



Volume II

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Michelle Ann Fosnaugh  
Editor-in-Chief



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## Editor's Preface to the Fall 2002 Edition

*The American Undergraduate Journal of Politics & Government* provides a competitive, bi-annual platform exclusively for outstanding undergraduate papers. The *Journal* hopes to bring to the academic community the best in undergraduate research in politics and government, as well as to provide opportunities for recognition and innovation for undergraduates. I would like to recognize the relentless effort of the Editorial Board, who persisted for more than a semester to present five papers that they felt represented the strength and quality expected of the *Journal*.

In its fourth edition, the Editorial Board extended the invitation for submission to more colleges and universities and improved the editing process. The most significant development for this edition was the addition of political science graduate students to the Advisory Board. We appreciate the support of the faculty and graduate students in the Department of Political Science at Purdue University and would especially like to recognize Dr. William Shaffer, the department head, for his encouragement. We are also grateful to the Pi Sigma Alpha National Office for their support and commitment to our efforts.

Thank You.

Michelle Ann Fosnaugh  
Editor-in-Chief

## Submission of Manuscripts

Submissions for the *Journal* are received on a rolling basis from undergraduates of any class or major from institutions across the nation. Submitted papers must be fewer than 30 pages of typed, double-spaced text with tables and charts on separate pages. Submissions must be in the form of a Microsoft Word document and have endnote citations. All documents must be accompanied by an abstract to be considered for publication. Please include name, university affiliation, contact details, and complete works cited information. Subscriptions are available through Purdue Pi Sigma Alpha, but each edition can also be purchased individually. The *Journal* has launched a web site at [www.purdue.edu/americanjournal](http://www.purdue.edu/americanjournal), which is presently being renovated. To make a submission to the next edition or to contact the Editor-in-Chief, e-mail *The American Undergraduate Journal of Politics & Government* at [journal@polsci.purdue.edu](mailto:journal@polsci.purdue.edu).

## Determinants of the Outcomes of U.S. House Open Seat Elections

Scott Keller  
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*Recent studies of congressional elections have focused on both incumbency and campaign spending. While incumbency has been shown to have a huge advantage, little research has been done on open seat races where incumbency is not a factor. These races provide a natural way to control for incumbency so as to measure the effects of other forces present in congressional elections. This study produced an excellent model for predicting open seat races in the U.S. House. The partisan makeup of a congressional district and the previous political experience of both candidates played the largest role in determining the outcome of these open seat elections. Interestingly, campaign spending was not a significant predictor of the election results. This research provides a new foundation for examining the factors involved in Congressional elections.*

### Introduction

For years, researchers have sought to determine those characteristics that influence elections. Simply, why does one candidate receive more votes than another? By understanding these characteristics, one would be able to predict (and thus advise a candidate on) the outcome of elections based on those variables. In 1971 the United States's election campaign system was drastically changed. This change brought about increased disclosure of campaign finance information, and ever since, researchers have placed a heavy emphasis on campaign finance as a strong determinant for the outcome of federal elections. Recently, though, most researchers have concentrated their studies on the effects of incumbency.

With the increased awareness of the great amount of money pouring into candidates' war chests, some legislators have begun to push for an even greater limitation on the amounts that candidates can raise and spend. The theory behind this is that a democracy should not be controlled by elites who have the resources to mount extremely costly campaigns for public office. This political movement would be aided by concrete evidence of the effect of campaign finance. From a scientific point of view, if one were able to hold constant the effect of incumbency, the effects of campaign expenditure would be clearer to see.

I propose that one way to do so is by examining open seat elections—campaigns in which no incumbent is running. Open seat elections have no incumbency advantage, and therefore a model for elections can be created without that influence. Some would treat open seat elections as typical House campaigns, identifying incumbency as belonging to the party that previously controlled the seat. For example, if a Democrat held the district's seat in the previous term, the Democratic candidate for the current election would be considered the incumbent. This approach however, is flawed. It has been hypothesized that incumbents enjoy the advantages they do because they already have notoriety within their districts. The candidate from the previous incumbent's party would not necessarily enjoy this advantage, and thus should not be considered the incumbent for the purpose of analyzing the incumbent advantage. Indeed, this consideration would measure district party identification much more than incumbency.

Although the results achieved in this study may not offer a major shift in the explanation of elections, little research has been done on open seat elections. Open seat races can also be a strong predictor of shifts in the partisan makeup of the House. If incumbents are reelected most of the time, then it is open seats that provide both parties with the opportunity to gain seats. While a substantial proportion of House races do involve incumbents (403 of the 435 races in 2000), open seat elections represent a crucial part of the American political system. Not only do they provide the scientific means to eliminate the effect of incumbency (so as to analyze the effects of other variables on campaigns), but also open seat elections are considerably different from incumbent House races. This difference is so telling that, by focusing on open seat campaigns, we would again be able to predict the outcomes of such elections with greater accuracy.

This study will be able to add to the existing base of campaign spending models for congressional elections. In focusing on open seat elections in terms of campaign spending, a new dimension to the assessment of campaign finance will be presented. This assessment is vital in light of the current political movement for campaign finance reform. The influence of campaign spending has sparked heated debates striking at the heart of our representative democracy. While the overwhelming number of House elections have incumbents, and thus make the study of those races more practical, by eliminating the effect of incumbency, a more accurate picture of the other variables affecting congressional elections can be analyzed. This study seeks to initiate that analysis.

In short, this examination of U.S. House of Representatives open seat races should be able to produce a model explaining the vote received by candidates. In doing so, the effects present through incumbent and challenger characteristics will be controlled for naturally. I hypothesize that campaign spending, district partisanship, and previous political experience will be the substantive variables with the greatest influence on the vote. If more money is spent on a candidate's campaign, that candidate will be better known and people will be more likely to vote for him or her. The more the district partisanship is in favor of Republican candidates, the more votes the Republican candidate will receive. Finally, candidates with greater political experience will enjoy greater electoral support. Together with these core variables, minority population, candidate celebrity or notable status, and district socioeconomic status will affect the vote. A district minority population will have a strong effect in district partisanship; this can be accounted for because of the Democratic Party's traditional support among minorities. Furthermore, candidates with celebrity or notable status will receive a larger percentage of the vote. Like incumbency and campaign spending, the more well known a candidate is, the more likely people are to vote for him or her. Socioeconomic status (measured by education level) will not be strongly correlated with the vote for a particular political party. Depending on the field of study, education may or may not have a liberalizing effect on people. More education will thus not necessarily mean a shift in identifying with one party or the other.

After conducting the data analysis, as hypothesized, the effects of district partisanship, candidates' previous political experience, and celebrity status had a strong effect on the vote outcome in open seat elections. Campaign spending was not found to be significant. Minority population did have a small effect on the vote, while socioeconomic status was not correlated with the vote outcome. A solid model for predicting U.S. House open seat election outcomes was created.

## Literature Review

Previous research in the area has focused on federal elections and the effects of incumbency. There has been little research done solely on the area of open seat races, but there have been studies done on congressional races in general. The Federal Elections Campaign Act of 1971 and its Amendment of 1974 sparked much debate on the topic of campaign spending.

Jacobson found that for both House and Senate candidates, challenger campaign spending had a much greater effect in determining the vote outcome than did incumbent spending.<sup>1</sup> Jacobson's study was the earliest, best example of the scope that congressional election studies would take: they would focus on campaign finance and incumbency.

Green and Krasno's study ten years later calls into question Jacobson's finding that challenger spending has a greater effect than incumbent spending on the vote.<sup>2</sup> They contend that because Jacobson did not control for challenger quality and because he used a linear model, his results were not valid. Green and Krasno hypothesized correctly that campaign spending would have diminishing returns—that is, the marginal value of spending decreases as candidates spend more. This theoretical basis comes from equating spending with candidate publicity. At first, publicity will reach the people who have not heard much about the candidate. As more money is spent, that publicity will be reaching the same public and thus its value diminishes. Green and Krasno also critique Jacobson's findings of the incumbents' likelihood to raise money. If an incumbent were facing a stronger challenge, they would, in turn, raise more money. Thus, higher amounts of campaign spending could be correlated with a greater chance to lose the election rather than the total amount affecting the vote. Green and Krasno initiated debate over the nature of campaign finance and elections.

Abramowitz's research added other variables that Jacobson had omitted in constructing a model of election outcomes in U.S. Senate races.<sup>3</sup> He found that incumbent spending was significant and, similar to Green and Krasno, the marginal effect of challenger spending was three times greater than the effect of incumbent spending.

Gerber sought to expand upon Abramowitz's Senate model.<sup>4</sup> He concluded that instrumental variables such as candidate wealth, state population, and lagged spending (total spending in the previous Senate election held in that state) all contributed to the amount of money raised, but, at the same time, did not impact the vote. To assess the candidate's ability to contribute funds to his or her campaign, he chose to measure candidate wealth by using a dummy variable (0 for not wealthy, 1 for wealthy). Currently, existing data would allow this variable to be measured at the ratio level by looking at the amount of money a candidate personally contributes to his or her own campaign. This produces a much better representation of the intended effect on personal campaign spending than Gerber's dummy variable. Nonetheless, Gerber concluded that when the endogeneity of campaign finance levels are taken into account, the incumbent and challenger spending levels have fairly equal marginal returns.



Without a doubt, conflicting theories and results of campaign spending have been found. One reason for this is, in the attempt to determine the effect of campaign spending in congressional elections, the factor of incumbency has clouded the debate. By eliminating the strong effects of incumbency, the impact of campaign spending can be measured with greater accuracy.

Although studies of open seat races have been scant, there has been some work done on them. In Abramowitz's study on U.S. Senate elections, he provided a separate analysis for open seat races.<sup>5</sup> Unfortunately, the sample of open seats over the time period he evaluated was small. Regardless, campaign spending and the relative political experience of the candidate were the two variables having the greatest impact on the winner of the open Senate seat election. Interestingly, the partisan makeup of the states and national effects were considerably less important.

Coinciding with Abramowitz's findings on the effect of national issues on elections, Hibbing and Alford found that the positive and negative macroeconomic conditions (i.e., national issues) were only attributed to incumbents that were of the same party as the current president.<sup>6</sup> Specifically, national political and economic tides were found to have a very small effect on open seat candidates and incumbents from the party opposite that from the current president. Prior research by Kramer<sup>7</sup> and Tufte<sup>8</sup> had found that national issues influenced House elections. Considering that a large number of districts had incumbents running for reelection, Hibbing and Alford's findings expand upon this prior research. Interestingly, Gaddie found that in open seat elections, previous political experience had a much larger benefit for Democratic candidates than it did for Republican candidates.<sup>9</sup> Additionally, large district minority populations helped account for what Gaddie found to be a Democratic Party advantage in open seat races.

Previous findings show that forces such as incumbency, district partisanship, campaign spending, minority population, celebrity status and previous political experience all play some role in congressional elections. Additionally, campaign spending has been found to have a curvilinear relationship. By concentrating on open seat elections, this study can focus its efforts on developing a congressional election model that accounts for variables such as campaign spending, district partisanship, and previous political experience—all of which have been found to be significant predictors in the outcome of congressional races while controlling for the confounding effects of incumbency.

## Design and Operationalization of Variables

This study explores election outcomes in open seat congressional races. It is limited to the 2000 United States House of Representatives open seat elections; in 2000, there were 32 open seat races. Data taken only from one election cycle eliminate the effect of forces present in varying years (e.g., the effect of an incumbent president). Also, data taken only from U.S. House elections hold the total district populations relatively constant.

The dependent variable in this study is the final vote outcome. I measure it by the proportion of the vote the Republican candidate received in the two-party vote. Thus, only Republican and Democratic candidates' vote totals were used and any other political party candidates' votes were omitted. Voting results were gathered through the *Associated Press* and the *Washington Post's* coverage of the 2000 elections.<sup>10</sup>

Many independent variables were examined to see if they affected the vote outcome. First, campaign spending was examined. Jacobson<sup>11</sup>, Green and Krasno<sup>12</sup>, and Abramowitz<sup>13</sup> all found campaign spending to be a strong determinant of the vote received. The difference between the total amount spent by the Republican candidate and the total amount spent by the Democratic candidate was examined. Campaign finance information was gathered from the Federal Election Commission for the 1999-2000 election cycle.<sup>14</sup> I hypothesize that the greater the difference between the amount spent by the Republican candidate and the amount spent by the Democratic candidate, the greater number of votes the Republican candidate will receive in the election.

Besides campaign finance, another variable that was hypothesized to play an important role in determining the district vote is the partisanship of the district; in fact, district partisanship was found to be one of the two variables most affecting the vote result.<sup>15</sup> District partisanship was measured by the average of the difference between the district's two-party vote and the state's two-party vote in the 1992 and 1996 presidential election. In Abramowitz's study on House elections, he chose to measure district partisanship by the difference in the district vote for presidential candidates to the national vote in one presidential election.<sup>16</sup> By taking multiple elections into account (both of which were under the same Congressional districts), trends occurring for a single year will be eliminated. I have chosen to compare district levels of presidential vote to state levels to account for regional partisanship. Statistics for district and statewide presidential votes for the 1992 and 1996 elections were gathered from the *Almanac of American Politics 2002*.<sup>17</sup> As noted above, Abramowitz found challenger spending and district

partisanship to be the two best predictors of the election of the incumbent.<sup>18</sup> To coincide with his findings, I predict that the greater the district's Republican partisanship, the greater the vote for the Republican candidate.

A third important independent variable is the candidates' previous political experience. As Abramowitz<sup>19</sup> and Gaddie<sup>20</sup> concluded, prior political experience for a candidate in an open seat race has a sizeable effect on the vote that candidate receives. Previous political experience was measured through the use of an ordinal variable (0-no previous experience, 1-Local Official, 2-Minor State Official, 3-Major State Official).<sup>21</sup> The difference between this value for the Republican candidate and the Democratic candidate was examined to see what role having more experience plays. Gerber employed a similar system of measuring previous political experience.<sup>22</sup> These data will be collected by assessing the candidates' experience through the information provided in *Congressional Quarterly's* pre-election report appearing in the *Washington Post's* coverage of the 2000 election.<sup>23</sup> I hypothesize that the greater the difference between a Republican candidate's previous political experience and a Democratic candidate's previous experience, the more votes the Republican candidate will receive.

The size of the minority population in a district has been shown to have an effect on the vote outcome.<sup>24</sup> I created a variable that measures the percentage of Caucasians in the district. I gathered the data from the *Almanac of American Politics 2002*.<sup>25</sup> Like Gaddie, I believe that the greater the minority population in a district, the fewer votes the Republican candidate will receive. In this study, the greater the Caucasian population of the district, the more votes the Republican candidate will receive. This is due to the fact that minorities traditionally identify much more with the Democratic Party.<sup>26</sup> District partisanship could very well be an intervening variable that is influenced by the antecedent variable, Caucasian population.

In a further effort to see if district makeup influences open seat elections, a variable was created to represent the socioeconomic status of the district. This was measured by the percentage of the district's population with a college education. These data were gathered from *Congressional Quarterly* via the *Washington Post's* coverage of the 2000 election.<sup>27</sup> I hypothesize that socioeconomic status alone will not have a substantial impact on the outcome of the races. It is included in this analysis in case having a district with a higher socioeconomic status is in fact correlated with greater support for one political party over the other.

Finally, I created a variable that accounts for celebrity or notable status of a candidate. Simply, if the Republican candidate is a celebrity or notable (a television personality, for example), then the value of 1 was given to the candidate. The value of 0 was assigned to those candidates without this notable status. In this sample, no Democratic candidates could be classified as celebrities. This variable is a means to control for candidates who are already well known. Celebrity status is comparable to (if not stronger than) incumbency, as in both cases the candidate is better known than his or her other competitor. Again, using the *Congressional Quarterly's* pre-election report information on all of the candidates, the determination of notable status was made.<sup>28</sup> If a Republican candidate has this notable status, the vote for the Republican candidate will be greater.

Due to the fact that previous findings regarding national issues have centered on the presence of a sitting president and whether the candidates were of the president's party or the opposite party, and in light of Hibbing and Alford's findings, a variable to account for national issues is not present in this study.<sup>29</sup> The second term of President Clinton expired in 2000, so the presidential race was an open seat as well.

With these variables, a model for determining the percentage of the vote acquired for House open seat elections was created. Table 1 shows a list of the variables and their hypothesized relationships. Again, this model is free from any influence of incumbency and takes into account the issue of campaign spending. The statistical procedure of ordinary least squares (OLS) regression will be used to test the model.

## Data Analysis

The model created for House open seats races turned out to be extremely strong. The hypotheses presented, for the most part, were confirmed. District partisanship, difference in experience, notable status and the district Caucasian population all had direct relationships with the vote received by the Republican candidate and all contributed to the model's predictive power. Socioeconomic status, represented by the percent of the district population with a college education, was not statistically significant. Most surprisingly, however, campaign spending was found to be an insignificant predictor of the vote outcome.

To begin, an OLS regression was run including all of the variables. The statistical outcome of this regression can be seen in Table 2. The F-statistic clearly indicates that a significant model was created (Prob>F = 0), and the model itself is a very strong predictor of the vote outcome (Adjusted R<sup>2</sup> = 0.7186). The proportional reduction in error nature of the Adjusted R<sup>2</sup> value allows us to say that we have reduced our error by nearly 72

percent in predicting the value of the vote received by the Republican candidate when we know the six independent variables measured.

An examination of each independent variable tells even more about the model. Education, Caucasian population, and campaign spending all failed to achieve statistical significance (Education  $P > t = 0.732$ , Caucasian  $P > t = 0.217$ , Spending  $P > t = 0.364$ ). Experience ( $P > t = 0$ ), notable status ( $P > t = 0.003$ ), and district partisanship ( $P > t = 0.008$ ) on the other hand, were all found to be statistically secure. The Beta statistic clearly shows that the difference in experience is the variable with the most effect on the vote (Beta = 0.452) with district partisanship (Beta = 0.4049) closely behind it. Notable status also had a large impact on the vote outcome (Beta = 0.3358). Of the three non-significant variables, Caucasian population did seem to play some role in the vote outcome (Beta = 0.1668), with difference in spending (Beta = 0.0957) and education (Beta = 0.043) having much smaller effects on the vote outcome.

Tests for multicollinearity were then performed to ensure that the concepts the variables were measuring were not overlapping (see Table 3). OLS regressions were then run in which the dependent variable (Republican candidate's percentage vote) was replaced by each independent variable. These regressions could test further for multicollinearity. Table 4 displays the six separate regressions. These regressions show that district partisanship, education, and Caucasian population are all strong predictors of each other. In every instance checking for the relationships between those three variables, the results were highly significant ( $P > t$  values all less than 0.01) and the Beta values were all above the 0.45 level.

Given these tests, I estimated the OLS regression model again, this time omitting the socioeconomic status (Education) variable, which was clearly not affecting the vote outcome—as hypothesized—and was suffering from multicollinearity. Table 5 shows the results of this regression. The model remained significant (Prob > F = 0), and by omitting the education variable, the Adjusted  $R^2$  value actually increased from 0.7186 to 0.7282, thus improving the model's fit for open seat elections. Examining the Beta values, one sees that the district partisanship became a slightly stronger predictor of the vote outcome when the education variable was eliminated (Beta increased from 0.4049 to 0.431), which is expected given the multicollinearity tests. The Caucasian population and the difference in spending variables still failed to achieve statistical significance (Caucasian  $P > t = 0.207$ , Spending  $P > t = 0.349$ ), and their effect on the vote total was still minimal, as shown by each variable's Beta statistic (Caucasian Beta = 0.1429, Spending Beta = 0.0969).

At this point, given the poor results of the campaign spending variable (Spending Difference), a curvilinear relationship was examined. By using the OLS regression procedure, one assumes a linear relationship. A curvilinear relationship would not have accurate results in an OLS model. As established by Green and Krasno's major criticism of Jacobson, campaign spending is curvilinear and has diminishing returns.<sup>30</sup> In order to test for the curvilinearity of the Spending Difference variable, a new variable was created that squared the value of the Spending Difference. Due to the curvilinear relationship, when running the OLS regression with this new, squared variable, the result should produce a negative coefficient value for the Spending Difference-squared value. In fact, the model produced such a result. Because the original variable had a positive coefficient and its square had a negative coefficient, a curvilinear relationship is shown that which matches the results of previous studies.<sup>31</sup>

Given the multicollinearity finding between district partisanship and spending difference and the statistical insignificance of the spending difference variable in the previous OLS models, the spending difference variable was eliminated from the model. That is not to say that campaign spending does not have an impact on open seat elections, but the OLS procedure used assumes a linear relationship.

The model was run once again, this time without the education and spending difference variables. Table 6 shows the results of this OLS regression. Again, the model remained significant and became even stronger by eliminating spending difference (Adjusted  $R^2$  increased from 0.7282 to 0.7291). All of the remaining independent variables except Caucasian population remained significant (Caucasian  $P > t = 0.269$ ). Caucasian population, however, did have a Beta value of 0.122 showing that it did have some impact on the dependent variable.

Because Caucasian population was found to be a probable source of multicollinearity and was statistically insignificant, the regression was run for a fourth time. This time, Caucasian population, along with education and spending difference, were eliminated. The results of this regression can be seen in Table 7. All three remaining variables—experience difference, notable status, and district partisanship—were all highly significant (as seen by the  $P > t$  values being extremely close to 0) and all made strong contributions to predicting the vote outcome (the lowest Beta value was 0.3668). Nonetheless, the Adjusted  $R^2$  value did drop slightly from 0.7291 to 0.7264 with the omission of the Caucasian population variable. Due to this and the Caucasian population variable having had a sizeable Beta value in the previous regressions, it was added back into the model.

In the end, a very strong model for U.S. House open seat races was created (as shown by the Adjusted  $R^2 = 0.7291$  of the model—Table 6). The statistical results confirmed the hypothesis that district socioeconomic status

has no relationship in predicting the vote of the election. Additionally, the hypotheses that an increased Republican district partisanship, a Republican candidate with notable status, a greater difference between the Republican and Democratic candidates' experience, and a greater district Caucasian population will all result in the Republican candidate receiving more votes were confirmed. The data were inconclusive, however, on the role of campaign spending. While the analysis did not find campaign spending to be statistically significant, problems with the statistical procedure used (OLS regression) could bias that result.

## Conclusion

In sum, a strong model is produced that seeks to explain the Republican candidate's vote in U.S. House open seat elections. Room for error in this study is present. Namely, the sample size is small. In holding constant the year (2000), the institution (U.S. House of Representatives), and the type of election (open seat), the sample was reduced to 32. A greater sample would obviously yield more distinct results, but regardless, this study lays the groundwork for the creation of an open seat model. Studies in the future could examine multiple years of House open seat elections. In that case, variables will have to be added to control for Presidential coattails and other factors coming into play when the year is varied. As previously stated, a measure to control for the curvilinearity of campaign spending would yield a much more accurate account of its effect in Congressional elections. Even given that control, if spending could be separated by money spent in the primary election and money spent in the general election, one could take a closer look at open seat primary elections. In some open seat races (especially those with a lopsided district partisanship), a party cannot even provide a strong candidate to run against the party that is entrenched in the district. Just by looking at the amount of money pouring into campaigns, it is obvious that U.S. House seats are highly coveted. In some districts, this can probably be seen better at the primary election level than at the general election level. In fact, in those districts, it would be more useful to develop a model for open seat primary elections than general elections. It is also possible that open seats are usually vacated because the incumbent representative feels that his or her party will be able to retain the seat in the following election. Thus, a variable could be added to measure that effect (number of years the previous representative held the seat, for instance). This concept, though, is most likely covered by the measure of district partisanship, as the retiring representative would most likely base a huge proportion of his or her decision on that variable.

In the final analysis a very strong model was produced to measure the effects of multiple variables on the vote outcome. An  $R^2$  value above 0.72 is almost unheard of, yet this model was able to be that accurate even without accounting for campaign spending. Of particular note is the operationalization of the district partisanship variable. By comparing the district vote to the state vote of previous presidential races over multiple years, a strong measure of the concept was created. On the other hand, the anemic performance of the campaign spending was disappointing. Even given its curvilinear relationship, it is possible that campaign spending has been overestimated (at least in open seat elections). When controlling for district partisanship, campaign spending could lose its significance. Another probability is that, given the nature of open seat elections—highly contested races in which both political parties hope to gain seats—certain forces are at work to make sure that candidates can make a competitive bid for office (those in more competitive districts, for example) by being adequately funded. Thus, in highly partisan districts, the significance of campaign spending pales in comparison to district partisanship. Indeed, in competitive districts (small disparity in district partisanship), strong candidates are recruited to run, and political parties make sure that these candidates are given adequate funding to run a strong campaign. In this scenario, given the diminishing returns of spending, because both candidates would be well funded, campaign spending does not matter. If this were the case, it would imply that campaign spending has a huge impact when candidates are under funded, but it does not have nearly the same impact when they are over funded. This, in itself, would have incredible implications in the ongoing debate over campaign finance. An argument could be made that spending limits are not necessary, but all candidates should be given money up to a minimum level to keep elections competitive.

While this study cannot conclusively add much to the discussion of campaign finance, I believe it fills a wide gap in current research. Open seat elections are vital in predicting electoral and partisan shifts in U.S. government. By eliminating incumbency, one can see that district partisanship and the quality of the candidate are strong variables in predicting the outcome of Congressional elections.

## Table 1: Variables

### Dependent Variable

Percentage of the Vote Gained by the Republican Candidate

### Independent Variables

Difference of Spending between the Republican and

Democratic Candidate – Direct Relationship

District Partisanship – Direct Relationship

Difference of Political Experience – Direct Relationship

Percentage of Caucasian Population – Direct Relationship

Notable Status for the Republican Candidate – Direct Relationship

Socioeconomic Status – No Relationship

Table 2 : OLS Regression with All Variables

<b><u>All Variables</u></b>	<b>F(6,25)=</b>	14.2
N=32	<b>Prob&gt;F=</b>	0
	<b>R<sup>2</sup>=</b>	0.7731
	<b>Adj. R<sup>2</sup>=</b>	0.7186

<b>% Vote for Republican</b>	<b>Coefficient</b>	<b>Std. Error</b>	<b>t</b>	<b>P&gt;t</b>	<b>Beta</b>
Education	0.0007	0.0021	0.35	0.732	0.0434
% White	0.0019	0.0015	1.27	0.217	0.1668
Difference in Experience	0.0470	0.0106	4.44	0	0.4520
Notable Status	0.1863	0.0564	3.30	0.003	0.3358
Difference in Spending	0	0	0.92	0.364	0.0957
District Partisanship	0.6968	0.2415	2.89	0.008	0.4049
Constant	0.3255	0.1488	2.19	0.038	--

Table 3 : Correlation Table

	<u>District Partisanship</u>	<u>% White</u>	<u>Education Difference</u>	<u>Spending Difference</u>	<u>Experience Difference</u>
<b>District Partisanship</b>	1				
<b>% White</b>	<b>r = 0.434</b>	1			
	P>t = 0.0131				
<b>Education</b>	<b>0.3082</b>	<b>-0.3471</b>	1		
	0.0861	0.0516			
<b>Spending Difference</b>	<b>0.3424</b>	<b>0.213</b>	<b>-0.0082</b>	1	
	0.0551	0.2419	0.9644		
<b>Experience Difference</b>	<b>0.2777</b>	<b>-0.0424</b>	<b>0.0821</b>	<b>0.099</b>	1
	0.1239	0.8178	0.655	0.5898	

Table 4 : OLS Regressions Testing for Multicollinearity

<b><i>Education</i></b>	<b>t</b>	<b>P&gt;t</b>	<b>Beta</b>
% White	-3.14	0.004	-0.5510
Experience Difference	-1.11	0.277	-0.1726
Notable Status	-0.93	0.360	-0.1455
Spending Difference	0.17	0.864	0.0280
District Partisanship	3.24	0.003	0.5989

  

<b><i>White</i></b>	<b>t</b>	<b>P&gt;t</b>	<b>Beta</b>
Education	-3.14	0.004	-0.4993
Experience Difference	-0.68	0.502	-0.1022
Notable Status	0.73	0.472	0.1093
Spending Difference	-0.78	0.441	-0.1190
District Partisanship	3.91	0.001	0.6472

  

<b><i>Experience Difference</i></b>	<b>t</b>	<b>P&gt;t</b>	<b>Beta</b>
Education	-1.11	0.277	-0.2625
% White	-0.68	0.502	-0.1715
Notable Status	-0.50	0.620	-0.0978
Spending Difference	0.04	0.968	0.0082
District Partisanship	1.71	0.099	0.4391

  

<b><i>Notable Status</i></b>	<b>t</b>	<b>P&gt;t</b>	<b>Beta</b>
Education	-0.93	0.360	-0.2220
% White	0.73	0.472	0.1839
Experience Difference	-0.50	0.620	-0.0981
Spending Difference	0.42	0.678	0.0835
District Partisanship	0.29	0.776	0.0778

  

<b><i>Spending Difference</i></b>	<b>t</b>	<b>P&gt;t</b>	<b>Beta</b>
Education	0.17	0.864	0.0411
% White	-0.78	0.441	-0.1930
Experience Difference	0.04	0.968	0.0079
Notable Status	0.42	0.678	0.0805
District Partisanship	1.59	0.123	0.4040

  

<b><i>District Partisanship</i></b>	<b>t</b>	<b>P&gt;t</b>	<b>Beta</b>
Education	3.24	0.003	0.4793
% White	3.91	0.001	0.5715
Experience Difference	1.71	0.099	0.2311
Notable Status	0.29	0.776	0.0408
Spending Difference	1.59	0.123	0.2201



Table 5 : OLS Regression without Education

<b><u>Without Education</u></b>	<b>F(5,26)=</b>	17.61
N=32	<b>Prob&gt;F=</b>	0
	<b>R<sup>2</sup>=</b>	0.772
	<b>Adj. R<sup>2</sup>=</b>	0.7282

<b>% Vote for Republican</b>	<b>Coefficient</b>	<b>Std. Error</b>	<b>t</b>	<b>P&gt;t</b>	<b>Beta</b>
% White	0.0016	0.0013	1.29	0.207	0.1429
Difference in Experience	0.0462	0.0102	4.55	0	0.4446
Notable Status	0.1828	0.0545	3.35	0.002	0.3295
Difference in Spending	0	0	0.95	0.349	0.0969
District Partisanship	0.7416	0.2004	3.70	0.001	0.4310
Constant	0.3631	0.1001	3.63	0.001	--

Table 6 : OLS Regression without Education and Spending  
Difference

<b><u>Without Education &amp; Spending Difference</u></b>	<b>F(4,27)=</b>	21.86
	<b>Prob&gt;F=</b>	0
N=32	<b>R<sup>2</sup>=</b>	0.764
	<b>Adj. R<sup>2</sup>=</b>	0.7291

<b>% Vote for Republican</b>	<b>Coefficient</b>	<b>Std. Error</b>	<b>t</b>	<b>P&gt;t</b>	<b>Beta</b>
% White	0.0014	0.0012	1.13	0.269	0.1220
Difference in Experience	0.0462	0.0101	4.56	0	0.4446
Notable Status	0.1868	0.0543	3.44	0.002	0.3367
District Partisanship	0.8132	0.1855	4.38	0	0.4725
Constant	0.3821	0.0979	3.90	0.001	--

Table 7 : OLS Regression without Education, Spending Difference,  
and Caucasian Population

<b><u>Without Education,</u></b>	<b>F(3,28)=</b>	28.44
<b><u>Spending, &amp; White</u></b>	<b>Prob&gt;F=</b>	0
N=32	<b>R<sup>2</sup>=</b>	0.7529
	<b>Adj. R<sup>2</sup>=</b>	0.7264

<b>% Vote for Republican</b>	<b>Coefficient</b>	<b>Std. Error</b>	<b>t</b>	<b>P&gt;t</b>	<b>Beta</b>
Difference in Experience	0.0459	0.0102	4.51	0	0.4418
Notable Status	0.2035	0.0525	3.88	0.001	0.3668
District Partisanship	0.9009	0.1693	5.32	0	0.5235
Constant	0.4915	0.0143	34.43	0	--

<sup>1</sup> Gary C. Jacobson, 1978. "The Effects of Campaign Spending in Congressional Elections." *The American Political Science Review* 72 (June): 469-491.

<sup>2</sup> Donald Philip Green and Jonathan S. Krasno, 1988. "Salvation for the Spendthrift Incumbent: Reestimating the Effects of Campaign Spending in House Elections." *American Journal of Political Science* 32 (Nov): 884-907.

<sup>3</sup> Alan I. Abramowitz, 1988. "Explaining Senate Election Outcomes." *The American Political Science Review* 82 (June): 385-403.

<sup>4</sup> Alan Gerber, 1998. "Estimating the Effect of Campaign Spending on Senate Election Outcomes Using Instrumental Variables." *The American Political Science Review* 92 (June): 401-411.

<sup>5</sup> Abramowitz, 385-403.

<sup>6</sup> John R. Hibbing and John R. Alford, 1981. "The Electoral Impact of Economic Conditions: Who is Held Responsible?" *American Journal of Political Science* 25 (Aug): 423-439.

<sup>7</sup> Gerald H. Kramer, 1971. "Short-Term Fluctuations in U.S. Voting Behavior, 1896-1964." *The American Political Science Review* 65 (Mar): 131-143.

<sup>8</sup> Edward R. Tufte, 1975. "Determinants of the Outcomes of Midterm Congressional Elections." *The American Political Science Review* 69 (Sep): 812-826.

<sup>9</sup> Ronald Kieth Gaddie, 1995. "Is There an Inherent Democratic Party Advantage in United States House Elections? Evidence from the Open Seats." *Social Science Quarterly* 76 (Mar): 203-212.

<sup>10</sup> *The Washington Post*, Election 2000 Results, 21 Dec 2000, <http://www.washingtonpost.com/wp-srv/onpolitics/elections/2000/results/house/front.htm>

<sup>11</sup> Jacobson, 469-491.

<sup>12</sup> Green and Krasno, 884-907.

<sup>13</sup> Abramowitz, 385-403.

<sup>14</sup> United States, Federal Election Commission, 2002. 2000 House and Senate Campaigns, [http://www.fec.gov/finance\\_reports.html](http://www.fec.gov/finance_reports.html)

<sup>15</sup> Alan I. Abramowitz, 1991. "Incumbency, Campaign Spending, and the Decline of Competition in U.S. House Elections." *The Journal of Politics* 53 (Feb): 34-56.

<sup>16</sup> Ibid.

<sup>17</sup> *Almanac of American Politics 2002*, National Journal Group, Inc., <http://nationaljournal.com/members/almanac/2002/states/>

<sup>18</sup> Abramowitz, "Incumbency, Campaign Spending...", 34-56.

<sup>19</sup> Abramowitz, "Explaining Senate Election Outcomes.", 385-403.

<sup>20</sup> Gaddie, 203-212.

<sup>21</sup> Examples: minor local officials have served in city or county government, minor state officials have served as state legislators, and major state officials have held state-wide office.

<sup>22</sup> Gerber, 401-411.

<sup>23</sup> *The Washington Post*, Election 2000 Results.

<sup>24</sup> Gaddie, 203-212.

<sup>25</sup> *Almanac of American Politics 2002*.

<sup>26</sup> Gaddie, 203-212.

<sup>27</sup> *The Washington Post*, Election 2000 Results.

<sup>28</sup> *Ibid.*

<sup>29</sup> Hibbing and Alford, 423-439.

<sup>30</sup> Green and Krasno, 884-907.

<sup>31</sup> *Ibid.*

## Realism, Idealism, and Determination: United States Foreign Policy toward Angola during the Presidential Administrations of Ford, Carter, and Reagan: 1975-1989

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*At the onset of the Cold War after World War II ended in 1945, the United States took a pointed interest in the emergence of post-colonial Africa. The United States formed a policy toward Angola that was largely intended to shut the Soviets out of the region. However, the Ford Administration saw the Tunney Amendment ban the use of U.S. funds for Angola unless specified in the budget, and six months later the Clark Amendment made this ban permanent. The Carter Administration presented a confused strategy from idealist cooperation to realist anticommunism, while its successor Reagan returned to the clear anticommunist commitment of the Ford Administration. The Reagan Administration was also able to bargain for the repeal of the Clark Amendment and arrange for withdrawal of Cuban troops and South African aid from Angola. The fifteen-year period, from 1975 to 1989, serves as a stark reminder of the various ideologies, influences, and actors that serve to shape American foreign policy.*

### Introduction

At the onset of the Cold War after World War II ended in 1945, the United States took a pointed interest in the emergence of post-colonial Africa. Specifically, this interest centered on a succession of African states which were beginning to enjoy freedom from centuries of outside domination. The driving question for both the United States and the Soviet Union was this: Would the newly independent states install governments based on pro-Western democracies, or would there be drives to set up socialist governments based on Soviet ideology? This essay explores one of those nations at the dawn of independence and examines the highly divergent strategies that three United States presidential administrations took in crafting foreign policy toward the southwestern African nation of Angola. The independence of many African states provided opportunities for the United States. However, Angola had attracted attention from not only the U.S. and the Soviet Union, but also its previous colonizer, Portugal, and even had an intervention by Cuba. This multi-pronged attention to Angola led the United States to craft some of the most fascinating and challenging strategies it had toward another nation, especially one that previously had been so unattractive.

The United States formulated a policy toward Angola and its colonizer Portugal that was largely intended to keep the Soviets out of the region. Previously, the United States produced little in the way of a foreign policy toward Africa, leaving the region to the powerful colonizers. Angola was a region of little interest to the United States until 1975, when Angola was preparing for its independence. This led the shapers of U.S. foreign policy to approach relations with Angola in divergent ways. Furthermore, events that developed at that time also influenced U.S. legislators and thus had a significant impact on how the U.S. would act in its further interactions with Angola. An agreement by three Angolan organizations in early 1975, followed shortly thereafter by a pair of amendments set forth by U.S. legislators, set the stage for a new phase in American foreign policy toward Angola, which would last for the next fifteen years. These events affected the presidential administrations of Gerald Ford, Jimmy Carter, and Ronald Reagan.

### Leading Up to 1975: U.S. Foreign Policy Toward Angola, Post-World War II to Pre-Angolan Independence

Back in the 1950's, the foreign policy of the United States toward European colonies in Africa was underscored by the outgoing President Dwight D. Eisenhower's actions regarding a UN vote that would declare self-determination for the colonies run by Portugal, including Angola. The American UN ambassadors abstained from casting a vote per Eisenhower's instructions. The administration suspected that the processes leading to the independence of African nations were being manipulated by the Soviet Union to allow it to install a communist government. This U.S. attitude toward the continent of Africa was largely unchallenged, with a notable exception of

Senator John F. Kennedy who perceived moving toward decolonization as the “wave of the future.” Kennedy saw the rise in nationalism and the quest for independence as being unstoppable, and later, during his term as president, used American arms and money in the ongoing struggle in Angola. During this era, the foreign policy of the United States toward Angola could be seen as one that was shaped more by fears of communism than by longing for good relations.<sup>1</sup>

Attempts at relations with Angola, and Africa in general, were placed well below those with the Soviet Union and China during the presidential administrations of Lyndon Johnson and Richard Nixon. The priorities of the relations were so far down the scale that the National Security Council (NSC) declared that, while relations were important with African states, emphasis should be placed on those states with U.S. interests, including those with majority Caucasian governments. President Johnson increased military assistance to Portugal and both President Nixon and National Security Advisor Henry Kissinger placed their faith and support with the Portuguese government’s rule over Angola. Nevertheless, Portuguese dominance in the region would soon come to an end.<sup>2</sup>

On November 11, 1975 during the administration of President Gerald Ford, Angola celebrated its independence from Portugal. Henry Kissinger, a key member of the Nixon Administration and a large influence in relations with Angola, was serving as Secretary of State in the new administration. This was an era during which the American people were finally seeing the end of the long American intervention in Vietnam. Would the public’s exhaustion from this bitter conflict in Southeast Asia influence legislators to hold back from involving the country in yet another intervention to stem the tide of Soviet expansion? The U.S. desired relations with Angola in order to prevent communism from taking hold in that region and took covert action to assist the pro-Western faction in defeating the pro-Soviet Angolan organizations. However, in the midst of Angola’s Independence Day, a series of events occurred that culminated in an abrupt change in U.S. foreign policy towards the African state.<sup>3</sup>

## A Short History of Angola’s Long Road to Independence

During the nineteenth century, there was a “scramble for Africa” in which several European states and kingdoms carved boundaries throughout Africa for the purposes of colonizing the continent. Africa was rich in raw materials, provided European corporations the necessary cheap labor, and was made up largely of tribal nations, which offered little military resistance against the might of the European armies. Portugal was one of those European powers that staked a claim in Africa, and their interest in the continent went back as far as the fifteenth century.

Under Portuguese colonial rule, Angola began a struggle for liberation starting in the 1940’s similar to those taken by other African colonies. While most African nations were gaining independence from the European colonizers, Portugal actually tried to reassert its rule over Angola. This continued dominance, coupled with the rise of Angolan nationalism, saw the emergence of liberation movements manifested in several organizations. However, these organizations held ideological stances varying from Marxist-Leninist on one side to pro-Western style democratic ideals on the other, and the drive toward independence saw the outbreak of warfare against both Portuguese rule and one another.<sup>4</sup> Although many African nationalists sought a principle of non-alignment, that is, promoting neither a Western liberal capitalist view nor a critical form of Marxism in favor of a third path of development, most wound up aligned with one of the two major ideologies.<sup>5</sup> Furthermore, a new “scramble for Africa” had begun, this time not for the attractiveness of Africa’s resources, but for a Cold War-style balance of power. The United States feared that African states would replace their colonizers with socialist or communist governments, while the Soviet Union was anxious not to let Western-style democracies spread through that part of the world.<sup>6</sup> So strong was this East-West interest in Angola, that the rival organizations received assistance, financial and military, from Algeria, Zaire, China, Cuba, and the United States.

During all of this, Portugal too, had its interests in Angola to guard. However, Portugal saw a lessening in their economic and political status as a European power. Protecting its influence in Angola, coupled with the Portuguese interests in other parts of Africa, had a costly price. This financial drain on a country already economically weak and suffering from declining morale (and increasing loss of lives) among the military in the Angolan battles led to an overthrow of the government in the capital city of Lisbon. The leader of the coup, General António de Spínola, promised to assist Angola in not only achieving independence, but also in establishing a stable government. The government of Portugal, however, wanted to relinquish power only to a unified government and sought ways to assemble a provisional leadership that would be prepared to take over when Independence Day arrived.<sup>7</sup>

The emergence of a unified government was a difficult prospect. In the 1950’s and 1960’s, three organizations were founded that began the drive toward both gaining independence and governing Angola. Portugal had its own internal issues with communism, and in 1956 the Portuguese Communist Party assisted in the formation

of the Popular Liberation Movement of Angola (MPLA), which was backed by many rural inhabitants and the Soviet Union. The United States supported another organization, the National Front for the Liberation of Angola (FNLA). Yet another faction arose that had little international support known as the National Union for the Total Independence of Angola (UNITA). Both the FNLA and UNITA sought a non-communist government, while the MPLA looked to create a Marxist state. All three groups desired the independence of Angola, but their ideological and tribal identity differences continued to drive wedges into whatever unity they could hope to achieve.<sup>8</sup>

In spite of these differences, in January, 1975, the three factions met in Alvor, Portugal, and reached an agreement that would provide for a transitional government. This agreement guaranteed a government that drew from the ranks of each of the organizations. The agreements, made less than 10 months before Angolan independence, prompted both hope and skepticism.<sup>9</sup>

The organizations could not resolve their differences and the Alvor Agreement collapsed, thus starting the country off into a state of chaos. Disagreements about policy and competition for personal power resulted in the MPLA forcing the FNLA out of Luanda and the UNITA declaring war on the MPLA. The United States Central Intelligence Agency (CIA), under the Ford Administration, channeled funds to the pro-Western FNLA, which had now allied with UNITA. In late summer 1975, South Africa, concerned with the leftist ideology of the MPLA, came to the aid of the FNLA-UNITA alliance. This led to an increase in Soviet assistance, as well as an inflow of Cuban troops to assist the MPLA.<sup>10</sup>

The desire of Portugal to move out of Angola and relinquish power to a stable government turned instead into a mere evacuation of the African nation, with Portugal simply ceding independence to the Angolan people. The MPLA had the upper hand, due to the assistance from Cuba, and set up government in Luanda, while the FNLA-UNITA alliance set up a regime of their own.<sup>11</sup> The brutal battles and conflicts that followed Angola's independence from Portugal set the tone for a fifteen-year period of divergent foreign policy between the United States and Angola.

## U.S. Foreign Policy toward Angola during the Ford Administration

The months that led up to Angolan independence saw the United States engrossed in many difficult international and domestic affairs. The Vietnam War ended with the mass evacuation of troops out of Saigon as that city fell to a communist government. President Ford bombed a Cambodian port when communists from that country seized an American freighter. The country was also reeling from the effects of the Watergate scandal and the first resignation ever by a president. Although Ford took the reins of office and inherited the unpleasantness left behind, he also brought with him from the previous administration Secretary of State Henry Kissinger.

Long involved with the Angolan issues, Kissinger continued to pay close attention to that region, and Ford too was deeply interested in the ongoing Angolan affairs. Focusing on the delicate balance of power, the U.S. continued to fund covert activities by the FNLA-UNITA alliance over the objections of the U.S. Senate. Senator Dick Clark, Chairman of the Subcommittee on Africa, had been convinced prior to Angola's independence that U.S. involvement was a big mistake, yet was unable to prevent funds from flowing through the CIA due to the secretive nature of the aid. However, a series of leaks to major newspapers opened the floodgate of information to the public. In early December of 1975, Kissinger made a public acknowledgment of the U.S. covert aid in Angola.<sup>12</sup>

Suddenly, because knowledge of the U.S. involvement in Angola had been made public, the House and Senate began a scramble to involve themselves in the Ford-Kissinger foreign policy strategies in Africa. Although the Senate had been briefed on Angolan relations, Kissinger accused them of beginning to unravel the intelligence machinery by insisting that funding should always be made public. Further, Kissinger remarked that Congress would "acquiesce in the program so long as the public did not know of it; they would run for cover once it became public" and was concerned about Senator Clark's arguments that the U.S. had no significant interests, economic or otherwise, in Angolan affairs.<sup>13</sup>

With the Senate preparing to vote on whether to cut off funding for the CIA mission, the Ford Administration had to formulate strong arguments to overcome the public mood. With the 1976 presidential election less than a year away and the tragic conclusion of the Vietnam conflict only a year prior, Kissinger and Ford had a battle on their hands. Kissinger stated the objectives: withdrawal of outside forces from Angola, negotiations with the rival factions, and a cease-fire. Additionally, he could not guarantee the assistance necessary to overcome Soviet interference in the area; the U.S. simply would not have the unity and resolve to do so. Although the Senate seemed receptive, the public mood was too overwhelming. The Senate, along with the American public and the media, felt that African affairs were too far removed from traditional spheres of influence and not vital to economic or security interests, that there was no clear time frame when the job could be completed, and that the U.S. may be backing an organization that would not be able to handle the task of governing. The overwhelming mood, as



described by Kissinger, resulted in the passage on December 19, 1975 of the Tunney Amendment, which banned the use of U.S. funds for Angola unless specifically appropriated in the budget. Six months later, in the midst of a presidential campaign, the passage of the Clark Amendment made the Tunney Amendment permanent. This ended any covert activity in Angola and made any overt assistance open to the legislative process. Despite an appeal by President Ford for the overturning of the amendment, it stayed. Ford angrily accused the Senate of abandoning responsibilities to global situations. Less than a week after the passage of the amendment, the Soviet aid to Angola accelerated, and Cuban forces arrived at a rapid rate. During an Organization for African Unity conference, twenty-two African nations refused to recognize the MPLA government.<sup>14</sup>

Ford continued to place the blame on Congress for “losing” Angola to the Soviet Union, and in November 1976 he was defeated for reelection by Jimmy Carter. The era of the realist approach to global affairs, initiated first by Richard Nixon and Henry Kissinger, and then continued by Gerald Ford and Kissinger, gave way to the idealism and visions of a cooperative future introduced by Carter.

## U.S. Foreign Policy toward Angola during the Carter Administration

Jimmy Carter raised the hopes of those who wished for a new policy towards Africa, when during his 1976 presidential campaign he stated in an interview that Soviet and Cuban presence in Angola did not necessarily pose a threat to the interests of the United States and that the U.S. missed out on opportunities to help Angola. Furthermore, he appointed high level officials that supported the recognition of the newly established People’s Republic of Angola. Yet, upon its exit from the White House in January 1981, following its defeat by Ronald Reagan, the Carter Administration still had not formally recognized Angola’s government.<sup>15</sup>

President Carter’s relations with southern Africa as a whole have been described as naïve and a failure. Although he criticized Kissinger during the 1976 presidential campaign for acting without regard for Congress, Carter too tended to act alone. Carter proclaimed early in his administration that the U.S. had entered into a worry-free era in regards to communism, yet two years later changed his strategy to an anticommunist platform. Discord between Secretary of State Cyrus Vance and National Security Advisor Zbigniew Brzezinski complicated matters even further. Carter’s inexperience with foreign affairs resulted in an incoherent foreign policy that alienated allies and invited ridicule from enemies.<sup>16</sup> Although his foreign policy achievements such as the Panama Canal treaty and the Camp David Accords were perceived as victories, Carter will likely never be seen as a strong leader in the realm of foreign policy.

Since Carter’s later stance on anticommunism developed into policy, there was a fear that recognizing the government of Angola would lead to charges by his political opponents that the administration was soft on communism. The Carter Administration intended to eventually recognize Angola’s government, but wished to do so at a more appropriate time. Arguments have been set forth as to when the right time would be, such as after the U.S. normalized relations with China, the Panama Canal treaty, or the Strategic Arms Limitation Talks (SALT). A plan to recognize the Angolan Government was formulated to take place after Carter’s election defeat and before he left office, but was abandoned after the Soviet invasion of Afghanistan.<sup>17</sup>

The U.S., still in support of UNITA, may have unwittingly helped the Soviet Union’s support of the MPLA. Relations were strained between the MPLA and the Soviet Union, and a coup was plotted for early 1978 against President Neto in order to install his main rival within the faction, Nito Alves. The plan was made with the support of the Soviet Union and two other unrevealed Eastern European states. The coup, while unsuccessful, weakened the MPLA, and the CIA and the NSC saw this as an opportunity to throw support behind UNITA. During this time Carter had sought to improve relations with the MPLA, and although Carter rejected the CIA and NSC plan, members of the MPLA had already discovered the plan and became angry with the U.S. president, driving them back toward the Soviet Union.<sup>18</sup>

Finally, Carter’s stance toward Angola may be best underscored by UNITA leader Jonas Savimbi’s visit to Washington in 1979. The administration clearly did not see the visit as meriting special attention. The highest-ranking member to meet with Savimbi was a State Department desk officer assigned to Angola.<sup>19</sup>

At the beginning of Carter’s term, it was clear that he was driven by an idealist vision of politics, justice, and cooperation. His outlook on and pursuance of strategic arms control, human rights, and international relations characterized his first years in office and was a marked departure from predecessors like Henry Kissinger and Gerald Ford.<sup>20</sup> Although his final days in office saw him move toward a realist stance, possibly due to the decline in his popularity and upcoming bid for reelection, Carter was far from the *realpolitik* of the Ford-Kissinger era and was not even close to the foreign policy that was to be the legacy of the next president, Ronald Reagan.

## U.S. Foreign Policy toward Angola during the Reagan Administration

Henry Kissinger characterized Ronald Reagan as a president that developed “a foreign policy of extraordinary consistency and relevance.”<sup>21</sup> This was a clear departure from the past four years of Carter’s incoherent and undefined policies. The charisma of Reagan, largely mocked and ridiculed by intellectuals and the media, struck a chord with the American people and enabled him to formulate a foreign policy that the public would support. His staunch commitment to anticommunism was a carry over from his days as California governor, and he brought to the White House a view of American exceptionalism that he felt was lacking in the Carter Administration. During his presidential campaign of 1980, Ronald Reagan told a leading newspaper that he favored military intervention in Angola on behalf of UNITA.<sup>22</sup> Given Reagan’s rhetoric that the Soviet Union had overreached, it came as no surprise that he would take this stance toward the MPLA.

Assistant Secretary of State for Africa Chester Crocker stated a goal that had an impact on the formulation of the Reagan Administration’s foreign policy on Angola. Crocker insisted that the path to success in Angola was to reduce or eliminate the presence of communist troops. However, Crocker did not envision U.S. military support for UNITA as a prerequisite.<sup>23</sup> At that time, of course, the Clark Amendment prohibited Reagan from taking any initiative in Angola. Nevertheless, the ongoing cost of the war to the Soviet Union and Cuba ultimately led to the reduction of troops.

In his State of the Union Address in 1985, Reagan declared that the United States must not “break faith” with those who were involved in the daily struggle against “Soviet-supported aggression.” Reagan, fresh from a landslide victory in the 1984 presidential election, was able to sweep to another win: the repeal of the Clark Amendment that had ended the Ford Administration’s Angolan foreign policy strategy. Reagan had already appealed successfully to Congress for U.S. assistance in El Salvador to help that government thwart attacks from Marxist guerrillas, and in August 1985, the Clark Amendment was repealed. Six months later, the Reagan Administration began sending a covert aid package of \$15 million dollars annually.<sup>24</sup>

Deals began that would bring a resolution to the Angolan unrest. Fighting continued between the rival factions, and Cuban presence increased. The Reagan team focused once again not just on military intervention, but also on the reduction of the Cuban presence.

A complex strategy that became known as “constructive engagement” resulted in a series of agreements, arrangements, and the intended withdrawal of Cuban troops from Angola. The United States, Angola, Cuba, and South Africa were all involved in this package deal. The MPLA was under constant threat from South African troops, thus stating their case for the necessity of Cuban presence to help protect the border between Angola and Namibia. Under South African control, Namibia was seeking independence. If Namibia was granted independence it would serve as a buffer zone between Angola and South Africa. Angola claimed that Cuban troops would be unnecessary if the attacks from South Africa would cease. Crocker, in late 1988, brokered a deal that saw the independence of Namibia, the end of South African aid to UNITA, and the reduction of Cuban and communist presence in Angola. The withdrawal of 50,000 Cuban troops was to take place over a period of three years, thus ending a presence in Angola of sixteen years.<sup>25</sup>

## Angola After 1989

The MPLA and UNITA eventually signed a peace treaty and multiparty elections were held in 1992. The leader of the MPLA faction was elected president, but amidst UNITA’s protests that the elections were fraudulent. Civil war erupted again. A peace treaty was again signed, and in 1995 the United Nations sent in a peacekeeping force. The MPLA still holds the office of the presidency. Angolan President Jose Eduardo dos Santos visited President Bill Clinton in 1995, and Secretary of State Warren Christopher made the first visit to Angola by such a U.S. official in 1996. Jonas Savimbi, the leader of the opposition party UNITA, was declared a war criminal and an international terrorist in a parliamentary resolution set forth by the National Assembly of the Republic of Angola.<sup>26</sup> He was killed in February 2002 by government troops.

## Conclusion

The 1970's brought the American people the end of the Vietnam War, Watergate, and an energy crisis. Yet it also provided fascinating insight into how foreign policy was shaped at that time. For the fifteen-year period of 1975 to 1989, a vast range of principles, beliefs, and motives were used in the formation of policy toward Angola. President Gerald Ford approached Angola with the balance of power concept, and his Secretary of State Henry Kissinger did not hesitate to use power politics, combining both force and diplomacy. The Ford-Kissinger era gave way to President Jimmy Carter's approach stressing moral principle and domestic values as the shapers of policy, and the idea that it was more important to look at a global cooperative effort to stop warfare and misery than to use the institutions of the state as the chief determinant. President Ronald Reagan used charisma and determination to drive the Soviet Union to dissolution and went before the American people to let them know that they were living in that "great shining city on the hill" and that America was powerful again.

Other actors also had major roles in determining foreign policy during this time. Senator Dick Clark's displeasure at U.S. covert action in Angola led to a complete halt of the Ford-Kissinger strategy. Clashes between Carter's Secretary of State Cyrus Vance and National Security Advisor Zbigniew Brzezinski resulted in the president's failure to give Angola proper attention. Assistant Secretary of State for Africa Chester Crocker was a key element in Reagan's "constructive engagement" negotiations.

This fifteen-year period, from 1975 to 1989, serves as a stark reminder of the various ideologies, influences, and actors that serve to shape the foreign policy of the United States and provides an unparalleled look at how one small nation was able to capture so much attention from one of the world's superpowers.

<sup>1</sup> Gerald J. Bender, 1985. "American Policy Toward Angola: A History of Linkage." *African Crisis Areas and U.S. Foreign Policy*, eds. Gerald J. Bender, James S. Coleman, and Richard L. Sklar (Berkeley: University of California Press): 110.

<sup>2</sup> Gerald J. Bender, 1987. "The Eagle and the Bear in Angola." *The Annals* 489: 126; Walter LaFeber, 1994. *The American Age: U.S. Foreign Policy at Home and Abroad 1750 to the Present* (New York: W.W. Norton): 662-663.

<sup>3</sup> Henry Kissinger, 1999. *Years of Renewal* (New York: Simon and Schuster): 815.

<sup>4</sup> Thomas Collelo ed., 1991. *Angola: A Country Study* (Washington, D.C.: Federal Research Division, Library of Congress): 23-26.

<sup>5</sup> Peter J. Schraeder, 2000. *African Politics and Society: A Mosaic in Transformation* (Boston: Bedford/St. Martin's): 131.

<sup>6</sup> Bender, "American Policy Toward Angola", 110-111.

<sup>7</sup> Collelo, 30-36.

<sup>8</sup> Bill Hammons, 2001. *The History of Cuban Intervention in Africa and Its Effects on Angola* (unpublished, by author): 11-12.

<sup>9</sup> Kissinger, *Years of Renewal*, 795.

<sup>10</sup> Collelo, 39-40.

<sup>11</sup> Collelo, 40; Hammons, 14.

<sup>12</sup> Gerald J. Bender, 1978. "Kissinger in Angola: Anatomy of Failure." *American Policy in Southern Africa: The Stakes and the Stance*, ed. René Lemarchand (Washington, D.C.: University Press of America, Inc.): 98-99.

<sup>13</sup> Kissinger, *Years of Renewal*, 828-829.

<sup>14</sup> Bender, "Kissinger in Angola: Anatomy of Failure", 99-100; Kissinger, *Years of Renewal*, 830-833.

<sup>15</sup> Bender, "American Policy Toward Angola", 113-114.

<sup>16</sup> LaFeber, 682-683, 691.

<sup>17</sup> Bender, "American Policy Toward Angola", 114.

<sup>18</sup> This section was informed by Gerald J. Bender's "The Eagle and the Bear in Angola," 127-128. Soviet support for the MPLA wavered at times, and following the coup in Lisbon, the Soviets actually threw their support not behind Neto, but one of Neto's rivals, Daniel Chipenda.

<sup>19</sup> Bender, "The Eagle and the Bear in Angola", 129.

<sup>20</sup> James M. McCormick, 1998. *American Foreign Policy and Process* (Itasca: F.E. Peacock Publishers): 126, 130-131; John T. Rourke, 2001. *International Politics on the World Stage* (New York: McGraw-Hill): 18.

<sup>21</sup> Henry Kissinger, 1994. *Diplomacy* (New York: Touchstone): 765.

<sup>22</sup> Bender, "American Policy Toward Angola", 115.

<sup>23</sup> Ibid., 115-116.

<sup>24</sup> Lou Cannon, 1991. *President Reagan: The Role of a Lifetime* (New York: Touchstone): 368-370.

<sup>25</sup> Cannon, 370; Collelo, 48-49; Hammons, 16.

<sup>26</sup> Angola, "Parliamentary Resolution Declaring Jonas Savimbi a War Criminal." Angola.org [home page on-line] available from <http://www.angola.org/referenc/laws/warcrimres012799.html> (28 July 2002); Angola, "U.S.-Angolan Relations." Angola.org [home page on-line] available from <http://www.angola.org/fastfacts/relations.html> (28 July 2002); Hammons, 16-17.

## **The Supreme Court, *Zelman v. Simmons-Harris* (2002), And the Establishment Clause: Still a "Hopel ess Disarray"**

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*In 2002, the United States Supreme Court made the most recent ruling on the controversial Establishment Clause of the First Amendment to the Constitution. Zelman v. Simmons-Harris involved the constitutionality of an Ohioan education policy that provided school vouchers to lower-income families in the Cleveland City School District. This paper reviews the Supreme Court jurisprudence on the issue and evaluates the different approaches to the case, including the commonly used Lemon Test from the Burger Court. A review of the majority and minority opinions from the Court's ruling on June 27, 2002, where it decided the Ohio voucher program was constitutional under the Establishment Clause, then directs the discourse to the anticipated impacts of Zelman.*

### **Introduction**

*Zelman v. Simmons-Harris* (2002)<sup>1</sup> was arguably the United States Supreme Court's most anticipated decision of its 2001-2002 term. *Zelman* was a case challenging the Cleveland Public School voucher program. The publicly financed program supplies parents living in Cleveland with vouchers to help pay for their children's private education. Ninety-six percent of the vouchers have gone to private religious schools. The question set before the Supreme Court was whether this was a violation of the Establishment Clause of the First Amendment, which calls for a separation of church and state. The Court ruled 5-4 that the program was constitutional.

An extensive scholarly literature exists on the Establishment Clause<sup>2</sup>, but little has been written yet on the *Zelman* case. This study seeks to contribute to what promises to be a substantial body of literature on this major Supreme Court decision.

This study will focus on two main themes: the impact of the decision on Establishment Clause jurisprudence and the impact of the decision on America's public education policy. The first theme involves an analysis of three questions involving possible changes in the Court's Establishment Clause policies. First, has the Court changed in its general approach to the Establishment Clause? Second, has the Court made modifications to the Lemon Test that was created in the early seventies to determine whether a certain program was in violation of the Establishment Clause? Finally, has the Court altered its use of specific precedent by citing certain precedents and denying the validity of others? The second theme will involve a speculative analysis of the overall effect of the Court's decision on both the program in the Cleveland public schools and the possibility of implementation of voucher programs in public schools across the nation.

Based on these themes, the paper will be divided into three parts. The first part will be an overview of the case focusing on the facts of the case, the Supreme Court's Establishment Clause jurisprudence, and public policy issues. This part will draw from the briefs of both sides, the lower federal court decisions, the decisions of precedent cases, and scholarly literature both favoring and opposing voucher programs. The second part will be an examination of the final decision focusing first on the majority and concurring opinions and then on the dissenting opinions. This will involve an overview of each justice's opinion and his or her general approach to the Establishment Clause, use of the Lemon test, use of specific precedents, and considerations of public policy. The final part will be a speculative analysis of the long-term impact of *Zelman* on both Establishment Clause jurisprudence and public policy.

### **Overview of the Case**

The Ohio Pilot Scholarship and Tutorial Program provides vouchers to low-income families to use for private school or tutorial help. The program was enacted in 1995 by Ohio's General Assembly after the United States District Court placed the Cleveland Public Schools under the direction of the State Superintendent of Public Instruction. The graduation rate for the Cleveland City School District had fallen to 32.8 percent. Only 11.6 percent of students had passed the Ninth Grade Proficiency Test, and the School District had failed to meet any of the twenty-seven performance standards set by the State of Ohio.<sup>3</sup> The purpose of the voucher program was to help solve this education crisis in the Cleveland Public Schools. Children in the applicable school districts in

kindergarten through eighth grade were provided scholarships through the voucher program, with a preference to low-income families. Many of the selected families were at or below the poverty line, and the scholarships were awarded according to financial need. Private schools that chose to participate in the program had to cap tuition at \$2,500 and the voucher paid for 90 percent of that tuition.<sup>4</sup> Parents of the child attending the private school must endorse the check to the school in order to pay tuition, and all funds received by the private school through the voucher program could be used for any purpose the school deemed appropriate. In the 1999-2000 school year, forty-six of the fifty-six private schools participating were religiously affiliated.<sup>5</sup> As an alternative to private school, the vouchers might also be used to pay for a tutor or to attend adjacent public schools. However, none of the public schools adjacent to Cleveland had chosen to participate in the program.

A suit was filed in the United States District Court for the Northern District of Ohio by the respondents, which included teachers, local religious leaders, parents of children in the Cleveland Public School system, and local taxpayers. The issue in the case was whether the voucher program violated the Establishment Clause of the First Amendment. The District Court found the Ohio Pilot and Scholarship Tutorial Program indistinguishable from the tuition reimbursement program found unconstitutional by the United States Supreme Court in *Committee for Public Education and Religious Liberty v. Nyquist* (1973).<sup>6</sup> Because the Court found that the tuition reimbursement program in *Nyquist* violated the Establishment Clause, the District Court granted the injunctive relief sought by the respondents and ruled the Cleveland voucher program unconstitutional. The case was then appealed to the Sixth Circuit Court of Appeals. The Court of Appeals affirmed the District Court's ruling. The petitioners, which included the State of Ohio, as well as Susan Tave Zelman, Superintendent of Public Instruction, and Sandra Berry, Director of the Cleveland Scholarship and Tutoring Program, petitioned the Supreme Court to overturn the Court of Appeals' ruling, while the respondents asked the Court to affirm the Court of Appeals' ruling. The Supreme Court heard oral arguments on February 20, 2002. On June 27, 2002, the Court ruled 5-4 in favor of the Cleveland Voucher program.

## The Supreme Court's Establishment Clause Jurisprudence

One reason why *Zelman* was viewed as the most important case in the Court's 2001-2002 term was because of its potential to change existing Establishment Clause jurisprudence. The Court had previously been inconsistent in its rulings on Establishment Clause cases. The Court's Establishment Clause case law is confusing and has often been misinterpreted. Justice Thomas put it best in *Rosenberger v. Rector and Visitors of University of Virginia* (1995) when he said that the Court's Establishment Clause jurisprudence "is in hopeless disarray."<sup>7</sup> The Court has never reached a consensus on a method of deciding Establishment Clause cases and this has contributed to the confusion.

Establishment Clause case law has three main sources of confusion. First of all, the court has never agreed on a general approach to the Establishment Clause, specifically whether to use strict separation, accommodation, or neutrality. Second, the Court had difficulty agreeing upon a specific test, especially the Lemon Test. Finally, Establishment Clause precedent is both confusing and contradictory. The Court has made a practice of using certain precedent and ignoring others.

This section will examine these three sources of confusion in relation to *Zelman*. Each will be analyzed in relation to three questions. First, what was the Court's jurisprudence before *Zelman*? Second, how did lower courts handle these issues? Finally, what did opposing parties in *Zelman* ask the Court to do? This section will also address public policy issues.

## Approaches to the Establishment Clause

Over the years, the Supreme Court has formed three different approaches to the Establishment Clause: strict separation, accommodation, and neutrality. Strict separation was the first to emerge following Thomas Jefferson's image of a high, impregnable wall separating church and state. Following this approach, "virtually any form of government assistance, whether preferential or nonpreferential, is viewed as a violation of the Establishment Clause."<sup>8</sup> Under this approach, the justices would be likely to strike down the voucher program. In contrast to strict separation, the accommodation approach did not see the need to prevent churches from receiving government assistance. While the accommodationists are against the establishment of a national church, they believe that nonpreferential government aid to religion is not in violation of the Establishment Clause. With this approach, the justices would not find the voucher program in violation of the Establishment Clause. Finally, neutrality is the last approach to the Establishment Clause. This approach has evolved as a combination of the first two approaches and

does not have as long a history. A neutralist finds the other two approaches to be too extreme. Strict separation rejects the religious side of American history, overemphasizes the potential dangers of government assistance to religion, and can result in hostility between government and religion. Accommodationists do not consider the beliefs of religious minorities or nonbelievers in their willingness to provide certain religions with government aid. This can create a high potential for civil strife and other problems. It was through the neutralist approach that the Lemon Test was formed. A neutralist views the accommodationist approach as advancing religion and the strict separationist approach as inhibiting it. Unfortunately, this approach has never been clearly defined and has been used superficially. If the neutralist approach was used in this voucher case, the Court's decision would not be easy to predict.

The Supreme Court has used each of these approaches to the Establishment Clause, but the Court has never used one approach consistently. The process began in the Court's first major Establishment Clause case, *Everson v. Board of Education* (1947).<sup>9</sup> This case involved reimbursing parents for sending their children to parochial schools on public transportation. The Court used strict separationist language but reached an accommodationist result in finding the program constitutional. The Court also mentioned the neutrality approach in *Everson*. The Warren Court in the 1950's and 1960's also used all three approaches but seemed to embrace the neutrality view.

The Burger Court carried on the neutralist approach established by the Warren Court. In the early seventies, the Court tended to use the neutralist approach and found only a few government programs to be constitutional. Then, in the early eighties, the Court took an accommodationist approach in cases such as *Mueller v. Allen* (1983),<sup>10</sup> *Marsh v. Chambers* (1983),<sup>11</sup> and *Lynch v. Donnelly* (1984).<sup>12</sup> In *Mueller*, the Court approved a government program that allowed parents to receive tax breaks for the price of their children's books, tuition, and transportation costs. In *Marsh*, the Court allowed for legislative prayer, citing historical reasons. Finally, in *Lynch*, the Court approved a public Christmas display that included a nativity scene. Surprisingly, however, the Court returned to the neutralist approach in a series of decisions handed down in 1985 that included *Wallace v. Jaffree*,<sup>13</sup> *Aguilar v. Felton*,<sup>14</sup> and *Grand Rapids v. Ball*.<sup>15</sup> *Jaffree* was the first case to reverse the Court's accommodationist approach used in *Mueller*, *Marsh*, and *Lynch*, and return to the neutrality approach by invalidating an Alabama law, which authorized a moment of silence in Alabama public schools for meditation or silent prayer. *Grand Rapids* followed with the Court finding that the provision of secular classes to private schools, of which a large majority were sectarian, violated the Establishment Clause. Finally, the Court found in *Aguilar* the use of public employees to teach remedial classes in parochial schools to be unconstitutional. The Burger Court thus concluded with a neutralist approach to the Establishment Clause.

The Rehnquist Court picked up with the neutralist approach of the Burger Court, but would modify it substantially. In *Edwards v. Aguillard* (1987),<sup>16</sup> it looked as though the Rehnquist Court was going to follow in the Burger Court's footsteps, using a neutralist approach. *Edwards* involved a challenge of Louisiana's Creationism Act, which did not allow teaching evolution theory without including creation theory in that lesson. The Court found that the act violated the Establishment Clause. Over time, the debate over which approach to use disappeared and neutrality became the accepted approach. However, a debate began to emerge over the proper interpretation of neutrality.

The debate reached a climax in *Mitchell v. Helms* (2000).<sup>17</sup> *Mitchell* involved the application of Chapter 2 of the Education Consolidation and Improvement Act of 1981 to Jefferson Parish, Louisiana. Chapter 2 allows for state educational agencies to give local education agencies federal funds to allocate to local public and private schools in the form of various educational equipment. In Jefferson Parish, 20 percent of the federal funds went to private schools, mostly Catholic or religiously affiliated. In finding the program constitutional, Thomas wrote a plurality opinion joined by Scalia and Rehnquist in which he set forth a very broad interpretation of neutrality that was very close to the earlier accommodationist approach. Thomas argued that a parochial aid program like this one was neutral and therefore constitutional, as long as the aid was offered on an even-handed basis and did not have a religious purpose. O'Connor and Breyer agreed that the program was constitutional, but they argued that the approach of the plurality misinterpreted the Court's prior understanding of neutrality, which was substantially more stringent than Thomas stated. Souter, joined by Stevens and Ginsburg, was even more critical of the plurality's view of neutrality. Souter argued that neutrality prohibited direct subsidies to religious organizations. He further charged that "the plurality would break with the law" and that "there is absolutely no mistaking the abandonment of doctrine that would occur if the plurality were to become a majority."<sup>18</sup>

Turning now to an analysis of the Establishment Clause approach of the lower court decisions, the District Court used the neutrality approach to decide the *Zelman* case and found the voucher program in violation of the Establishment Clause. The District Court realized that the Supreme Court has ruled that "incidental or indirect aid that flows to religious educational institution does not violate the [Establishment] Clause," and in addressing church and state, concluded "that it is probably not possible or desirable to erect a complete wall between the two."<sup>19</sup>



However, the court concluded that the voucher program provided aid to religious schools directly through the limiting of choices, and therefore the program is prohibited by the Establishment Clause. The Sixth Circuit Court of Appeals also used the neutrality approach to reach a final decision. Looking mainly at the Burger Court cases, the Circuit Court found little to justify the voucher program. They used a neutrality approach that leaned more towards strict separation than accommodation. Like the District Court, the Circuit Court found “no evidence that the tuition vouchers serve as a neutral form of state assistance which would excuse the direct funding of religious institutions by the state, despite the statute’s language,”<sup>20</sup> and found the program in violation of the Establishment Clause.

The lawyers of both sides based their briefs to the Supreme Court mainly on the Circuit Court decision. The petitioners focused on the neutrality of the program, looking at the fact that the program does not prefer religious schools over secular ones and the choice is left up to the parents. The petitioners stated that the program is “a neutral regime based on genuine parental choice from an array of educational options.”<sup>21</sup> Under the neutrality approach, the fact that the aid is provided indirectly through private choice validates it. The respondents argued that the program does give preferential treatment to religious schools and took a more separationist approach, believing that government aid should never be used for religious purposes. The respondents conclude that the voucher program is not unlike a state program that makes “direct unrestricted government payments to sectarian private schools providing religious education based on the number of students attending such schools” and it is “patent that the program violates the Establishment Clause.”<sup>22</sup>

## The Lemon Test

In addition to using general approaches to understand and interpret the Establishment Clause, the Court has sought over the years to develop more precise tests to guide its decision-making. The primary approach has been the Lemon Test. This test has undergone many changes over the past three decades, and an important issue in the *Zelman* case was how the Court would use the Lemon Test, if indeed it were used at all.

The Lemon Test was created by the Burger Court, but the foundations for it can be found in earlier cases. *Everson v. Board of Education* (1947) nationalized the Establishment Clause. As noted earlier, the case involved a program that reimbursed parents for the cost of public busing to parochial schools. The Vinson Court set forth strong, strict separationist principles to decide this case. However, they came to an accommodationist decision. While the Court believed in a high and impregnable wall dividing church and state, they found the program constitutional under the child benefit theory. Justice Black wrote the majority opinion in which he found the program valid because it did not give preference to a certain religion and was for the purpose of educating children. The Warren Court followed the Vinson Court’s decision with their own decision in *School District of Abington Township, Pennsylvania v. Schempp* (1963).<sup>23</sup> *Schempp* involved the reading of ten Bible verses at the beginning of the school day in the state’s public schools. Building upon *Everson*, the Court set up a two-prong test to reach their decision. They concluded that a law must have a secular legislative purpose and the primary effect of neither advancing nor inhibiting religion. Under this test, the law questioned in *Schempp* was found unconstitutional. Finally, the Burger Court took the two-prong test created by the Warren Court in *Schempp* and formed a new three-prong test in *Lemon v. Kurtzman* (1971).<sup>24</sup> The third prong states that the law cannot result in an excessive entanglement of church and state. While the Burger Court was using all three prongs in earlier cases, *Lemon* finally united all three in one case. *Lemon* was a case about parochial schools receiving government aid. The program was found unconstitutional under the newly formed test.

Following the creation of the Lemon Test in 1971, the Burger Court used this test in every Establishment Clause case but one. Nonetheless, the Burger Court justices were in deep disagreement regarding the test. The more conservative, accommodationist justices strongly disliked the test because it typically led to decisions finding the government programs unconstitutional. They argued that it lacked any foundation in the basic principles and history of the Establishment Clause, and they complained that the test gave no clear guidance and cohesion to Establishment Clause decision-making. A majority of the Court seemed ready to overturn the Lemon Test in the early eighties. In *Mueller v. Allen* (1983) and *Lynch v. Donnelly* (1984), accommodationist majorities stated that the Lemon Test had serious flaws and was only one of several tests and an optional one. Furthermore, in *Marsh v. Chambers* (1983), the Court made no reference at all to the Lemon Test. As the Burger Court came to an end, it appeared the Lemon Test was either endangered or doomed. Surprisingly, however, in three major 1985 cases – *Wallace v. Jaffree*, *Grand Rapids v. Ball*, and *Aguilar v. Felton* – a majority of the Burger Court justices reaffirmed the Lemon Test, along with supporting the neutrality approach.

The Rehnquist Court used the Burger Court’s Lemon Test in their first Establishment Clause decision in *Edwards v. Aguillard* (1987). The *Edwards* case, as described above, challenged a Louisiana law that required creationism to be taught with evolution in the public schools. The Court found that this violated the first prong of

the Lemon Test in that the purpose was to advance religion in teaching that a supreme being created the world. However, the Lemon Test met with criticism. O'Connor and White filed concurring opinions, but did not agree with the use of the Lemon Test. Dissenters Scalia and Rehnquist wrote an opinion that completely rejected the validity of the Lemon Test. In his opinion, Scalia cited Rehnquist's opinion of the Lemon Test in *Wallace*, stating the test is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply, and yields unprincipled results."<sup>25</sup>

The Rehnquist Court continued to disagree on the use of the Lemon Test and, after a while, the Lemon Test disappeared completely. In *Lee v. Weisman* (1992),<sup>26</sup> the Court ignored the Lemon Test and formed a new coercion test. The Lemon Test did not reemerge until *Lamb's Chapel v. Center Moriches Union Free School District* (1993),<sup>27</sup> and even then, met with controversy.

After its reemergence, the Lemon Test went through revisions and changes. In *Agostini v. Felton* (1997),<sup>28</sup> the test was revised to a two-prong test. *Agostini* was a case challenging the Supreme Court's decision in *Aguilar v. Felton* (1985), which prevented public school teachers from teaching in parochial schools. The *Agostini* Test returned to the original two prongs set up in *Schempp*. However, it added three criteria to the primary effect prong, which states that the aid must not have the impermissible effect of advancing or inhibiting religion. These criteria include (1) the aid must not result in government indoctrination, (2) the aid must not define its recipients by reference to religion, and (3) the aid must not create excessive entanglement between church and state. In *Agostini*, the significance of the excessive entanglement criterion was reduced, which allowed the Court a looser interpretation of excessive entanglement.

However, the excessive entanglement criterion was mainly overlooked in *Mitchell v. Helms* (2000). *Mitchell* sets the strongest precedent for *Zelman*. It involved Chapter 2 of the Education Consolidation and Improvement Act of 1981 that allowed state educational agencies to give federal funds to local public and private schools in the form of educational equipment. Many of the private schools that received the aid were religiously affiliated. The Court found that the aid did not violate the revised Lemon Test because it did not result in government indoctrination and the program did not define its recipients with reference to religion. Therefore, the program did not violate the Establishment Clause, and the excessive entanglement criterion was left out of the decision.

The lower courts in *Zelman* followed the Rehnquist Court's interpretation of the Lemon/*Agostini* Test. The District Court found that while the program had a valid secular purpose and did not create excessive entanglement of church and state, it did have the impermissible effect of advancing religion. To reach this conclusion, the District Court used the first two criteria set up in *Agostini*. The program did result in government indoctrination of religious beliefs and created an incentive to attend religious schools because of the limited choices available to parents. Like the District Court, the Circuit Court came to the conclusion that the program failed the second prong of the Lemon Test. The program allows for 82 percent of the private schools to be religiously affiliated. Also, private religious schools have the opportunity to participate in the program because their overhead costs are lower and they can accept a larger number of students. Finally, no local public schools have joined the program, which eliminates that choice. The only other choice the students have is a private school. Because of this, the Circuit Court concluded that "the program clearly has the impermissible effect of promoting sectarian schools."<sup>29</sup>

Both the petitioners and the respondents gave extensive attention to the Lemon Test and its reconstructions in their briefs. The petitioners argued that the program passed the more recent Lemon/*Agostini* Test, stating that the program easily passes the purpose and effect prongs. The purpose of the program is to provide children from low-income families with a better education, which is a valid secular purpose. The program does not have the effect of advancing or inhibiting religion and passes all the criteria created for this prong. The petitioners argued that the respondents have made no argument that suggests that the program results in excessive entanglement of church and state, so only the first two criteria are important to this case. In regard to the first criterion, the petitioners maintained that the neutrality of the program and its basis of true private choice prevent it from receiving government indoctrination. The program does not prefer religion over secular schools, and it is the parents that ultimately make the final choice. As for the second criterion, the program selects its recipients according to economic status with preference to low-income families. Also, the program does not provide an incentive to choose religious schools simply by including them. It provides many other choices.

The respondents disagreed, stating that the program fails both the original Lemon Test and the newer Lemon/*Agostini* Test. The respondents argued that the program does create a financial incentive to choose parochial schools, and the program creates the perception that the state is endorsing religious beliefs. The restrictions on location and the amount of tuition prevent many of the nonreligious schools from participating. Therefore, the parents have no choice but to select a private school in order to receive the aid, and a financial incentive is created in favor of religious schools. Finally, the government aid is financing religious schools despite the indirect means, and

the program aids a larger amount of private schools. This gives the overall perception that the government is endorsing religion. For these reasons, the respondents argued that the program does not pass the Lemon/Agostini Test.

The Lemon Test has thus had a long and confusing role in the Court's Establishment Clause jurisprudence, and this confusion surrounded the *Zelman* case. It was unclear whether the Court would use the original Lemon Test, adopt the newer Lemon/Agostini approach, create yet another modification, or perhaps not use the Lemon Test at all. Whichever test the Court decided to use, the justices would have to support their decision by reference to existing precedent, which brings in the third source of confusion.

## The Supreme Court's Use of Precedent

The use of precedent cases to justify a final decision is central to decision-making by the Supreme Court. Unfortunately, the Court has been inconsistent in its decisions on Establishment Clause cases, and this inconsistency has caused contradiction in the Court's precedent cases. Therefore, both sides of the *Zelman* case could appear valid because both sides could be supported by seemingly valid precedent.

The Rehnquist Court's use of precedent in Establishment Clause cases has been inconsistent. In some cases, it is the only guideline upon which the Court has based its final decision, with little attention given to the approaches or the Lemon Test. In the case of *Zobrest v. Catalina Foothills Schools District* (1993),<sup>30</sup> for example, the Court disregarded the general approaches to the Establishment Clause and the Lemon Test. Instead, the justices used only existing precedent to guide their final decision.

More recently, the Rehnquist Court has been willing to modify or overturn precedent. The Court's decision in *Agostini v. Felton* (1997) overturned in part both *Aguilar v. Felton* (1985) and *Grand Rapids v. Ball* (1985). Justice O'Connor delivered the opinion of the Court in which she stated that recent Establishment Clause cases had undermined the ideas formed in *Aguilar*. She cited both *Zobrest* and *Witters v. Washington Dept. of Services for the Blind* (1986)<sup>31</sup> as controlling precedent. Both cases involved assistance and aid given to handicapped students that attended religiously affiliated schools. The Court ruled in both cases that the programs were constitutional. O'Connor stated that the New York Title I program struck down in *Aguilar* was no different from the programs upheld in *Zobrest* and *Witters*. Thus, according to the recent Establishment Clause precedent, *Aguilar*, and its companion case *Ball*, were no longer valid precedent and were overturned.

The Rehnquist Court also overturned cases in *Mitchell v. Helms* (2000). The majority decided to overturn both *Meek v. Pittenger* (1975)<sup>32</sup> and *Wolman v. Walter* (1977).<sup>33</sup> Both programs held that the government provision of materials and equipment to Catholic schools was unconstitutional. *Mitchell* held constitutional the Chapter 2 program that provided funds to state and local agencies, which used the funds to provide public and private schools with materials and equipment based on the number of children enrolled in the school. In Jefferson Parish, many of the private schools that received aid under Chapter 2 were religiously affiliated. The majority found that the recent decision in *Agostini* invalidated the precedent set by *Meek* and *Wolman*, and therefore, the decisions of those two cases were overturned and Chapter 2 was found constitutional.

Turning now to the use of precedent by the lower courts, both the District and Circuit Courts emphasized the precedent set forth in *Committee for Pub. Ed. And Religious Liberty v. Nyquist* (1973). *Nyquist* involved a New York state statute that established a voucher program to provide a partial tuition reimbursement to low-income parents whose children attended a private school. The reimbursement applied to any private school, not just sectarian ones. The Court found that the program had the effect of advancing religion and was unconstitutional. Both the Courts agreed that the voucher program was similar to the program struck down in *Nyquist*. The lower Courts argued that the voucher program was like *Nyquist* in that only private schools received any funds and the tuition grants were unrestricted. The District Court was not persuaded that "post-*Nyquist* cases suggest there are meaningful distinctions between this case and *Nyquist*."<sup>34</sup> Under *Nyquist*, both Courts found the voucher program to be in violation of the Establishment Clause.

In their briefs, the petitioners argued that the Court should follow recent Establishment Clause precedent and that *Nyquist* should not be applied in this case. The petitioners contended that the Court should follow the precedent set by *Agostini* and *Mitchell*. They used the Lemon/Agostini Test in their argument and referred to the Court's opinions in *Mitchell*. They also argued that the voucher program was very similar to the programs upheld in both *Agostini* and *Mitchell*. Finally, the petitioners maintained that, while the voucher program was within the guidelines of *Nyquist*, *Nyquist* should not be applied to this case. They claimed that *Nyquist* had been a source of confusion nationwide, and its use in this case would only cause more confusion.

The respondents agreed with the lower courts that *Nyquist* was the controlling precedent in this case. The Supreme Court struck down the idea of private choice in *Nyquist* and concluded that government aid that reaches

private schools is unconstitutional. They stated that recent Establishment Clause cases, such as *Agostini* and *Mitchell*, are too far removed from this case to be applicable. Under *Nyquist*, the respondents maintained that the Court should find the voucher program unconstitutional.

## Public Policy Issues

Like many of the Supreme Court's larger cases, *Zelman v. Simmons-Harris* (2002) has sparked controversy across the nation. On February 20, 2002, supporters and opponents of the voucher program gathered outside the Supreme Court in droves as the Court listened to oral arguments for the case.<sup>35</sup> People left their quiet homes in Ohio, Florida, and Wisconsin to travel to the nation's capital in order to support their cause. The Court heard arguments in a full courtroom, as people were desperate to hear suggestions of the Court's stand on this case. While much of the focus was on what the lawyers had to argue, it is hard to ignore the public's stand on this issue.

Supporters of the voucher program find vouchers to be a prudent method of solving the educational crisis in many public schools. Only one in four students graduated from the public schools, and the district had failed to meet any of the performance standards set by the state of Ohio. They argue that the educational crisis has to be solved and alternatives must be tried. Priority should be given to those alternatives that offer choice. In relation to the voucher program itself, it appears viable and has been proven effective in solving the educational crisis. In response to opponents, supporters argue that critics of the voucher program have overblown the potential dangers of the voucher program, and their arguments are not based on merit but on public school teachers opposed to change.

Members of the African-American community make up a large part of the supporters for the voucher program. In a 1998 survey, 72 percent of African American parents supported the voucher system as opposed to 59 percent of white parents who supported it.<sup>36</sup> The Black Alliance for Educational Options submitted an amicus brief in support of the petitioners and the NAACP posted articles on their website in support of vouchers. The African-American community has taken a stand on this issue because they are in a position to gain the most from the program. African-American families are a majority of the low-income families the voucher system aims to support. African American students make up 68.7 percent of the students receiving vouchers.<sup>37</sup> Educational systems have faced a widening gap between black and white education. The main reason for this is economic status. Many white families have a choice of where to live because of their economic status and can choose areas with better school systems. African Americans have, for a large part, maintained a lower economic status, and therefore, do not have as much choice about where to live. For this reason, many African-American children end up in problematic schools. Also, many of these schools are not racially diverse. Forty percent of the students in the Cleveland Public School district attend a school that is over 90 percent minority students, whereas over 90 percent of private school students are white.<sup>38</sup> The voucher program aims to provide low-income families with the means to choose a better school system than was affordable before and to promote racial integration. The African American community hopes that this solution will lessen the black-white education gap.

While the main argument of this case is focused on separation of church and state, opponents criticize the program on the basis of school funding. They argue that the voucher program has the potential of diverting a substantial amount of money from the public school system. Taking money away from the public schools will only worsen the educational crisis, not help it. The *Associated Press* released poll results relating to the *Zelman* decision on August 6, 2002. The results showed that most voters supported education vouchers, but many changed their minds when they were informed that the program would drain money from the public schools.<sup>39</sup> While vouchers appear to be a possible solution, their critics find that the impact on the public schools is too considerable to overlook.

Opponents also characterize the program as intolerant. The voucher program supports only a small portion of the many religions existing within the nation's borders. Catholic schools make up a large majority of the private schools participating in the program. The program ignores religious minorities by offering them little choice in the matter; they can either choose a secular private school or put their children in a religious private school despite their conflicting beliefs. Religious intolerance is a large problem in a society made up of so many diverse religions and the voucher program has the potential of creating more problems.

## Majority and Concurring Opinions

After considering all these issues as they were articulated in the briefs of the petitioners and respondents and the lower court decisions, the Supreme Court decided 5-4 that the Ohio voucher program was constitutional on June 27, 2002. Justices Rehnquist, Scalia, Thomas, Kennedy, and O'Connor made up the majority, while Justices

Stevens, Souter, Breyer, and Ginsburg were in dissent. Chief Justice Rehnquist delivered the opinion of the Court, and O'Connor and Thomas wrote concurring opinions.

The majority gave only passing attention to neutrality to come to their decision. Rehnquist defined the Establishment Clause by its purpose of preventing laws that have the purpose or effect of advancing or inhibiting religion. O'Connor agreed with Rehnquist on his approach, but neither of them followed the strict outline for neutrality set up in *Mitchell v. Helms* (2000). While Rehnquist and O'Connor made reference to the neutrality approach in their decisions, neutrality was used in only a superficial manner rather than being central to their argument. On the other hand, Thomas took the extraordinary position of questioning the application of the Establishment Clause to this case. In effect, Thomas took a more accommodationist approach, reasoning that the Establishment Clause was created to restrict the federal government and not the states. He concluded that the states should be allowed to pass neutral laws that involve religious matters.

Rehnquist briefly used the Lemon/Agostini Test to justify his opinion, but he introduced yet another modification in the test. The first prong of the test states that the aid must have a secular legislative purpose. The second prong requires that the aid cannot have the primary effect of advancing or inhibiting religion. This prong included three criteria: (1) the aid must not result in government indoctrination, (2) the aid must not define its recipients by reference to religions, and (3) the aid must not create excessive entanglement of church and state. However, Rehnquist ignored the third criterion of the second prong in his analysis. He addressed the first prong in the beginning of his opinion, stating that the purpose of the voucher program was to provide children of low-income families with a chance for a better education and was, therefore, secular. The program also satisfied the second prong. The first criterion involves government indoctrination. The program passes this part through the use of private choice. The government provides the parents with a check for 90 percent of the tuition. The parents must endorse the check and send it to the private school of their choice. The government cannot be held responsible for the parents' final choice. The program also provides aid with preference to low-income families without any reference to their religion. Therefore, the program passes the second criterion. The third criterion was set up to prevent the entanglement of church and state. In the Lemon Test, the entanglement prong was originally a separate prong. Over the years, it has lost importance in Establishment Clause cases, moving to a criterion of the second prong in *Agostini*. Rehnquist took this step further by eliminating it completely in this case.

In her concurring opinion, O'Connor strayed from the Lemon/Agostini Test to suggest implicitly a new Establishment Clause test. Like Rehnquist, O'Connor began with the Lemon/Agostini Test, restating the fact that the program cannot have the purpose or effect of advancing or inhibiting religion. She also had two criteria to this. First of all, the aid must be provided without any basis on religion. This was much like the second criterion of the second prong of the Lemon/Agostini Test. The program passed this criterion in that the beneficiaries of the program are defined according to economic status and not religion. She deviated, however, with her second criterion: the program must provide its beneficiaries with a genuine choice between religious and non-religious schools. The government must provide aid to religious and secular schools without discrimination. The voucher program does this by leaving the final choice up to the parents. The parents are provided with many choices, including magnet and community schools, secular private schools, neighboring public schools, and tutorial aid within the Cleveland Public Schools. O'Connor comes to the conclusion that the program provides parents with a substantial amount of secular educational choices and provides no incentive for the parents to choose a religious school. The parents are completely free to choose either a religious or non-religious school, and therefore the program is not in violation of the Establishment Clause.

As for precedent, the majority chose the precedent line that started with *Mueller v. Allen* (1983). As mentioned earlier, *Mueller* involved a program that provided tax deductions for parents for educational costs, including private school tuition. In *Mueller*, the Court focused on the beneficiaries of the program. Because both parents of children who attended sectarian schools and parents of children attending nonsectarian schools could benefit from the tax deductions, the program was constitutional. The Court found the program was one of true private choice and did not provide incentives for parents to send their children to religious schools. The majority also cited *Witters v. Washington Dept. of Servs. For the Blind* (1986), *Zobrest v. Catalina Foothills School Dist.* (1993), *Agostini v. Felton* (1997), and *Mitchell v. Helms* (2000).

Finally, in addressing the lower courts' use of *Committee for Public Ed. & Religious Liberty v. Nyquist* (1973) the Court disagreed that *Nyquist* should be used as the controlling precedent for this case for two reasons. First of all, the Ohio voucher program differed from the program in *Nyquist* in that aid is provided to parents of children attending private schools, as well as children attending public schools or receiving tutorial aid, whereas the program in *Nyquist* only provided aid to parents with children in private schools. Second, *Nyquist* does not govern programs that distribute aid neutrally without regard to religion, while more recent decisions, such as *Zobrest* and

*Mueller*, address such programs. In conclusion, the Court found that *Nyquist* cannot apply in this case, and more recent precedent is more relevant to the program challenged in this case.

Justice Thomas was the only majority justice to address the public policy issues of this case. The main point of Thomas' opinion was equal education and lessening the education gap between black and white students. As he stated in his opinion, the failing school districts "disproportionately affect minority children most in need of educational opportunity."<sup>40</sup> In conclusion, he presented a possible cycle of poverty, dependence, crime, and alienation unless such programs as the voucher program are allowed to exist.

## Dissenting Opinions

Three dissenting opinions were filed for this case. Justice Stevens submitted a sole dissenting opinion. Justice Souter also wrote an opinion in dissent in which he was joined by Justices Stevens, Breyer, and Ginsburg. Finally, Justice Breyer wrote a dissenting opinion that was joined by Justices Stevens and Souter.

Like the majority, Justices Souter and Breyer used the neutrality approach in their opinions. However, the general approach Justice Stevens took was strict separation. He believed that no government aid should ever be allowed to reach a religious school. The wall between religion and government should be impermeable. As he stated in his opinion, "Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy."<sup>41</sup>

None of the dissenting opinions addressed the specific tests used by the majority, but they did criticize the majority's use of two main criteria: neutrality and private choice. Souter argued that the majority has confused the principle of neutrality. He defined neutrality as "evenhandedness in setting eligibility as between potential religious and secular recipients of public money."<sup>42</sup> A true neutrality test would examine the aid flowing to both religious and secular schools and determine if the aid program favors religion. Souter pointed out that the majority failed to follow this method of looking at all sources of aid instead of just the vouchers themselves. While some aid can reach public schools through the program, none of that aid is in the form of a voucher, the majority had not tested the neutrality of just the tuition vouchers and, therefore, had not truly tested the neutrality of the voucher program.

Second, the dissenting justices questioned the majority's consideration of private choice, as well as their definition of it. Justice Stevens questioned the applicability of private choice in his opinion: "the voluntary character of the private choice to prefer a parochial education over an education in the public school system seems to me quite irrelevant to the question of whether the government's choice to pay for religious indoctrination is constitutionally permissible."<sup>43</sup> Souter questioned the majority's definition of private choice. He reached the conclusion that the majority had made the same mistake with private choice as they did with neutrality. In considering choice, Souter pointed out the majority considers all the choices other than the tuition vouchers. Instead of focusing on the choices parents have in regard to the vouchers, the majority considered all schools that receive state aid, indirectly or directly. Truthfully, the parents who receive the tuition vouchers have very few choices available to them. Private secular schools cannot afford to accept as many students as private religious schools, and this can have the effect of forcing parents to choose a religious school for their child. This does not allow the parent to have true private choice, and the program fails that criteria according to Souter's definition.

Another main point of Justice Souter's argument focused on precedent and the history of Establishment Clause cases. The basis for Souter's opinion is formed around *Everson v. Board of Ed. Of Ewing* (1947). The case involved the use of government tax funds to pay for busing to parochial schools. While the Court did approve it, the dissenters felt that the benefits to religion were too pronounced, and all the justices agreed on the principle that no tax can be used to support any religious activity or institution. Souter also cited *Board of Ed. Of Central Schools Dist. No. 1 v. Allen* (1968),<sup>44</sup> in which the Court came to a realization that religious schools have two purposes, religious instruction and secular education, and that supporting secular education would be constitutional. Souter came to the conclusion that the Court has moved from strict separation to accommodation in half a century since *Everson*.

Justice Breyer addressed some of the public policy issues in his dissenting opinion. His opinion focused on possible social conflicts. The nation is more religiously diverse now than it was when the Supreme Court decided its major Establishment Clause cases. The promotion of the voucher program has the possibility of causing religious intolerance. Religious conflict has always existed and the voucher program will only strengthen that conflict. It overlooks the religious minority and forces the taxpayer to support religions in which he or she does not believe. In the end, the damages of the program outweigh its effectiveness.

## Impact of *Zelman*

While the *Zelman* decision was the most anticipated decision of the Court's 2001-2002 term, it is unclear if the case will prove to be as important as had been expected. In reference to the actual decision, it is rare that six justices submit opinions for one case, even in larger decisions. It is clear that this case did not bring order to the "hopeless disarray" that is Establishment Clause case law. It only contributed to the mess and confusion.

*Zelman*'s impact on the nation has yet to be seen. In a time of educational reform, Catholic priest scandals, and national fear of diverse cultures, it is hard to predict whether this decision will have any major, lasting effect. While President Bush has been a strong advocate for school vouchers, other things have diverted the nation's attention, and the national implementation of a voucher program seems to have been put off indefinitely as the nation struggles with its own crises. Yet, this case still has the potential to affect greatly future Establishment Clause cases as well as public policy.

In considering future Establishment Clause cases, the *Zelman* decision could potentially set the standards for the general approach to the Establishment Clause, the controlling test, and the use of precedent. As for general approach, the Court could come to regard it as a minor guideline for future Establishment Clause decisions if they follow the methods used in *Zelman*. The majority used the neutrality approach in a very superficial manner, undervaluing its need in deciding Establishment Clause cases. Also, the Court will tend to lean more towards an accommodationist definition of neutrality, but continue to refer to it as neutrality, despite the differences between the two. If the Court continues this way, it will begin to accommodate more and more government support of religion.

As for a controlling test, the Court has made another modification to the Lemon Test. Chief Justice Rehnquist made a bold step in his opinion by eliminating the excessive entanglement prong from the original Lemon Test. Excessive entanglement had been losing importance since *Agostini v. Felton* (1997). Now excessive entanglement is eliminated completely. Whether this elimination will become permanent has yet to be seen. The Court could also choose to accept O'Connor's proposed Establishment Clause Test. Justices have proposed other tests throughout Establishment Clause history, but none of them have lasted. If the Court accepts O'Connor's test, it could be the controlling test in all Establishment Clause cases. However, the Court will most likely stick with the Lemon Test and just make modifications to it.

Like the approaches, precedent will be used to accommodate religious education. *Zelman* follows from a long line of neutral-accommodationist decisions, including *Mueller v. Allen* (1983), *Zobrest v. Catalina Foothills School Dist.* (1993), *Agostini v. Felton* (1997), and *Mitchell v. Helms* (2000). This precedent line now includes *Zelman v. Simmons-Harris* (2002) and will remain the controlling precedent for future Establishment Clause cases.

This case not only affects future Establishment Clause cases but also has the potential to impact public policy. This decision opens the door for other states to implement voucher programs across the nation. It also allows Cleveland to make improvements to its existing program and increase participation. However, this decision does not end opposition to the program. Opponents continue to fight the voucher program in the state courts, hoping smaller victories will invalidate the Court's decision. Also, support for the program has dwindled as people realize that the vouchers will divert money away from the public schools and towards private schools.

## Conclusion

In the end, the *Zelman* decision has been a disappointing one. The majority opinion seemed rushed and superficial, giving only a glance to the neutral approach and modifying the controlling Lemon Test to accommodate for the voucher program. The dissenting opinions overreacted to possible effects of the decision, threatening the majority with a possible religious war. Finally, when the decision was released, the nation did not seem to care. At the same time, a California federal court announced its decision declaring the Pledge of Allegiance unconstitutional. The *Zelman* decision was overshadowed, receiving relatively little recognition from the media. As for the Cleveland Public Schools, participation in the voucher program increased only 10 percent since the decision, and private school systems were reportedly finding it hard to accommodate the few extra students. The state of Ohio will probably search for other means to solve its educational crisis. Whether the decision will have any long-term effects, such as national implementation, only the future will tell, but it seems clear that the Supreme Court's *Zelman* decision will not be the last word on school vouchers. As for the Establishment Clause, it appears that it will remain a "hopeless disarray" for now.

<sup>1</sup> *Zelman v. Simmons Harris*, 536 U.S. (2002), 70 USLW 4683.

<sup>2</sup> Robert S. Alley, ed., 1988. *The Supreme Court on Church and State* (New York: Oxford University Press); Leif Carter, 1991. *An Introduction to Constitutional Interpretation: Cases in Law and Religion* (New York: Longman); Robert L. Cord, 1982. *Separation of Church and State: Historical Fact and Current Fiction* (New York: Lambeth Press); Thomas J. Curry, 1986. *The First Freedom: Church and State in America to the Passage of the First Amendment* (New York: Oxford University Press); Leonard W. Levy, 1986. *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan); John C. Jeffries Jr. and James E. Ryan, 2001. *A Political History of the Establishment Clause*. 100 Mich. L. Rev. 279.

<sup>3</sup> Kimball H. Carey and Susan B. Greenburger, 2001. *Brief of Amici Curiae In Support of the Respondents*: 5.

<sup>4</sup> Betty D. Montgomery and David M. Gormley, 2001. *Brief of State Petitioners*: 14.

<sup>5</sup> Robert H. Chanin, Andrew D. Roth, and Laurence Gold, 2001. *Brief for the Respondents*: 9-10.

<sup>6</sup> *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

<sup>7</sup> *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), 515 at U.S. 861.

<sup>8</sup> Thomas R. Hensley, Christopher E. Smith, and Joyce A. Baugh, 1997. *The Changing Supreme Court: Constitutional Rights and Liberties* (St. Paul: West Publishing): 136.

<sup>9</sup> *Everson v. Board of Ed. of Ewing Tp.*, 330 U.S. 1 (1947).

<sup>10</sup> *Mueller v. Allen*, 463 U.S. 388 (1983).

<sup>11</sup> *Marsh v. Chambers*, 463 U.S. 1 (1983).

<sup>12</sup> *Lynch v. Donnelly*, 465 U.S. 668 (1984).

<sup>13</sup> *Wallace v. Jaffree*, 472 U.S. 38 (1985).

<sup>14</sup> *Aguilar v. Felton*, 473 U.S. 402 (1985).

<sup>15</sup> *Grand Rapids v. Ball*, 473 U.S. 365 (1971).

<sup>16</sup> *Edwards v. Aguillard*, 482 U.S. 578 (1987).

<sup>17</sup> *Mitchell v. Helms*, 530 U.S. 793 (2000).

<sup>18</sup> *Mitchell v. Helms*, 68 USLW at 4701 (2000).

<sup>19</sup> *Simmons-Harris v. Zelman*, 54 F.Supp.2d 725 (1999).

<sup>20</sup> *Simmons-Harris v. Zelman*, 234 F.3d 945 (2000).

<sup>21</sup> Montgomery and Gormley, *Brief of State Petitioners*, 15.

<sup>22</sup> Chanin, Roth, and Gold, *Brief for Respondents*, 6.



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- <sup>23</sup> *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203 (1963).
- <sup>24</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
- <sup>25</sup> *Edwards v. Aguillard* , 482 U.S. at 591 (1987).
- <sup>26</sup> *Lee v. Weisman*, 505 U.S. 577 (1992).
- <sup>27</sup> *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).
- <sup>28</sup> *Agostini v. Felton*, 521 U.S. 203 (1997).
- <sup>29</sup> *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000).
- <sup>30</sup> *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993).
- <sup>31</sup> *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986).
- <sup>32</sup> *Meek v. Pittenger*, 421 U.S. 349 (1975).
- <sup>33</sup> *Wolman v. Walter*, 433 U.S. 209 (1977).
- <sup>34</sup> *Simmons-Harris v. Zelman*, 54 F.Supp.2d 725 (1999).
- <sup>35</sup> Dennis J. Willard and Doug Oplinger. “Supporters, Foes Face Off Outside Court.” *Akron Beacon Journal*, 21 February 2002, A8.
- <sup>36</sup> Paul Peterson and William Howell. “A Quiet Revolution.” *The National Law Journal*, 8 July 2002, A21.
- <sup>37</sup> Jay P. Greene. “The Racial, Economic, and Religious Context of Parental Choice in Cleveland.” <http://www.schoolchoiceinfo.org> (October 8, 1999): 10.
- <sup>38</sup> Greene, 10.
- <sup>39</sup> Jan Crawford Greenburg. “State Courts New Battleground for School Vouchers.” *Akron Beacon Journal*, 10 August 2002, A4.
- <sup>40</sup> *Zelman v. Simmons Harris*, 536 U.S.\_\_\_\_ (2002), 70 USLW 4683. 70 USLW at 4696.
- <sup>41</sup> *Zelman v. Simmons Harris*, 536 U.S.\_\_\_\_ (2002), 70 USLW 4683. 70 USLW at 6921.
- <sup>42</sup> *Zelman v. Simmons Harris*, 536 U.S.\_\_\_\_ (2002), 70 USLW 4683. 70 USLW at 4700.
- <sup>43</sup> *Zelman v. Simmons Harris*, 536 U.S.\_\_\_\_ (2002), 70 USLW 4683. 70 USLW at 4697.
- <sup>44</sup> *Bd. of Ed. of Central Schools Dist. No. 1 v. Allen*, 392 U.S. 236 (1968).

## Justifying NATO's Intervention in Kosovo

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*The NATO intervention in Kosovo has raised questions of sovereignty, non-intervention, and international human rights responsibilities. Some fear that we are disposing of an integral stabilizing norm of international relations if cases such as the Kosovo operation are in violation of international law and states knowingly and deliberately violate that law. If states no longer feel obligated to abide by international law with respect to the norm of non-intervention and the territorial sovereignty of other states, should we not expect that the value they place on compliance with international law will deteriorate as well? Although NATO violated international law, I will argue that the circumstances demanded that NATO intervene in Kosovo. Through justifying this action, a framework from which to judge future humanitarian intervention using criteria that have been formulated by different scholars will be created. In this way, the paper not only deals with humanitarian intervention's past through Kosovo, but hopes to contribute to the dialogue on the future of humanitarian intervention.*

### Introduction

On March 24, 1999, the Northern Atlantic Treaty Organization (NATO) began what was supposed to be a short bombing campaign of Serbia, which included the province of Kosovo. The assault was meant to bring Slobodan Milosevic to his knees, and was supposed to last a matter of days. Instead, the war dragged on until June 10, when the air strikes were called to a halt. NATO troops entered Kosovo a few days later.<sup>1</sup>

The Kosovo operation is the latest instance of intervention into a sovereign state by an outside party, and it has prompted scholars to re-examine their own views on the legality and the consequences of humanitarian intervention. At this point in time there is a clear lack of consensus in the international community on how (or even if) humanitarian intervention should be carried out. This paper addresses three questions. First, was the NATO intervention in Kosovo legal? By analyzing the UN Charter, I will attempt to show that NATO violated international law. Second, if the intervention was illegal, can it still be justified? I will argue that the circumstances demanded that NATO intervene in Kosovo. The intervention can be justified on moral grounds, as well as through international law, though to a lesser extent. Third, if Kosovo can indeed be justified, what criteria can be created in light of this specific action to form a threshold that must be met in order for future interventions to be justifiable? I will specify a number of criteria that should be part of a consistent, new vision for when and how the world should undertake these operations.

The body of the paper is divided into three parts. In the first section, a brief history of the conflict is given and the legality of NATO's involvement is considered. The conclusion reached is that the intervention was indeed in violation of current international law, which still holds traditional norms of sovereignty in high regard. The second section seeks to justify the Kosovo intervention in spite of this illegality. It describes how the international community's views on sovereignty are changing. The final section of the paper leaves Kosovo behind and looks to the future. It provides a framework from which to judge humanitarian intervention in general using criteria that have been formulated by different scholars. In this way, the paper not only deals with humanitarian intervention's past through Kosovo, but hopes to contribute to the dialogue on the future of humanitarian intervention.

### History of NATO's Involvement in Kosovo

Kosovo, a province of Serbia, enjoyed almost full autonomy in governing itself until 1989. President Slobodan Milosevic of the Federal Republic of Yugoslavia (of which Serbia is a full-fledged republic) revoked the province's autonomy in 1989, saying that there was an impending danger of discrimination against the Serb minority. He closed schools taught in Albanian and prevented ethnic Albanians from being hired for many job positions, most notably in teaching and in the public sector. Albanians felt discriminated against and the Kosovo Liberation Army (KLA) was formed to fight for Kosovo's independence from Serbia. The Yugoslav (read Serbian) Army invaded Kosovo to combat the KLA and "protect" the Serbian minority.<sup>2</sup> The infamous "ethnic cleansing" then began.

In March 1998, various Western states demanded that Milosevic and the Kosovar Albanians begin to negotiate their differences. As the two sides fought, NATO discussed the possibility of the use of force, since it did

not seem the United Nations Security Council (UNSC) would be willing to act militarily to stop Serb aggression. On October 13, to avoid NATO's threat of impending air strikes, Milosevic agreed to withdraw forces from Kosovo, as demanded under UNSC resolutions. He also agreed to NATO's demand that an international "verifying" body of unarmed monitors be let into Kosovo. NATO further forestalled the air strikes on October 27 because of seeming compliance by Milosevic to their demands.

On January 15, 1999, Yugoslav forces killed forty-five Kosovar Albanians in Racak. This event prompted President Clinton to re-evaluate the U.S.-Yugoslavia strategy and the use of force now became a real possibility. Peace negotiations began between the Federal Republic of Yugoslavia (FRY) and the Albanian leadership on February 6 in Rambouillet, France. The Kosovar Albanians signed the peace agreement on March 18. Despite intense pressure from the U.S. and others, Serbia refused to back the agreement. On March 24, NATO began its bombing campaign that was expected to last only a few days. A UNSC draft resolution denouncing the bombing was defeated.

On March 30, NATO began Phase 2 of its air operations, targeting actual Serb military sites and infrastructure. Over the next month, the number of bombing missions increased. In early May, NATO called for Milosevic's agreement to the complete withdrawal of Serb forces from Kosovo and the deployment of an international (UN-sponsored) peacekeeping force into the area as the requirement for the termination of air strikes. Milosevic did not show any signs of compliance with these demands. On May 27, an International Criminal Tribunal indicted Milosevic and others for war crimes.

Finally, on June 9, NATO and Yugoslav military officials signed the Military-Technical Agreement, which embodied the earlier demands made for the end of the air strikes. The next day NATO suspended its air operations and the UNSC adopted a resolution that heralded an end to the war, directed FRY forces to withdraw from Kosovo, and provided for the deployment of a UN-sponsored peacekeeping force in Kosovo. The final remnants of FRY forces withdrew from Kosovo on June 20 and the UN peacekeepers were deployed. No one knew then how long the forces would need to be there; that question remains unanswered.<sup>3</sup>

## The Traditional View of Sovereignty as a Barrier to Intervention

Before discussing the legality of NATO's intervention in the context of the UN Charter, it is useful and necessary to be aware of the role that the classic notion of sovereignty has played in humanitarian intervention. Ever since the Peace of Westphalia was signed in 1648, the world has looked at the state as being the most fundamental part of the international system. A central global government does not govern the world, nor are international relations conducted by a mass of people acting freely as individuals, knowing no commanding authority. The state – and not the individual – has been the supreme actor in the international arena.

Hedley Bull's definition of the state serves us well: "[States are] independent political communities each of which possesses a government and asserts sovereignty in relation to a particular portion of the earth's surface and a particular segment of the human population."<sup>4</sup> States are "sovereign" in two ways. First, they exercise complete and absolute control over the people and governing authorities within their borders. Second, they are considered to be free from any external control, that is, from other authorities outside their borders. It should be noted that a state is sovereign in this respect only if the international community (other states) consider it to be so.<sup>5</sup> One of the requirements for inclusion in this international society is the holding of many of the same fundamental values as other states. One of these values that is very important for our discussion is a state's commitment to comply with the responsibilities it has to other states and international entities. The importance of this value will become apparent when we examine whether NATO's action was in compliance with international law.

Inherent in the concept of sovereignty and in the fact that the primary actors in the international system are states is another important point. Since sovereignty is only extended to states, and since the right to be a state is contingent upon the recognition as such by other states, it has long been held that each state enjoys the same rights as any other.<sup>6</sup> Thus, a state's "external" and "internal" sovereignty (to use Bull's descriptions) is to be respected by other states, regardless of that state's size or global influence. A state – and not a people – has international rights.

Along with the development of the theory of state sovereignty came the establishment of the rule of non-intervention in a state by an outside force.<sup>7</sup> The rationale for this principle is at least twofold. First, those who rule (and, presumably, those who are ruled) do not want forces from without meddling or exerting undue influence on the affairs of their state. This is due to a feeling of nationalism. Second, a chief reason for the development of the state system in international relations was that rulers hoped a more peaceful society would result if each state's sovereignty were respected. No state would have the right to encroach upon another's internal or external sovereignty without just cause (this will be dealt with later in the paper), and thus the world would be more peaceful.

The idea that certain rights of individuals have greater intrinsic value than state sovereignty goes against the established and tried precedent of over three hundred years. The barrier that proponents of humanitarian intervention must overcome in this respect is enormous.

## The Collision of the UN Charter and NATO's Action in Kosovo

The debate around the Kosovo intervention pits justice against law. NATO claimed that strict international law left no room for doing justice and halting the human rights abuses that were occurring. Those who opposed the intervention pointed to possible bad precedents that the intervention could set by de-legitimizing international law. Both arguments have merit.

The UN Charter is considered to be one of the highest forms of law in existence regulating interstate behavior and action. The Charter is part of international law; that is, all UN member states are bound to comply with it. This is because of the aforementioned "rule" of the international system that recognition of statehood requires the desire on the part of the state to comply with promises and agreements made.

Herein lies part of the importance of this discussion. Some fear that we are disposing of an integral stabilizing norm of international relations if cases such as the Kosovo operation are in violation of international law and states knowingly and deliberately violate that law. If states no longer feel obligated to abide by international law with respect to the norm of non-intervention and the territorial sovereignty of other states, should we not expect that the value they place on compliance with international law will deteriorate as well? States with the most power will feel free to act at their discretion, indifferent to what international law dictates. Another, perhaps more important concern, is that the fundamental norm of internal and external sovereignty is being undermined.

It is often said that the UN Charter has paradoxical goals and purposes. It champions both the traditional norm of sovereignty while at the same time promoting human rights. Those who seek to uphold the traditional norm of sovereignty say humanitarian intervention not sanctioned by the UNSC is in violation of international law. They point to the following statements in the Charter in support of their argument.

Article 2(1) is the preeminent clause, stating "[t]he Organization is based on the principle of the sovereign equality of all its Members." Article 2(4) states that Members "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state... ." Similarly, Article 2(7) states that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state... ." UN General Assembly Resolution 2625 declares that "no state or group of states has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state."<sup>8</sup> All of these statements clearly show how important the concept of sovereignty was to the framers and signatories of the Charter.

In contrast to the importance of maintaining the sovereignty of its Members, the UN Charter sets out a seemingly contradictory purpose in Article 1(1). It is to "maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace" in accordance with international law. This is a direct blow to traditional sovereignty in cases where there is a threat to international peace and security in the form of human rights violations and Members are bound to rectify the situation. Article 2(3) declares that "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." Of course, everyone wants crises to be settled peacefully, through the means of "negotiation, inquiry, mediation, and conciliation,"<sup>9</sup> but sometimes this is impossible. The Charter provides three exceptions to Articles 2(4) and 2(7) – instances in which force may be used. These exceptions are now discussed in light of the Kosovo operation.

## Classic UN Charter Provisions for the Use of Force Against a State Self-Defense

Article 51 reads, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." Acting in self-defense was a sanctioned use of force even before the Charter, as is denoted by "the inherent right." This exception has been used several times since the inception of the Charter to legitimize interventions. The American bombing of Libya in 1986 was couched in self-defense rhetoric. President Bush claimed self-defense when he authorized the U.S. invasion of Panama to overthrow the dictatorial government. Other examples are the interventions in the Congo, the Dominican Republic, Entebbe, and Grenada.<sup>10</sup>

It is difficult to legitimize NATO's Kosovo action by employing this exception to the rule of non-intervention. First, Kosovo is not recognized as a state and so could not claim the right of self-defense that is relegated only to states. Second, NATO member states were never even threatened with force, let alone actually attacked, and cannot claim to have been acting to protect themselves. Third, it is even difficult to apply the related "collective self-defense" doctrine here. For states to act in self-defense on behalf of another, the afflicted state must ask for help. The FRY certainly did not ask for assistance, and the Kosovar Albanians cannot legally ask for help because they are not part of a recognized, sovereign state.<sup>11</sup> There is even a legal precedent condemning the NATO action on this point. The International Court of Justice ruled in 1986 that the U.S. had acted in violation of international law when it claimed self-defense as a justification for its intervention in Nicaragua in the early 1980s. The Court ruled that Nicaraguans had not asked the U.S. for help before the U.S. intervened and thus the "collective self-defense" argument could not be used.<sup>12</sup>

## UNSC Enforcement Action

Article 24(1) of the Charter gives the UNSC the "primary responsibility for the maintenance of international peace and security." The UNSC is also given the authority to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken...to restore international peace and security."<sup>13</sup> The UNSC can also determine the means to restore peace, including the use of armed force if peaceful means are not effective.<sup>14</sup> Member states are required to "carry out the decisions of the Security Council" and must not aid the aggressor states.<sup>15</sup>

This exception to the rule does not work in the case of Kosovo either, since the UNSC did not authorize any intervention prior to NATO's bombing campaign. UNSC Resolution 1160 (March 1998) placed an arms embargo on Yugoslavia.<sup>16</sup> UNSC Resolution 1199, adopted on September 23, 1998, acknowledged that peace was threatened in the region and called for the FRY forces to withdraw.<sup>17</sup> On October 24, 1998, UNSC Resolution 1203 was adopted, which endorsed the agreement for the Organization for Security and Cooperation in Europe (OSCE) "verifying" force to enter Yugoslavia.<sup>18</sup> Russia and China were both adamantly opposed to UN involvement and signaled that any UNSC Resolution even condoning the NATO involvement would be vetoed. UNSC Resolution 1239 (adopted after the NATO bombing had begun) did not take a side on the intervention because of the influence of Russia and China.<sup>19</sup> UNSC Resolution 1244 was adopted after the war but it did not condone NATO's action either. It merely authorized the deployment of UN peacekeepers to the region.<sup>20</sup>

## Regional Group Action

Chapter VIII of the Charter authorizes regional entities to take action to rectify breaches of the peace, but only if this action is authorized by the UNSC.<sup>21</sup> Since the UNSC did not at any time authorize NATO's action in Kosovo, it can hardly be argued that this third provision can be applied in this case to justify the intervention.

## Justifying NATO's Action in Kosovo: Evolution of Sovereignty

Prior to World War II there was little international concern on the subject of human rights. Colonial empires still existed in Africa and Asia, dictatorships were brutal in South America, and the Soviet regime was one of terror. The abuses of human rights within these places were considered to be strictly domestic matters and outside powers were not permitted to interfere, a reflection of the strictness of the sovereignty norm. After World War II, the revelation of the Holocaust's evil began to change the world's perspective on human rights and its value system.<sup>22</sup> The UN Charter's Preamble reflects this hope for a better world when it affirms the Members' commitment to "fundamental human rights." The Cold War left little room for improvement in the area of human rights, however. Each superpower poured its international energies toward persuading states of the goodness of its respective political and economic ideology. Progress in creation of human rights norms and compliance with those norms was given little attention during this period.

The end of the Cold War as a factor in this evolution cannot be stressed enough. It made possible a heightened attention to issues such as human rights, and slowly, through international agreements, the strict interpretation of sovereignty as a barrier to all outside intervention began to crumble. The change is not occurring so much because the international community has begun to care more about abuses; it cared even during the Cold War. The difference has been that the bipolar system no longer exists, nor does the struggle that encompassed all other world issues in ideological rhetoric. The West (not to imply that it was free of human rights abuses before

1989) is now able to influence the development of legal and ethical standards in various countries without threat of reprisal from the USSR.

States have increasingly lent their consent to agreements limiting their sovereignty. The creation of international organizations, such as the International Monetary Fund, World Bank, and World Trade Organization, has limited the concept of sovereignty. Technology and economic interdependence are constricting once rigid territorial borders (witness NAFTA and the EU). States are becoming more interdependent than ever before, and this fact has required states to be more vigilant in their monitoring of each other's policies and regimes. These developments only underscore the fact that if at any time in world history a state could act without thought of its neighbors and the consequences of its actions, that time is certainly past. States are more involved in each other's affairs than ever before.<sup>23</sup>

Even now, however, many of the so-called agreements on human rights are part of customary, rather than treaty, law. The Geneva Conventions of 1949, as well as the International Military Tribunal at Nuremberg, are examples of codified legal agreements. The Universal Declaration of Human Rights, in contrast, is only a resolution and is therefore not legally binding on UN Members. Yet it makes little difference whether states pay attention to these standards because of treaty or custom. The point is that most do acknowledge the same standards (save some Muslim and Asian states, who argue that these norms do not apply in their entirety to their people) and the international community now expects states to observe those standards.<sup>24</sup> There are penalties involved for non-compliance with these norms, the most drastic of which is intervention to rectify the situation. During the 1990s, interventions by outside forces occurred in a number of places. We now turn to just two of these instances in more detail to understand how the concern over human rights has gradually dissolved the traditional ban against intervention, setting the stage for a more radical departure from international law in the case of Kosovo.

In January 1992, conflict-ridden Somalia was stricken with a famine, making already difficult conditions desperate. The UN placed an arms embargo on the country and called for increased humanitarian aid. An international team was sent to the country in March with the purpose of administering aid and brokering a peace agreement between the two warring factions in the country. Slowly, the team's numbers increased and its purpose broadened until the UNSC finally acted under Chapter VII guidelines, deeming the situation a threat to international peace and security and authorizing UN action to establish a safer environment in which to distribute aid to the people. This action was tremendously important in its contribution to the evolution of the norm of sovereignty. It was the first time that the UNSC had used humanitarian grounds to justify action under the Charter's Chapter VII enforcement policies. Moreover, the Council intervened without the consent of the Somali government, which was completely unprecedented.<sup>25</sup>

In the case of the 1994 Rwandan genocide, in which some 500,000 to 800,000 people were murdered, the UN was extremely slow to respond. The case highlighted the ever-present reality that human rights are still subservient to the overall political national interest of a country. The memory of Somalia, where 18 U.S. soldiers were killed in heavy fighting and several were dragged through the streets by a mob, was still fresh in the minds of the international community. No state leader wanted to put state troops in danger and felt that domestic opinion would turn against the leadership for intervening. The thought of becoming involved in the separation of two warring groups appealed to no one, not even in the face of massacres that occurred five times faster than the Nazi killing machine.<sup>26</sup> The UN as an organization showed its weakness in that it was powerless to use force to stop the killings since Member states did not want to contribute troops to the effort or put them directly in harm's way to stop the fighting. Governments knew the gravity of the situation but simply decided not to get involved. On May 19, 1994, acting under Chapter VII, the UNSC authorized France to lead a force to stop the human rights abuses by whatever means necessary.<sup>27</sup> Though the Rwandan intervention can rightly be considered a failure because it came so late, it should still be noted that Members were finally willing to intervene. In this case, however, the potential violation of sovereignty was probably not the main barrier to intervention; rather, political interests blocked any action in the early stages.

## "Implicit" UN Charter Justifications for Intervention

It is very difficult to justify NATO's intervention through a strict, legal interpretation of the UN Charter. Its classic provisions for the use of force clearly did not apply in Kosovo's case. In efforts to justify the Kosovo action, scholars have put forward a number of arguments, both legal and moral. The following are those that I find most persuasive.

In reading these defenses of intervention, one should keep in mind a few facts surrounding the human rights abuses in Kosovo. Serb "ethnic cleansing" put some 10,000 Albanians to death during the period before

NATO became involved in the situation.<sup>28</sup> Thousands were raped and brutalized in other ways. At least 800,000 Albanians were forced to flee Kosovo; hundreds of thousands more were displaced within the province. Some 1,000 to 2,000 Serbs were killed, counting both civilians and military personnel. The underlying motive of the Serb aggression was to force most Albanians to leave Kosovo so that Serbia could achieve greater power in the region.<sup>29</sup> There was a definite humanitarian crisis in the area.

## Popular Sovereignty

One justification of actions such as the Kosovo intervention involves the concept of popular sovereignty. W. Michael Reisman explains that sovereignty itself has undergone a dramatic change in how it is understood through international law. He argues that we no longer seek to protect the sovereignty of the ruler of a state as much as we seek to protect the sovereignty of the people of that state.<sup>30</sup> Article 21(3) of the Universal Declaration of Human Rights states that “[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”<sup>31</sup> Article 1 of the UN Charter states that Members are to develop friendly relations with each other “based on respect for the principle of equal rights and self-determination of peoples.” These statements are significant in that they are part of international legal documents, recognized by virtually all states. Popular sovereignty is violated when the will of the people is thwarted, especially in the context of how they choose their leaders. Reisman states that “[i]nternational law is still concerned with the protection of sovereignty, but, in its modern sense, the object of protection is not the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order, but the continuing capacity of a population freely to express and effect choices about identities and policies of its governors.”<sup>32</sup>

Such a justification could perhaps be made in the case of Kosovo. Kosovar Albanians definitely wanted to be independent of the FRY and their right to self-determination was being ignored. It can be argued that NATO’s intervention helped to realize those rights. A problem with adopting Reisman’s argument (as Reisman himself acknowledges) is that it potentially leads to a “slippery slope” predicament. If we deem that Kosovo was an acceptable instance in which to break classic international law because the people’s sovereignty had been violated, when do we not intervene? Are we now forced to intervene whenever a people dislike their government or wish to be free from it? External and internal sovereignty would not be of much value.

## Enhancing “Territorial Integrity”

UN Charter Article 2(4) seeks to promote the “territorial integrity” of states. A view of that phrase places emphasis on the integrity of the territory rather than on the territory of the state. In other words, if a state’s territory is rife with human rights abuses, the integrity of the territory is now compromised, since we expect states to uphold certain standards of human rights. The international community has the obligation to restore the integrity of the territory under this Article.<sup>33</sup> NATO did just that in Kosovo.

## “Waiver” of Sovereignty

As discussed above, a necessity of conferred sovereignty by the international community is the act of complying with agreements. Arguably, international human rights law, though not completely codified, has now become *jus cogens*, a universally accepted principle by which all states are bound, regardless of consent.<sup>34</sup> A related argument enhancing territorial integrity argues that a state effectively waives its right to sovereign immunity when it does not comply with its agreements. Since the FRY demonstrated its lack of compliance with human rights norms as recognized by itself and other states it waived the state’s right to sovereignty and NATO was justified in its intervention.<sup>35</sup>

## Failure of the UN to Act

The fact that Russia and China both indicated that they would veto any UNSC resolution to intervene in Kosovo prevented the UN from authorizing the use of force that would have easily legitimated the NATO operation. The reality is that the UN did not act to achieve one of its goals: ensuring that human rights norms were observed throughout the world. In this event, some scholars argue that states have the right to act unilaterally or in regional

groups to achieve the UN's goals.<sup>36</sup> The General Assembly adopted a resolution in 1950 stating that if the UNSC did not act to maintain international peace and security because of lack of unanimity, the body could authorize individual members to take effective collective action to accomplish the UN goals.<sup>37</sup> This argument would be stronger in the case of Kosovo had the General Assembly acted in this manner, as it did in the Korean War during the 1950s.

## Obligation under UN Charter to Uphold Human Rights Norms

Articles 55 and 56 resolve that “[a]ll UN Members [will] pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of...universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” The way in which states treat their citizens or allow them to be treated by groups within the state is not a matter of domestic jurisdiction in light of this statement. The Kosovo case can especially be cited here since people were being killed because of their race, religion, and language. Members are bound to intervene in these cases because the international community has a vested interest in the treatment of humanity, regardless of borders. Since human rights are no longer subject to the internal affairs category of a state, the prohibition of use of force under Article 2(7) does not apply.<sup>38</sup> This is perhaps the strongest singular argument for intervention, since it makes a claim that justice should win out over law – at least some of the time.

## Arguments against Intervention

The preceding arguments justifying the Kosovo action are certainly not without problems or potentially harmful consequences if adopted as norms of international behavior. Most problematic is the obvious attempt to circumvent the established (and perceived as legitimate) route of intervention authorization: the UNSC. Following are three arguments outlining the consequences that could result from legitimating the Kosovo action, and they must be dealt with appropriately.

## The Perils of Institutionalization

I have tried to justify the Kosovo intervention not only morally, but legally as well. The fact that international law is based not on a central system of enforcement but on a classically-defined, unenforceable rule system is critical. If international law is to survive and aid us, it requires that states obey rules voluntarily even if doing so is not expedient in the short-run. International rules of law and customary norms of behavior that have attained strong legitimacy over time, such as the principle of non-intervention, should not be violated outright by anyone.<sup>39</sup> Doing so decreases the desire for states to abide by rules and increases the likelihood of interstate conflict, because no one can agree on norms of behavior.

Having made those points, however, I reject the notion that the requirements for actions such as those undertaken in Kosovo be completely institutionalized under international law. Scholars who endorse this route say there is a need to dispense with the current system that prohibits the international community from doing what it knows to be right: upholding human rights norms. The UNSC veto is cited as a particularly troublesome obstacle in achieving these objectives.<sup>40</sup> These scholars place greater importance on justifying Kosovo-like actions strictly according to international law (which at the present time is impossible) than on justifying them under something higher than the law. It is certainly a good thing to strive for legal legitimacy, for reasons I have noted above, but there is a price to pay for following this course.<sup>41</sup>

If states were given latitude to intervene on humanitarian grounds, the control of a government over its affairs would not be stable, because of the potential for abuse of this norm. Violations of human rights norms are common in this world and if every state was permitted on its own whim to intervene when and where it saw fit, the world would be in chaos. This does not mean, however, that humanitarian intervention should be outlawed because of the potential for abuse of the action by states. There have been abuses to the claim to the right of self-defense, but that hardly means that we should cease to employ that justification for the use of force. The reality that claims to use force will be made with good and bad intentions cannot deter us from allowing the use of force at all.<sup>42</sup>



## Selective Application of Intervention

Concerned about ensuring that the international legal system is seen as fair and legitimate, critics of humanitarian intervention say that if it is permitted on a wide scale, political and strategic interests would solely decide when states should intervene. Though legalized, some instances that should be intervention cases will be disregarded. The response to this argument is that in the past humanitarian intervention under international law has been understood by states as their right rather than as an obligation. Compliance with international law has always been a matter of choice and must continue that way.<sup>43</sup>

## Purity of Motive

There is a fear that the legal acceptance of humanitarian intervention will result in states intervening with impure motives; that is, they will intervene in self-interest rather than in the interest of humanity. This argument says that not only should humanitarian need be apparent for a lawful humanitarian intervention to occur, but the motives of the intervening government should be pure. Such an argument seems imprudent in that it fails to see how difficult it is to determine the motive of a state action, given that a state is a conglomerate of multi-interested groups. Moreover, it seems cavalier to declare that an intervention will only be legal if pure motives reign when human lives are at stake; the afflicted people hardly care if those who act intervene solely because saving lives is a good thing.<sup>44</sup>

## Need for Established Criteria for Intervention

Those of us who shrink from the idea of institutionalization of classically illegal intervention, but feel that the current ad hoc international policy is far from adequate in maintaining the legitimacy of international law should form criteria that must be met in order for intervention to occur. We must ask ourselves, under what conditions should we permit the violation of international law, such as occurred in the Kosovo case? This practical process helps to ensure that crises will be dealt with and that international order will not degenerate.

First, unilateral or regional (for example, NATO) intervention should only occur in the cases in which the UNSC has failed (for whatever reason) to authorize action but there is common knowledge of widespread human rights abuses.<sup>45</sup> This was certainly the case in Kosovo. Second, to combat the potential for abuse of the norm, a clear humanitarian need must be present; again, Kosovo meets this requirement. The need should be overwhelmingly evident to the international community.

Third, there should be a requirement of "proportionality." The action taken to rectify the human rights abuses should not inflict greater harm or tragedy than did the abusers themselves. Here the NATO action falls short. The policy of conducting bombing campaigns at night and at high enough altitudes to be out of range of anti-aircraft fire kept pilots and aircraft safe, but it was more difficult for pilots to hit their targets. There was much damage inflicted by NATO on civilian property and some civilians were even killed. This is inevitable in a war but the question is whether or not NATO took necessary pains to prevent what civilian damage it could. The evidence seems to show that it did not.<sup>46</sup> One scholar writes that "[t]he NATO bombing was disproportionate for being both excessive in its impact on the human rights of one civilian population [Serbs] and inadequate by dint of the absence of ground forces to protect the other population [Albanians]."<sup>47</sup> Kosovo and Rwanda have shown that a necessity of a successful peacemaking operation – one that secures the peace on the ground and stops human rights abuses – requires those who intervene to be willing to sacrifice the lives of their troops. NATO was not willing to do this in Kosovo, and states should be aware of this requirement before intervening in the future.

Finally, those who intervene must be willing to stay on after the conflict is ended to ensure the internalization of new norms.<sup>48</sup> This is a huge commitment and should deter states from rampant interventionism. UN troops are still stationed in the Balkans and probably will be for some time to come. Whether Member states desire it or not, they are dedicated to a long-term commitment because of the lack of stability in the region.

## Conclusion

We live in a time of uncertainty in the realm of international law. Will Kosovo set a new (and beneficial) precedent for state practice in the future? Or is it simply a bump in the familiar road of respect for state sovereignty and the indecisiveness of the UNSC? Only time will tell. It seems to me that the controversy surrounding the legality of the Kosovo intervention will serve to move the international community in the best direction, the route

that seeks to aid humanity in times of crisis though action is an infraction of present international law. There were two options in Kosovo. NATO could “forgo formally lawful action under the Charter or...forgo the lives and human rights of the Kosovars. NATO states chose the first.”<sup>49</sup>

The decision to intervene, however, will never be solely motivated by an ethical or moral incentive to help people. In the cases of Kosovo and Rwanda, it is easy to see the interaction between politics and law, and how the concept of justice does not always triumph over the law. In Kosovo, domestic politics dictated an intervention by the West. In Rwanda, state leaders feared domestic opinion and declined to champion the cause of justice until much too late. The lack of rigidity in, and enforcement of, international law means that domestic and international politics will play the decisive role in states’ decisions of when and where to intervene.

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<sup>1</sup> Ivo H. Daalder and Michael E. O’Hanlon, 2000. *Winning Ugly* (Washington, DC: The Brookings Institution): 233-34.

<sup>2</sup> Ruth Wedgwood, 1999. “NATO’s Kosovo Intervention: NATO’s Campaign in Yugoslavia.” *The American Journal of International Law* 93 (October): 828-29.

<sup>3</sup> Daalder & O’Hanlon, 227-34.

<sup>4</sup> Hedley Bull, 1977. *The Anarchical Society, 2d ed* (New York: Columbia UP): 8.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid., 33.

<sup>7</sup> Ibid., 35.

<sup>8</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations: A/RES/2625 (XXV), (1970).

<sup>9</sup> Julie Mertus, 2000. “Humanitarian Intervention and Kosovo: Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo.” *William and Mary Law Review* 41 (May): 1754.

<sup>10</sup> Jonathan I. Charney, 1999. “NATO’s Kosovo Intervention: Anticipatory Humanitarian Intervention in Kosovo.” *The American Journal of International Law* 93 (October): 836.

<sup>11</sup> Mertus, 1757.

<sup>12</sup> James P. Rowles, 1986. “Nicaragua versus the United States: Issues of Law and Policy.” *The International Lawyer* 20 (4): 1279.

<sup>13</sup> UN Charter Art. 39.

<sup>14</sup> UN Charter Arts. 40, 41.

<sup>15</sup> UN Charter Arts. 25, 2(5).

<sup>16</sup> UNSC Resolution 1160. (1998). Available from <http://www.nato.int/kosovo/docu/u980331a.htm> (20 September 2002).

<sup>17</sup> UNSC Resolution 1199 (1998). Available from <http://www.nato.int/kosovo/docu/u980923a.htm> (20 September 2002).

<sup>18</sup> UNSC Resolution 1203 (1999). Available from <http://www.nato.int/kosovo/docu/u981024a.htm> (20 September 2002).

<sup>19</sup> UNSC Resolution 1239 (1999). Available from <http://www.nato.int/kosovo/docu/u990514a.htm> (20 September 2002).

<sup>20</sup> UNSC Resolution 1244 (1999). Available from <http://www.nato.int/kosovo/docu/u990610a.htm> (20 September 2002) and Mertus, 1757-61.

<sup>21</sup> UN Charter Arts. 52, 53.

<sup>22</sup> Jack Donnelly, 1998. *International Human Rights, 2d ed* (Boulder, Colorado: Westview Press): 3-4.

<sup>23</sup> Mitchell A. Meyers, 1997. "A Defense of Unilateral or Multi-lateral Intervention Where a Violation of International Human Rights Law by a State Constitutes an Implied Waiver of Sovereignty." *ILSA Journal of International & Comparative Law* 3 (Spring): 905-06.

<sup>24</sup> Donnelly, 11-13.

<sup>25</sup> Ved P. Nanda, Thomas F. Muther, Jr., and Amy E. Eckert, 1998. "Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia – Revisiting the Validity of Humanitarian Intervention under International Law – Part II." *Denver Journal of International Law and Policy* 26 (Winter): 832-34.

<sup>26</sup> *The Triumph of Evil*, 1999. Mike Robinson and Ben Loeterman, prod. 60 min., WGBH Educational Foundation, videocassette.

<sup>27</sup> Nanda et al, 846-51.

<sup>28</sup> Daalder and O'Hanlon, 3.

<sup>29</sup> Richard A. Falk, 1999. "NATO's Intervention: Kosovo, World Order, and the Future of International Law." *The American Journal of International Law* 93 (October): 849.

<sup>30</sup> W. Michael Reisman, 1990. "Sovereignty and Human Rights in Contemporary International Law." *American Journal of International Law* 84 (October): 867, 69.

<sup>31</sup> Universal Declaration of Human Rights: A/RES/217A (III), (December 10, 1948); Donnelly, 165-68.

<sup>32</sup> Reisman, "Human Rights," 872.

<sup>33</sup> Mertus, 1767-68.

<sup>34</sup> Meyers, 907.

<sup>35</sup> *Ibid.*, 907-09. See also: W. Michael Reisman, 1971. *Nullity and Revision* (New Haven, Connecticut: Yale UP): 666-67.

<sup>36</sup> Mertus, 1775-76.

<sup>37</sup> A/RES/377A (V), (1950).

<sup>38</sup> Mertus, 1771-73.

<sup>39</sup> Thomas M. Franck, 1998. "Legitimacy in the International System." *American Journal of International Law* 82 (October): 705-06.

<sup>40</sup> Michael J. Glennon, 1999. "The New Interventionism: The Search for a Just International Law." *Foreign Affairs* 78 (3): 2-7.

<sup>41</sup> Thomas M. Franck, Edward C. Luck, Walter J. Rockler, and Michael J. Glennon, 1999. "Sideline in Kosovo?" *Foreign Affairs* 78 (4): 116-22.

<sup>42</sup> Dino Kritsiotis, 1998. "Reappraising Policy Objections to Humanitarian Intervention." *Michigan Journal of International Law* 19 (summer): 1020-22.

<sup>43</sup> *Ibid.*, 1026-27.

<sup>44</sup> Ibid., 1034-38.

<sup>45</sup> Bartram S. Brown, 2000. "Humanitarian Intervention and Kosovo: Humanitarian Intervention at a Crossroads." *William and Mary Law Review* 41 (May): 1726.

<sup>46</sup> Ibid., 1729.

<sup>47</sup> Christine M. Chinkin, 1999. "NATO's Kosovo Intervention: Kosovo: A 'Good' or 'Bad' War?" *The American Journal of International Law* 93 (October): 845.

<sup>48</sup> Brown, 1737.

<sup>49</sup> W. Michael Reisman, 1999. "NATO's Kosovo Intervention: Kosovo's Antimonies." *The American Journal of International Law* 93 (October): 860.

## Islamic Uprisings and National Faith: Egypt and Iran

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*Conflict between nationalism and Islamism in the Middle East has taken different paths in the second half of the Twentieth Century. The rulers of Egypt and Iran have employed strikingly different methods and goals to create independent, non-Western governments and have seen varying results. Nasser attempted to solidify non-religious, non-Western nationalism in Egypt, while the Shah of Iran accepted aid from the United States for his secular experiment. Developing through multiple stages and political and religious leaders, both nations have arrived at a revival of Islam and continued social, economic, and political problems for their people.*

### Introduction

Middle Eastern nations suffer political pressure stimulated by the strength of the Islamic faith. Muslim rulers have often used Islam to pacify their subjects and legitimate their rule. Yet monarchs and dictators constantly clash with movements of uncompromising religious goals spurred by unsatisfied Islamic purists.<sup>1</sup> Following colonial rule in the Middle East, Islamism has paralleled nationalistic revolutions. Westernization received blame for the socioeconomic troubles plaguing old colonial territories, and people held Western influence responsible for political corruption among elites. Examples of why nationalism faltered pushing religion to the forefront are evident in the history and political mutations of Egypt and Iran. Early in the postcolonial period, these nations pioneered attempts to create national identities in the Middle East, but both patriotic constructions deteriorated in religious dissent. Nationalism, led by Nasser in Egypt, succumbed to Western influence without resolving internal social, political, and economic crises. Those who embraced Nasser's philosophy of nationalism returned to Islam in the wake of nationalism's collapse. Nationalism in Iran died in its inception as the Shah of Iran accepted Western aid to oppress his own people. Iran turned to Islam more quickly than Egypt. Islam in theory remains untouched by Western influence, but Iran has found that a purely Islamic regime is difficult to establish and maintain. A comparison of concepts of nationalism between the two countries and the evolution of the importance of religion as a modern form of identification provides two dramatically different approaches to how Middle Eastern nations initially sought to redefine themselves and escape Western imperialism. The modern results of the internal struggles in Egypt and Iran have made the countries essential forces in the continued Western involvement in the Middle East. Today, understanding how each nation developed its current policies towards faith and politics offers insight into the relationships between the two themes in the Middle East.

### Egypt and Early Nationalism

Anti-British sentiment stirred by the Palestinian War embodied initial Arab nationalism. Various radical groups, many Islamic, displayed their Western animosity through guerilla attacks on British bases. Nasser's underground nationalist movement, the Free Officers, smuggled arms to groups battling the British in the Suez Canal zone.<sup>2</sup> Egypt, like many Middle East countries, suffered severe economic depression and overpopulation complicated by the lack of irrigated farmland. In Egypt's cities, most commerce and banking belonged to European expatriates and minorities who only circulated among their peers.<sup>3</sup> Riots between native Egyptians and British "trespassers" came to a head on "Black Saturday" in 1952 when Egyptians in Cairo retaliated against a British raid on a Canal police station with a citywide massacre of Britons.<sup>4</sup> Nasser finally expelled the British in what Egyptians perceived as an anti-Western "victory." He built upon the nationalistic pitch; Egyptians likened Nasser to a modern pharaoh and political cartoonists drew him as a sphinx.<sup>5</sup>

As Middle Eastern nations embraced modernism, secular nationalism restricted religion to personal life. Luft al-Sayyid, a political philosopher of Lower Egypt, explained that traditional Islam had no implication in the realities of the political Muslim world. Al-Sayyid proposed, "[There are] those who maintain that the land of Islam is the fatherland of all Muslims..."<sup>6</sup> The sense of fatherland thus grew from nationalism, especially in Egypt, where patriotism based on love for a territorial homeland bound Egyptians together. Nationalism was inflamed by writers such as al-Sayyid, who wrote ardently, "Our Egyptianness demands that our fatherland be our *qibla* (direction of Muslim prayer)."<sup>7</sup>

Egypt's past held its own historical separateness, giving the Mid-Eastern nation a unique base for national identity. Under the Ottomans, Egypt's rulers nominally recognized the Caliph as their ruler, but continued to run their territory semi-autonomously.<sup>8</sup> Nasser's reign represented the first indigenous Egyptian ruler to officially govern Egypt in 2,000 years. His appeal to the Egyptian masses stemmed powerfully from his land reform, begun immediately after his revolution. He redistributed land that had once belonged to a few privileged landowners, reducing the maximal family farm to 200 *feddans*.<sup>9</sup> Nasser followed other programs of economic reform, not the least of which was nationalizing the Suez Canal, in order to reduce foreign dominance in domestic markets.

Believing his state belonged to a larger community, Nasser planned to broaden Egypt's nationalism to include the entire Arab world. Article I of the 1956 Egyptian Constitution described Egypt as a "sovereign independent state...part of the Arab nation."<sup>10</sup> In addition, Cairo hosted the center of the Arab League.<sup>11</sup> The Arab League and its Egyptian secretary-general gave Nasser a central base upon which to build Arab nationalism guided by Egyptian power.<sup>12</sup> Nasser's vision centered Egypt in three overlapping circles, the Arab, Muslim, and African worlds.<sup>13</sup> He thought the most important Arab circle connected to Egypt historically and spiritually. Nasser sought to unify and perpetuate Arab-speakers' unity as an ethnic and linguistic entity. Egypt represented the center of the Arab world to him, logically making him the modern father of Arab nationalism. Islam, while a great contribution of the Arabs, did not encompass all Arabs, some of whom practiced Christianity and Judaism. With these premises and a strong aversion to the West, Nasser forged his idea of Arab nationalism.

## Arab Disunity

The masses followed Nasser's charismatic appeal and his popular criticism of corrupt Western influence on other Middle East rulers.<sup>14</sup> Cairo radio stations broadcasted *Sawt al-Arab* (Voice of the Arabs), the first international Middle Eastern program, which called for freedom from imperialism.<sup>15</sup> Nasser's perceived victory over Western imperialism in the Suez Canal made him an Arabic symbol of nationalism. Arabic leaders in other nations, however, feared nationalism. The Hashemite rulers of Jordan and Iraq, quailing under Nasser's criticism, remained ambiguously pro-British in order to maintain their autocratic power with British military assistance.<sup>16</sup> Nasser suspiciously regarded Iraq and the other Arabic members of the pro-British Baghdad Pact, which admitted the non-Arab Turkey.<sup>17</sup> Combined with this lack of unity among the Arab nations, Nasser's revolution, while bringing land and legal reform, did not greatly improve the Egyptian economy. Many Egyptians still lived in poverty.<sup>18</sup>

Egyptian nationalism also remained territorial with a mostly local patriotism influenced, despite Nasser's prejudices, by Western ideas.<sup>19</sup> Within Egypt, Western ideas, according to Hasan al-Banna, leader of the popular Egyptian Muslim Brotherhood party, threatened Egypt and its major religion, Islam. He too blamed the West for Egypt's internal problems. Secularism allowed materialism and Westernization to spread Muslim decline.<sup>20</sup> In order to fully reject the Western corruption, al-Banna emphasized Islamic purity and the need for a religious government devoid of all Western influences.<sup>21</sup> In response to its opposition, the Nasser regime violently purged the Brotherhood, but in June 1967, many Brotherhood members in detention were released and quickly regrouped.<sup>22</sup> Western modernization and its models of government were condemned due to political corruption, social inequality, and economic failure.<sup>23</sup>

## Iran's National Experiment

Egypt's nationalism found successful roots in history, but failed to flourish in the modern world. Similarly in Iran, an attempt for nationalism began under Muhammad Reza Shah Pahlavi who made Pahlavi, a language of pre-Islamic Iran, the national tongue. He renamed public places in honor of pre-Islamic heroes, and he established Zoroastrianism and Islam as the state's religions. But in Iran, these actions alienated the prominent *ulama*, Islamic clergy, who also resented the adoption of Western-based legal codes. The growth of a Western-style bureaucracy in which the Ministry of Justice oversaw traditionally Islamic *Shariah* courts further infuriated devout Muslims.<sup>24</sup> Western presence in the country increased with the discovery of oil. In the 1970s, the Shah's power depended largely on the United States's military assistance given in weapons and training. Iran's government, plagued by corruption and bad organization, failed to properly institute any of the reforms in the Shah's "White Revolution." Like Egyptians, Iranians interpreted domestic turmoil as the responsibility of Western interference, and thus angrily rejected Western influence in the government. The Shah seemed a traitor to the nation. His rule held legitimacy only because of Western military power; he lacked popular and religious support, leading estranged factions to merge and challenge his power under Khomeini's religious leadership.

## Islam in Egyptian Government

Even Nasserism, though secular at its inception, required Islam to legitimize Nasser's ideology and nationalism for both internal and external politics. European modernization had succeeded in penetrating courts and in nationalizing al-Azhar University, the oldest Islamic university. Much of the education system reflected Western influence, and Egyptian writers such as Taha Hussein claimed the state and Islam had long ago separated.<sup>25</sup> However, Islam offered another means of popularizing Nasser's movement with the masses in Egypt and abroad.<sup>26</sup> The Egyptian Constitution recognized Islam as the state religion. Nasser instituted the Ministry of Awqaf to oversee endowments and religious affairs and appoint and pay *imams* in state-controlled mosques. The influence garnered in these relationships helped Nasser mobilize strong religious backing for his reforms. Mahmud Shaltut, rector at al-Azhar, asserted that Islam complemented socialism as both ideologies focused on "ensuring the welfare of society."<sup>27</sup>

When he succeeded Nasser, Sadat labeled Nasser's era as "the reign of materialism and atheism." Nasser's secular tool of unity, nationalism, fell prey to Sadat's manipulative and powerful use of religion, with which Sadat sought to replace Nasser's influence with his own. In the early years of Nasser's reign, Sadat was a member of the "People's Tribunal" that had ordered the death of Muslim Brothers for conspiracy, yet with Nasser's death, he used the Brotherhood to combat his pro-Nasser opposition. In 1976, Sadat allowed the Brotherhood to publish their political journals *al-Da'wah* and *al-Itisam*. As Sadat's policies tilted towards the West with the Camp David agreement, the *Ikhwan* (Muslim Brotherhood) grew strongly critical.<sup>28</sup> Sadat responded with increased state control of religion, attempting to control the subjects of mosque sermons and managing Islamic media programming and Islamic school courses.<sup>29</sup>

Egyptian religious fervor grew in the 1973 Egyptian-Israeli War when Sadat replaced Nasser's motto of "Earth, Sea, and Sky" from the 1967 war with "Allah Akbar," the opening words of Muslims' call to prayer. Waged in the holy month of Ramadan, Sadat accompanied the *jihad* idea of the war with demonstrations of his own piety. Sadat publicized pictures of himself attending mosque. He carried a prayer mark on his forehead and began his speeches with "In the name of God" and ended them in verses from the Qur'an.<sup>30</sup> Sadat advanced his own image as devout and pious, a worthy Muslim ruler of an Islamic nation-state, a stark contrast to Nasser's failed idea of secular nationalism.

## Islam replaces Nationalism in Egypt

Religious movements in Egypt recruited members from mosques and schools, organizing recruits into secret "family" cells. Recruits largely included young Egyptians who came from small-town middle-class backgrounds and possessed science or engineering education. In the cities, these young Egyptians witnessed the "failure" of nationalism to hinder Western corruption: severe income gaps and unemployment combined with street mores markedly differing from Islamic values. Separated from their relatives, the youth turned to the growing religious organizations for leadership and social critiques. Young women volunteered to wear veils and joined strict Islamic political parties, like the *Jamaat al-Takfir wa al-Jafir*.<sup>31</sup>

Leaders of the *Jamaat al-Takfir wa al-Hijra* in the 1970s were executed for allegedly kidnapping the former Minister of the Waqf. This incidence, combined the widespread popularity of *Ikhwan*-inspired Islamic groups among students, caused Sadat to reconsider his support base. His government was submerged in Islamic legislative proposals concerning the constitution, media, transportation, and criminal law, which Islamic activists desired to conform to the *Shariah*. The government delayed processing the new legislation while Sadat tried to reassert authority.<sup>32</sup> Still, Sadat carefully remained the "Believer-President" who chose as his philosophical political base two strongly Islamic Arabic terms: *imam*, or faith, and *ilm*, or knowledge of religious disciplines.<sup>33</sup> Sadat hoped to entwine nationalism and Islamism to strengthen his rule.

## Iran's Islamic Uprising

Unlike Egypt, in Iran, the Islamic revolution contained no class conflict or elite struggle. Political activism involving Islamic ideologies led to the overthrow of an "un-Islamic" regime. Khomeini, a Shi'ite, distanced himself from nationalism when Mossadeq rose in an unsuccessful attempt to limit the Shah's power. Khomeini's ideology, Islam, appealed to a wide support base that overcame the Iranian military as well as the Shah's government.



Khomeini's goals also included the end of Western imperialism in his country, as outlined in his book, *Kashf al-Asnar (Discovery of Secrets)*. Through rhetoric recorded on tapes distributed by his followers, Khomeini sought to end the Pahlavi dynasty and Iran's growing American influence, stimulated by the importance of oil.<sup>34</sup> With contempt akin to Nasser's criticism of Middle Eastern rulers, Khomeini called for individual Muslims to reform their countries where the rulers had proved weak, having become "the hands of Jews and the puppets of Americans and Britain."<sup>35</sup>

In Iran, heterogeneous mixtures of people joined together to overthrow the Shah. All political groups rejected the United States and the USSR, choosing as their salvation Allah. Demonstrations remained largely peaceful, but in Tabriz in February 1978, in Yazd the next month, and in Qum on May 10, police fired on demonstrators. Beneath gunfire from police, tanks, and helicopter gunships, the riots that ensued often attacked symbols of the monarchy and modern-Westernization, such as police stations and luxury hotels. On September 7, referred to as "Black Friday," military police converged upon a sit-in demonstration of 75,000 people in Jaleh Square. Ayatollah Khomeini, observing the struggles from exile, stressed not only the importance of the Iranian Islamic revolution, but the export of its goals to liberate all oppressed Muslims. To discontented Iranians, he became the symbol of the Qur'anic mandate to implement and extend God's rule.<sup>36</sup>

The Iranian political organizations whose goal became Islamic revolution exemplified their beliefs with action. When the regime murdered his son, Khomeini, already banished to Iraq, fled to Paris but continued to conduct his campaign. Iranians responded in full force to his dedication, and Khomeini's word held more importance than any promises the Shah made. Other Ayatollahs and dissident leaders responded to his cause, providing Khomeini with financial support and solid loyalty. The history of Iran appealed to Khomeini's Islamic movement as well, extending farther into the past than the Persian rule's nationalism. Near Kerbala, Iran, an un-Islamic ruler martyred Imam Hussein in 680 AD, and his memory stirred the Iranians in their new rebellion against tyranny. Their nationalism lay in *jihad* (holy war) and defending the faith. Khomeini served as a father figure during and following the revolution, refusing to accept an official position but urging unity under Islam.<sup>37</sup>

## Egypt's Islam

Egypt, unlike Iran, lacked the USSR border or oil influence to sustain the constant involvement of Western powers.<sup>38</sup> Yet anti-Western sentiment remained despite Nasser's expulsion of the British. Under Sadat, Islam now championed the cause that nationalism had failed, but Islamic activists clashed with government forces. *Shahab Muhammad* (Muhammad's Youth) failed in their attack on Cairo's Military Technical College in 1974 and its leaders were executed. More uprisings followed and political purges continued in the *al-Jihad* (Holy War), the *Jund Allah* (Allah's Army) and the Islamic Liberation Party.<sup>39</sup> Sadat had once encouraged the fledgling Islamic student organizations that now dominated elections at universities.<sup>40</sup> To curb non-state-sponsored Islam's reach, Sadat increased state monitoring of mosques and religious gatherings. He imprisoned the main spokesman of the *Ikhwan*, Omar Telmassani, and arrested religious leaders for government criticism. State security forces were deployed to forcibly disperse massive student protests.<sup>41</sup>

Egypt's economic conditions remained unchanged, and Cairo erupted in food riots. Sadat planned to boost the Egyptian economy through an *al-infithah* (open-door) economic policy. He also participated in the Camp David peace treaty with Israel. Combined with his economic programs, Camp David reintroduced Western influence and American involvement to Egypt. Arab nationalism collapsed in the Egyptian "capitulation" to Israel and its Western patron, the United States. Al-Azhar sanctioned the peace process, validating widespread belief that Egyptian Islamic institutions were puppets of the government.<sup>42</sup> In the name of Islam, Egyptian officers assassinated Sadat in October 1981.<sup>43</sup>

## Iranian Islamic Political Philosophy

When the Egyptian government stressed religious importance, leaders of both groups clashed over the significance of faith. Fundamental Islam, as in Iran, cannot separate religion from politics, opposing the syncretism presented by different interpretations. State control of religion undermines Islam as a man to God relationship reliant upon man-to-man relationships.<sup>44</sup> The *Ummat*, or Muslim human society, must obey a common leader in order to obtain a common aim, thereby, according to Shariati, an Iranian philosopher, requiring an Imamate.<sup>45</sup> The *Ummat* sought world revolution to unite all people under God. The constant state of motion required by such a goal is called *hijra*.<sup>46</sup> Shariati claimed each member of the community must be willing to sacrifice his life fighting "imperialistic forces, of Zionism, colonialism"<sup>47</sup> for the sake of the next generation's life. Shariati inspired the

intelligentsia of Iran with his writing, just as al-Sayyid spoke to the Egyptian people about nationalism. Shariati's message, however, regarded Islam as the "Islam of justice and leadership...of Imamate."<sup>48</sup> If an *Ummat* achieves true *Tawhid*, or harmony among God, nature, and man, then no legal, economic, national, territorial, or racial contradictions can exist.<sup>49</sup> One *Qibla* oversees all a man's hopes and desires and mediates all of his conflicts.<sup>50</sup>

Khomeini in Iran embraced these ideals. He determined that the most terrible danger to the Islamic regime came from *munafiqun* (hypocrites) who held secular or personal interests in his country.<sup>51</sup> Khomeini's impassioned views gained strong support in Iranian society, and, following the Islamic revolution, he trained the *Pasdaran-e-Inqulab* (Islamic Revolutionary Guards) to squash internal *munafiqun*. *Komitehs* (Committees) were instigated to draw support from the *mostafeens* (the oppressed) masses that suffered most under the Pahlavi.<sup>52</sup> The Khomeini government's outlined purpose reiterates much of Shariati's ideals, specifically Khomeini's desire to eradicate heresies legislated by artificial parliaments, implement *Shariah* justice, and end foreign intervention in Muslim affairs.<sup>53</sup> His regime instituted an Islamic tax system in order to restore a more equitable distribution of wealth and end exploitation.<sup>54</sup>

## Islamic Unity

Iran's orientation on Islamic unity fared little better than Nasser's Arab nationalism in the Middle East. Muslim Arab countries strived to end Iran's regime for differing reasons; some desired territorial gain while others feared Islamic revolution, as they once hoped to avoid nationalistic revolutions.<sup>55</sup> Shii Imams in Iraq were murdered, and in Egypt the secular purge of Islamic groups continues today. Mubarek in Egypt aligned official Islam with the state, absorbing mainstream Muslims in order to separate the Egyptian majority from extremists and militants, or "religious fanatics."<sup>56</sup> In support of this clerical moderation, the Iranian leadership's efforts to define their socioeconomic model have exposed the variant opinions among the clergy. Islam in Iran has been used to justify privatization and economic state-control. Class conflict remains, and the economic gaps, left after the unsuccessful Iran-Iraq war, persist in disillusioning the people with the Islamic regime.<sup>57</sup>

## Moderation

The Middle Eastern response to liberation from oppressive Western colonialism incited nationalistic fervor and the search for state identity. Nationalism's failure gave rise to Islam's revival, but both have failed to end the social, economic, and political problems of Egypt and Iran, as well as their neighboring nations. In response, governments in both states have steered toward more moderate policies. Rafsanjani and Khomeini have worked to normalize diplomatic relations and economic interactions between Iran and the international community. Iran's aid to radical Lebanese Shii factions has been reduced, and Iran accepted disaster assistance from the United States and other Western powers for the June 1990 earthquake.<sup>58</sup> Egypt's Islamic activism has become institutionalized. The realities of Egyptian life have increased citizens' desire to lead more Islamic lives, but this applies largely to personal behavior instead of political influence.<sup>59</sup> Both nations seek to end internal turmoil largely through their own methods. Leaders seek to compromise religious, economic, social, and political goals through a moderate path of reform and growth, wary of the instability created by passionate religious and patriotic fervor. These efforts to alleviate political and Islamic tension in Egypt and Iran comprise an important area of modern Middle Eastern affairs.

<sup>1</sup> Asaf Hussain, 1983. *Islamic Movements in Egypt, Pakistan, and Iran* (London, England: Mansell Publishing Ltd.): xiii.

<sup>2</sup> Peter Woodward, 1992. *Profiles in Power: Nasser* (New York: Longman Inc.): 24.

<sup>3</sup> Malcolm H. Kerr, September 1963. "Egypt Under Nasser." *Headline Series, No 161* (New York: Foreign Policy Association, Inc.): 5.

<sup>4</sup> Woodward, 24.

<sup>5</sup> *Ibid.*, 13.

<sup>6</sup> John L. Esposito, 1991. *Islam and Politics* (Syracuse, NY: Syracuse University Press): 67.

<sup>7</sup> *Ibid.*, 68.

<sup>8</sup> *Ibid.*, 66.

<sup>9</sup> Woodward, 37.

<sup>10</sup> Esposito, 128.

<sup>11</sup> Woodward, 43.

<sup>12</sup> Kerr, 8.

<sup>13</sup> Woodward, 37.

<sup>14</sup> *Ibid.*, 62-63.

<sup>15</sup> *Ibid.*, 43.

<sup>16</sup> *Ibid.*, 64.

<sup>17</sup> *Ibid.*, 44.

<sup>18</sup> *Ibid.*, 69.

<sup>19</sup> Esposito, 66.

<sup>20</sup> *Ibid.*, 133.

<sup>21</sup> *Ibid.*, 133.

<sup>22</sup> Asaf Hussain, 1983. *Islamic Movements in Egypt, Pakistan, and Iran* (London, England: Mansell Publishing Ltd.): 12.

<sup>23</sup> Esposito, 216.

<sup>24</sup> *Ibid.*, 122.

<sup>25</sup> *Ibid.*, 68-69.

<sup>26</sup> *Ibid.*, 128.

<sup>27</sup> Ibid., 129.

<sup>28</sup> Joel Gordon, 1992. *Nasser's Blessed Movement: Egypt's Free Officers and the July Revolution* (New York: Oxford University Press, Inc.): 13.

<sup>29</sup> Esposito, 213.

<sup>30</sup> Ibid., 213.

<sup>31</sup> Ibid., 218.

<sup>32</sup> Gordon, 13.

<sup>33</sup> Esposito, 212.

<sup>34</sup> Gordon, 88.

<sup>35</sup> Ibid., 91.

<sup>36</sup> Esposito, 201.

<sup>37</sup> Gordon, 89.

<sup>38</sup> Ibid., 97.

<sup>39</sup> Ibid., 14.

<sup>40</sup> Esposito, 214.

<sup>41</sup> Gordon, 14.

<sup>42</sup> Esposito, 219-220.

<sup>43</sup> Gordon, 15.

<sup>44</sup> Hussain, xiii.

<sup>45</sup> Ibid., 95.

<sup>46</sup> Ibid., 95.

<sup>47</sup> Ibid., 95.

<sup>48</sup> Gordon, 95.

<sup>49</sup> Hussain, 96.

<sup>50</sup> Ibid., 97.

<sup>51</sup> Ibid., 98.

<sup>52</sup> Ibid., 98.

<sup>53</sup> Ibid., 89.

<sup>54</sup> *Ibid.*, 90.

<sup>55</sup> *Ibid.*, 97.

<sup>56</sup> Esposito, 225.

<sup>57</sup> *Ibid.*, 209-210.

<sup>58</sup> *Ibid.*, 211.

<sup>59</sup> *Ibid.*, 226