditions are present in the school prayer cases, and to the extent the Court has acted "independently" of the elected branches in charting the path of its school prayer jurisprudence, it has done so in the face of significant opposition and criticism.<sup>46</sup> Likewise, Hall's Dynamic Court model predicts that the Court's school prayer decisions should receive relatively low compliance: the decisions were deeply unpopular, they are, in Hall's parlance, "lateral" rather than "vertical" (that is, they require cooperation by non-judicial actors for implementation), and they require affirmative alterations to established patterns of behavior outside the courtroom rather than a simple discontinuance of criminal prosecution.<sup>47</sup> Yet the empirical evidence shows a greater degree of

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42. See *infra* Part II.

43. See *id.*

44. See *infra* Parts III–IV.

45. Baum, *supra* note 35, at 172.

46. See ROSENBERG, *supra* note 6, at 13–21.

47. See HALL, *supra* note 37, at 130–36.

compliance with these decisions than can be readily accounted for even by Hall's articulation of the Dynamic Court model. Hall himself partially acknowledges this, recognizing that the high degree of compliance with the Court's religion in school cases in the Northeast "is difficult to explain" under his model and perhaps "suggest[s] that the Court is even more powerful than [his] theory suggests."<sup>48</sup> In short, neither the Constrained Court view nor the Dynamic Court view seems capable of explaining the relative success that the Court's school prayer decisions have enjoyed.<sup>49</sup>

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48. *Id.* at 136. In our view, Hall overstates the extent to which the patterns of compliance in regions outside the Northeast are consistent with the predictions of his theory. We need not dwell on this point; as we discuss at greater length below, we find the larger picture of imperfect but substantial compliance in the face of widespread opposition in every national region more significant to our inquiry than the variations on that theme among the regions.

49. It is worth noting here that the very notion of "compliance"—a concept that is critical to the arguments of both the Constrained Court and Dynamic Court views—is problematic under both models. One problem with assessing compliance with the Court's decisions in the school prayer cases is that the assessment depends on the assessor's threshold determination about what the Court's decision was meant to achieve. What the justices intend their decisions to achieve is subjective and thus unknowable, however. Thus, Malcolm Feeley has pointed out that a fundamental problem with Rosenberg's formulation of the problem of compliance is that he uses "exaggerated expectations [of activist lawyers whose declarations were 'uttered in the heat of battle'] as 'the' goal of the courts" and therefore "makes it relatively easy to expose the great gap between the goal and the reality of subsequent events, to show that the goal was not reached or that it was reached by roads other than those paved by the courts." Malcolm M. Feeley, *Hollow Hopes, Flypaper, and Metaphors*, 17 LAW & SOC. INQUIRY 745, 748 (1992). This same criticism can be leveled at advocates of the Dynamic Court view, who may understate the Court's goal in any given case and thus lower the bar for total compliance with the Court's order. The line between "minimal compliance" and "resistance" to a Court's decision is a critical one for the study of judicial capacity, yet it is ill defined conceptually and often resides within a zone of interpretive indeterminacy. Assessments of compliance with the Court's decisions thus may underestimate the Court's ability to generate social change because many Americans who attempt to comply with the Court's decisions may not be counted as "compliant" if their understanding of what compliance requires differs from the understanding of the academic measuring it. On the other hand, individuals may sincerely believe themselves to be acting in compliance with the Court's orders based on an interpretation of the Court's opinion distorted by a lack of information, insufficient legal expertise, or ideological opposition to the substance of the decision. More broadly, these considerations suggest the difficulty of attempting to quantify compliance with many decisions. With these limitations in mind, hereinafter we refer to "compliance" as the degree to which societal change, rather than stagnation or opposition, manifests in response to the Court's rulings. Ultimately, we mean to imply that, in the absence of the Court's intervention, no such change would have occurred.

## II. THE SCHOOL PRAYER CASES AND THE PUBLIC'S RESPONSE

### A. *The School Prayer Cases*

In the mid-twentieth century, the Supreme Court began to lay the foundation for a robust anti-establishment jurisprudence limiting the role of religion in America's public schools. Beginning with *Engel v. Vitale*<sup>50</sup> and *Abington School District v. Schempp*<sup>51</sup> in the early 1960s, the Court increasingly recognized and enforced constitutional limits on the degree to which public schools could facilitate religious activities such as prayer and Bible study. These cases are among the most controversial decisions the Court has ever handed down, provoking an immediate and popular backlash that endures today.

*Engel v. Vitale* was the first major decision of the United States Supreme Court recognizing limitations on devotional activity in public schools.<sup>52</sup> In *Engel*, ten plaintiff parents filed suit against the New York State Board of Regents challenging the Board's instruction to school principals to begin each school day with the recitation of a short non-denominational prayer—"Almighty God, we acknowledge our dependence upon Thee, and beg Thy blessings upon us, our teachers, and our Country."<sup>53</sup> The prayer itself had been adopted during the Red Scare heyday of the early 1950s by a "specially chosen, interfaith committee" acting with the express goal of composing a "non-sectarian" (and thus, as the Regents announced in adopting the policy, "clearly constitutional") devotional recitation.<sup>54</sup> The Court invalidated the practice, finding "that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause"<sup>55</sup> of the First Amendment as incorporated against the states by the Fourteenth Amendment in *Cantwell v. Connecticut*.<sup>56</sup> Although many Americans perceived the Court's opinion as

50. See *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

51. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963).

52. Although *Engel* was the first decision of the U.S. Supreme Court in this area, the issue of religious observance in public classrooms had a long history of litigation in state courts. Beginning in the nineteenth century in response to perceived Catholic incursion into public classrooms, a number of states adopted so-called "Blaine Amendments," named after an amendment to the U.S. Constitution proposed by Representative James G. Blaine, forbidding the use of public funds for parochial education. See Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 38 (1992); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 318 (2001).

53. *Engel*, 370 U.S. at 421–22.

54. SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA* 84–86 (2010); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 186 (2000).

55. *Engel*, 370 U.S. at 424.

56. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

hostile to religion,<sup>57</sup> the *Engel* Court's decision expressly recognized the pervasiveness of religion in American culture and justified its decision as being protective of both church and state, stating that "[t]he Establishment Clause . . . stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."<sup>58</sup>

Following *Engel*, the Court decided *Abington School District v. Schempp* in 1963.<sup>59</sup> In that decision, the Court invalidated a Pennsylvania law requiring public schools students to read ten Bible verses each day and a local school district's policy of beginning each school day with a recitation of the Lord's Prayer.<sup>60</sup> *Schempp*, unlike *Engel*, did not seek to present its outcome as driven entirely by respect for the "sanctity" of religious belief. Instead, the Court concluded that the practices at issue undermined the First Amendment's purpose "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."<sup>61</sup> Although the Court again acknowledged the importance of religion in America, quoting *Engel*'s observation that the "history of man" is "inseparable from the history of religion," it found that there exists in American culture an equally robust tradition of respect for religious diversity and religious liberty that necessitates a strong separation of church and state.<sup>62</sup>

*Schempp* marked the end of the Warren Court's involvement with the issue of prayer in public schools. Despite at least one opportunity to do so,<sup>63</sup> the Supreme Court did not return to the issue for two decades, during which time eight of the nine Justices involved in *Engel* and *Schempp* left the bench, and the Court, along with the national political climate generally, moved in a conservative direction.<sup>64</sup> When the Court finally returned to the issue of school

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57. See *infra* Part II.

58. *Engel*, 370 U.S. at 431–32.

59. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963). Although the *Schempp* decision was issued a year after *Engel*, it had first come before the Court in 1960, when the Justices remanded the case "on a procedural point that they knew as well as anyone would make no difference in the case." Corinna Lain, *God, Civil Virtue, and the American Way: Reconstructing Engel*, 67 STAN. L. REV. (forthcoming 2015). Lain speculates that, knowing that *Schempp* would return and anticipating a strong public reaction to a decision striking down the reading of the Lord's Prayer and the Bible in public classrooms, the Court may have granted *certiorari* in the "oddball" case of *Engel* in order to "ease the nation into *Schempp*." *Id.*

60. *Schempp*, 374 U.S. at 205.

61. *Id.* at 217.

62. *Id.* at 212–13.

63. See *Stein v. Oshinsky*, 382 U.S. 957 (1965) (denying petition for *certiorari* in litigation challenging public school district's policy prohibiting student-initiated prayer).

64. It is neither surprising nor coincidental that the Court's ideological shift tracked that of the broader political culture, as political scientists and legal scholars have long understood that

prayer in *Wallace v. Jaffree*,<sup>65</sup> Justice Brennan was the only remaining member of the Court that had decided *Engel* and *Schempp*. Nonetheless, *Jaffree* not only reaffirmed, but significantly extended the separationist position the Court had adopted in its earlier decisions. *Jaffree* involved an Alabama statute that provided for a one-minute moment of silence at the beginning of each school day “for meditation or voluntary prayer.”<sup>66</sup> Applying the test articulated in *Lemon v. Kurtzman*,<sup>67</sup> the Court concluded that Alabama’s moment of silence statute violated the Establishment Clause because it “was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose,”<sup>68</sup> a conclusion supported largely by testimony from the statute’s sponsor that “the legislation was an ‘effort to return voluntary prayer to our public schools’” and that he had “no other purpose in mind” when introducing it.<sup>69</sup> *Jaffree*’s principal inquiry thus shifted from a question of the policy’s effect as an

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the Article III appointment process as well as various informal mechanisms place pressure on the Court to move with the prevailing ideological winds. William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POLIT. SCI. REV. 87, 95, 97 (1993); Dahl, *supra* note 23, at 280. See also David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 J. POL. 652, 659, 661 (1985).

65. *Wallace v. Jaffree*, 472 U.S. 38, 39–42 (1985). The Court’s 1985 decision concerning Alabama’s statutory moment of silence for “meditation or voluntary prayer” is the most significant decision of the *Jaffree* series and the one on which our discussion will focus. It should be noted, however, that in granting *certiorari* for that case, the Court summarily affirmed the Eleventh Circuit’s holding that another Alabama statute, which provided that “any teacher or professor in any public educational institution within the state of Alabama . . . may pray, [or] may lead willing students in prayer,” violated the Establishment Clause. *Id.* at 40 n.3; see *Jaffree v. Bd. of Sch. Comm’rs*, 459 U.S. 1314, 1315 (1983). Although the Court heard no cases dealing with the specific issue of school prayer, the years between *Schempp* and *Jaffree* were not entirely devoid of cases involving the interaction of religion and public education. In 1968, only five years after *Schempp*, the Court struck down an Arkansas statute prohibiting the teaching of human evolution in public schools and universities. *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968); cf. *Edwards v. Aguillard*, 482 U.S. 578, 582 (1987) (overruling Louisiana statute requiring instruction in “creation science” alongside evolution). In 1980, the Court held that a Kentucky statute permitting the posting of the Ten Commandments in public classrooms violated the Establishment Clause. *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam). In all of these cases, the Court applied a strongly separationist interpretation of the Establishment Clause and further entrenched the division between religious observance and public education.

66. *Jaffree*, 472 U.S. at 40 n.2 (quoting Ala. Code § 16-1-20.1).

67. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). The *Lemon* test dictates that “to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive government entanglement with religion.” *Comm. for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973) (citing *Lemon*, 403 U.S. at 612–13) (citations omitted).

68. *Jaffree*, 472 U.S. at 56.

69. *Id.* at 56–57.

endorsement of religion, which had characterized the *Engel* and *Schempp* decisions, to one of the legislature's purpose or reason for enacting it. The *Jaffree* majority distinguished the legislative desire to protect a student's right to pray voluntarily from the desire "to convey a message of state endorsement and promotion of prayer," and thus implied that only the latter motivation is constitutionally suspect.<sup>70</sup> Therefore, although the Court's decision to invalidate Alabama's moment of silence statute adhered to the separationist policy adopted in the Warren Court's earlier decisions, the decision has been rather limited in practice. As of 2008, thirty-five states had statutes permitting or requiring moments of silence in public classrooms,<sup>71</sup> and those statutes have generally passed judicial muster under the *Lemon* test notwithstanding the Court's ruling in *Jaffree*.<sup>72</sup>

More recent decisions have seen the Court's attention shift from religious activities in public classrooms to those that occur during extracurricular activities. The Court's decisions in these cases have maintained the separationist position of its earlier decisions, further limiting the sphere of constitutionally permissible religious observance in activities related to public education. At the same time, these decisions have reiterated the Court's recognition of religion's respected status in American culture. The first of these cases, *Lee v. Weisman*, presented an Establishment Clause challenge to a policy of the Providence, Rhode Island School Committee and the Superintendent of Schools to permit principals to invite members of the clergy to give invocations and benedictions at middle school and high school graduation exercises.<sup>73</sup> In a 5–4 decision, the Court overruled the policy, concluding that "[t]he government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school."<sup>74</sup> As in *Engel* and *Schempp*, the Court emphasized the need to protect religious liberty from state interference and found the school principal's request for a "nonsectarian" prayer to be an

70. *Id.* at 59; see also *id.* at 62 (Powell, J., concurring) (asserting that "some moment-of-silence statutes may be constitutional"); *id.* at 67–69 (O'Connor, J., concurring).

71. *States with Moment of Silence or School Prayer Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/education/moment-of-silence-and-school-prayer.aspx> (last updated 2008).

72. See, e.g., *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 508–09 (7th Cir. 2010) (upholding Illinois statute providing for a "a brief period of silence" that "shall be an opportunity for silent prayer or for silent reflection," distinguishing *Jaffree* on the basis that the Illinois statute had a secular purpose); *Croft v. Perry*, 562 F.3d 735, 750–51 (5th Cir. 2009) (upholding Texas moment of silence statute); *Brown v. Gilmore*, 258 F.3d 265, 281–82 (4th Cir. 2001) (upholding Virginia moment of silence statute); *Bown v. Gwinnett Cnty. School Dist.*, 112 F.3d 1464, 1474 (11th Cir. 1997) (upholding Georgia moment of silence statute); *May v. Cooperman*, 780 F.2d 240, 252–53 (3rd Cir. 1985) (upholding New Jersey moment of silence statute).

73. *Lee v. Weisman*, 505 U.S. 577, 581 (1992).

74. *Id.* at 579, 587.

unconstitutional incursion of the state into matters of religious expression.<sup>75</sup> “It must not be forgotten, then,” the majority wrote, “that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, [the Free Exercise and Establishment] Clauses exist to protect religion from government interference.”<sup>76</sup> The practice of school-sponsored religious observance at graduation ceremonies, then, was constitutionally impermissible both because of its effect on the objecting student, who “had no real alternative which would have allowed her to avoid the fact or appearance of participation,”<sup>77</sup> and also for its effect on creating a state-sponsored religious orthodoxy.<sup>78</sup>

Eight years after *Weisman*, the Court issued its most recent decision concerning the constitutional contours of school-sponsored prayer at public school extracurricular activities, *Santa Fe Independent School District v. Doe*.<sup>79</sup> *Doe* took the separationist principle even further, applying it not only to the capstone extracurricular event of graduation, but to student-led, student-initiated prayer at high school football games. In *Doe*, the petitioner District adopted a policy permitting the student body to hold a referendum each spring on whether an “invocation” or “message” would be delivered as part of the pre-game ceremonies and, if so, to elect a student to deliver it.<sup>80</sup> Applying the principles set forth in *Weisman*, the Court held that although the prayer was approved by the student body and delivered by an elected student representative, the delivery of prayer at extracurricular football games violated the Establishment Clause.<sup>81</sup> The Court determined, first, that the majoritarian

75. *Id.* at 594.

76. *Id.* at 589–90.

77. *Id.* at 588.

78. *Lee*, 505 U.S. at 589–90.

79. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 290, 294 (2000). Classifying *Doe* as the most recent of the “school prayer” decisions requires some perhaps arbitrary line-drawing, as does distinguishing “school prayer” cases from other cases exploring the intersection of religion and public education. As noted above, for example, the Court heard an Establishment Clause challenge to a state statute requiring posting the Ten Commandments in public classrooms in 1980, during the period between *Schempp* and *Jaffree*. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963). The Court has also addressed closely related issues in the years since *Doe*; in 2001, for example, the Court held in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001), that a public school’s exclusion of an after-school student club based on its religious nature constituted viewpoint discrimination in violation of the Free Speech Clause, and that such discrimination was not justified by the Establishment Clause.

80. *Doe*, 530 U.S. at 298 n.6. The school actually adopted two versions of the policy, the second of which specified that any pre-game prayer must be “nonsectarian” and “nonproselytizing.” *Id.* at 296–97. The alternative policy would go into effect only if a court order enjoined the District from enforcing the primary policy; such an injunction was in fact entered, but the distinction between the two policies was immaterial to the Supreme Court’s analysis.

81. *Id.* at 316 n.23.



process of the student referendum and election did not establish the pre-game ceremony as a limited public forum, and second, that “the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion.”<sup>82</sup> Concluding that “that the delivery of a pregame prayer has the improper effect of coercing those present to participant in an act of religious worship,” the Court invalidated the District’s policy as a violation of the Establishment Clause.<sup>83</sup>

### B. *Immediate Responses to the School Prayer Cases*

Although the Court attempted in many of its school prayer decisions to explain the importance of separation as a mechanism for ensuring religious liberty and freedom of conscience, the public has nonetheless seen these cases as an encroachment of secularism against the free exercise of religion. *Engel* and *Schempp* “fell like a meteor into American society” and were perceived by much of the American public as an attack on the nation’s religious heritage and liberty.<sup>84</sup> Americans responded by criticizing and rejecting the Court’s separationist reading of the Establishment Clause.<sup>85</sup> The *Engel* decision alone generated more hate mail than any previous decision in the institution’s history, beating out its enormously controversial decision in *Brown v. Board of Education* ordering the desegregation of public schools eight years earlier.<sup>86</sup> In the immediate aftermath of *Engel*, each living former President of the United States quickly condemned the decision; President Kennedy’s response, though moderate in comparison, carefully avoided explicitly endorsing the Court’s ruling.<sup>87</sup> Cardinal Francis Spellman of New York was “shocked and

82. *Id.* at 304–05.

83. *Id.* at 312.

84. GORDON, *supra* note 54, at 86. Steven Engel, the prevailing petitioner in *Engel v. Vitale*, put the matter more bluntly: “We won the case [and] all hell broke loose.” BRUCE J. DIERENFIELD, *THE BATTLE OVER SCHOOL PRAYER: HOW ENGEL V. VITALE CHANGED AMERICA* 138 (2007).

85. Although opposition to the school prayer decisions was widespread, it was not entirely unanimous. Jewish and mainline Protestant organizations largely approved of *Engel* and *Schempp*, as did the editorial pages of the *New York Times* and the *Washington Post*. See DIERENFIELD, *supra* note 84, at 135; Jeffries & Ryan, *supra* note 52, at 320–21.

86. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); POWE, *supra* note 54, at 187.

87. In his biography of Earl Warren, Jim Newton argues that while former presidents Truman, Eisenhower, and Hoover quickly “denounced” the Court’s decision in *Engel*, President Kennedy “unequivocally stood behind it.” JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 394–95 (2006). This seems true only for a quite narrow definition of “unequivocal.” Kennedy’s response—which comprised a single answer to a question at the end of an otherwise unrelated press conference—was more an exhortation to moderation than an endorsement of the Court’s decision. Kennedy noted the importance of “support[ing] the Supreme Court[’s] decisions even when we may not agree with them,” and suggested “a very easy remedy and that is to pray ourselves.” THEODORE C. SORESENSEN, *KENNEDY* 364 (1965). He

frightened” by the two landmark decisions, and evangelist Billy Graham was “shocked and disappointed”<sup>88</sup> by the Court’s “step toward the secularization of the United States.”<sup>89</sup> Moreover, many American Protestants were genuinely confused by a decision that seemed to disregard the distinction between sectarian and ecumenical instruction that they believed to be entrenched in state and federal constitutional doctrine.<sup>90</sup> One study, for example, quotes an unidentified Protestant minister who objected to the *Engel* decision on the ground that “I realize that denominationalism cannot be taught in schools but to say that we cannot refer to God or the Bible is outrageous.”<sup>91</sup> Even some Catholics, who traditionally had been the targets of Protestant anti-sectarian lawsuits, defended the non-sectarian model in the aftermath of *Engel* and *Schempp*, such as when Bishop John J. Russell of Richmond said at the 1963 Red Mass in Washington, D.C., “Thank God, our Constitution forbids the State’s setting up or favoring any particular form of religion . . . . But that separation of church and state which we all cherish in our country never meant the divorce of government from religion or the separation of law from morality.”<sup>92</sup> This opposition to *Engel* was not merely rhetorical; another study notes, “schools opened in the fall of 1962 with reports of prayer and Bible-reading in most parts of the country.”<sup>93</sup>

Congress’s institutional response mirrored the public’s indignation. Representative George Andrews (D-AL) complained that the Court had “put the Negroes in the schools and now they’ve driven God out,”<sup>94</sup> and Representative Thomas Abernethy (D-MS) complained that the decision would

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urged parents to take the decision as an opportunity to renew their religious commitments at home and in church while continuing to “support the Constitution and the responsibility of the Supreme Court in interpreting it, which is theirs, and given to them by the Constitution.” President John F. Kennedy, News Conference Number 37 at the State Department Auditorium (June 27, 1962), available at [http://csis.org/files/media/csis/programs/taiwan/timeline/sums/time\\_line\\_docs/CSI\\_19620627.htm](http://csis.org/files/media/csis/programs/taiwan/timeline/sums/time_line_docs/CSI_19620627.htm). Kennedy thus “stood behind” the decision only in the sense of urging respect for the judicial process without expressing any personal endorsement of the decision itself. *Id.*

88. PETER IRONS, A PEOPLE’S HISTORY OF THE SUPREME COURT: THE MEN AND WOMEN WHOSE CASES AND DECISIONS HAVE SHAPED OUR CONSTITUTION (rev. ed. 2006).

89. Peter Irons, *Curing a Monumental Error: The Presumptive Unconstitutionality of Ten Commandments Displays*, 63 OKLA. L. REV. 1, 6 (2010).

90. See Jeffries & Ryan, *supra* note 52, at 282–83.

91. Bruce J. Dierenfield, *Secular Schools? Religious Practices in New York and Virginia Public Schools Since World War II*, 4 J. POL’Y HIST. 361, 369 (1992).

92. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 174–75 (2010).

93. FRANK J. SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE 296 (1976).

94. IRONS, *supra* note 88, at 6.

be “most pleasing to a few atheists and world Communism.”<sup>95</sup> Perhaps most portentous was the response of Representative Frank J. Becker (R-NY), the eventual leader of the movement to reverse the Court’s decision by constitutional amendment, who viewed *Engel* as “the most tragic decision in the history of the United States.”<sup>96</sup> Congressman James Haley (D-FL) immediately “offered an amendment to a judiciary appropriations bill to earmark out of the Supreme Court’s appropriations funds to purchase ‘for the personal use of each justice a copy of the Holy Bible’ . . . . And on September 27, the House voted unanimously to place the motto ‘In God We Trust’ behind the Speaker’s desk.”<sup>97</sup> Upon hearing that the school board in Netcong, New Jersey, had adopted a practice of beginning each school day by reading and reflecting upon the portion of the *Congressional Record* in which the chaplain’s prayer is entered, Representative Richard Roudebush (R-IN) began reading children’s prayers into each week’s *Record* stating, “I hope this plan catches on like wildfire, . . . and that schools across the Nation will turn to the pages of the *Congressional Record* for a source of children’s prayers inserted to provide a legal remedy to the tragic Supreme Court decision.”<sup>98</sup>

*Engel* and *Schempp* marked the beginning of a decades-long campaign to amend the Constitution to return religious worship to public education. Even before *Schempp* was decided, “some fifty-odd proposals to amend the Constitution in order to overcome the result of the *Engel* decision were introduced in the House of Representatives and in the Senate of the United States.”<sup>99</sup> As the 1964 elections loomed nearer, the number of amendments proposed by members of Congress to undo the Court’s religion rulings swelled to at least 146.<sup>100</sup> The most noteworthy of the early attempts to reverse the Court through a constitutional amendment was the “Becker Amendment,” introduced by Congressman Becker on September 10, 1963. Among other things, the Becker Amendment proposed to allow “the offering, reading from, or listening to prayers or Biblical scriptures” on a voluntary basis or “making reference to belief in, reliance upon, or invoking the aid of God or a Supreme

95. William M. Beaney & Edward N. Beiser, *Prayer in Politics: The Impact of Engel and Schempp on the Political Process*, in *THE IMPACT OF SUPREME COURT DECISIONS: EMPIRICAL STUDIES* 22, 24 (Theodore L. Becker & Malcolm M. Feeley eds., 2d ed. 1973).

96. *Id.*

97. *Id.*

98. JOAN DELFATTORE, *THE FOURTH R: CONFLICTS OVER RELIGION IN AMERICA’S PUBLIC SCHOOLS* 97 (2004).

99. Paul G. Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031, 1032 n.4 (1963).

100. Beaney & Beiser, *supra* note 95, at 28; cf. Lain, *supra* note 59, at 29 (“[B]y the time congressional hearings were held in 1964, nearly 150 proposed constitutional amendments had been submitted.”) (citing Geoffrey R. Stone, *In Opposition to the School Prayer Amendment*, 50 U. CHI. L. REV. 823, 826 (1983)).

Being” in public schools.<sup>101</sup> Although opponents of the Becker Amendment ultimately killed the bill in the House Judiciary Committee, the proposal prompted lengthy hearings in Congress and attracted the support of a majority of members at the height of its popularity.

Opponents of the Court’s school prayer decisions were relatively undeterred by the Becker Amendment’s failure in Congress. For example, Senator Robert C. Byrd (D-WV) proposed the “School Prayer Amendment,” which would have protected Americans’ right to engage in voluntary prayer “and to recognize their religious beliefs, heritage, or traditions on public property, including schools,” seven times between 1962 and 1997.<sup>102</sup> Likewise, on May 18, 1982, President Ronald Reagan proposed an amendment allowing school prayer, declaring in a radio address that “the first amendment is being turned on its head” by the Court’s religion decisions.<sup>103</sup> In 1994, newly-elected Speaker of the House Newt Gingrich proposed yet another amendment allowing voluntary school prayer, which President Bill Clinton considered endorsing before eventually retreating from that position.<sup>104</sup> President Clinton’s lukewarm support for a constitutional amendment allowing voluntary school prayer was consistent with the position of almost every president since *Engel*, most of who have expressed at least limited support for such a proposal.<sup>105</sup>

101. Stephen K. Green, *Evangelicals and the Becker Amendment: A Lesson in Church-State Moderation*, 33 J. CHURCH & ST. 541, 557–58 (1991).

102. JAN B. YOUNG, *THE UNITED STATES CONSTITUTION: A BRIEF HISTORY AND COMMENTARY* 60 (2010).

103. Ronald Reagan, Radio Address to the Nation on Prayer in Schools from Camp David, Md. (Feb. 25, 1984), available at <http://www.presidency.ucsb.edu/ws/?pid=39565>.

104. Stephen Carter, *Let Us Pray*, NEW YORKER, Dec. 5, 1994, at 60.

105. Nearly every president since *Engel* and *Schempp* were decided has taken a public position on the issue of religion in schools, many of them expressing at least mild support for a constitutional amendment permitting voluntary prayer during the school day. For instance, in a campaign debate against then-presidential nominee Jimmy Carter, President Gerald Ford said: “I believe also that there is some merit to an amendment that Senator Everett Dirksen proposed very frequently, an amendment that would change the Court decision as far as voluntary prayer in public schools.” President Gerald R. Ford, Presidential Campaign Debate at the College of William & Mary (Oct. 22, 1976), available at <http://www.presidency.ucsb.edu/ws/?pid=6517>. President Ronald Reagan, in proposing the amendment discussed above, lamented the Court’s “relentless drive to eliminate God from our schools.” President Ronald Reagan, Remarks at a Candle-Lighting Ceremony for Prayer in Schools (Sept. 25, 1982), available at <http://www.reagan.utexas.edu/archives/speeches/1982/92582b.htm>. President George H.W. Bush argued in defense of prayer in schools that “I continue to believe, as do the overwhelming majority of Americans, in the right to nondenominational voluntary school prayer.” President George H.W. Bush, Remarks at the Annual Convention of the National Religious Broadcasters (Jan. 27, 1992), available at <http://www.presidency.ucsb.edu/ws/?pid=20540>. President Jimmy Carter, although in favor of voluntary, student-initiated prayer, said that “in general . . . the Government ought to stay out of the prayer business and let it be between a person and God and not let it be part of a

After several decades of failed attempts to override the Court's decisions by amending the Constitution, Congress fell back on statutory measures to ensure that the exclusion of religious observance from public education would not exceed the specific parameters set by the Court. The No Child Left Behind Act of 2001 (NCLB)<sup>106</sup> amended the Elementary and Secondary Education Act of 1965 (ESEA)<sup>107</sup> to require the United States Department of Education to issue "guidance" on a biennial basis "on constitutionally protected prayer in public elementary schools and secondary schools."<sup>108</sup> The NCLB also requires as a condition for receipt of federal funds under the ESEA that local educational agencies file annual certifications to the State educational agency "that no policy of the local educational agency prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary schools and secondary schools."<sup>109</sup> State agencies are then required to report to the federal Department of Education any local agencies that fail to certify their non-interference with constitutionally protected prayer activities, or against which any complaints of noncompliance have been made.

### C. *Persistent Public Hostility*

As noted in the previous section, Congress's hostility to those decisions prohibiting devotional activities in public schools echoes the public's strong and enduring opposition to *Engel* and its progeny. Americans consistently support a greater role for religion in public life, and public schools specifically, than they have understood the Court's decisions to allow. All available evidence concerning the public's attitudes toward religious observance in public classrooms indicates that the public generally disapproves of the Court's decisions and prefers a policy of greater inclusion of religious expression than

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school program under any tangible constraints, either a direct order to a child to pray or an embarrassing situation where the child would feel constrained to pray." President Jimmy Carter, Interview with the President Remarks and a Question and Answer Session with Editors and News Directors (Apr. 6, 1979), available at <http://www.presidency.ucsb.edu/ws/?pid=32170>. George W. Bush, speaking as a candidate, echoed Carter's view, expressing his support for "voluntary, student-initiated prayer" while cautioning that "[w]e should not have teacher-led prayers in public schools, and school officials should never favor one religion over another, or favor religion over no religion (or vice versa)." Calvin Woodward, *Bush and Gore on the Issues: 20 Questions and Answers*, ASSOCIATED PRESS (Oct. 19, 2000), available at <http://www.lexisnexis.com.ezp.slu.edu/hottopics/Inacademic/?verb=sr&csi=7911> (search "Bush and Gore on the Issues"; follow Oct. 19, 2000 hyperlink).

106. No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–7941 (2012).

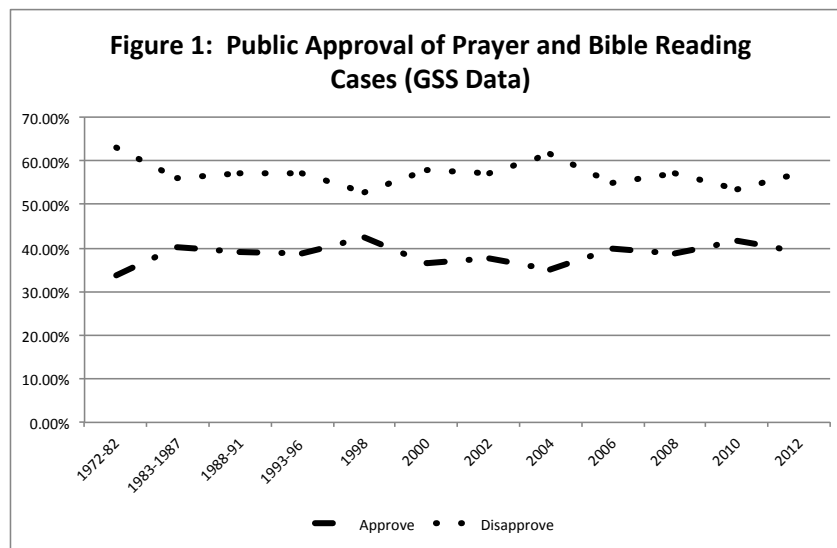
107. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965) (amended 2012).

108. Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, 68 Fed. Reg. 9645 (Feb. 28, 2003). Although the NCLB's biennial guidance requirement remains in effect, the guidance has not been updated since 2003.

109. 20 U.S.C. § 7904(b) (2012).

it believes the Court to have adopted. Although it is true that the public's initial outrage at the Court's early school prayer decisions, particularly *Engel*, was in part the result of a distorted understanding of the Court's holding, public opposition to those decisions has remained basically stable as the Court's jurisprudence has moved further in the direction of separation.

The best evidence of long-term public disapproval of the school prayer decisions is found in the General Social Survey (GSS). Figure 1 depicts forty years of GSS data indicating the public's response to the following question: "The United States Supreme Court has ruled that no state or local government may require the reading of the Lord's Prayer or Bible verses in public schools. What are your views on this—do you approve or disapprove of the court ruling?"<sup>110</sup> The GSS data indicate consistent public disapproval of *Schempp*, ranging from a low disapproval rate of 52.8% in 1998 to a high of 62.4% in 1972–82.<sup>111</sup>



The GSS results summarized in Figure 1 are the most comprehensive data available, but they pertain directly only to the *Schempp* decision (although we would argue that they are strongly suggestive of public disapproval of *Engel*,

110. See NAT'L OPINION RESEARCH CTR., GENERAL SOCIAL SURVEYS, 1972–2012: CUMULATIVE CODEBOOK viii, 301 (Mar. 2013). "No opinion" and "no answer" responses are omitted from the graph; black oversamples for 1982 and 1987 are included in the results for those years.

111. Although the earliest data point reflects the highest disapproval rate, it should be noted that the data do not reflect a general downward trend in disapproval over time. The second-highest disapproval rate was 61.6% in 2004, and the majority of data points are between 56% and 58%, including the most recent, 2012, at 57.1%. *Id.* at 301.

as well). Other sources of information concerning the public's approval of the school prayer decisions also indicate broad public disapproval of those decisions. A Gallup News Service report issued in 2005, for example, shows generally consistent public support for an amendment to permit voluntary prayer in public schools between 1983 and 2005.<sup>112</sup> Although the degree of support for such an amendment as reported by Gallup has wavered between a high of 81% in 1983 and a low of 73% in 1994,<sup>113</sup> Gallup's data indicate a high and relatively stable degree of public antipathy toward the firm wall of separation the Court erected between religious observance and public education.

Although the Gallup report covers only the more recent period of the post-*Engel/Schempp* era, strong public opposition to the cases emerged immediately after they were decided. David G. Barnum's work on the Supreme Court's responsiveness to public opinion summarized American National Election Studies (ANES) data on school prayer from 1960 through 1980.<sup>114</sup> Consistent with the later Gallup data, Barnum's summary indicates that a majority of greater than 70% agreed with the proposition that "[s]chools should be allowed to start each day with a prayer" during the entirety of that period.<sup>115</sup> Moreover, during the shorter period of time during the mid-1970s in which the question was asked, a majority consistently greater than 60% of the public expressly disapproved of the Court's decisions in *Engel* and *Schempp*.<sup>116</sup>

The Gallup and ANES data are consistent with every other source of public opinion on this issue of which we are aware. Table 1 below summarizes a number of relevant polls from the last two decades, all of which indicate the public's dissatisfaction with the Court's current doctrine and its desire for a greater presence of religion in the public classroom. Many of these polls seek public opinion not only on the questions of prayer and Bible study in the classroom that the Court addressed in *Engel* and *Schempp*, but also more contemporary issues such as the constitutionality of moments of silence and prayer at extracurricular events with which the Court has engaged in its more recent decisions. In all but one instance,<sup>117</sup> regardless of the question asked, a

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112. See David W. Moore, *Public Favors Voluntary Prayer for Public Schools: But Strongly Supports Moment of Silence Rather than Spoken Prayer*, GALLUP (Aug. 26, 2005), <http://www.gallup.com/poll/18136/public-favors-voluntary-prayer-public-schools.aspx>.

113. *Id.*

114. See Barnum, *supra* note 64, at 655–56.

115. *Id.* at 658.

116. *Id.*

117. The single exception is the 2006 CBS News poll, which reported an even split of 46%–46% in response to the question whether “teaching the Bible in a public school does or does not violate the Constitution and the separation of church and state.” *Religion* (2), POLLINGREPORT.COM, <http://www.pollingreport.com/religion2.htm> (last visited Dec. 20, 2014). This apparent anomaly might be explained by the poll's explicit focus on the legal rather than the

majority or large plurality of poll respondents has expressed a desire for greater religious observance in public education.

Table 1: Public Opinion Polls Concerning Prayer in Public Schools		
Polling Entity	Time Period	Description
Deseret News/ KSL-TV <sup>118</sup>	Unspecified; early 1991	80% of poll respondents (Utahns) believe that prayer “definitely” or “probably” should be permitted at high school graduation ceremonies.
NBC News/Wall Street Journal, conducted by the polling organizations of Peter Hart and Robert Teeter <sup>119</sup>	June 16–19, 1999	65% of respondents answered “should allow prayer” to the following prompt: “Let me read you two positions on school prayer. Between these positions, which do you tend to side with more? Position A: Government should allow prayer in public schools. Position B: Government should preserve a clear separation between church and state.”
ABCNews.com <sup>120</sup>	March 22–26, 2000	67% of respondents answered “should be permitted” to the question “at public school activities such as sporting events, do you think students should or should not be permitted to use the public address

normative aspect of the issue. That is, some segment of the public may be willing to accept the Court’s authority as the final arbiter of constitutional meaning even when it disagrees with the Court’s decision on normative grounds. *See infra* Part V (discussing the concept of legal “legitimacy” as an autonomously normative force).

118. Bob Bernick, Jr., *80% Favor Permitting Graduation Prayers*, DESERET NEWS (May 26, 1991, 12:00 AM), <http://www.deseretnews.com/article/164241/80-FAVOR-PERMITTING-GRADUATION-PRAYERS.html?pg=all>.

119. *Religion* (3), POLLINGREPORT.COM, <http://www.pollingreport.com/religion3.htm> (last visited Dec. 20, 2014).

120. *Id.*



		system to lead the audience in religious prayers?”
Newsweek, conducted by Princeton Survey Research Associates <sup>121</sup>	June 29–30, 2000	68% of respondents “disagree” and 29% “agree” with “the recent decision that public school districts cannot promote prayer before high school football games, saying it violates the separation between church and state.”
CNN/USA Today/Gallup <sup>122</sup>	September 19–21, 2003	78% of respondents “approve” of “a non-denominational prayer as part of the official program at a public school ceremony such as a graduation or a sporting event.”
Pew Research Center <sup>123</sup>	July 2005	67% of respondents replied “too far” and 28% replied “not too far” in response to the question “do you think that liberals have gone too far in trying to keep religion out of the schools and the government, or don't you think liberals have gone too far?”
Gallup <sup>124</sup>	August 8–11, 2005	60% of respondents answered “too little” in response to the following question: “Thinking about the presence that religion currently has in public schools in this country, do

121. *Judiciary* (3), POLLINGREPORT.COM, <http://www.pollingreport.com/court3.htm> (last visited Dec. 20, 2014).

122. *Religion* (3), *supra* note 119.

123. *Religion*, POLLINGREPORT.COM, <http://www.pollingreport.com/religion.htm> (last visited Dec. 20, 2014).

124. *Religion* (2), *supra* note 117.

		you think religion has too much of a presence in public schools, about the right amount, or too little of a presence in public schools?”
Fox News/ Opinion Dynamics <sup>125</sup>	November 29–30, 2005	87% of respondents favor “allowing public schools to set aside time for a moment of silence.” 82% of respondents favor “allowing voluntary prayer in public schools.” 82% of respondents favor “allowing public schools to have a prayer during graduation ceremonies.”
CBS News <sup>126</sup>	April 6–9, 2006	Respondents evenly split (46%–46%) in response to the question “in general, do you think that teaching the Bible in a public school does or does not violate the Constitution and the separation of church and state?” 64% of respondents believe that schools should “be allowed to teach the Bible as a piece of literature, in classes like English or Social Studies.” Plurality of 49% responded “more” to the question “would you like to see religious and spiritual values have more influence in the schools than they do now, less influence, or

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125. *Id.*

126. *Id.*

		about the same influence as they do now?" (32% responded "same," only 16% responded "less").
Pew Research Center <sup>127</sup>	August 2006	69% of respondents replied "too far" and 26% replied "not too far" in response to the question "[d]o you think that liberals have gone too far in trying to keep religion out of the schools and the government, or don't you think liberals have gone too far?"
Fox News/ Opinion Dynamics <sup>128</sup>	Sept. 14–16, 2010	84% of respondents answered "right to pray anywhere" to the question "do you think the federal courts are correct in ruling that the Constitution allows government to stop prayer in schools and on public property, or do you think when the Constitution says no branch of the government shall interfere with the free exercise of religion that it gives Americans the right to pray anywhere they want?" <sup>129</sup>
Rasmussen <sup>130</sup>	Unclear; early 2011	65% of respondents answered "favor" in response to the question

127. *Religion*, *supra* note 123.

128. *Id.*

129. *Id.* We hesitate to acknowledge this poll given the clearly distorted picture of Establishment Clause doctrine it presents and the suggestive manner in which the question is phrased, but include it for whatever value it may possess.

130. *65% of Americans Favor Prayer in Public Schools*, RASMUSSEN REPORTS (Feb. 11, 2011), [http://www.rasmussenreports.com/public\\_content/lifestyle/general\\_lifestyle/february\\_2011/65\\_of\\_americans\\_favor\\_prayer\\_in\\_public\\_schools](http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/february_2011/65_of_americans_favor_prayer_in_public_schools).

		“[d]o you favor or oppose prayer in public schools?”
Harris <sup>131</sup>	September 12–19, 2011	69% of respondents “strongly support” or “somewhat support” “prayer in school.”
Pew Research Center <sup>132</sup>	June 28–July 9, 2012	65% of respondents replied “too far” and 30% replied “not too far” in response to the question “[d]o you think that liberals have gone too far in trying to keep religion out of the schools and the government, or don’t you think liberals have gone too far?”
Public Religion Research Institute <sup>133</sup>	January 16–20, 2013	76% of respondents “completely agree” or “mostly agree” with the statement “[p]ublic high schools should be allowed to sponsor prayer before football games”; 21% “completely disagree” or “mostly disagree.”

All of this evidence appears to point to one conclusion: the public largely opposes the Supreme Court’s decisions in *Engel*, *Schempp*, and their progeny, and its opposition remained relatively stable over the last five decades.<sup>134</sup> But

131. *Public Opinion on 15 Controversial and Divisive Issues*, HARRIS POLLS (Oct. 4, 2011), <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/ctl/ReadCustom%20Default/mid/1508/ArticleId/874/Default.aspx>.

132. *Religion*, *supra* note 123.

133. *Id.*

134. On the other hand, recent evidence indicates that intensity of public preference regarding school religion may have diminished since the immediate backlash against *Engel* and *Schempp*. In the September 2011 Harris poll cited in Table 1, only 6% of respondents identified “[p]rayer in school” as one of “the two issues that are most important to you when voting for a candidate.” “Prayer in school” thus ranks an unimpressive twelfth on the list of Americans’ most pressing concerns. *See Public Opinion*, *supra* note 131. On the other hand, it is the only issue from the heyday of the Warren Court to appear on the Harris list at all. In fact, the only social issue directly traceable to a specific Supreme Court decision that ranks higher on the Harris list than “[p]rayer

is this opposition to what the Court actually held, or is it largely result of the public's ignorance about and misunderstanding of the scope of the Court's decisions? In a recent history of *Engel*, Corinna Lain presents a compelling argument that the initial public outcry against that decision was driven largely by popular misunderstanding of the Court's holding that was caused by media distortions and the tone-deaf manner in which the Court presented its decision.<sup>135</sup> Professor Lain notes that the public reaction to *Engel* was shaped largely by the initial media reports that, in their haste, frequently misinterpreted the decisions' scope or omitted important details.<sup>136</sup> For instance, media reports about *Engel* "went out within five minutes of the decision's announcement, feeding what would become the lead story in all news outlets by the end of the day and front-page news the following morning."<sup>137</sup> Those initial reports "gave the impression that the Court had forbidden prayer of any type—individual or state-sponsored—in public schools."<sup>138</sup> "COURT OUTLAWS GOD," the newspapers declared, and the public took the media at their word.<sup>139</sup> Lost in this flurry of breathless reporting and reflexive outrage was *Engel*'s nuance—the fact that the decision applied only to state-drafted prayer of which New York's was *sui generis*, the majority's clarification that its reasoning did not extend to all types of religious observance in public schools or to ceremonial deism more generally, and so on. Had the initial media reaction more accurately portrayed the context and content of the decision, there is some reason to believe that the public's reaction may have been less hostile than it was. Indeed, Professor Lain notes the irony that the considered views of legislative and religious leaders who started out as sharp critics of *Engel* moved closer to the Court's position as they strove to draft a constitutional amendment protecting the right to school-led prayer in a religiously pluralistic society.<sup>140</sup> Even the final version of the Becker Amendment, which the Republican Party adopted as part of its platform in 1964, looked remarkably similar to the policy that the Court adopted in *Engel*.<sup>141</sup>

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in school" is "[a]bortion rights," an area in which the public debate continues to be influenced by the Burger Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny.

135. Lain, *supra* note 59, at 31–33.

136. *Id.* at 26–31.

137. *Id.* at 34.

138. *Id.*

139. *Id.* at 27 (citing EARL WARREN, THE MEMOIRS OF CHIEF JUSTICE EARL WARREN 315–16 (1977)).

140. Lain, *supra* note 59, at 40 (citing JOHN H. LAUBACH, SCHOOL PRAYERS: CONGRESS, THE COURTS, AND THE PUBLIC 95 (1969)).

141. The 1964 Republican platform called for:

A Constitutional amendment permitting those individuals and groups who choose to do so to exercise their religion freely in public places, provided religious exercises are not

Professor Lain also points to the Court's own presentation of its decision in *Engel* as contributing to the public's misunderstanding of the decision. The Court viewed the case as such a clear violation of the Establishment Clause that it failed to anticipate the public outcry against its decision, or to clearly emphasize the limits of its holding.<sup>142</sup> As the Court explained a year later in *Schempp*, the *Engel* decision rested on "principles . . . so universally recognized" that Justice Black's majority opinion resolved the issue "without the citation of a single case."<sup>143</sup> Chief Justice Warren noted in conference that the respondent had "practically conceded" the Establishment Clause violation, and even the conservative Justice Harlan agreed that reversal was "inescapable."<sup>144</sup> "To the justices in the majority, *Engel* was self-evident, a matter of constitutional common sense," and the tone and brevity of the majority's decision reflected the Justices' sense that the result was obvious.<sup>145</sup> The Court's own perception of *Engel* as an unambiguous case of religious establishment apparently left the Justices blind to the potential for media distortion and public outrage against a decision that, however lightly, cut against the previous decade's rampant religiosity and, by extension, anti-Communism.<sup>146</sup>

The majority's failure to perceive the potential for controversy surrounding *Engel* was compounded by the concurring and dissenting opinions, which Professor Lain credits with playing a significant role in shaping the public's perception of the Court's decision. Both Justice Douglas, writing in concurrence, and Justice Stewart, the lone dissenter, failed to see any limiting principle in the majority's reasoning that could constitutionally distinguish the Regent's Prayer at issue in that case from the myriad forms of "ceremonial deism," such as the reference to God on currency and the phrase "under God"

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prepared or prescribed by the state or political subdivision thereof and no person's participation therein is coerced, thus preserving the traditional separation of church and state.

*Id.* at 40 (citing LAUBACH, *supra* note 140, at 93).

142. *Id.* at 19 ("For [a decision] engendering so much controversy, *Engel* was remarkably uncontroversial among the Justices who decided it.").

143. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 220–21 (1963). This is not strictly accurate, as Justice Black's opinion does cite the Court's earlier decision in *Everson v. Board of Education*, 330 U.S. 1 (1947), albeit only as a matter of historical background. *See Engel v. Vitale*, 370 U.S. 421, 428 n.11 (1962).

144. Lain, *supra* note 59, at 19.

145. *Id.* at 21.

146. *Id.* at 17–18 (discussing rise and wane of religiosity as anti-Communist signifier in the 1950s); *see also* GORDON, *supra* note 54, at 49. The Regent's Prayer at issue in the *Engel* decision was adopted in 1951 by the New York State Board of Regents as an anti-Communist measure. *See* POWE, *supra* note 54, at 186.

in the Pledge of Allegiance,<sup>147</sup> that proliferate American public culture.<sup>148</sup> Agreeing that the Regent's Prayer was indistinguishable from other forms of state-sponsored religious references, Douglas and Stewart disagreed only as to the constitutional implications of that observation: for Stewart, the Regent's Prayer fit comfortably within the sphere of constitutionally permissible ceremonial references to the divine, whereas for Douglas, the Establishment Clause prohibited all state-sponsored invocations of God.<sup>149</sup> The disagreement between Douglas and Stewart, Professor Lain argues, seemed to call into question the constitutional validity not only of the idiosyncratic prayer that New York imposed on its public schools, but the much broader corpus of public religiosity.<sup>150</sup> The majority, to which the distinctions seemed apparent, responded to this interpretation only in a brief footnote, which was largely ignored by media commentary on the case.<sup>151</sup> Thus, the majority's sparse articulation of its own reasoning and its failure to respond more robustly to Justices Douglas and Stewart contributed directly to the media's distortions of the decision, which in turn fed the public's perception that *Engel* struck at the heart of America's religious culture.<sup>152</sup>

We find Professor Lain's historical analysis convincing, but also entirely compatible with the point that the school prayer cases have been the object of intense and sustained public opposition since *Engel* was decided. From the perspective of Rosenberg's and Hall's theories of judicial power, the question of *why* a line of precedent is broadly unpopular is less significant than the simple fact that it *is* unpopular. It is indeed ironic that the considered position of many political and religious elites who initially opposed *Engel* came to resemble the Court's holding as they were forced to grapple with the issue of

147. The phrase "under God" was legislatively added to the Pledge of Allegiance in 1954. *See* 4 U.S.C. § 4 (2012). In 2004, the Supreme Court heard an Establishment Clause challenge to that language, but dismissed the case for lack of standing without addressing the First Amendment issue. *Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17–18 (2004).

148. *See* *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) (citing Arthur Sutherland, *Book Review*, 40 IND. L.J. 83, 86 (1964)); *Engel*, 370 U.S. at 449 (Stewart, J., dissenting).

149. *Engel*, 370 U.S. at 437 (1962) (Douglas, J., concurring) ("The point for decision is whether the Government can constitutionally finance a religious exercise. Our system at the federal and state levels is presently honeycombed with such financing. Nevertheless, I think it is an unconstitutional undertaking whatever form it takes.") (footnote omitted); *id.* at 450 (Stewart, J., dissenting) (arguing that the Regent's Prayer is compatible with other forms of constitutional ceremonial deism).

150. Lain, *supra* note 59, at 31.

151. *Id.* at 31 (quoting *Engel*, 370 U.S. at 435 n.21). For example, the *New York Times* reprinted the main text of the *Engel* decisions, but did not print the footnotes. Its readership was therefore left unaware of the majority's response to Douglas's and Stewart's broad interpretation of the *Engel* decision. *Id.* at 32.

152. *Id.* at 31–32, 39.

state-sponsored devotional practice in a religiously pluralistic society. Nevertheless, it remains true that the general public and many elites have persisted in disapproving *Engel* and its progeny even when, in some cases, their substantive policy preferences on the issue of religious observance in public classrooms are not far from the Court's position. This disapproval and the accompanying public backlash against the school prayer decisions is sufficient to activate whatever causal mechanisms may be associated with unpopularity in both Rosenberg's and Hall's analyses; it is unnecessary that the disapproval also be well-informed. Indeed, public ignorance of the Court's decisions has been and is widespread.<sup>153</sup> A background assumption of public ignorance is therefore a necessary element of any plausible theory of judicial power.

It is also true that the gap between public perception and legal reality concerning religious observance in public schools has narrowed since *Engel* was decided. *Engel* itself may have only applied to the state-composed ecumenical prayer that was unique to New York, but the Court quickly invalidated recitation of the Lord's Prayer and Bible reading—two practices that enjoyed broader public support—in *Abington School District v. Schempp*.<sup>154</sup> Two decades later, in *Wallace v. Jaffree*, the Court struck down a school district policy requiring a moment of silence for voluntary prayer at the beginning of each school day,<sup>155</sup> and in *Lee v. Weisman* and *Santa Fe Independent School District v. Doe*, it prohibited voluntary or student-led prayer at extracurricular events.<sup>156</sup> All of these practices enjoyed—and continue to enjoy—broad public support.<sup>157</sup> Thus, although some hyperbole and distortion persists, the public is not wrong to believe that the Court's decisions have adopted a separationist position that is at odds with the preferences of a substantial and stable majority of citizens.<sup>158</sup> While the Court

153. See VALERIE J. HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS 6 (2003); Gregory A. Caldeira, *Courts and Public Opinion*, in THE AMERICAN COURTS: A CRITICAL ASSESSMENT 303, 303 (John B. Gates & Charles A. Johnson eds., 1990); Gregory A. Caldeira & Kevin T. McGuire, *What Americans Know About the Courts and Why It Matters*, in THE JUDICIAL BRANCH 262, 265 (Kermit L. Hall & Kevin T. McGuire eds., 2005).

154. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963).

155. *Wallace v. Jaffree*, 472 U.S. 38, 60–61 (1985).

156. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000); *Lee v. Weisman*, 505 U.S. 577, 599 (1992).

157. See *supra* Table 1.

158. It may be the case, though it is too early to say so definitively, that the Court's recent decision in *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1828 (2014), upholding the petitioner municipality's practice of opening town board meetings with prayer against an Establishment Clause challenge, may signal a greater openness on the part of the Court to state-sponsored prayer in public schools. See, e.g., Christopher Lund, *Symposium: Town of Greece v. Galloway Going Forward*, SCOTUSBLOG (May 6, 2014, 5:05 PM), <http://www.scotusblog.com/2014/05/symposium-town-of-greece-v-galloway-going-forward/> (noting that "[t]he Court is clear about its desire



has by no means “outlaw[ed] God,”<sup>159</sup> it has for over fifty years adhered to an interpretation of the Establishment Clause that requires increasingly strict separation between public education and religious observance despite persistent public opposition. Moreover, it has done so without substantial assistance from the other branches of the federal government in enforcing its interpretation of the Establishment Clause, and in an area in which it must rely on non-judicial actors, including teachers, principals, school superintendents, and other education professionals, for direct implementation of its decisions. In such circumstances, both Rosenberg and Hall would predict that the Court’s edicts on school prayer would face near total noncompliance. The next section examines that prediction in light of the available empirical evidence.

### III. EMPIRICAL ASSESSMENTS OF THE RELIGION CASES’ IMPACT

The Court’s school prayer decisions, perhaps predictably given the public response they generated, have attracted much attention from legal and political science scholars from a variety of perspectives. While legal scholars in particular have debated the doctrinal validity of the Court’s application of the Establishment Clause in these cases at great length,<sup>160</sup> our concern here is with those cases’ empirically demonstrable effects. Regardless of the merits of the Court’s constitutional interpretation, to what extent were these decisions successful in altering the behavior of a largely hostile public? A number of

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to raise the bar [for Establishment Clause challenges to legislative prayer], but unclear on where exactly it means to set it.”). However, it is unclear how, if at all, *Galloway* will apply in the public school context; the Court’s Establishment Clause jurisprudence has always been more strictly separationist with respect to public classrooms than in other areas, and its actions thus far suggest a disinclination to revisit the school prayer issue after *Galloway*. See *Elmbrook Sch. Dist. v. Doe*, No. 12-755, slip op. 1, 2 (U.S. June 16, 2014) (denying petition for certiorari in a case presenting an Establishment Clause challenge to school district’s practice of holding high school graduation ceremonies in a church).

159. See Lain, *supra* note 59, at 27.

160. See, e.g., 1 Douglas Laycock, *A Survey of Religious Liberty in the United States*, in RELIGIOUS LIBERTY: OVERVIEWS AND HISTORY 272, 274–90 (2010); Jesse H. Choper, *The Unpredictability of the Supreme Court’s Doctrine in Establishment Clause Cases*, 43 WAYNE L. REV. 1439 (1997); Daniel O. Conkle, *Toward A General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113 (1988); Mark W. Cordes, *Prayer in Public Schools After Santa Fe Independent School District*, 90 KY. L.J. 1 (2002); Christopher L. Eisgruber, *Madison’s Wager: Religious Liberty in the Constitutional Order*, 89 NW. U. L. REV. 347 (1995); Debbie Kaminer, *Bringing Organized Prayer in Through the Back Door: How Moment-of-Silence Legislation for the Public Schools Violates the Establishment Clause*, 13 STAN. L. & POL’Y REV. 267 (2002); Paul G. Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031 (1963); Louis H. Pollak, *Foreword: Public Prayers in Public Schools*, 77 HARV. L. REV. 62 (1963); Stephen D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions*, 38 PEPP. L. REV. 945 (2011); Geoffrey R. Stone, *In Opposition to the School Prayer Amendment*, 50 U. CHI. L. REV. 823 (1983); Arthur E. Sutherland, Jr., *Establishment According to Engel*, 76 HARV. L. REV. 25 (1962).

studies have examined the degree of compliance with the Court's school prayer decisions. These studies vary in terms of the methodology utilized and the geographic and temporal location of the inquiry, but some broad patterns are clear. At the most general level, the response to the Court's directions has been mixed, but on the whole there has been more compliance, much of it concededly grudging and minimal, than outright resistance to the Court's mandates. Those studies that search for regional variation in compliance patterns find that such variation does exist, with the greatest degree of noncompliance found in the South.<sup>161</sup> Despite the heated rhetoric of open defiance that these decisions have generated, however, empirical studies show that most school districts, most of the time, have aimed to interpret the Court's orders in good faith (if not generously) and to comply with their perceived legal obligations. At the same time, however, several of these studies highlight the difficulties, endemic to much of the scholarship on judicial efficacy but often unacknowledged, in defining exactly what "compliance" with a general rule articulated in the context of a specific case or controversy means and how it is to be measured in real-world situations in which the applicability of the Court's general pronouncement may be less than perfectly clear.

The first nationwide study of compliance with the *Engel* and *Schempp* decisions, undertaken by Frank Way, was published in 1968.<sup>162</sup> The Way study was conducted during the 1964–65 school year on a random sample of 2320 public elementary school teachers representing 464 schools across the nation.<sup>163</sup> Teachers were asked to complete survey questions comparing their practices of prayer and Bible reading in the classroom prior to the *Engel* decision in 1962 and in the present day.<sup>164</sup> The survey responses indicated a

161. Notwithstanding the undeniable regional variations that the empirical studies discussed in this section clearly demonstrate, we feel it important to resist the common tendency to analogize the public's response to the school prayer decisions to the national experience in the wake of the desegregation and racial justice cases of the 1950s and 60s. In both cases, public opposition and active resistance to the Court's decisions were greatest in the South. In the case of the school prayer decisions, however, this regional difference was a matter of relatively moderate degree. Religious observance was common in schools across the nation prior to the Court's decisions, and public opinion was—and continues to be—opposed to the Court's decisions in every national region. In fact, three of the five major cases discussed in Part II—*Engel*, *Schempp*, and *Lee*—concerned practices in public schools in the Northeast. The recent case of *Ahlquist v. City of Cranston ex rel. Strom*, 840 F.Supp. 2d 507, 526 (D.R.I. 2012), in which a federal district court ordered the removal of a prayer banner from a public high school in Cranston, Rhode Island, demonstrates that tensions between popular religious expression and Court-mandated neutrality continue to simmer even in the national region where empirical studies indicate the highest level of compliance with the Court's decisions on religion in public schools.

162. See Frank H. Way, Jr., *Survey Research on Judicial Decisions: The Prayer and Bible Reading Cases*, 21 W. POL. Q. 189 (1968).

163. *Id.* at 189–90.

164. *Id.* at 191.

significant drop in religious observance after the Court's decisions were announced. Whereas 60% of survey respondents acknowledged conducting prayer in the classroom prior to the *Engel* decision, only 28% reported that they continued to do so in the 1964–65 school year. The numbers concerning Bible reading were similar: 48% of survey respondents reported conducting Bible readings in the classroom before 1962, while only 22% reported continuing those readings in 1964–65.<sup>165</sup> At the same time, decades before *Wallace v. Jaffree*, the Way study reported that the prevalence of “silent meditation” in public classrooms had increased by 61% between 1962 and 1965.<sup>166</sup> Consistent with later studies, Way found that a majority of respondents reported that the local school district avoided adopting a policy concerning prayer and Bible reading in public classrooms, leaving the matter to the discretion of individual teachers.<sup>167</sup> Also consistent with later studies and with the history of the school prayer controversy, Way found that Protestant teachers were significantly more resistant to compliance with the Court's decisions in *Engel* and *Schempp* than were Roman Catholic and Jewish teachers.<sup>168</sup> Way also discovered significant regional variations in attitudes and practices concerning prayer and Bible reading in public classrooms, with the South being “unique” among the national regions in its resistance to the Court's decisions.<sup>169</sup> Table 2 reports Way's results concerning regional variations in religious practices in public classrooms before and after *Engel* and *Schempp*. The South is indeed an outlier, particularly with respect to its open defiance of the Court's mandates in the 1964–65 school year.

Table 2: Way Responses Concerning Prayer and Bible Reading<sup>170</sup>

	South	New England	Middle West	Middle Atlantic	Rocky Mt.-Far West
Bible reading, pre-1962 (%)	80	64	28	62	14
Bible reading, 1964-65 (%)	57	20	12	5	6

165. *Id.*166. *Id.* at 191 n.6.167. Way, *supra* note 162, at 192–93.168. *Id.* at 195.169. *Id.* at 199.170. *Id.*

Morning prayer, pre-1962 (%)	87	95	38	80	14
Morning prayer, 1964-65 (%)	64	27	21	7	5

The next assessment of compliance with the Court's school religion cases was undertaken by William Muir, who interviewed twenty-eight individuals in school district leadership positions in the "Midland" district both six months before and eight months after the *Schempp* decision,<sup>171</sup> concerning their role perceptions or "self-images" regarding religion in schools, their policy preferences regarding religion in schools, and their attitudes toward law and the Supreme Court generally.<sup>172</sup> Muir described the process by which disputes and uncertainties within the Midland community concerning compliance with *Schempp* were resolved, and how the Midland district implemented compliance with the Court's mandate, primarily through the efforts of two prominent local officials: a lawyer and a school superintendent. In Muir's assessment, the Supreme Court's decisions banning religious exercises in public schools created for individuals a tension between their belief in the value of religion in education, the value of not allowing a single sectarian viewpoint to pervade public education, and the value of respect for Supreme Court decisions and the rule of law generally.<sup>173</sup> Thus, school administrators and teachers deferred to those local officials' assessment of the Court's mandate to avoid dissonance between their personal behavior and the Court's order. Although Muir's study does not present a quantitative assessment of compliance with the Court's decisions across multiple communities, it does elucidate the process by which divisions within a particular community were resolved in favor of compliance with the Court's direction. As Stuart Scheingold observed, Muir's study illustrates that "[l]egal norms may not induce acquiescence; they may not be self-authenticating; but they do seem capable of exercising an independent influence on political attitudes."<sup>174</sup>

171. "Midland" is a pseudonym for the otherwise unidentified, medium-sized city in which Muir conducted his study. See WILLIAM K. MUIR, LAW AND ATTITUDE CHANGE 2 (1973).

172. *Id.* at 2-3.

173. *Id.* at 122-25.

174. STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 147 (1974).

Likewise, in 1970, Kenneth Dolbeare and Philip Hammond published a study of compliance with the Supreme Court's school religion decisions,<sup>175</sup> following up on an earlier study by Dierenfeld on the frequency of devotional practices in public schools.<sup>176</sup> Dolbeare and Hammond sent questionnaires to teachers who had indicated, in response to Dierenfeld, that their schools engaged in religious activity as of 1960. They found that, as of 1967, two-thirds of those who had reported engaging in such practices no longer did so.<sup>177</sup> Compliance was lowest in the South, where only approximately 21% of school districts complied with the Court's rulings, and highest in the East, where approximately 93% of respondents reported compliance.<sup>178</sup> Conducting further qualitative studies of compliance in the "Midway" area, however, Dolbeare and Hammond discovered a more complicated picture: even school districts that were "complying" with the Court's decisions on paper were suffused with unconstitutional religious observance in practice.<sup>179</sup> Dolbeare and Hammond find it curious that, although there was little openly defiant rhetoric toward the Court's decisions and a general understanding among the relevant actors that religious observations in public schools were constitutionally impermissible, no one took action to bring the Midway schools into actual compliance.<sup>180</sup> They identify four factors contributing to this "banality of noncompliance": first, the lack of a single official with a clear responsibility for imposing compliance on wayward schools; second, the tacit ethos of conflict avoidance among local elites in the Midland communities; third, the "cognitive insulation" among local officials that caused them to misconstrue *Engel* and *Schempp* so as to justify local practices as compliant with the Court's directions and to maintain a willful ignorance as to exactly what practices the schools engaged in; and fourth, the lack of institutionalized channels through which local officials could be forced to address the issue.<sup>181</sup>

Robert Birkby's study of Tennessee school districts' response to *Schempp*<sup>182</sup> in the 1964–65 school year highlights the difficulties and ambiguities inherent in the concept of compliance with a judicial decision.<sup>183</sup>

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175. Kenneth Dolbeare & Phillip Hammond, *Inertia in Midway: Supreme Court Decisions and Local Responses*, 23 J. LEGAL EDUC. 106, 106 (1970).

176. See Richard B. Dierenfeld, *The Impact of the Supreme Court Decisions on Religion in the Public Schools*, 62 RELIG. EDUC. 445, 445–51 (1967).

177. Dolbeare & Hammond, *supra* note 175, at 110.

178. *Id.*

179. Like Muir's "Midland," Midway is a pseudonym for five unidentified communities in a single Midwestern state. Dolbeare & Hammond, *supra* note 175, at 107.

180. *Id.* at 111.

181. *Id.* at 115–17.

182. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

183. Robert H. Birkby, *The Supreme Court and the Bible Belt: Tennessee Reaction to the "Schempp" Decision*, in *THE IMPACT OF SUPREME COURT DECISIONS: EMPIRICAL STUDIES* 110

Prior to *Schempp*, Tennessee state law required Bible reading in public schools.<sup>184</sup> In the immediate aftermath of that decision, the Tennessee Commissioner of Education announced that, in his view, Bible reading in public schools remained permissible but left the decision to local school officials.<sup>185</sup> Birkby found that seventy of the 121 Tennessee school districts (approximately 58%) that participated in the study left their policies requiring Bible reading in place, deferring to the Commissioner's interpretation of the Court's decision.<sup>186</sup> Of the remaining districts, only one changed its policy to expressly forbid Bible reading; the remaining fifty "merely made student participation voluntary and left the decision whether to have devotional exercises to the discretion of the classroom teacher."<sup>187</sup> While he hypothesized that the ultimate effect of delegating the decision to the discretion of the individual teacher may have been to preserve the practice of Bible reading in many cases, Birkby's surveys of school district officials in the districts that enacted that delegation demonstrated that many viewed their actions as conforming to the Supreme Court's direction. Survey respondents in those districts wrote, for example, that "[w]e must conform with Federal law. If we are to teach our children to obey laws we must set an example[.]" and "[w]e are commanded by the Bible to be subject to civil powers as long as their laws do not conflict with laws of God."<sup>188</sup> While we might question the degree to which a school district's simple delegation of the issue to individual classroom teachers, with no further affirmative steps to ensure that improper devotional activity did not occur, constitutes a good-faith effort to comply with the Court's order, Birkby's respondents demonstrate a clear and apparently sincere self-perception as having met their legal and moral obligations to obey federal law.

Kevin McGuire's 2009 study presents an updated picture of public compliance with the Court's school religion cases that takes into account its later decisions in *Lee v. Weisman*, *Wallace v. Jaffree*, and *Santa Fe v. Doe*.<sup>189</sup> His study consists of a survey, conducted in February 2004, of 252 undergraduate students at the University of North Carolina Chapel Hill regarding those students' experiences with devotional activities in their public high schools. McGuire's results illustrate the degree of noncompliance with the Court's major school prayer decisions by region. The results indicate

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(Theodore L. Becker & Malcolm M. Feeley eds., 1973). See *supra* note 49 and accompanying text for a discussion of the conceptual difficulties inherent in measuring compliance.

184. Birkby, *supra* note 183, at 110.

185. *Id.*

186. *Id.* at 111.

187. *Id.*

188. *Id.* at 116.

189. Kevin T. McGuire, *Public Schools, Religious Establishments, and the U.S. Supreme Court: An Examination of Policy Compliance*, 20 AM. POL. RES. 50, 50 (2009).

significant regional variations in resistance to the Court's decrees, with the South continuing to show significantly greater resistance than other regions of the country (which McGuire represents collectively as the "non-South").<sup>190</sup> On the other hand, while the pattern of regional variation remains intact, McGuire's study indicates a significantly greater degree of compliance in absolute terms across the board, and particularly in the South, than was found by Dolbeare and Hammond thirty-eight years earlier.<sup>191</sup> McGuire's results further illustrate the degree to which the interpretation of data on these questions is contingent upon the interpreter's baseline expectations of the efficacy of judicial power. McGuire himself is somewhat pessimistic as far as the implications of his data for Court effectiveness, describing the degree of noncompliance demonstrated by his study as "quite stark."<sup>192</sup> Wald and Calhoun-Brown, however, interpret McGuire's study as indicating that "the practices of teacher-led prayer and Bible reading have become rare" in the decades since *Engel* and *Schempp* were decided.<sup>193</sup> Our own interpretation, as discussed at greater length below, is that McGuire's results, both in terms of the degree of compliance and the trend toward greater compliance over time, cannot be adequately explained by either of the prevailing models of judicial power.

#### IV. THE SCHOOL PRAYER CASES' CHALLENGE TO PREVAILING MODELS OF JUDICIAL POWER

The pattern of opposition and conformity to the Supreme Court's decisions restricting religious devotional activities in public schools pursuant to the Establishment Clause of the First Amendment presents a challenge to both of the prevailing models of judicial power in the United States. Although the Dynamic Court and Constrained Court models disagree about the extent of the Supreme Court's ability to bring about widespread social change, they agree that the Court's ability to affect behavior, however robust or limited it may be, is at its weakest when two criteria are satisfied: first, the Court's decision is opposed by a majority (or at least a determined minority) of the public affected by its ruling; and second, the Court lacks the active support of the elected branches—the keepers of the Hamiltonian "purse" and "sword"—in implementing its order.<sup>194</sup> Both criteria are quite clearly satisfied in the case of the Court's school prayer decisions, and both models of judicial power would therefore predict that the Court's ability to achieve compliance with its

190. *Id.* at 62.

191. See Dolbeare & Hammond, *supra* note 175, at 110.

192. McGuire, *supra* note 189, at 69.

193. KENNETH D. WALD & ALLISON CALHOUN-BROWN, *RELIGION AND POLITICS IN THE UNITED STATES* 100 (6th ed. 2011).

194. THE FEDERALIST NO. 78, *supra* note 14, at 464; see *supra* Part II.

decisions prohibiting religious observance in public schools would be quite constrained. But the empirical evidence on the question of compliance with these decisions reveals a more complicated picture. Although compliance with the Court's decisions is far from perfect, neither model can adequately explain the pattern of compliance that the empirical studies reveal. The Constrained Court view as articulated by Rosenberg would predict near total noncompliance with the Court's decisions given the presence of the three institutional constraints on the Court's power and the absence of any of the four conditions sufficient to achieve significant social change when those constraints are overcome. The Dynamic Court view as articulated by Hall also cannot explain the apparent compliance with the Court's decisions because the two mechanisms that it claims explain the entirety of the Court's power—verticality of implementation and the decision's popularity—are absent in these cases. Both models, then, must omit some significant source of judicial power that can account for the surprising, albeit far from complete, measure of compliance that the Court's school prayer decisions achieved.

It is clear that the Court, in deciding the school prayer cases, failed to overcome the institutional constraints that Rosenberg identifies as impediments to effective judicial policymaking.<sup>195</sup> Although the Court did overcome Rosenberg's first constraint, the "bounded nature of constitutional rights," by identifying an Establishment Clause right against compulsory religious activity in public schools, it was unable to overcome Rosenberg's second and third constraints.<sup>196</sup> The Court is incapable of acting independently of the other branches of the federal government, or of the states, in these cases because it must rely on those authorities' cooperation in implementing its orders.<sup>197</sup> This creates opportunities for the other branches to subvert the Court's goals, for example, when Congress focused its attention in the No Child Left Behind Act on defining the scope of constitutionally *protected* religious activity rather than discouraging activities the Court had deemed unconstitutional.<sup>198</sup> Moreover, the Court "lack[s] the tools to readily develop appropriate policies and implement decisions" concerning public school policy, thus failing to overcome Rosenberg's third constraint.<sup>199</sup> As noted by the studies of compliance with the school prayer decisions cited above, implementation of the Court's decisions depended on the planning and cooperation of state education officials, school administrators, and teachers. The Court itself lacks the expertise or institutional resources to craft detailed policies for individual school districts, and it made no efforts to do so in the school prayer cases.

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195. See ROSENBERG, *supra* note 6, at 10.

196. *Id.* at 10–11, 13.

197. See *id.* at 15.

198. See *supra* note 106 and accompanying text.

199. See ROSENBERG, *supra* note 6, at 21.



Rosenberg's model would thus predict that the Court would be unsuccessful in implementing its school prayer decisions.

Even Hall's Dynamic Court model, which is more optimistic than Rosenberg's concerning the Court's ability to effect social change where certain criteria are present, would predict that the Court would have little success in the school prayer area. Implementation of the school prayer decisions relies necessarily on the cooperation of school board members, administrators, and teachers; school prayer is therefore a "lateral" rather than a vertical issue. Moreover, it can hardly be disputed that the Court's school prayer decisions have been deeply unpopular since their initial decision.<sup>200</sup> These cases are some of the most controversial of the past half-century, and unlike many cases that are controversial at the time of their decision, the public has not warmed much to the Court's interpretation of the Establishment Clause since *Engel* and *Schempp* were decided in the early 1960s.<sup>201</sup> This is unsurprising in light of the extent to which the culture of the United States is suffused with religious belief. James Morone persuasively argues that the United States remains a nation in the shadow of its puritanical forebears,<sup>202</sup> and the furor with which the Court's initial decisions removing state-sponsored prayer from public classrooms was greeted, is consistent with this thesis. Religion permeates American political culture to such a degree that Justice William O. Douglas—hardly a paragon of religious sobriety himself<sup>203</sup>—could claim in *Zorach v. Clauson* (1952) that "[w]e are a religious people whose institutions presuppose a Supreme Being."<sup>204</sup> The first half of Justice Douglas's statement, at least, seems indisputable as a descriptive matter, and the religiosity of American society has not changed much since 1948.<sup>205</sup>

200. See *supra* notes 112–13 and accompanying text.

201. *Id.*

202. See JAMES A. MORONE, *HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY* 3 (2003).

203. See BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 249, 295 (2003).

204. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Murphy recounts Justice Jackson's speculation that Douglas "appeared to be taking this proreligion position [in *Zorach*] because of his thoughts about the need to win the support of a Catholic constituency for a possible run for the presidency later that year." MURPHY, *supra* note 203, at 311.

205. This is true in a broad sense, not with respect to the details of sectarian distribution. See, e.g., CLAUDE S. FISCHER & MICHAEL HOUT, *CENTURY OF DIFFERENCE: HOW AMERICA CHANGED IN THE LAST ONE HUNDRED YEARS* 193 (2006). For example, more than 95% of the American public adhered to one of the three dominant traditions of Protestantism, Catholicism, and Judaism from the turn of the twentieth century until around 1968, a figure that declined to 83% by 2000 as religious belief among the American public diversified. *Id.* at 194. The portion of native-born Americans belonging to a Protestant denomination declined from about 80 percent around the turn of the twentieth century to around 50% near its end. *Id.* at 196. However, diversification of religious belief has not led to wholesale secularism. *Id.* at 206. Fischer and Hout

Immigration has contributed further to the burgeoning religious diversity that spurred the Court's decision to impose a more strict segregation between church and state in the first place, yet those very decisions have mitigated the once-significant tensions between sectarian communities as members of the Judeo-Christian tradition have united against the forces of secularism.<sup>206</sup> Thus, Rick Santorum, running for the Republican presidential nomination in 2012, could claim to have "wanted to throw up" reading John Kennedy's 1960 speech assuring the American public that, if elected president, he would not be influenced by the views of the Vatican on public policy.<sup>207</sup> For Santorum, unlike Kennedy, Catholicism is no longer a political liability; as the spectrum of American faith traditions has expanded, religious conservatives' in-group identification has concomitantly broadened, and the degree of suspicion with which members of non-Protestant religious sects are viewed has diminished.<sup>208</sup>

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"concur" with earlier assessments that "[c]ontrary to received wisdom in social science and the mass media, [there is] no evidence of religious secularization as measured by the attendance at religious services in the United States over the past half-century." *Id.*

206. Jeffries & Ryan, *supra* note 52, at 302–04, 348–49.

207. Felicia Sonmez, *Santorum Says He 'Almost Threw Up' After Reading JFK Speech on Separation of Church and State*, WASH. POST (Feb. 26, 2012, 11:54 AM), [http://www.washingtonpost.com/blogs/election-2012/post/santorum-says-he-almost-threw-up-after-reading-jfk-speech-on-separation-of-church-and-state/2012/02/26/gIQA91hubR\\_blog.html](http://www.washingtonpost.com/blogs/election-2012/post/santorum-says-he-almost-threw-up-after-reading-jfk-speech-on-separation-of-church-and-state/2012/02/26/gIQA91hubR_blog.html).

208. In the interest of mitigating what will undoubtedly be an oversimplification of complex historical dynamics in any case, we acknowledge that the ideological trends among America's dominant faith traditions have not been uniformly in the direction of ecumenical cooperation. Sarah Gordon claims that "[t]he legacy of the prayer decisions has been division, despite the Court's emphasis on divisiveness as a dangerous consequence of the *failure* to separate church and state," GORDON, *supra* note 54, at 93, while Jeffries and Ryan emphasize the "schism" between mainline and evangelical Protestants over the question of church and state separation since the mid-twentieth century. Jeffries & Ryan, *supra* note 52, at 328. If this is so, it is only part of the story. It is undeniable that intra-sectarian divisions on questions of political and social policy have become commonplace in the decades since the Court's school prayer decisions. Wilcox and Jelen cite a number of theorists who "see the religious diversity of America distilling into two divergent forces engaged in a 'culture war' to influence American values and policy" during this period. Clyde Wilcox & Ted G. Jelen, *Religion and Politics in an Open Market*, in RELIGION AND POLITICS IN COMPARATIVE PERSPECTIVE: THE ONE, THE FEW, AND THE MANY 289, 295 (Ted G. Jelen & Clyde Wilcox eds., 2002). Mainline Protestants and liberal Jews and Catholics have largely aligned with secularists and other members of the left wing in supporting a strong separation of church and state, as well as such social policies as the freedom of reproductive choice, opposition to racial and gender-based discrimination, and, more recently, the movement for gay rights and marriage equality. *Id.* at 295, 307–08 Evangelical Protestants, conservative Catholics, and Orthodox Jews have largely occupied the other side of all of these debates, advocating for a less rigid division between church and state. *Id.* at 296. Wilcox and Jelen note that while conservative Judeo-Christian denominations remain divided by "highly salient" doctrinal issues, they are nevertheless capable of cooperating "in political organizations that fight abortion, or on behalf of political candidates who promote traditional family values." *Id.*

While increasing religious diversity has softened some sectarian rivalries, Americans' suspicion of irreligion remains largely unmitigated. Although a distinct strand of secularism has existed in counterpoise to the dominant religiosity of American culture since the nation's founding,<sup>209</sup> those professing no theistic belief remain a small segment of the population—estimated to comprise approximately 10.3% of the American public as of 2008.<sup>210</sup> In addition to this numerical disparity, nonbelievers remain among the most distrusted groups by the American public.<sup>211</sup> According to Gallup polling data, 49% of respondents in 2011 would refuse to vote for their party's nominee for president if that person were an atheist, making “atheist” by far the most distrusted category.<sup>212</sup> In comparison, a “gay or lesbian” nominee, the next most distrusted category, would be refused by only 32% of respondents, while a Mormon nominee—the next most distrusted religious category—would be refused only by 22% of respondents.<sup>213</sup> And the public's distrust of the irreligious is not limited to the narrowly political arena. A sociological study by Edgell *et al.* notes that atheists rank highest, by considerable margins, in survey responses in which respondents are asked to identify the group “[that] does not at all agree with my vision of American society” as well as the group of which respondents would disapprove of their child marrying a member.<sup>214</sup> They argue that this distrust is grounded not in the specific beliefs of individual atheists that respondents have encountered but rather with the identification of the atheist as one who transgresses the foundational premises of civil society, finding that “Americans construct the atheist as the symbolic representation of one who rejects the basis for moral solidarity and cultural membership in

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Nevertheless, we maintain that this transition in emphasis from sectarian identity to political ideology marks a historic shift in relations among the major faith traditions.

209. See SUSAN JACOBY, *FREETHINKERS: A HISTORY OF AMERICAN SECULARISM* 13–14 (2004).

210. PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY: RELIGIOUS AFFILIATION: DIVERSE AND DYNAMIC 5 (2008).

211. *Id.*

212. Lydia Saad, *In U.S., 22% Are Hesitant to Support a Mormon in 2012*, GALLUP (June 20, 2011), <http://www.gallup.com/poll/148100/hesitant-support-mormon2012.aspx>.

213. *Id.* It is unlikely that this figure was affected by Mitt Romney's popularity among Republican voters in 2011; Saad notes that it is “largely unchanged since 1967.” *Id.* We may, of course, question the sincerity of the anti-Mormon sentiment indicated in this poll in light of the close results of the 2012 presidential election.

214. Penny Edgell, Joseph Gerteis & Douglas Hartmann, *Atheists as “Other”: Moral Boundaries and Cultural Membership in American Society*, 71 AM. SOCIOLOGICAL REV. 211, 217–18 (2006). As to the first question, 39.6% of respondents replied that atheists disagree with their vision of American society. *Id.* Atheists were followed by Muslims (26.3%), homosexuals (22.6%), and, interestingly, conservative Christians (13.5%). *Id.* Nearly half of the American public—47.6%—would disapprove of their child marrying an atheist, followed by Muslims (33.5%), African Americans (27.2%), Asian Americans and Hispanics (tied at 18.5%). *Id.*

American society altogether.”<sup>215</sup> Given that construction, the resilience of Americans’ opposition to the Supreme Court’s perceived secularization of the public school system in the line of cases beginning with *Engel* and *Schempp* is hardly surprising.<sup>216</sup>

The American public’s deep aversion to irreligion likely explains why the Court’s decisions also received little support from the elected branches of the national government, whose institutional responses have ranged from lukewarm acquiescence to outright defiance of the Court’s decrees. Unlike the Court’s controversial school desegregation cases, as to which Rosenberg argues the active support of Congress and the president was essential to the degree of success that the Court eventually achieved, no other branch of government has shown any enthusiasm for supporting the Court’s position on the issue of prayer and devotional observance in public schools in the decades since the first of these cases was decided. To the contrary, Democratic and Republican politicians have generally agreed that the Court’s decisions are too secular in setting forth a vision of relations between religion and government in the context of public education, distinguished primarily by the intensity of that conviction and the distance to which they believe the line should be moved back in favor of increased religious observance in the public classroom. Congress’s institutional responses to the Court’s decisions have been largely hostile, aimed at reversing the Court through constitutional amendment or, failing that, limiting the impact of the Court’s rulings through the funding and guidance provisions of the NCLB in order to preserve the greatest legally permissible zone of liberty for religious observance in public schools. Indeed, the best that can be said of the elected branches’ cooperation with the Court in this area is that, on occasion, a well-placed supporter of the Court’s position has succeeded in utilizing one of the numerous veto points in the legislative process to prevent legislative action adverse to the Court’s rulings, as was the case, for example, when Representative Emmanuel Celler (D-NY) utilized his position as Chairman of the House Judiciary Committee to delay and eventually derail the Becker Amendment in 1964.<sup>217</sup> In short, and with a few notable exceptions, American politicians have long seen association with atheism or secularism as a losing proposition for their career prospects, and have been quite reluctant, whatever their personal views on the matter, to risk

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215. *Id.* at 230.

216. Muir suggests that atheists’ outsider status may have counterintuitively encouraged compliance with the school prayer decisions by lending credibility to threats to litigate against non-compliant school districts. *See* MUIR, *supra* note 171, at 123. The “average Midland educator,” writes Muir, viewed opponents of school prayer policies as “ultraliberals,” “a bunch of crackpots,” and “inverse bigots”; such individuals enjoyed the “special bargaining force of men who refuse to be sensible” and were, in the view of the educators, “too obstinate or too unintelligent to realize what they were doing when they brought a lawsuit.” *Id.* at 123–24.

217. *See* Beane & Beiser, *supra* note 95, at 29–30.

being perceived as advancing the cause of irreligion in the public sphere, including public education. The Court's highly separationist interpretations of the Establishment Clause have thus far escaped reversal by constitutional amendment largely on the basis of the significant institutional advantage enjoyed by the status quo in the American constitutional system, notwithstanding significant popular and political support for such an amendment.

It is thus hardly surprising that the Court's decisions restricting the commingling of religious observance with secular education in the public schools were met with a high degree of public opposition, or that compliance with the Court's decisions in public classrooms has been less than perfect. Perhaps even more so than its infamously controversial decisions on racial desegregation, the Court's school prayer decisions—at least to the extent that they were associated in the public eye, fairly or not, with the advance of atheism—struck at a foundational premise of Americans' perception of themselves as a people. What is much more surprising, then—and unexplained by either Rosenberg's Constrained Court model or Hall's version of the Dynamic Court view—is that, in the face of this public outcry and in the absence of more than tepid support from a few elected officials, the Court's decision was nevertheless broadly implemented even in some localities in which public sentiment was strongly opposed to a strict separation of religious and secular education. Compliance was certainly not perfect, and school districts sometimes self-reported compliance based on erroneous or willful misunderstandings of the content of the Court's decisions, but even these incomplete measures indicate the extent to which local officials feel compelled to present at least the appearance of compliance. The question of why, in the face of public opposition and the absence of any direct enforcement measures by the Court, these officials felt so compelled is a difficult one for either of the prevailing models of judicial power to explain. We will turn to that question in the next section.

#### V. LESSONS FROM THE SCHOOL PRAYER DECISIONS: OMISSIONS AND OVERSIGHTS IN THE CONSTRAINED AND DYNAMIC COURT MODELS

The degree of compliance with the Supreme Court's rulings in the area of religion in public schools notwithstanding determined popular opposition and the Court's relative lack of an enforcement apparatus calls into question the Hamiltonian assumptions about the nature of judicial power that lie at the foundation of both models of judicial authority. In particular, the broad acquiescence to the Court's anti-establishment cases notwithstanding widespread and persistent public disapproval demonstrates that the Court is capable of overcoming its institutional constraints to produce social change in ways that neither Rosenberg nor Hall fully articulate. It is not our intention here to offer a fully formed alternative model of judicial power to supplant

those of Rosenberg and Hall, but rather to suggest, on the basis of the foregoing case study as well as existing socio-legal scholarship on legal compliance, additional mechanisms that could account for the pattern we observe and offer a more accurate model of courts' capacity to effect substantial social change in other cases.

The broad question of when, and whether, landmark judicial decisions are capable of effecting widespread social change cannot be resolved with an acceptable degree of precision through a single case study. However, we believe that the school prayer decisions offer a compelling counterpoint to Rosenberg's claim that courts are "almost never" capable of effecting significant social change, or that they can do so only when the four institutional constraints that Rosenberg identifies are overcome and one of the necessary "conditions" are met.<sup>218</sup> Our review of the empirical studies of compliance with the school prayer decisions suggests that the Constrained Court model fails to recognize at least one instance in which the Court has been able to achieve widespread though imperfect compliance with its orders without the support of the other branches of the federal government and in spite of popular opposition to the Court's separationist interpretation of the Establishment Clause.

The Dynamic Court view, broadly defined as the view that courts can effect social change in more than a narrowly constrained set of circumstances, seems better able to account for the degree of public compliance with the school prayer decisions; but advocates of the Dynamic Court view have failed to explain satisfactorily the mechanisms by which the Court can create social change on a national scale, leaving them especially vulnerable to methodologically sophisticated attacks by critics like Rosenberg.<sup>219</sup> Among proponents of the Dynamic Court model, only Matthew Hall has attempted to articulate a fully fledged model of judicial power to rival Rosenberg's presentation of the Constrained Court view. Although Hall's elaboration of the Dynamic Court model, which explains judicial power as a function of the verticality and popularity of the decision in question, is more rigorous than early critics of Rosenberg who presented no alternative model,<sup>220</sup> its inability to account for the level of compliance with the religion decisions suggests some yet unaccounted for aspects of the Supreme Court's institutional ability to induce compliance. While Hall criticizes Rosenberg for "us[ing] up all of his degrees of freedom" by "creat[ing] seven rules to explain three events," Hall's model, although avoiding the statistical over-specification problem, turns on two independent variables that lack sufficient explanatory power to predict the

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218. ROSENBERG, *supra* note 6, at 422.

219. *Id.* at 35.

220. See Baum, *supra* note 35, at 175; Feeley, *supra* note 49, at 746–47. See also Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715 (1992).

pattern of compliance with the school religion cases.<sup>221</sup> Accordingly, we suggest below some additional factors not considered by Hall or Rosenberg that appear relevant to the pattern of compliance observed in response to the school prayer cases that may be relevant to the study of judicial power more generally.

The most compelling factor that both Rosenberg and Hall overlook does not operate on the level of constitutional structure, but rather individual human psychology. Neither Rosenberg nor Hall takes into account the autonomous normativity of law *qua* law—that is, the tendency of legal norms, simply by virtue of their status as *legal* norms, to motivate compliance independently of the subject's personal views of the wisdom or morality of particular legal rules. This phenomenon is explored in depth in Tom Tyler's psychological studies of legal compliance. In an influential study, Tyler conducted a panel study in which an initial cohort of 1575 residents of Chicago were administered a telephone survey regarding their attitudes toward legal obligations and compliance; of that group, 804 were selected for a follow-up survey one year later.<sup>222</sup> Tyler's survey experimentally contrasts the "instrumental" view of compliance, which holds that individuals comply with legal rules only because it is in their immediate self-interest to do so, with the "normative" view that compliance is motivated to some degree by the perceived legitimacy of law—its capacity to impose moral obligations to obey that transcend immediate self-interest.<sup>223</sup> Tyler's results lend strong support to the "key implication" of his work: "that normative issues matter."<sup>224</sup> For example, survey respondents in Tyler's study showed a remarkable tendency to moralize compliance even with legal offenses typically classified as *mala prohibita* such as speeding, littering, and illegal parking.<sup>225</sup> Moreover, a "striking" majority of respondents—82%—agreed that "[people] should obey the law even if it goes against what they think is right."<sup>226</sup> Tyler concludes that the normative model better describes compliant behavior insofar as individuals are motivated to comply with legal authorities that they deem "legitimate" without reference to whether compliance advances their narrow self-interest in specific cases.<sup>227</sup>

An adequate model of judicial power must take into account the normative force of law *qua* law in motivating compliance even when the subjects of law may disagree on normative grounds with the policy that the law prescribes.

221. HALL, *supra* note 37, at 161.

222. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 4–5, 8 (1990).

223. *Id.* at 161–62.

224. *Id.* at 178.

225. *Id.* at 44. Eighty-four percent of Tyler's respondents indicated that it is "morally wrong" to speed; 86% said the same concerning illegal parking. *Id.*

226. TYLER, *supra* note 222, at 45.

227. *Id.* at 161, 167, 178.

Indeed, the normative force of law is seen in some of the empirical studies of compliance with the school prayer decisions as a factor motivating compliance in communities that disagreed strongly with the Court's anti-establishment position. In Birkby's study, for example, respondents emphasized the importance of "set[ting] an example" for children and "obey[ing] [Federal] law" in explaining their decision to comply with the Court's rulings notwithstanding their disagreement with the Court's separationist vision of the relationship between religion and public education.<sup>228</sup> This effect may be reinforced by religious norms mandating deference to "civil authority" where such authority does not conflict with religious obligations.<sup>229</sup> Muir's study likewise suggests that the force of legal authority can create normative imperatives notwithstanding individuals' disagreement with the Court's policy decisions.<sup>230</sup> Of course, the normative force of law can be outweighed by other factors, and individuals may vary significantly in the extent to which they ascribe moral force to legal edicts.<sup>231</sup> Nevertheless, the available evidence suggests that the law's moral legitimacy may play an important role in motivating compliance even with unpopular rulings that the Court lacks the institutional capacity to directly enforce.

A more institutionally oriented perspective might emphasize the extent to which the Court's decisions strengthen the hand of minority groups "[b]argaining in the [s]hadow of the [l]aw."<sup>232</sup> That is, the Court's declaration of a legal norm provides a political and rhetorical resource upon which advocates of change may rely to advance their preferred policy outcomes even in the face of majoritarian opposition.<sup>233</sup> Even where a majority of the community might prefer to defy the Court and maintain a policy of prayer, Bible reading, or other religious observance in public schools, the Court's decisions enable dissenting minority groups to credibly threaten protracted litigation against local district officials who refuse to bring their policies into compliance with controlling legal norms. Even aside from the possibility of an eventual court order mandating policy changes, the threat of litigation itself can be a motivating factor insofar as litigation makes the decision to resist the

228. Birkby, *supra* note 183, at 116.

229. *Id.* (quoting one respondent's statement that "[w]e are commanded by the Bible to be subject to civil powers as long as their laws do not conflict with laws of God."); see *Matthew* 22:21 ("Then saith he unto them, Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's.").

230. See MUIR, *supra* note 171, at 1–2, 111–21, 138.

231. Dolbeare and Hammond, for example, found "[no] differentiation between school board members in law-abidingness" that might account for the failure of Midway school districts to comply with the Court's decisions. Dolbeare & Hammond, *supra* note 175, at 114.

232. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979).

233. See SCHEINGOLD, *supra* note 174, at 147.



Court's order more costly.<sup>234</sup> In addition to the direct financial costs that defending a lawsuit imposes on the school district, the litigation process may subject the district and individual officials to potentially uncomfortable media scrutiny and can distract those same officials from other duties as they must invest time and attention on communicating with counsel and gathering information in response to discovery requests. This suggests a longer-term mechanism whereby the Supreme Court's decisions may shift the political balance of power in local politics and embolden dissenting minority groups to press their demands for change backed by the credible threat of costly and inconvenient litigation.<sup>235</sup> Consistent with this view, then, it is conceivable that the Court's orders in the school prayer cases created a sense of "entitlement" among the community of parents opposed to religious exercise in schools that empowered and mobilized them to seek change in their local communities. This could account for the slow but steady rate of increasing compliance reflected in the estimates of Dolbeare and Hammond<sup>236</sup> and McGuire.<sup>237</sup>

Timothy Lytton's account of the impact of sex abuse litigation in bringing about institutional reform within the Catholic Church offers an account consistent with Mnookin and Kornhauser in its emphasis on the indirect effects of judicial decisions in effecting widespread change, but it focuses less on the effect of judicial power in equalizing differentials in political power than on its effects in overcoming bureaucratic inertia.<sup>238</sup> "In contrast to Rosenberg's sweeping claim," writes Lytton, "litigants in clergy sexual abuse litigation *were* effective in producing major policy changes within the Catholic Church and among law enforcement, and smaller but still significant policy changes within state legislatures across the country."<sup>239</sup> Lytton offers several mechanisms in his account of how litigation achieved institutional change in the Catholic abuse cases: "litigation framed the problem of clergy sexual abuse as an issue of institutional failure, placed that issue on public and institutional agendas, and generated information essential to addressing it."<sup>240</sup> Courts, in

234. Cf. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT*, at xv–xix, 199–200 (1979). Feeley's study focuses on the transaction costs of litigation in a lower criminal court, but some of his insights concerning the costs, financial and otherwise, of the litigation process upon its participants apply with equal force to civil constitutional litigation. *Id.*

235. As Muir noted, opponents of public school prayer policies may have been perceived as especially likely to follow through on threats to litigate because of their reputation as "crackpots" who adopt "tactics like the Fascists used." MUIR, *supra* note 171, at 123.

236. Dolbeare & Hammond, *supra* note 175, at 110.

237. McGuire, *supra* note 189, at 6–7.

238. See TIMOTHY D. LYTTON, *HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE* 3–6, 207–08 (2008).

239. *Id.* at 207.

240. *Id.* at 207–08.

other words, are effective in generating publicity and bringing otherwise unavailable information into public view. While the mechanisms Lytton posits work well in the case of clergy sexual abuse, in which the plaintiffs' allegations once established as credible were met with nearly universal outrage, we wonder whether they would be similarly effective in cases in which the plaintiffs' position is broadly unpopular. While Lytton explains that the Catholic Church and related groups have argued with some limited success that clergy sexual abuse is a matter best handled internally by the church, there is no pro-sex abuse lobby opposed to the plaintiffs' position in these cases; the same cannot be said for cases involving school prayer, desegregation, and many others discussed by Rosenberg and Hall.

Another factor that judicial impact scholars have not yet considered is that the Court's power may be greater where structural alternatives to compliance exist. This is best illustrated by an example: In the school religion cases, the Court's rulings only prohibited students from engaging in school-sanctioned, religious activities in public schools; however, as President Kennedy observed in the immediate aftermath of *Engel*, students remained perfectly free to engage in such activities elsewhere, including at home, at church, or in private schools. The availability of these alternatives helps explain why, although public opposition to the Court's school religion decisions has remained consistently high, public schools faced less pressure to resist the Court's orders than Hall's model predicts. Many parents who were moderately opposed to the Court's decision likely found home and church sufficient alternative venues for religious instruction, and those who were most intensely opposed opted out of the public education system entirely in favor of private religious or home schooling, in which the Court's rulings posed no obstacle. In fact, the Court's school prayer decisions are largely credited with initiating the movement toward non-Catholic private religious education in the United States.<sup>241</sup> The availability of alternative venues for religious activity thus contributed to public acceptance of the school religion decisions by providing those private citizens most inclined to resist the Court's ruling with an opportunity to comply without violating their deeply held moral and religious beliefs.

Other mechanisms may present themselves upon further study. We propose the above mechanisms as neither necessary nor sufficient, but simply illustrative of the possibilities implied by the literature on this subject and yet unaccounted for by the currently prevailing models of judicial impact.

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241. See Neal Devins, *State Regulation of Christian Schools*, 10 J. LEGIS. 351, 356-57 (1983).

## CONCLUSION

The debate about the nature of the Supreme Court's power has endured for more than two hundred years, and it may well continue for two hundred more. But by exposing an apparent contradiction in both of the prevailing models of Supreme Court power—the religion-in-schools cases—and proposing several alternative and unexamined mechanisms through which the Supreme Court can bring about social change, this Article moves the conversation between modern-day Federalists and Anti-Federalists substantially forward. Neither the Constrained nor Dynamic Court view, as we demonstrate here, are capable of fully explicating the way in which the Supreme Court can and does engender social change; ironically, though, both theories, while in almost total disagreement, are in this case wrong in precisely the same way.

In our effort to expose this critical shortcoming of the two prevailing models of judicial power, we make several additional contributions to the relevant legal literature. First, we introduce to the Rosenberg-Hall debate important insights gained from other literatures, including the socio-legal and political science literatures. We suggest, for example, that the Court's power, in some cases, is a function of individual- and societal-level beliefs and perceptions that often have little or nothing to do with the actual substance of the Court's decisions or its institutional resources. Second, we demonstrate that the judicial impact literature's failure to pin down the meaning of "compliance"—the standard against which the Court's success or failure is to be measured—makes it difficult to have a constructive conversation, and near-impossible to answer the questions in which most students of judicial impact are interested.

The effort to understand the role of and constraints on courts in the United States is much more than an academic exercise. Resorting to the court system, though exceedingly common in the United States, is resource intensive in terms of time, money, and manpower—resources that many of those people and institutions appealing to courts to effect their preferred outcomes tend not to have in sufficient quantities. And this pattern of relying on courts to solve a nation's most thorny social problems, according to Robert Kagan and Charles Epp, has been exported to and adopted by other countries in recent decades. It is critical for those who seek to effect social change on a grand scale to have realistic expectations as to what litigation and courts, in general, can and cannot be expected to accomplish. That is to say, if, as Rosenberg suggests, courts cannot deliver on their promise to effect social reform, then activists should re-allocate their resources and re-think their court-centric strategies. Although we believe that Rosenberg's analysis leaves much to be desired, neglecting to consider important ways in which courts can bring about social change, we recognize that the question of judicial impact has not been, and nor

can it be, resolved through one case study, however robust or compelling it may be.

Moreover, understanding the nature of judicial power, in addition to being of practical consequence for change-seekers, is essential to understanding some of this nation's most treasured institutions, as well as its history. For example, at the heart of Rosenberg's *The Hollow Hope* and the debate that erupted after its publication in 1991 is a question about the Supreme Court's role in ending segregation, and to a lesser extent, advancing women's, criminal defendants', and LGBT persons' rights. Rosenberg's pronouncement that the Court is a "hollow hope" under all but the most limited circumstances stirred up the academic and legal communities because it represented a rejection of the conventional wisdom about what works, and further, because it represented a rejection of the conventional wisdom about ourselves. In short, we cannot hope to understand our past if we do not first understand our foundational institutions.

In sum, although we do not here identify the precise contours of American courts' power, the above analyses demonstrate that those institutions are far more capable of producing social change than the conventional wisdom would suggest. Thus, though we must continue to study the judiciary's impact on society to fully understand it, those who seek to realize social reform through the courts would be unwise to abandon them now.

