

IDEOLOGICAL AND LEGAL DETERMINANTS OF U.S. SUPREME COURT JUSTICES'
VOTING IN ESTABLISHMENT CLAUSE CASES IN K-12 EDUCATION: 1947-2014

by

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Abstract

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This study investigated the influence of: (1) justices' political ideology; (2) justices' religious affiliation; (3) justices' qualifications; and (4) legal precedent on voting at the United States Supreme Court in Establishment Clause decisions and other such decisions impacting K-12 education rendered between 1947 and 2014, using binary logistic regression as its main statistical tool. The principal findings for this group of K-12 decisions are:

- (1) Ideology as measured by party-of- the-appointing president and Segal-Cover scale measures were significant predictors of conservative voting in the Establishment Clause decisions examined;
- (2) Higher Segal-Cover qualification scores, indicating higher levels of qualifications, were correlated to less conservative voting;
- (3) U.S. Supreme Court legal precedents *Zobrest v. Catalina Hills School District* (1993), *Agostini v. Felton* (1997), and *Zelman v. Simmons-Harris* (2002) did not show significance as factors in judicial voting.

The results of the study support the conclusion that the attitudinal model of judicial voting behavior is an effective method for understanding how Supreme Court justices vote in Establishment Clause disputes that impact K-12 education.

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Chapter 1

Introduction

After President Ronald Reagan's first nominee to the United States Supreme Court, Sandra Day O'Connor, had been confirmed, Reagan later had the opportunity to nominate another justice to the United States Supreme Court in 1986, Antonin Scalia. Both men were known for their conservative ideology. It was not surprising, therefore, that a conservative president would nominate a candidate with conservative views. Scalia was also highly qualified for the position on the Supreme Court, as noted by contemporary commentators and validated by U.S. Senators, who confirmed Scalia with a unanimous 98-0 vote. The following year, however, saw a shift in the confirmation process for Supreme Court nominees. In 1987, President Reagan nominated Robert Bork, also a highly qualified nominee, but his nomination was rejected by the Senate, seemingly because he discussed his judicial philosophy and how such a philosophy would be reflected in his voting (Epstein, Lindstädt, Segal, & Westerland, 2006, p. 1). Caldeira (1989) has called this Bork rejection a "high-water mark of the influence of organized interests in federal judicial nominations" (p. 538). This reflected an enduring shift in the way nominees to the Supreme Court are confirmed by the Senate. Some researchers claim that Bork's rejection marked a shift away from a process "that de-emphasizes ethics, competence, and integrity" toward one that now emphasizes "politics, philosophy, and ideology" (Epstein et al., 2006, p. 1).

Other researchers dispute the effect of the Bork rejection. Krutz, Fleisher, and Bond (1998) claim that the use of ideology as a tool for justifying the rejection of a presidential nominee for any position, not just the Supreme Court, actually began at the beginning of Reagan's term as president in 1981. Even Bork himself said that his rejection was due in part to

the “increasingly political nature of the Supreme Court, which reached its zenith during the Warren Court” (Bork, 1990, p. 348). Despite the debate about the timeline of the use of ideology as a justification for rejecting (or accepting) a presidential nominee, researchers who weigh in on the discussion accept as a given that ideology plays a role in the process of confirming the presidential nominees.

During one of her nomination hearings in 2010, Justice Elena Kagan had responded to a question regarding her philosophy about adjudicating difficult cases that such decisions must rely on “law all the way down” (*The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*. 111th Cong. 103 (2010)). Justice Kagan claimed that it is the law and the law alone that will guide her decision making as a Supreme Court justice, a model of judicial decision making that will be explained below as the legal model. Such a claim by Justice Kagan was not readily accepted by legal researchers, however. In contrast to Justice Kagan’s claim, research by Sisk and Heise (2012) reveals that “...the powerful role of political factors in Establishment Clause decisions appears undeniable and substantial. In the context of federal court claims implicating questions of Church and State, it appears to be *ideology* much, if not all, of the way down” (p. 1204). Researchers such as Sisk and Heise (2012) remained wary of such a claim by Justice Kagan of her intent to adjudicate disputes without reference to non-legal factors such as ideology.

The role of ideology in the Supreme Court nomination and confirmation process continues to be tested by researchers. Epstein et al. (2006) have stated that “determining whether a piece of received political wisdom can withstand rigorous scrutiny is almost always a worthwhile undertaking” and “revisiting the conventional wisdom also opens the door to

revisiting the standard account of Senate voting over Supreme Court nominees” (p. 2). One way to test the impact of ideology is to analyze its role in actual voting by Supreme Court justices while they are serving on the Court, after the nomination process. Epstein et al. (2013) claim that there is “...strong evidence that ideology does influence the Justices’ judicial votes, and thus the Court’s outcomes, in a variety of cases, and that this ideological influence has been growing” (p. 103). “Ideological influence” on a justice’s voting can be derived from measures taken from the period of time before the confirmation of the Supreme Court nominee and after the time of the nominee’s confirmation. Measuring ideology before the nominee has been confirmed is an *ex ante* measure, while measuring ideology after the nominee has been confirmed is an *ex post* measure (Epstein et al., 2013, p. 70).

Defining ideology is an important component of understanding how the concept may be tested by researchers. For this study, ideology is understood as “the integrated assertions, theories and aims that constitute a sociopolitical program” (<http://www.merriam-webster.com>). While the term may be easily defined, how ideology is measured and the effectiveness of those measures are central investigations of this study. This study analyzes the effectiveness of two different *ex ante* measures of ideology, both of which are independent of judicial votes (Epstein et al., 2013; Segal & Cover, 1989; Sisk & Heise, 2005). The purpose of the study is to compare the two *ex ante* measures: party-of-appointing-president (P-A-P) and the Segal-Cover ideology score, relative to one another and to other independent variables, in their ability to predict how Supreme Court nominees will vote in Establishment Clause cases involving K-12 education and other such cases that impact K-12 education.

Significance of the Topic

While studies continue to investigate the role of ideology on judicial voting at different levels of the judicial process (District Court, Court of Appeals, Supreme Court) and on types of cases, such as civil liberties and economic regulation (Epstein et al., 2013, p. 106), there is little research on the role of ideology in Supreme Court judicial voting behavior in K-12 Establishment Clause cases and other such cases that impact K-12 education. Taking a broader approach, research by Sisk and Heise (2012) had focused on the role of ideology as identified by party-of-appointing-president and Common Space Scores in *all* Establishment Clause decisions by federal court of appeals and district court judges from 1996 through 2005. This study addresses the gap in research involving K-12 education cases. It is important to address this gap in the research for at least two reasons. First, this study will contribute to the ongoing investigation of the degree of influence of Supreme Court justices' *ex ante* ideology on actual voting after confirmation. Second, this study will provide a useful tool for those who have an interest, in terms of educational policy, in crafting legislation in such a way or at such a time that may lead to desired judicial outcomes at the Supreme Court.

Research Questions

To understand how the two *ex ante* measures party-of-appointing-president (P-A-P) and the Segal-Cover ideology score, relative to one another and to other independent variables, can predict how Supreme Court nominees will vote in Establishment Clause cases involving K-12 education and other such cases that impact K-12 education, the following research questions will be addressed:

1. What is the effectiveness of party-of-appointing-president in predicting conservative voting in Establishment Clause cases involving K-12 education and other such cases impacting K-12 education?
2. What is the effectiveness of the Segal-Cover ideology score in predicting conservative voting in Establishment Clause cases involving K-12 education and other such cases impacting K-12 education?
3. What effect do key U.S Supreme Court Establishment Clause decisions have on the voting of U.S. Supreme Court justices' over time?
4. What effect does a justices' religious affiliation have on U.S. Supreme Court justices' voting in K-12 Establishment Clause voting decision.

Hypotheses

Since the purpose of the study is to compare the two *ex ante* measures party-of-appointing president (P-A-P) and the Segal-Cover ideology score, relative to one another and to other independent variables, in their ability to predict how Supreme Court nominees will vote in Establishment Clause cases involving K-12 education and other such cases that impact K-12 education, the following hypotheses are made:

Hypothesis 1: The odds of a Republican-appointed U.S. Supreme Court justice voting in a conservative direction in K-12 Establishment Clause cases are greater than for a Democratic-appointed justice.

Hypothesis 2: The odds of a U.S. Supreme Court justice with a higher conservative Segal-Cover ideology rating voting in a conservative direction in K-12 Establishment Clause cases are greater than the odds for a justice with a lower conservative Segal-Cover ideology rating.

Hypothesis 3: Protestant and Catholic affiliated justices will vote in a more conservative direction in K-12 Establishment Clause cases than Jewish justices.

Limitations and Delimitations

Epstein et al. (2013) have stated that ideology is an influential factor in Supreme Court justices' voting. They write: "We find strong evidence that ideology does influence the Justices' judicial votes, and thus the Court's outcomes, in a variety of cases, and that this ideological influence has been growing" (p. 103). In addition, research by Songer and Tabrizi (1999) suggests that "judicial decisions appear to be the result of interactions among a complex set of forces including judicial values, legal forces, and contextual pressures" (p. 520). A limitation of this study is that it does not take into account the entire range of the "complex set of forces" that may influence judicial voting. Only *ex ante* measures of ideology, namely, party-of-appointing-president and Segal-Cover ideology scores, were used as factors to determine the role of ideology in judicial voting. This study did not include *ex post* measures, that is, predictors derived from justices' voting after they arrived on the Court. Since justices may change their approach over time this limits the implications which may be drawn from this investigation. However, since the focus here is on predicting how justices behave before they are seated on the Court, this purpose is adequately served.

Not all legal forces were included in this study. The three legal precedents used in the study, namely, the *Zobrest* (1993) case, the *Agostini* (1997) case, and the *Zelman* (2002) case, were chosen because of their importance as landmark cases in Establishment Clause jurisprudence (Crisafulli, 2003). However, other such cases may provide different results when

they interact with the other factors that may influence judicial voting. This study does not account for every possible factor or combination of legal factors influencing the voting.

This study is further limited by the number of cases that comprise the case database. The study considers 68 Establishment Clause cases or other such cases that impact K-12 education. To more fully understand the predictability of judicial voting based on *ex ante* ideology measures, a greater number of Supreme Court cases should be analyzed.

Chapter 2

Literature Review

History of First Amendment

The First Amendment to the United States Constitution states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances” (U.S. Const. amend. I). In addition, the Constitution, which became operational in 1789, called for Congress to organize itself to create a federal government in Article I, Section I: “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” This Congress had many important responsibilities in the early stages of the implementation of the 1789 Constitution. Undertaking a democratic experiment, the Congress had to organize not only itself as a governing body, but also the executive and judicial branches of American government. It had to address matters such as collecting revenue, governing western territories, addressing relations with Native Americans, and devising a coherent policy on foreign relations. The tasks given to the first Congress were significant, not only because they were seminal in nature, but also because the tasks themselves were important (Willis, 2002).

In the midst of these structural concerns, the first Congress also had to address the issues of states’ rights and liberties of individuals. The power of the federal government had to be restricted so that these rights and liberties would be protected. James Madison, the representative from Virginia, proposed a number of amendments on June 8, 1789, before the final three states had even ratified the 1787 Constitution. These amendments proposed by

Madison would protect the rights of individuals and be integrated into different parts of the text of the Constitution. The final result, however, under the leadership of Roger Sherman, representative from Connecticut, was that Madison's proposed amendments be attached to the Constitution as a separate item. The concept of a separate set of amendments was finally accepted with the ratification of the Bill of Rights, the first ten amendments to the Constitution, on December 15, 1789 (Willis, 2002).

While ten amendments were finally ratified, 12 were originally proposed. What is now the First Amendment was intended to be the third in the original set of amendments. The First Amendment sets limits on legislative power, thus restricting the authority of the federal Congress. Since the beginning of the nation, the First Amendment has been applied to Congress in limiting its authority. In 1790, the Copyright Act was passed, which is the first law regarding intellectual property. The Alien and Sedition Acts of 1798 created much controversy because of their conflict with the First Amendment. Regarding the Religion Clauses of the First Amendment, Congress began addressing issues surrounding religion with the Northwest Ordinance of 1787 and later, during the nineteenth century, undertook the cause of educating Native Americans with a Christian education (Willis, 2002).

From its inception until 1940, the First Amendment was understood to apply only to the federal government. The Amendment itself states that "*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (emphasis added). Religious liberty questions were generally left to the states to resolve, either in state legislatures or courts. Congress and the federal court system had little involvement with religious liberty questions, thus interpreting the Amendment to apply only to Congress in its responsibility of

writing legislation. The interpretation of how the Amendment ought to be applied changed in the 1940s, however. With *Cantwell v. Connecticut* (1940) and *Everson v. Board of Education* (1947), state and local governments became subject to the Religion Clauses of the First Amendment. In these two cases, the Supreme Court began to use a broader application of the First Amendment to include not only Congress, as stated in the Amendment itself, but government at the local and state levels. The justification for this broadening of the application of the First Amendment was supplied by the Fourteenth Amendment: “No state shall deprive any person of...liberty...without due process of law.” The concept of religious liberty, as contained in the First Amendment, was considered to be one of many liberties protected by the Fourteenth Amendment. Because the Fourteenth Amendment applied to the states, encroachments against religious liberty by the state could now be adjudicated by the federal system (Witte & Nichols, 2011).

The interpretation of the meaning of the words of the First Amendment that impact church-state issues in the United States Constitution has never been a settled matter. More specifically, the First Amendment’s explanation of the relationship between religion and politics, faith and the public-square, or church and state, contains ambiguities that serve to perpetuate an endless debate about what the authors of that Amendment intended. Referring to the first sixteen words of the First Amendment, namely, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” Vile, Hudson, and Schultz (2009) write that “the precise meaning of these words has been a matter of dispute from the beginning; they have produced more uncertainty, internal contradiction, and changes of course that perhaps any other provision of the Constitution” (p. 3). Beyond the ambiguities, and as

explained earlier, the two clauses that address religion can be said to be in tension with one another. Welner (2008) even states: “Attempts to accommodate the free exercise of religion can become an establishment, and attempts to avoid establishment can infringe on free exercise” (pp. 77-78). Disputes regarding the meaning of the First Amendment, therefore, are not mere academic disagreements about vocabulary and syntax, but can have consequences that are far-reaching, especially as Constitutional principles are used to decide the cases that eventually arrive at the Supreme Court.

To punctuate the unsettled nature of the interpretation of the first sixteen words of the First Amendment, scholars disagree about whether there is only one religion clause or two. As an example of the perspective that views the first sixteen words as one religion clause, proponents note that the first sixteen words comprise a single sentence and the word “religion” appears only once. Powerful political actors of the 18th century, such as evangelical dissenters (Baptists, for example) and enlightenment thinkers (Thomas Jefferson, for example) insisted that both components be a part of *one* First Amendment. From this perspective, the two components are seen as one concept in which religion is protected from both government restrictions, allowing for religious freedom, and government sponsorship, which could lead to government control. On the other hand, scholars who view the first sixteen words as two separate clauses point out that it is possible to have free exercise of religion while at the same time maintaining an established church. At the time of the nation’s founding, several states had just such an arrangement. In addition, some modern democratic nations, including Great Britain and Germany, have such a system of an established church alongside religious free exercise. In modern times, United States Supreme Court decisions generally favor the view that each clause

ought to be interpreted independently of the other, while accepting that each part exists in “tension” with the other, “the free exercise clause giving special protection to religion and the establishment clause prohibiting government action that benefits religion...” (Vile et al., 2009, p. 3). With the latter view, it is left to the Supreme Court to determine the best way to balance the two unique concepts that make up this section of the First Amendment (Vile et al., 2009).

Because the First Amendment has been subject to changing interpretations and applications over time, some scholars of the First Amendment have recognized that Supreme Court justices, acting as a group, have rarely, if ever, demonstrated a coherent and consistent jurisprudential philosophy of the application of First Amendment principles to religious conflicts. As a result, Supreme Court decisions are influenced by the judicial philosophies of the justices that serve on the Court. Despite emphatic statements by justices that it is the law which controls their decision making, empirical research indicates that other variables, particularly justices’ own policy preferences, affect their voting (Wasserman & Hardy, 2013). In addition to the variables that influence judicial voting patterns, the fact remains that the writing of the First Amendment itself, like other Constitutional documents, originated in an historical context that shaped its creation.

This historical context is crucial for understanding how the First Amendment has been applied to cases in the Supreme Court. In his dissent in *School District of City of Grand Rapids v. Ball* (1985), Associate Justice William Rehnquist wrote that the Court, as it had done in *Wallace v. Jaffree* (1985), *Everson v. Board of Education* (1947), and *McCullum v. Board of Education* (1948), “declines to discuss the faulty ‘wall’ premise upon which those cases rest. In doing so, the Court blinds itself to the first 150 years’ history of the Establishment Clause” (p.

401). Rehnquist's dissent demonstrates that historical context is a necessary interpretative tool for a Supreme Court justice to apply as it provides a mechanism for understanding the purposes served by the First Amendment. The guarantees of religious liberty that were instituted by the First Amendment had been described by Thomas Jefferson as an experiment that was new to the world of the 18th century (Witte & Nichols, 2011). Considering the history of Western Europe and its history of emphasis on a monolithic form of Christianity, the American experiment with religious liberty in which all religions were allowed to exist equally serves as a significant departure from 18th century America's inherited past.

In drafting the First Amendment, the founders recognized that they were creating something new when they rejected the notion of an established national religion and emphasized that the concept of religious liberty ought to apply to believers of any kind. The founders did not create their plan from nothing, however, as the history of Western civilization up until 1789 provided them with other such attempts. Nevertheless, even with historical examples at their disposal, the founders had to adapt the principles regarding the role of religion that they envisioned for the United States and these principles had to be debated, discussed, and tried in the context of an *experiment*. Thus, the First Amendment, as it now stands, does not reflect the depth of such debate and discussion. In fact, the Religion Clauses of the First Amendment establish the boundaries of what the national government may and may not do, namely, "establish" a particular religion or "prohibit" the exercise of one's religion. However, the Religion Clauses *do not define within such boundaries what the national government is permitted to do*. That field, within the boundaries of "establishment" and "prohibition," were left open for future development (Witte & Nichols, 2011).

In addition to considering written sources that reflect the debate and discussion leading to the First Amendment, state constitutions of the time and the ideas of those who contributed to their formation are important sources for constitutional interpretation. James Madison writes that those who seek to interpret the Religion Clauses of the First Amendment should consult “the text itself [and] the sense attached to it by the people in their respective State Conventions, where it received all the authority which it possesses” (*Letters*, 1884, p. 228). Madison makes the point that a necessary tool in understanding the intent of the Religion Clauses is discerning how the individual delegates in the state conventions interpreted these ideas. The text alone is not sufficient to understand the meaning intended by those who wrote the First Amendment, Madison explains. Rather, the voices and thoughts involved in the debates and discussions of the time must be considered to more accurately comprehend the complexity of the meaning of religious liberty as it was understood in the 18th century (Witte & Nichols, 2011).

Establishment Clause Jurisprudence

Establishment Clause cases have been analyzed using a framework that includes three primary theories about how this Clause is applied: strict separation, neutrality, and accommodation/equality (Chemerinsky, 2006). The strict separation theory holds that religion and government should be as separate as possible. Government should address secular matters only. Religion is a private matter entirely. The strict separation theory can be expressed by Thomas Jefferson’s notion of a “wall of separation,” an idea that was used in *Everson v. Board of Education* in 1947: “The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable” (p. 18). The goal of this philosophy is to provide

protection of religious freedom, particularly for those of minority faiths and no faith at all (Chemerinsky, 2006).

The second theory that has been used as a tool for analysis is the neutrality theory. In this theory, the government takes a neutral stance toward religion. The state may not show preference to one religion over another. Likewise, the state may not show preference to either religion or secularism. Some justices have adopted a so-called “symbolic endorsement” test to determine whether or not the government’s action is indeed neutral. If the government symbolically endorses of one religion over another, or either religion or secularism, then, under the symbolic endorsement test, the government’s action is unlawful. Explaining this theory, Justice O’Connor wrote that “...the endorsement test captures the essential command of the Establishment Clause, namely, that government must not make a person’s religious beliefs relevant to his or her standing in the political community...” (*County of Allegheny v. American Civil Liberties Union, Greater Pittsburg Chapter*, 1989, p. 627). If the government shows preference to one religion over another or to religion or secularism, the government demonstrates, or at least the government is perceived by an objective observer to demonstrate, that those who are not in the preferred group do not share the same status as those who are in the group (Chemerinsky, 2006).

The third theory that has served as a tool for analysis is the accommodation or equality philosophy. This theory holds that religion has an important role to play in society and the Supreme Court should accommodate religion’s place in government. Under this accommodation theory, the government only violates the Establishment Clause if it shows preference for a particular religion, mandates religious participation, or establishes a particular church. The state

can accommodate religion by giving it the same treatment it gives to nonreligious groups, or, in other words, treating religion equally when compared to government's treatment of nonreligious groups (Chemerinsky, 2006).

While there are three primary theories that have been used to decide Establishment Clause cases, namely strict separation, neutrality, and accommodation/equality (Chemerinsky, 2006), the history of the relationship between the Religion Clauses of the First Amendment reflects greater complexity. This complexity is due largely to the variety of ideas and philosophies that existed at the time of the nation's founding (Witte & Nichols, 2011). In addition, the complicated nature of the relationship between the Religion Clauses is partially revealed when one considers that some scholars believe that the wording of the First Amendment allows for the free exercise of religion *while at the same time* maintaining an established church. Further, the record of American history shows that such an arrangement actually existed in some states at the time of the nation's founding (Vile et al., 2009). Both the complexity in the task of interpreting the First Amendment along with the events of American history lead to the conclusion that, while using theories to frame a discussion about the Establishment Clause may be useful, the origins and context of the theories themselves have not been uniformly understood by scholars and justices (Witte & Nichols, 2011).

Free Exercise Jurisprudence

Free Exercise Clause cases can be placed into one of two categories: those that reflect a pre-*Employment Division v. Smith* philosophy or those that reflect a post-*Smith* philosophy. Until 1990, which was the year that *Employment Division v. Smith* was decided, jurisprudence about religious free exercise was guided by the 1963 case *Sherbert v. Verner*, in which a woman

of the Seventh-day Adventist faith was fired from her job for choosing not to work on her Saturday Sabbath. She was consequently denied unemployment benefits. This denial of benefits was found by the *Sherbert* Court to be unconstitutional because it placed a burden on the practice of her religion, causing her to make a choice between her religious practice and her employment (Chemerinsky, 2006). Wasserman (2014) notes that with this 1963 decision, “the Court expressly held for the first time that strict scrutiny should be used in evaluating laws burdening free exercise of religion...” (p. 3). The test of strict scrutiny was applied to determine the constitutionality of the state’s action, which required a compelling government interest when an adherent’s religious exercise was substantially burdened. Because the state could not demonstrate a compelling government interest, the denial of unemployment benefits was declared a violation of the Free Exercise Clause. While strict scrutiny was established by the Court as the test to determine Free Exercise disputes between 1963 and 1990, the test was rarely applied by the courts (Chemerinsky, 2006).

The 1990 case *Employment Division v. Smith* changed the Court’s methodology for evaluating laws when challenged under the Free Exercise Clause. The change reduced the test from one of strict scrutiny to one of rational basis scrutiny, “at least when [the laws] were neutral and generally applicable, and did not target religious exercise for burdening, or were motivated by a desire to obstruct religion” (Wasserman, 2014, p. 3). This change of tests marked a significant turning point in the way Free Exercise disputes were decided, as evidenced by legislators’ attempts to protect religious liberty as it had been protected prior to the 1990 *Smith* case through the Religious Freedom Restoration Acts, which were passed by Congress in 1993, and then by 18 state legislatures (Wasserman, 2014).

Cases That Involve “Play in the Joints”

In *Walz v. Tax Commission* (1970), the Court stated that “there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference” (p. 669). In the *Walz* case, an owner of real estate in Richmond County, New York, brought suit against the New York City Tax Commission for granting property tax exemptions to religious organizations for their properties that were used for worship. The Court decided that the tax exemptions are constitutional because they do not entail and have not historically entailed establishment of religion. In fact, the Court held, taxing churches would lead to greater involvement between the state and religion because there would be a fiscal connection (*Walz v. Tax Commission*, 1970). This concept of benevolent neutrality was reiterated in *Locke v. Davey* (2004) when the Court noted that “there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause” (p. 1311). In *Locke v. Davey* (2004), Joshua Davey was selected to receive a Washington State Promise Scholarship, based on the program’s academic and income requirements. Davey decided to enroll in Northwest College, a private Christian college associated with the Assemblies of God denomination, in Washington State, and pursue a double major in pastoral ministries and business management/administration. Davey’s was excluded from the Promise Scholarship program because of its devotional nature. Davey, in refusing to submit a letter stating that he was not pursuing a devotional degree, was consequently denied funds from the Promise Scholarship. Davey brought court action against the state of Washington by claiming that the state action violated the Free Exercise Clause, the Establishment Clause, and the Free Speech Clause of the First Amendment. In authoring the majority opinion, Chief Justice Rehnquist

wrote that Washington state can, in fact, deny scholarship funding to ministry students without violating the Free Exercise Clause. He wrote that the “[s]tate’s interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here” (*Locke v. Davey*, 2004, p. 725). Justices have disagreed about what “play in the joints” actually means, particularly as the idea is applied to what governments are permitted to do as opposed to what they are required to do. With the decision of *Locke* and the accompanying reaffirmation of the idea of “play in the joints,” the Court paved the way for allowing individual states to re-evaluate their funding programs for private school and religious training programs (Montoya, 2004).

Factors in Judicial Decision Making

Attitudinal Model

The aforementioned history of First Amendment jurisprudence reflects inherent ambiguity in the understanding and application of the Religion Clauses to actual cases. Such ambiguity allows for influences other than the law to impact Supreme Court justices’ voting (Epstein, Landes, & Posner, 2013, p. 103). This study relies on the attitudinal model of judicial decision making as explained by Segal and Spaeth (2002). According to Segal, Epstein, Cameron, and Spaeth (1995), “[a] predominant, if not *the* predominant, view of U. S. Supreme Court decision making is the attitudinal model” (p. 812). Their attitudinal model gives priority to justices’ own policy preferences as a means for understanding how justices vote in cases and write their opinions. Concerning the attitudinal model as a means for understanding judicial voting and opinions, Baum (2010) wrote that justices’ policy preferences

...exert their effects in combination with other importance forces, such as the political environment—and, for that matter the law. But policy preferences provide the best explanation for differences in the positions the nine justices take in the same cases, because no other factor varies so much from one justice to another. (p. 122)

According to Wasserman and Hardy (2013), justices' attitudes may be expressed either from their belief about what is good policy or they may express their attitude strategically. Providing examples of the strategic approach that justices may take, Wasserman and Hardy (2013) wrote:

Strategic actions might include deciding whether to grant a writ of certiorari based on how a justice believes other members of the court would vote on the merits of the case [footnote omitted], or in writing merits decisions, tailoring the content to win the support of other justices, even though the opinion does not fully reflect the justice's own views. (p. 115)

This study assumes the validity of the attitudinal model that justices' voting and opinions are ultimately reflections of the justices' own policy preferences.

In their study of judicial voting behavior at the federal district court and court of appeals levels, Sisk and Heise (2005) found that the ideology of judges influenced the outcomes of court cases, at least in their studies of religious freedom disputes. They wrote:

The expanding literature of empirical research on the [role of ideology on the selection and voting behavior of federal judges], including our own, makes it starkly clear that the partisan or political dimension is, among others, an inescapable element in understanding judicial behavior. But, at least at the lower federal court level, ideology explains only

part of judicial behavior and tends to emerge in certain narrowly defined sets of cases in studies designed to tease out those marginal effects. (Sisk & Heise, 2005, pp. 793-94)

Considering the role of justices' ideology in their voting behavior stands in contrast to the legal model in which justices claim that their decisions are made only by the application of the law, much like, as Chief Justice John Roberts claimed, umpires apply rules to the game of baseball (Epstein et al., 2013, p. 101).

Political Party of the Appointing President

Research by Sisk & Heise (2005) included the influence on judicial voting of judges' ideology as expressed by the political party of the president who appointed the judge. Their research included political party identification as expressed by the party of the appointing president because "[e]mpirical studies frequently have found political party identification to be a significant predictor of judicial voting in ideologically divisive cases [footnote omitted]" (Sisk & Heise, 2005, p. 769). This study uses the research methodology suggested by Sisk and Heise (2005) that the party of the appointing president be considered a factor in predicting judicial behavior and comparing this variable to other judge-level variables that might also be used as predictors.

Research by Epstein et al. (2013) further explained the usefulness of the political party of the appointing president as a factor in predicting judicial voting. Party-of-appointing-president is considered an *ex ante* measure because it is based only on "preappointment information about a judge or Justice" (p. 70). While it is the most commonly used *ex ante* measure, the political party of the appointing president can present problems, however, since it does not consider how a justice's ideology may change over time. The measure also assumes that every Republican

president is conservative and every Democratic president is liberal. In actuality, presidents within each party exhibit traits along a continuum and cannot be said to be uniformly conservative or liberal with respect to the other presidents within their parties (Epstein et al., 2013, p. 71).

Segal-Cover Scores

The Segal-Cover score was introduced by Segal and Cover (1989) to score Supreme Court nominees according to their political ideologies and qualifications. Research by Segal and Cover (1989) found that ideological and qualification scores demonstrated a strong correlation with justices' voting after their confirmation as Supreme Court justices (Segal & Cover, 1989, pp. 561-62). After testing the reliability of the measures, Segal and Cover (1989) found that "the scores accurately measure the perceptions of the justices' values at the time of their nominations" (p. 559). As an *ex ante* measure of judicial voting behavior, the Segal-Cover scoring method reinforces the attitudinal model of judicial decision making (Epstein et al., 2013, p. 73).

Using sources that were independent of the justices themselves, Segal and Cover (1989) relied originally on editorials from four newspapers¹ that were published before the Senate confirmed the nominees. For the ideology measure (JI), paragraphs from the newspaper editorials were coded as liberal, moderate, conservative, or not applicable. The justice's ideology (JI) was measured by the formula $JI = (\text{liberal} - \text{conservative}) / (\text{liberal} + \text{moderate} + \text{conservative})$ (Segal & Cover, 1989, p. 559). Segal and Cover (1995) updated their database in 1995 to extend the number of justices studied. To include additional data before the Warren

¹ Segal and Cover (1989) wrote: "We selected four of the nation's leading papers, two with a liberal stance (the *New York Times* and *Washington Post*) and two with a more conservative outlook (the *Chicago Tribune* and *Los Angeles Times*)" (p. 559).

Court era, two additional newspapers were added for consideration.² Segal and Cover (1989) used editorials found in newspapers because they believed that the editorials provided data about the justices that could be compared to one another. Segal-Cover ideology scores are listed as positive values ranging from 0 (most conservative) to 1 (most liberal).

Qualification scores were also determined by statements from the newspapers. Relevant editorials were coded with a “1” for positive statements, “.5” for neutral statements, or “0” for negative statements. Positive statements are considered reflective of high qualification and negative statements are considered reflective of low qualifications. Qualification scores are listed as positive values ranging from 0 (least qualified) to 1 (most qualified) (Segal, Spaeth, & Benesh, 2005, p. 263).³ As will be later observed the qualification scores of the Supreme Court justices are highly skewed in a positive direction.

Religion of the Justice

Attitudes and behavior in politics are influenced by religion (Songer & Tabrizi, 1999, p. 507). Songer and Tabrizi (1999) write that, because of the important role that religion plays in a society,

...the judiciary is no exception to the influence of religion and that religion in fact helps to shape the very decisions justices make in specific issue domains. We expect that religious affiliation is an indicator of a set of powerful socialization agents that may

² The two additional newspapers added for the research were the *St. Louis Post-Dispatch* (liberal) and the *Wall Street Journal* (conservative).

³ Segal et al. (2005) explained: “To determine perceptions of nominees’ qualifications and judicial philosophy, we use a content analysis from statements in newspaper editorials from the time of the nomination until the Senate vote on the nominee’s capabilities and ethics....To aid in the presentation of the results we then aggregated these scores, coding Qualifications as high, medium, or low [footnote omitted]” (p. 263).

contribute to the development of political attitudes in judges and that those attitudes will in turn affect the decisions of those judges.” (pp. 507-08)

In their quantitative research of obscenity, gender discrimination policy, and death penalty decisions in state supreme courts by Christian evangelicals, Songer and Tabrizi (1999) found that the religion of judges had a significant impact on the judges’ voting. In their study, they found that

...evangelical judges were substantially more likely to cast conservative votes than their mainline Protestant brethren even after the effects of party, prosecutorial experience, state citizen ideology, and changing Supreme Court policy were accounted for. Catholic judges were also more likely than mainline Protestants to support conservative outcomes, but they were less conservative than the Protestant evangelicals. Jewish judges had voting patterns that were similar to those of mainline Protestants. (Songer & Tabrizi, 1999, p. 521)

While the research by Songer and Tabrizi (1999) involved cases that were of a different category than those in the present study, that is, Establishment Clause disputes, their study suggests not only that justices’ religious affiliation may produce detectable influences on judicial voting behavior, but also that the religious affiliation of justices considered along with other factors in the context of the attitudinal model may provide a degree of predictability of judicial voting (Songer & Tabrizi, 1999, p. 523).

Review of Supreme Court Cases

Everson v. Board of Education (1947) was a landmark case because it, along with *Cantwell v. Connecticut* (1940), was the first time that the Supreme Court had applied the

Religion Clauses to governments at both the state and local levels (Witte & Nichols, 2011, p. xix). This shift provided a foundation for the Court to decide future cases. In *Everson*, a New Jersey, a statute authorized reimbursements to parents for bus transportation to send their children to Catholic parochial schools. The appellant, acting as a district taxpayer, claimed that such reimbursements violated the Establishment Clause because

...the statute and the resolution forced inhabitants to pay taxes to help support and maintain schools which were dedicated to, and which regularly teach, the Catholic Faith. This is alleged to be a use of State power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states. (*Everson v. Board of Education*, 1947, p. 5)

The Court, however, in a narrow 5-4 majority, found that New Jersey's statute did not violate the Establishment Clause. Justice Black, the author of the majority opinion, wrote:

...we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief. Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. (*Everson v. Board of Education*, 1947, pp. 16-17).

While arriving at a conservative decision, the Court used Jefferson's concept of the "wall of separation of church and state" in its opinion. Justice Black wrote that the "First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We

could not approve the slightest breach. New Jersey has not breached it here” (*Everson v. Board of Education*, 1947, p. 18). In addition, Justice Rutledge, who had dissented in the decision but agreed to the principles enunciated in *Everson* along with the rest of the minority (*Torcaso v. Watkins*, 1961, p. 494), wrote that “we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion” (*Everson v. Board of Education*, 1947, p. 59). Later justices, such as William Rehnquist, will reject the use of the metaphor of the “wall of separation” as being historically inaccurate.⁴

In *Everson*, the justices seemed to recognize that future conflicts over the meaning of the Religion Clauses were looming. Black wrote:

We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the state’s constitutional power even though it approaches the verge of that power....New Jersey cannot consistently with the ‘establishment of religion’ clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. (*Everson v. Board of Education*, 1947, p. 16)

⁴ Criticizing the use of Jefferson’s metaphor by the *Everson* Court, Rehnquist would write: “It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson’s misleading metaphor for nearly 40 years” (*Wallace v. Jaffree*, 1985, p. 92).

The *Everson* majority, while deciding the case based on the facts before it, acknowledged the inherent tension in the First Amendment's Religion Clauses. However, it would leave the development of judicial tools to address this tension to later justices.

In *McCullum v. Board of Education* (1948), religious teachers in Champaign County, Illinois, who were employed by religious groups, were allowed to teach religious classes in public school buildings during the regular school day. The religious classes were taught in place of secular subjects ordinarily taught in the public schools. The Court found that the facts of the case

...show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. (*McCullum v. Board of Education*, 1948, p. 209)

The Court found that the public school system of Champaign County, Illinois, was aiding religion, an action prohibited by the Court's recent interpretation of the First Amendment as found in *Everson*, which declared that the First Amendment applies to the States because of the Fourteenth Amendment. The Court noted in *McCullum v. Board of Education* (1948):

This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson v. Board of Education*, 330 U.S. 1....The majority in the *Everson* case, and the minority as shown by quotations from the dissenting

views...agreed that the First Amendment's language, properly interpreted, had erected a wall of separation between Church and State. (*McCullum v. Board of Education*, 1948, pp. 210-11)

McCullum v. Board of Education (1948) thus relied on the significant precedent set by *Everson*, which had made the First Amendment applicable to the States in addition to the federal government and which embraced Jefferson's idea of separation of church and state as a principle to be adhered to when adjudicating Religion Clause disputes. The Court further noted:

Here not only are the state's tax supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through the use of the state's compulsory public school machinery. (*McCullum v. Board of Education*, 1948, p. 212)

Believing that the religious groups received a double benefit from use of the public school buildings during the school day, the Court found that, in keeping with the new interpretation established by *Everson*, the Illinois program did not maintain the Jeffersonian notion of the "wall of separation of church and state" and was unconstitutional.

In *Doremus v. Board of Education* (1952), the Court considered a New Jersey statute that allowed for the reading of five verses from the Old Testament at the beginning of each school day in New Jersey's public schools. After the State Supreme Court found that the statute did not violate the federal Constitution, the two appellants appealed to the U.S. Supreme Court. One appellant appealed as both a parent and taxpayer of a public school student and the other appellant appealed as a taxpayer only. The Court found that because the parent-appellant's child

had already graduated, the parent lacked standing since there were no longer any rights to be protected. In addition, the Court also found that there was “not a direct dollars-and-cents injury” to the appellants as taxpayers. Justice Jackson, writing for the 6-3 majority, wrote that the Court’s decision rested on the lack of “possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct” (*Doremus v. Board of Education*, 1952, p. 435). There was no direct and specific financial injury to the appellants caused by the New Jersey statute, leading the Court to call the appellant’s taxation dispute “feigned.” Both claims by appellants, as a parent and as taxpayers, were thus denied standing by the Court’s majority.

Zorach v. Clauson (1952) considered a New York statute that allowed New York City to permit its public schools to release students from school during normal school hours to attend religious education classes or attend devotional activities. Students were required to present written permission from their parents to be released to attend the religious activities. Students who were not released for religious activities were required to stay at the public schools and the religious institutions were required to report to the public schools the names of students who had been released from the public schools but did not report for the religious activities. In contrast to the Illinois statute addressed in *McCullum v. Board of Education* (1948), the New York statute did not provide religious instruction in the public schools and the program did not spend public funds.

In a 6-3 decision, the majority found that the New York statute violated neither the Free Exercise nor the Establishment Clause of the First Amendment. Writing for the majority, Justice Douglas addressed the Free Exercise issue when he wrote:

No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotion, if any. (*Zorach v. Clauson*, 1952, p. 311).

Addressing the Establishment Clause question, Douglas additionally wrote:

There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion....Moreover, apart from that claim of coercion, we do not see how New York by this type of “released time” program has made a law respecting an establishment of religion within the meaning of the First Amendment. (*Zorach v. Clauson*, 1952, pp. 311-12).

Recognizing the complexity of the relationship between church and state, a complexity that the Court will grapple with for years to come, Douglas further noted:

There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated....The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other....Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. (*Zorach v. Clauson*, 1952, p. 312).

It is “the specific ways, in which there shall be no concert or union or dependency one on the other” that the potential for conflict lay for the Court. Disputes about how the church and state can avoid becoming “aliens” to one another will demonstrate an ongoing need for clarification by the Court about how church and state can operate within the boundaries of the First Amendment.

In *Torcaso v. Watkins* (1961), the governor’s appointee to the office of Notary Public in Maryland was denied his post because he chose not to affirm his belief in God. Such a declaration was required by the Maryland Constitution. Writing for a unanimous Court, Justice Black wrote:

Nothing decided or written in *Zorach* lends support to the idea that the Court there intended to open up the way for government, state or federal, to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept [footnote omitted]. We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person “to profess a belief or disbelief in any religion.”... This Maryland religious test for public office unconstitutionally invades the appellant’s freedom of belief and religion and therefore cannot be enforced against him. (*Torcaso v. Watkins*, 1961, pp. 494-96)

The Court’s 9-0 decision found in favor of the appellant by stating that the Maryland Constitution’s requirement that the appellant declare his belief in God was unconstitutional because it violated his free exercise.

Engel v. Vitale (1962) is an Establishment Clause dispute that involved New York State officials' composition of an official state prayer that they required be recited in all public schools in New York at the beginning of each school day. The prayer was composed by the State Board of Regents, which was an agency created by the New York State Constitution and to which was granted executive, legislative, and supervisory powers by the New York Legislature. The official prayer was considered non-denominational and students who did not wish to participate were allowed to remain silent or leave the classroom during the prayer. Writing for the unanimous⁵ Court, Justice Black wrote:

We think that by using its public school system to encourage recitation of the Regents' Prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause.... We agree with that contention [that the prayer violates the "wall of separation of church and state"] since we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government. (*Engel v. Vitale*, 1962, pp. 424-25)

Reflective of the Court's ongoing concern since *Everson* that separation between church and state be maintained, Black stated plainly that "[t]here can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer" (*Engel v. Vitale*, 1962, p. 430). The Court unanimously maintained its position that there be a

⁵ Justice Frankfurter took no part in the decision of this case. Justice White took no part in the consideration or decision of this case.

strict separation between church and state, regardless of the non-denominational nature of the prayer and whether or not students were permitted to be excused during the recitation of the prayer (*Engel v. Vitale*, 1962, p. 430).

Like *Engel v. Vitale* (1962), the issue of religious practices in public schools was also considered in *Abington School District v. Schempp* (1963). In that case, a Pennsylvania statute required that at least ten verses from the Bible be read at the beginning of each school day in the state's public schools. The statute provided for students either to refrain from participating in the biblical readings or to be excused from attending the biblical readings with a written request from parents. In an 8-1 majority, the Court found that the required biblical reading violated the Establishment Clause.

Recognizing the overlap that can occur between the Establishment Clause and the Free Exercise Clause, Justice Clark, writing for the majority, wrote of the Establishment Clause:

The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. (*Abington School District v. Schempp*, 1963, p. 222)

Addressing Free Exercise Clause principles, Clark further wrote:

And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any

compulsion from the state. This the Free Exercise Clause guarantees. (*Abington School District v. Schempp*, 1963, p. 222)

Clark provided an insight into the development of the justices' thinking about how to decide disputes involving Religion Clauses, especially the Establishment Clause. He referred to a test that the justices had been developing to assist them in deciding Establishment Clause disputes. Clark wrote:

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. (*Abington School District v. Schempp*, 1963, p. 222).

This developing test reflected the Court's attempts to clarify its interpretation of the meaning of the Establishment Clause of the First Amendment. The test, which will be identified later as the *Lemon* test, will eventually reach a more formal enunciation and be used by the Court for several decades to decide Establishment Clause disputes, reflecting the Court's concern for ensuring that constitutional boundaries for keeping church and state separate are maintained.

In *Chamberlain v. Public Instruction Board* (1964), the Court issued a per curiam decision regarding an Establishment Clause dispute. The Court decided that a statute implemented by the Dade County Board of Public Instruction in Florida requiring public schools to have devotional bible reading and prayers was unconstitutional. While other issues were dismissed for lack of being "properly presented," such as bacalaureate services and a religious

test for teachers, the Establishment Clause issue, the primary issue considered by the Court, resulted in a conservative decision. The Court followed the line of reasoning presented in *Abington Township v. Schempp* (1963) to arrive at its decision (*Chamberlain v. Public Instruction Board*, 1964, p. 402).

Flast v. Cohen (1968) decided whether or not the appellants, as taxpayers, had standing to sue with reference to the use of federal funds under the Elementary and Secondary Education Act of 1965 for the purposes of funding education in certain subjects, and the purchase of instructional materials in religious schools. Specifically, the taxpayer-appellants' dispute

...was that federal funds appropriated under the Act were being used to finance instruction in reading, arithmetic, and other subjects in religious schools, and to purchase textbooks and other instructional materials for use in such schools. Such expenditures were alleged to be in contravention of the Establishment and Free Exercise Clauses of the First Amendment. (*Flast v. Cohen*, 1968, pp. 85-86).

With an 8-1 majority, the Court decided that the appellants did have standing to sue. Chief Justice Warren, the opinion's author, wrote that the appellants had properly requested that a three-judge lower court decide the case. In addition, the taxpayer-appellants' status as taxpayers did not prevent them from bringing suit to the Supreme Court. Warren explained:

The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative and spending power. Such an injury is appropriate for judicial redress, and the taxpayer has established the necessary nexus between his status and the nature of the

allegedly unconstitutional action to support his claim of standing [emphasis added] to secure judicial review. (*Flast v. Cohen*, 1968, p. 106)

The Court decided that because the taxpayers alleged that their tax money was being spent in way that violated the constitutional protection against legislative abuse of power, the taxpayers had standing. Warren concluded by pointing out that the Court's majority stated "no view at all on the merits of appellants' claim in this case," only that "their complaint contains sufficient allegations under the criteria we have outlined" to seek relief from the federal court system (*Flast v. Cohen*, 1968, p. 106).

In *Board of Education v. Allen* (1968), the Court considered a New York statute that required local public school administrations to lend textbooks without cost to all students in grades seven through 12, regardless of whether the students attended public or religious schools. Appellants claimed that the statute violated both the Establishment and Free Exercise Clauses of the First Amendment. The Court of Appeals had found that because the law benefitted all students, both those in public and religious schools, and because only textbooks that had been approved by the public school system could be loaned, the statute was neutral and did not violate the Religion Clauses.

Relying on the developing test, later called the *Lemon* test, that allowed justices to decide Establishment Clause disputes regarding state involvement with religion, Justice White, writing for the 6-3 majority that voted in a conservative direction, did not believe that loaning secular textbooks to religious schools violated the Establishment Clause. The New York statute had the secular purpose of educating students in secular subjects and the statute did not advance or inhibit religion. White pointed out that the Court had recognized since *Pierce v. Society of*

Sisters (1925) that religious schools provided education in both religious subjects and secular subjects and that the Court accepted that a state's interest in secular education could be met by a religious school's teaching of those secular subjects. White then concluded that:

...we cannot agree with appellants either that all teaching in a sectarian school is religious or that the process of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion....Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion. (*Board of Education v. Allen*, 1968, p. 248)

The majority also concluded that the New York statute did not coerce the appellants with regard to their religious belief or practice, rejecting the argument that the statute violated the Free Exercise Clause (*Board of Education v. Allen*, 1968, pp. 248-49).

Epperson v. Arkansas (1968) is a case that considered an "ant-evolution" statute in Arkansas. The statute, adopted in 1928, prohibited the teaching that human beings evolved from other forms of life, particularly from a lower order, in any of its public school and universities. In addition, textbooks that taught this idea of evolution could not be used. In the specifics of the case, Susan Epperson, a 10th grade biology teacher at Central High School in Arkansas, was required to use a new textbook that had been purchased by the school administration. The new textbook contained a chapter about evolution, a concept prohibited by the Arkansas statute. Epperson faced the difficult decision either not to fulfill her responsibility to teach the material in the textbook, or teach the material, including the prohibited chapter about evolution, and violate

the Arkansas statute, which would end in her dismissal for committing a criminal offense. Epperson, therefore, sought to have the Arkansas statute declared void and her job protected for teaching evolution in violation of the statute (*Epperson v. Arkansas*, 1968, p. 101).

In a 9-0 decision, the Court found that the Arkansas statute violated the Establishment Clause of the First Amendment. Writing for the majority, Justice Fortas wrote:

The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group [footnote omitted]. (*Epperson v. Arkansas*, 1968, p. 103).

Fortas further notes that “[i]t is clear that fundamentalist sectarian conviction was and is the law’s reason for existence” leading to the conclusion that “Arkansas’ law cannot be defended as an act of religious neutrality” (*Epperson v. Arkansas*, 1968, pp. 107-109). Because this neutrality was not maintained in fact nor was it ever intended as part of the statute, the Court unanimously issued its liberal decision, reflective of its concern to keep church and state separate as expressed in the Establishment Clause.

Walz v. Tax Commission of City of New York (1970) considers an Establishment Clause dispute regarding tax exemptions in New York. Appellant Walz challenged a statute by the New York City Tax Commission that allowed property tax exemptions for property used solely “for religious, educational or charitable purposes” (*Walz v. Tax Commission of City of New York*, 1970, pp. 666-67). The appellant claimed that by granting religious organizations a tax

exemption, he was indirectly being required to contribute tax money to religion in violation of the Establishment Clause.

In a 7-1 decision, the Court found that the New York statute did not violate the Establishment Clause. Relying, in part, in the history of tax exemptions for religious organizations in the United States, Chief Justice Burger wrote:

The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state....There is no genuine nexus between tax exemption and establishment of religion. (*Walz v. Tax Commission of City of New York*, 1970, p. 675).

Perhaps as a foreshadowing of the entanglement prong of the future *Lemon* test, Burger also noted:

The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other. (*Walz v. Tax Commission of City of New York*, 1970, p. 676)

Granting religious organizations a property tax exemption prevents entanglement between church and state because the interaction between the two is minimal. By limiting interaction and entanglement between church and state, the principles of the Establishment Clause are maintained by ensuring there is separation between the two.

Lemon v. Kurtzman (1971) is a landmark case that provided an important foundation for future Establishment Clause disputes, primarily because of the test, identified as the *Lemon* test, that was defined in the case. In 1968, Pennsylvania enacted the Nonpublic Elementary and

Secondary Education Act which provided for the state to provide support for the purely secular educational activities in nonpublic schools. The statute allowed the Superintendent of Public Instruction to “purchase,” through reimbursements, certain services from the nonpublic schools. The state of Pennsylvania would reimburse to nonpublic schools actual monies spent on salaries for teachers, textbooks, and instructional materials. The nonpublic schools were required to keep accurate accounting of the secular services purchased by the state which were subject to audit by the state (*Lemon v. Kurtzman*, 1971, pp. 609-10).

The 8-0 majority⁶ voted in a liberal direction in the case’s decision, deciding that the Pennsylvania statute violated the Establishment Clause. Chief Justice Burger, who wrote the opinion for the unanimous Court, used this case to underscore the difficulty of deciding church-state relations and the Court’s attempts to devise a process to decide Establishment Clause disputes. Burger admitted:

The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be “no law respecting an establishment of religion.”...A given law might not establish a state religion but nevertheless be one “respecting” that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment. (*Lemon v. Kurtzman*, 1971, p. 612).

⁶ Justice Marshall took no part in the consideration or decision of the case.

Because identifying which laws “respect” the establishment of religion, as opposed to laws which themselves establishing an religion, is a “sensitive area of constitutional law” (*Lemon v. Kurtzman*, 1971, p. 612), the justices recognized the need for guiding principles to help them decide Establishment Clause disputes. Burger explained the historical development of a series of tests which, taken together came to be known as the *Lemon* test:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...finally, the statute must not foster “an excessive government entanglement with religion.” (*Lemon v. Kurtzman*, 1971, pp. 612-13).

The justices found the “entire relationship” between church and state in Pennsylvania violative of the First Amendment because it created excessive entanglement.

Burger did recognize the reality that there are times when church and state will interact. He wrote further:

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable....Judicial caveats against entanglement must recognize that the line of separation, far from being a “wall,” is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship. (*Lemon v. Kurtzman*, 1971, p. 614).

While the *Lemon* test attempted to provide clarity and guidance in the application of First Amendment principles to Establishment Clause disputes, the test itself became a topic of debate among the justices as they used the test to justify their differing opinions in Religion Clause disputes.⁷

In *Tilton v. Richardson* (1971), the Court considered whether or not the Higher Education Facilities Act of 1963 violated the Establishment and Free Exercise Clauses of the First Amendment. The Act provided for federal grants and loans to be given to higher education institutions for the purpose of constructing facilities that could not be used for sectarian instruction or worship. Facilities constructed with funds obtained through the federal grants and loans could not be connected to any religious program.

In a 5-4 decision, the Court decided in a conservative direction and found that the Act did not violate the Free Exercise Clause nor did it violate the Establishment Clause. While Chief Justice Burger pointed out that “[t]here are always risks in treating criteria discussed by the Court from time to time as ‘tests’ in any limiting sense of the term” (*Tilton v. Richardson*, 1971, p. 678) the Court nevertheless used the *Lemon* test to decide the Establishment Clause aspect of the dispute. A majority of the justices found that the Act did not violate the principles of the *Lemon* test, particularly since the Act applied to institutions of higher education and not K-12 schools. Burger explained:

⁷ The *Lemon* decision also addressed the Rhode Island Supplemental Act, enacted in 1969, which permitted state officials to pay a portion of the salaries of teachers in nonpublic elementary schools who taught secular subjects. The Act authorized direct payments to the teachers, not to exceed 15% of the teacher’s current salary and not to exceed the maximum salary paid to public school teachers. In Rhode Island, the nonpublic elementary schools enrolled about 25% of the state’s students, and about 95% of those students attended schools associated with the Roman Catholic Church. In the decision, the Supreme Court affirmed the judgment by the District Court that the Act violated the Establishment Clause because it led to “excessive entanglement” between religion and government (*Lemon v. Kurtzman*, 1971).

There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools....There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination (*Tilton v. Richardson*, 1971, pp. 685-686).

In addition to the characteristics of students in higher education, the religious institutions in question, all of which were affiliated with the Catholic faith, did not require students to attend religious services and the required theology courses were not required to be in Catholic doctrine. Because the institutions did not attempt to indoctrinate its students and religious instruction was not a significant purpose of the institutions, a majority of justices believed that there was low risk of entanglement between church and state (*Tilton v. Richardson*, 1971, p. 687).

Cruz v. Beto (1972) came to the United States Supreme Court on a motion to dismiss the complaint for insufficiency. There, a Buddhist prisoner claimed that his Free Exercise rights were violated by the state of Texas by his not being able to use the prison chapel, write to his religious advisor, or share religious material with other prisoners without being punished, while prisoners belonging to Protestant, Jewish and Catholic faiths were afforded those opportunities. In its *per curiam* opinion the Court concluded that under its rules a court should not dismiss a claim “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of this claim which would entitle him to relief” (*Cruz v. Beto*, 1972, p. 322). The plaintiffs satisfied this undemanding standard in their complaint. Notably, no specific Free Exercise standard was set forth in the opinion, but the opinion did state:

We do not suggest, of course, that every religious sect or group within a prison—however few in number—must have identical facilities or personnel. A special chapel or place of

worship need not be provided for every faith regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand. *But reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty* [emphasis added]. (*Cruz v. Beto*, 1972, pp. 322-23)

Without much elaboration, Justices Blackmun and Burger concurred in the result, stressing the allegations in the complaint were just barely sufficient to state a Free Exercise claim (*Cruz v. Beto*, 1972, p. 323). In its 8-1 decision, the Court decided in favor of Cruz, the Buddhist prisoner, by stating that the state of Texas may have violated, by way of the Fourteenth Amendment, Cruz's First Amendment right of Free Exercise. It vacated the judgment and remanded the case for further proceedings.

In *Wisconsin v. Yoder* (1972), adherents of the Old Order Amish religion and the Conservative Amish Mennonite Church were found to be in violation of the compulsory education attendance law in Wisconsin, which imposed criminal sanctions for the violation. The Supreme Court held that the Free Exercise Clause required that Amish parents be granted an exemption from compulsory school laws for their 14- and 15-year old children. In doing an in depth examination of the history of the Amish religion, the Court noted:

Aided by...three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish...have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and

the hazards presented by the State's enforcement of a statute *generally valid as to others* [emphasis added].⁸ (*Wisconsin v. Yoder*, 1972, p. 235)

In addition, the justices in the *Yoder* opinion recognized the important role that vocational education played in Amish religious belief. Home vocational education also was used to train children for living life within the Amish community. Such a program of education had been successful for hundreds of years within the Amish community (*Wisconsin v. Yoder*, 1972, p. 218).⁹

In light of the historical facts and practices of the Amish community, the Court stated that “when the interests of parenthood *are combined* [emphasis added] with a free exercise claim of the nature revealed by this record, more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State’s requirement under the First Amendment” (*Wisconsin v. Yoder*, 1972, p. 233). The *Yoder* Court held that the State did not demonstrate more than a “reasonable relation to some purpose within the competency of the State”. (*Wisconsin v. Yoder*, 1972, p. 236). The *Yoder* Court also made sure to consider only the claims that were made according to the official record because the unique claim made by the Amish was “one that probably few other religious groups or sects could make” (*Wisconsin v. Yoder*, 1972, pp. 235-36).

⁸ The Amish way of life does not allow for enrollment in high school and attendance at institutions of higher education. Such participation is not only discouraged, but is seen as detrimental to the Amish way of life. In part, attending high school and institutions of higher education would lead to an Amish adherent’s exposure to “worldly” influences (*Wisconsin v. Yoder*, 1972, pp. 210-11), which is prohibited by Amish values.

⁹ As evidence of the success of the Amish way of life, the Court referred to the fact that there is no evidence that in the instances where Amish adherents had left their community, with “their valuable vocational skills and habits,” had become burdens on society (*Wisconsin v. Yoder*, 1972, p. 225).

The statute compelling school attendance threatened Amish belief and practice, indeed the very way of life, for the Amish. This threat was a key component of the holding by the *Yoder* Court. (*Wisconsin v. Yoder*, 1972, pp. 235-36). On the one hand, the *Yoder* Court noted that “religiously grounded conduct must often be subject to the broad police power of the State” (*Wisconsin v. Yoder*, 1972, p. 220). On the other hand, however, the Court referred to key precedents such as *Sherbert v. Verner* (1963), which reached the conclusion that “there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability* [emphasis added]” (*Wisconsin v. Yoder*, 1972, p. 220). The Court emphasized that even what a compelling interest claim for compulsory education is asserted by the State against an issue of religious liberty, the gravity of the outcome of such a conflict requires a “searching” examination of “the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption” (*Wisconsin v. Yoder*, 1972, p. 221). The *Yoder* Court, then, applied *Sherbert* balancing by weighing the interest of the State in compulsory education of its citizens against the constitutional right to Free Exercise guaranteed by the First Amendment *and* the Court-affirmed right of parents to direct the education of their children (*Wisconsin v. Yoder*, 1972, pp. 213-15).¹⁰ This hybrid approach to the *Yoder* Court’s decision notwithstanding, the issue of the Free Exercise of religion provided the basis for its decision (*Wisconsin v. Yoder*, 1972, p. 236).

¹⁰ The parental right to direct the education and upbringing of their children used by the *Yoder* Court here is drawn from *Pierce v. Society of the Sisters* (1925). This case, which was held to violate the Due Process Clause, involved a compulsory education law that had required that all children attend *public* schools.

Lemon v. Kurtzman (1973), referred to as *Lemon II*, followed the Court's decision in *Lemon v. Kurtzman* (1971) which found that Pennsylvania's reimbursement program to religious schools for secular educational services violated the Establishment Clause. The District Court had prohibited Pennsylvania from making any reimbursement payments to the religious schools after the decision in *Lemon I*, but allowed reimbursements to be made for services that occurred before the *Lemon I* decision. In a 5-3 decision, the Court affirmed the District Court's decree authorizing reimbursement for services rendered before *Lemon I* was decided. The Court considered the issue of equity, in which "courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots" (*Lemon v. Kurtzman*, 1973, p. 201). In this case, the religious schools acted in good faith. In addition, the Court weighed "the remote possibility of constitutional harm from allowing the State to keep its bargain" against "the expenses incurred by the schools in reliance on the state statute inviting the contracts made and authorizing reimbursements for past services performed by the schools" (*Lemon v. Kurtzman*, 1973, p. 204). The Court's decision favored the "reliance interests" of the religious schools in rendering its conservative decision (*Lemon v. Kurtzman*, 1973, p. 204).

Norwood v. Harrison (1973) involved a complaint that some private secular schools in Mississippi which did not allow students of particular racial groups to enroll in their schools received direct state aid in the form of the Mississippi textbook lending program. Appellees argued that the state was providing direct aid to an education system that was racially segregated. Such direct aid served to prevent the process of desegregating Mississippi public schools. Writing for the Court, Chief Justice Burger pointed out that the Court had previously disallowed

tuition grants to students who attended private schools with racially discriminatory policies. Providing textbooks was a form of providing financial assistance, just as tuition grants would have been, because both forms of aid benefited private schools. Such segregation was not offered constitutional protection. Since both the Establishment Clause and Free Exercise Clause exist in tension with one another, Burger referred to the “play in the joints” that may exist between the two religion clauses, “to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools and their sponsors” (p. 469). Burger conceded that providing textbooks could be allowed under carefully defined circumstances, such as a certification program in which schools outline their admissions policies. Providing textbooks at the cost of perpetuating racial segregation was unacceptable, however.

In *Norwood v. Harrison* (1973) the Court unanimously found that there was state action under the Fourteenth Amendment when the State of Mississippi give free textbooks to private schools which practiced racial discrimination. The Mississippi program provided free textbooks to public and private schools, without reference to whether the schools engaged in racial discrimination. The Court noted the great growth in private school education in Mississippi in the years after desegregation was required. The Court stated that a “State’s constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination” (*Norwood v. Harrison*, 1973, p. 467). *Norwood’s* message was that

either the schools had to stop discriminating if they wanted the books or, if they kept their policy of discrimination, the state had to halt giving them the books.

The key reason why the Court found state action in the Mississippi textbook program seems to have been the state's rather glaring attempt to use private and religious schools to avoid the commands of the Equal Protection Clause, not because the program provided aid to religiously affiliated schools. This conclusion is supported by the fact that the Court has approved more substantial support for private and religious schools in cases such as *Board of Education v. Allen*, 392 U.S. 236 and *Mitchell v. Helms*, 530 U.S. 793 (2000) (discussed below), for example. At bottom, *Norwood* should be read as a case condemning the use of state machinery for invidious racial purposes rather than for reasons of state religious establishment. In this regard the *Norwood* opinion noted:

But the transcendent value of free religious exercise in our constitutional scheme leaves room for “play in the joints” to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools and their sponsors. (*Norwood v. Harrison*, 1973, p. 469).

Such a statement reaffirms that the justices believed that state aid, if carefully formulated within constitutional limits, could be given to religious schools. This attitude is also reflective of the legal flexibility discussed in *Lemon v. Kurtzman* (1973) and represents, at least in theoretical terms, a less rigid interpretation of the concept of the “wall of separation of church and state” (*Reynolds v. United States*, 1879, p. 164) that was used in *Everson v. Board of Education* (1947), the significant case that applied the Establishment Clause to the states for the first time.

Two principles of the *Lemon* test were used to demonstrate that a New York statute that would reimburse private schools, including sectarian schools, for certain state mandated services violated the Establishment Clause in *Levitt v. Committee for Public Education & Religious Liberty* (1973). The state sought to reimburse the schools for examinations prepared by the state as well as examinations prepared by teachers that measure student progress in individual classrooms. The Court determined that the New York statute violated two principles of the *Lemon* test, namely, that the statute may not have the primary purpose or effect of advancing religion, and that the statute may not lead to excessive entanglement by the state and religious institution (*Lemon*, 1971). Remaining consistent with the decision in *Committee for Public Education and Religious Liberty v. Nyquist* (1973), which was rendered the same day, the conclusion of the Court in *Levitt v. Committee for Public Education & Religious Liberty* (1973) was reached because the state was unable to show which portion of the reimbursement was allocated for the mandated secular services (testing), exclusive of any sectarian activities. To illustrate its point, the Court wrote that “no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction” (*Levitt v. Committee for Public Education & Religious Liberty*, 1973, p. 480). The Court observed that the State of New York had not undertaken a thorough explanation of how the funds would be applied and that if such an explanation had been provided by the State, the holding might have been different.

The *Nyquist* Court also pointed out that such determination is not the responsibility of the Court. Demonstrating a concern for maintaining the separation of powers and principles of federalism, the Court stated that the burden of showing how reimbursement funds would be

applied only to secular services fell to the legislature, not the judiciary. The Court stated that “neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. That is a legislative, not a judicial, function” (*Levitt v. Committee for Public Education & Religious Liberty*, 1973, p. 482). The majority appeared willing to permit reimbursement for secular services to religious schools, so long as there was clarity about how the funds would be used with regard to secular and sectarian activities.

While this decision kept the Court within the constitutional limits of its power, it also prevented future expectations that it perform the same function in future cases. By taking on the role of arbiter of secular and sectarian expenses, the Court could open itself up to an increase in the number of cases it was expected to decide, a concern that Rehnquist expressed in his dissent in *Cruz v. Beto* (1972).

The *Lemon* test was also used to decide *Hunt v. McNair* (1973). In this case, the appellant challenged the South Carolina Educational Facilities Authority Act by claiming that it violated the Establishment Clause because it allowed for the financing of building projects at the Baptist College at Charleston through the issuance of revenue bonds. The building projects would not be for the construction of facilities used for sectarian or religious purposes, and the Authority would maintain the right to inspect property and buildings to ensure that this restriction was adhered to by the College. The Court decided that the Act violated none of the principles of the *Lemon* test. The purpose of the Act was secular, it did not have the primary effect of advancing or inhibiting religion, and it did not lead to excessive entanglement with religion. Even with the State’s right to inspect this religious college’s property and buildings, the

Court concluded that the level of potential entanglement was low, especially given that religious instruction was not a pervasive activity of the College. The majority believed that a certain amount of entanglement of state purposes with religion may be tolerable, as long as the entanglement is minimal. The majority showed that it was struggling with defining what was “excessive” entanglement and what was minimal and what such a definition would imply with regard to the first two prongs of the *Lemon* test. If the majority was going to accept that some entanglement was permissible, albeit minimal, then it had to provide some justification about why such entanglement would be acceptable. In this case, the majority explained that there was a lack of pervasive religious instruction by the College, so entanglement by any degree would not likely lead to state support of religion. This view by the majority stood in contrast to its view regarding religious elementary and secondary schools, whose religious character was more extensive (*Hunt v. McNair*, 1973, p. 26). Entanglement with K-12 schools would be more problematic because of the increased possibility of promoting religious belief, thus violating the second prong of the *Lemon* test.

The impact of the amount of religious instruction in the educational institution on the Court’s use of the *Lemon* test, particularly the entanglement prong, was further addressed by the majority: “The Court’s opinion in *Lemon* and the plurality opinion in *Tilton*¹¹ are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use

¹¹ The case *Tilton v. Richardson* (1971) involved a challenge of the Higher Education Facilities Act of 1963, which provided construction grants using federal funds for facilities at colleges and universities, including those that were religiously affiliated. The Act stipulated that funds could not be used for the construction of facilities that would be used for religious worship or religious instruction. The Court held that the Act was constitutional and the four religious institutions in Connecticut that had made use of the funds for secular functions in the constructed facilities did so within constitutional limits since no sectarian influence occurred in the schools’ operations of their secular facilities.

varies in large measure with the extent to which religion permeates the institution. In finding excessive entanglement, the Court in *Lemon* relied on the ‘substantial religious character of these church-related’ (*Lemon v. Kurtzman*, 1971, 616) elementary schools” (*Hunt v. McNair*, 1973, p. 746). In addition, the Court followed the line of reasoning by Justice Burger in his opinion for the plurality in *Tilton v. Richardson* (1971) when he wrote: “Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education” (p. 687). The *McNair* Court pointed to both the “substantial purpose” and “activity” of the institution to determine whether or not there is enough religion present to justify the assertion that there would be excessive entanglement between church and state. Religious colleges and universities, by their very nature and by the philosophy and process of education that they use, are not sufficiently religious to claim that they are ineligible for state aid. What qualifies the institution for state aid in this case is the fact that it does not have the primary purpose of “religious indoctrination” (*Hunt v. McNair*, 1973, p. 747), which then makes the problem of entanglement largely moot since the state aid would not be entangled with a primarily religious institution.

Committee for Public Education v. Nyquist (1973) considers three financial aid programs as part of Amendments to the Education and Tax Laws of New York. The first program allowed for grants to be made to nonpublic elementary and secondary schools for the maintenance and repair of facilities and equipment. Such repair was aimed at the physical safety of students. The second program under the New York law provided for a tuition reimbursement plan for qualifying parents of children attending nonpublic elementary and secondary schools. The third

program gave those parents who did not qualify for tuition reimbursement the right to take a deduction on their state income taxes. Qualifying parents were able to deduct a certain amount of money per child from their adjusted gross income, thus providing tax relief to the eligible parents.

Relying on the decisions of previous Supreme Court cases, the Court held that all three provisions of the New York law violated the Establishment Clause. The method of legal analysis used to arrive at the decision was the *Lemon* test, under which each of the three sections of the New York law was found to violate the principle of advancing the religious mission of the schools. Each section of the law was considered separately, and the justices wrote opinions for each section of the law (*Committee for Public Education v. Nyquist*, 1973).

Sloan v. Lemon (1973) was decided on the same date as *Committee for Public Education v. Nyquist* on June 25, 1973. *Sloan* is a case that is similar in scope and outcome to *Nyquist*. In *Sloan*, Pennsylvania's Parent Reimbursement Act for Nonpublic Education, which was a tuition reimbursement statute for parents who sent their children to nonpublic schools, was found to be violative of the Establishment Clause because the effect of the law was to advance the religious missions of the sectarian nonpublic schools in the state. There were some differences in the details of the cases. Pennsylvania did not impose the same income limitations on parents to determine eligibility as New York. The Pennsylvania case also referred to the Equal Protection Clause by stating that if parents who send their children to nonsectarian private schools are eligible to receive tuition reimbursement, parents who send their children to religious nonpublic schools should also be eligible for tuition reimbursement. Noting that the "Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other

provisions of the Constitution” (*Sloan v. Lemon*, 1973, p. 834), the Court, using the principles of the *Lemon* test, ultimately found no significant constitutional difference between *Sloan* and *Nyquist* and ruled that the Pennsylvania statute violated the Establishment Clause.

The issue in *Johnson v. Robison* (1974) is whether the appellee may be denied educational benefits under the Veterans’ Readjustment Benefits Act of 1966 for his status as a conscientious objector. He claimed that denial of granting him the status of a veteran eligible for Veterans’ Educational Assistance violated both the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fifth Amendment. The Court allowed legal precedent, deference to legislative decisions, and balancing to guide its decision. The Court held that the denial of the appellee’s status as an eligible veteran violated neither the Due Process Clause nor the Equal Protection Clause.

In addressing the Equal Protection Clause claim, Justice Brennan used a rational basis approach to point out that the lives of active duty veterans are significantly more disrupted by their service than the lives of conscientious objectors who chose alternative civilian service. The majority opinion by Brennan stated:

First, the disruption caused by military service is quantitatively greater than that caused by alternative civilian service. A conscientious objector performing alternative service is obligated to work for two years. Service in the Armed Forces, on the other hand, involves a six-year commitment. While active duty may be limited to two years, the military veteran remains subject to an Active Reserve and then Standby Reserve obligation after release from active duty. This additional military service obligation was

emphasized by Congress as a significant reason for providing veterans' readjustment benefits. (*Johnson v. Robison*, 1974, p. 378).

In addition to this "quantitative" difference, Brennan also wrote about a further difference:

Second, the disruptions suffered by military veterans and alternative service performers are qualitatively different. Military veterans suffer a far greater loss of personal freedom during their service careers. Uprooted from civilian life, the military veteran becomes part of the military establishment, subject to its discipline and potentially hazardous duty. Congress was acutely aware of the peculiar disabilities caused by military service, in consequence of which military servicemen have a special need for readjustment benefits. (*Johnson v. Robison*, 1974, p. 379).

It is because of these disruptions to veterans' lives that Congress had provided benefits, such as educational benefits, to assist veterans in readjusting to civilian life after their service. Congress took such disruptions into consideration when they passed the Veterans' Readjustment Benefits Act of 1966, and Brennan's reliance on Congressional intent in his opinion demonstrated the majority's deference to legislative discretion.

In addressing the Free Exercise claim in *Robison*, Brennan relied on *Gillette v. United States* (1971) in writing the majority opinion. In that case, conscientious objectors to particular wars asserted a violation of their Free Exercise rights by being forced to reject their religious beliefs and participate in what they claimed was an unjust war or be imprisoned. In *Gillette*, the Court used a balancing approach and found that the government had a significant interest in acquiring military personnel. The government's interest was "of a kind and weight" (p. 461) such that the laws enacted to acquire military personnel were justified under the Free Exercise

Clause. In *Johnson*, the Court used a similar strict scrutiny approach and indicated that the stakes were even significantly lower in that there was little burden to Free Exercise, if any at all, on the appellee. The Court wrote that the “withholding of educational benefits involves only an incidental burden upon appellee’s free exercise of religion—if, indeed, any burden exists at all” (*Johnson v. Robison*, 1974, p. 385). Establishing that the appellee’s burden was incidental at best, the Court further wrote:

Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government....[Rather,] incidental burdens...[may be] strictly justified by substantial governmental interests. (*Gillette v. United States*, 1971, pp. 461-462; as cited in *Johnson v. Robison*, 1974, p. 384).

A strict scrutiny approach requires a compelling state interest, and the Court wrote that “the Government’s interest in procuring the manpower necessary for military purposes” is “of a kind a weight sufficient to justify under the Free Exercise Clause the impact of the conscription laws on those who object to particular wars” (*Gillette v. United States*, 1971, pp.461, 462; as cited by *Johnson v. Robison*, 1974, pp. 384-85). Further, and more specifically to this case, the Court concluded the government had a compelling state interest by enforcing the Veterans’ Readjustment Benefits Act of 1966, whose purpose was “to advance the neutral, secular governmental interests of enhancing military service and aiding in the readjustment of military personnel to civilian life” (*Johnson v. Robison*, 1974, p. 385).

The outcome of *Johnson v. Robison* (1974) directly impacted the case *Hernandez v. Veterans’ Administration* (1974) because the latter case, like the first, claimed the Veterans’

Administration violated the First and Fifth Amendments by denying educational benefits to conscientious objectors. In *Hernandez*, both the District Court and Court of Appeals had dismissed the claim based on lack of jurisdiction. In light of its decision in *Johnson*, the Court granted *certiorari* and decided the case with *Johnson*. Thus, the rationale for the *Hernandez* decision is identical to the *Johnson* decision, namely, that neither the Free Exercise rights nor the Equal Protection rights of the petitioners were violated by the Veterans' Administration's policy of denying educational benefits to conscientious objectors. Justice Brennan used a balancing approach to decide the case. Using the strict scrutiny test, the government's interest was weighed against that of the appellee. The Court thus concluded that the government had a compelling interest in burdening, albeit incidentally, the appellee's Free Exercise rights under the Religion Clauses of the First Amendment (*Hernandez v. Veterans' Administration*, 1974).

Meek v. Pittenger (1975) was another Establishment Clause case that made use of the *Lemon* test. Pennsylvania had enacted two statutes to provide certain kinds of aid to students enrolled in nonpublic elementary and secondary schools. Act 194 authorized "auxiliary services," such as speech therapy, counseling, and psychological testing and services, for students with the educational need of such services. Act 195 authorized the loan of textbooks to nonpublic schools, as well as instructional materials and equipment, such as maps, films, recordings, periodicals, recorders, projectors, and laboratory equipment. Stating that providing auxiliary services, authorized by Act 194, violated the excessive entanglement principle of the *Lemon* test, particularly since Pennsylvania would need to ensure that public school personnel did not advance religion by working in church-sponsored schools, the Court held that Act 194 violated the Establishment Clause. In addition, the Court found that loaning instructional

materials and equipment to nonpublic schools, authorized by Act 195, would have the primary effect of advancing religion since 75% of the nonpublic schools that would benefit from the loans were religious schools, thus leading to the decision that this portion of Act 195 violated the Establishment Clause.

However, following the logic established by *Board of Education v. Allen* (1968), the Court did conclude that for loans of textbooks, both because such loans made available to all children a generally accepted resource for secular learning and because any financial benefit that was made possible by such loans is realized by the students and their parents, not the nonpublic schools, was constitutional (*Meek v. Pittenger*, 1975).

The Court's reasoning in *Meek* will continue to appear in future school aid cases, such as *Grand Rapids School District v. Ball* (1985), which will reflect attempts to address the Establishment Clause concerns discussed by the justices in their opinions.

The *Lemon* test was used by the Court to decide *Roemer v. Maryland Public Works Bd.* (1976). The case addresses a Maryland statute which allowed state funds to be used as subsidies to qualifying colleges and universities, including religious ones. The statute did not allow the funds to be granted to colleges and universities that awarded only theological degrees nor did it allow the funds to be used for sectarian purposes at the schools. This Establishment Clause case focused specifically on four colleges affiliated with the Roman Catholic Church. The Court found that none of the three prongs of the *Lemon* test were violated by the statute, thus holding that the statute did not violate the Establishment Clause. The subsidy program had a secular purpose, an issue that was not challenged by the appellants. In addition, the subsidy did not advance religion because of the nature of the Catholic colleges and university. The institutions

were not “pervasively sectarian” (*Roemer v. Maryland Public Works Bd.*, 1976, p. 737) in that the role of the Catholic Church was minimal in the lives of the institutions. Also, the funds would be used only for the secular part of the institutions’ operations. Further, there was minimal entanglement between the state and religion because any inspections and audits that would occur would not be any more burdensome than those ordinarily conducted for other colleges and universities that were not religious in nature. The fact that the Catholic colleges and universities were different in nature than K-12 religious schools also prevented entanglement because indoctrination of religious beliefs was not a part of college and university curriculum, the colleges and universities were not restricted to Catholic students only, religious services and theology classes were not required, and academic freedom was a value in the colleges and universities (*Roemer v. Maryland Public Works Bd.*, 1976).

In *Roemer*, several justices began to express concerns about parts of the *Lemon* test. Justice White, in his concurrence, wrote that the third prong of entanglement was unnecessary and even confusing. The third prong was unnecessary because the entanglement discussion usually reverts back to one of the other two prongs, as in this case, and confusing because there was no clear method for determining what the term “excessive entanglement” actually means.

White wrote:

I am no more reconciled now to *Lemon I* than I was when it was decided....The threefold test of *Lemon I* imposes unnecessary, and, as I believe today’s plurality opinion demonstrates, superfluous tests for establishing “when the State’s involvement with religion passes the peril point” for First Amendment purposes. (*Roemer v. Maryland Public Works Bd.*, 1976, p. 768).

White's concurrence, joined by Justice Rehnquist, took the opportunity to air their complaint about the third prong of the *Lemon* test, that is, the entanglement test. They believed that this third prong was simply a "redundant exercise of evaluating the same facts and findings under a different label" (*Roemer v. Maryland Public Works Bd.*, 1976, p. 769). The reason such an exercise was "redundant" was that if there was excessive entanglement, the entanglement was only problematic because the government was entangled with religion.

That state aid could be given to the religious colleges in Maryland presumed that the funds could demonstrably be applied to the secular aspect of the institutions' operations. Since the secular aspects of the schools could be separated from the religious aspects, the justices believed that the funds would not violate the second prong of the *Lemon* test, namely, that the funds would not have the primary effect of promoting religion. White pointed out this fact in his concurrence in *Roemer v. Maryland Public Works Bd.* (1976), where he concurred in the judgment, but not the plurality opinion. In his critique of the plurality's opinion, White wrote:

...the Maryland legislation satisfies the second part of the *Lemon I* test: that on the record the "appellee colleges are not 'pervasively sectarian,'" *ante*, at 755, and that the aid at issue was capable of, and is in fact, extended only to "the secular side" of the appellee colleges' operations. (*Lemon v. Kurtzman*, 1971, p. 759; as cited in *Roemer v. Maryland Public Works Bd.*, 1976, p. 769).

Being able to separate the religious from the secular aspects of the school is more easily accomplished in higher education than in elementary and secondary education, the plurality in *Roemer* believed (*Roemer v. Maryland Public Works Bd.*, 1976, pp. 748-49). By their very nature, colleges do not necessarily share the same "pervasively sectarian" character as religious

elementary and secondary schools, a theme that became increasingly significant as justices sought to distinguish K-12 First Amendment cases from higher education First Amendment cases. The plurality opinion referred to *Tilton v. Richardson* (1971) to explain the

...general differences between college and precollege education: College students are less susceptible to religious indoctrination; college courses tend to entail an internal discipline that inherently limits the opportunities for sectarian influence; and a high degree of academic freedom tends to prevail at the college level....Though controlled and largely populated by Roman Catholics, the colleges were not restricted to adherents of that faith. No religious services were required to be attended. Theology courses were mandatory, but they were taught in an academic fashion, and with treatment of beliefs other than Roman Catholicism. There were no attempts to proselytize among students, and principles of academic freedom prevailed. With colleges of this character, there was little risk that religion would seep into the teaching of secular subjects, and the state surveillance necessary to separate the two, therefore, was diminished. (*Roemer v. Maryland Public Works Bd.*, 1976, pp. 750-51).

The distinction that the justices make between K-12 schools and colleges and universities is an important theme in Establishment Clause jurisprudence because the essential difference between the nature of these two fields of education affects the results of the application of the *Lemon* test. As *Roemer* illustrates, as well as others such as *Tilton*, assigning the “pervasively sectarian” characteristic to religious elementary and secondary schools is what can lead the institutions to be in violation of the second prong of the *Lemon* test, whereas colleges and universities appear less likely to be assigned such a characteristic. Such a distinction was important not only for

determining state aid, but for establishing a foundation for opinions in other First Amendment disputes.

Wolman v. Walter (1977) concerned an Ohio statute which allowed a variety of forms of aid to nonpublic schools, the majority of which were religious. Justice Blackmun, the author of the majority opinion, recognized that legislators had attempted to craft the statute to conform to Establishment Clause principles as applied in *Meek v. Pittenger* (1975). According to the Ohio statute, students attending nonpublic schools could benefit from funding and/or services in the district where the nonpublic school was located, including

- (1) purchasing secular textbooks approved by the superintendent of public instruction for use in public schools for loan to the children or their parents, on the request of either, made to the nonpublic school (3317.06 (A));
- (2) supplying such standardized tests and scoring services as are used in the public schools, with nonpublic school personnel not being involved in the test drafting or scoring, and no financial aid being involved (3317.06 (J));
- (3) providing speech and hearing diagnostic services and diagnostic psychological services in the nonpublic schools, with the personnel (except for physicians) performing the services being local board of education employees, physicians being hired on a contract basis, and treatment to be administered on nonpublic school premises (3317.06 (D));
- (4) supplying to students needing specialized attention therapeutic, guidance, and remedial services by employees of the local board of education or the State Department of Health, the services to be performed only in public schools, public

- centers, or in mobile units located off nonpublic school premises (3317.06 (G), (H), (I), (K));
- (5) purchasing and loaning to pupils or their parents upon individual request instructional materials and instructional equipment of the kind used in the public schools and that is “incapable of diversion to religious use” (3317.06 (B), (C));
- (6) and providing field trip transportation and services such as are provided to public school students, special contract transportation and services such as are provided to public school students, special contract transportation being permissible if school district buses are unavailable (3317.06 (L)). (*Wolman v. Walter*, 1977, p. 229)

The District Court found all six parts of the Ohio statute constitutional. However, the Supreme Court found constitutional only those parts of the statute relating to textbooks, standardized testing, and diagnostic, therapeutic, and remedial services. The parts of the statute addressing instructional materials and equipment as well as field trip services were found unconstitutional (*Wolman v. Walter*, 1977, p. 230).

The Establishment Clause questions that arose in *Wolman v. Walter* (1977) were decided using the *Lemon* test. Using the *Lemon* test, the Court found that the Ohio statute passed the first prong of the test, namely, the secular legislative purpose. On the other hand, the effects test and entanglement test were sources of dispute among the justices. In addition, Blackmun’s plurality opinion explained some justices’ thinking at the time about the relationship between church and state as it had evolved up to that point. He wrote:

We have acknowledged before, and we do so again here, that the wall of separation that must be maintained between church and state “is a blurred, indistinct, and variable barrier

depending on all the circumstances of a particular relationship.” *Lemon*, 403 U.S., at 614. Nonetheless, the Court’s numerous precedents “have become firmly rooted,” *Nyquist*, 413 U.S., at 761, and now provide substantial guidance. We therefore turn to the task of applying the rules derived from our decisions to the respective provisions of the statute at issue. (*Wolman v. Walter*, 1977, p. 236)

In referring to a wall of separation that is “blurred, indistinct, and variable,” Blackmun, it appears, wanted to emphasize, as had been done before, that Establishment Clause disputes are not clear-cut in terms of the relationship between church and state. Not only was the line between church and state “blurred, indistinct, and variable,” but the details of each dispute were to be considered according to its own uniqueness. Further, Blackmun emphasized yet again the significant work the Court had done in the past with deciding other similar disputes by mentioning the “numerous precedents”¹² that had been established in prior cases, particularly by “applying the rules derived from our decision,” that is, the *Lemon* test.

Not all justices accepted the subtleties acknowledged by Blackmun and the plurality, however. Justice Stevens was critical of Justice Blackmun’s reference to a “blurred, indistinct, and variable barrier,” considering such a stance toward Establishment Clause jurisprudence as reflective of an evolution of thinking that has “left us without firm principles on which to decide these cases. As this case demonstrates, the States have been encouraged to search for new ways of achieving forbidden ends” (*Wolman v. Walter*, 1977, p. 266). Stevens believed that the Court’s approach should reflect “a fundamental character. It should not differentiate between

¹² Justice Stevens, quoting the dissent by Justice Rutledge in *Everson v. Board of Education* (1947), called such precedents “corrosive” (p. 63; as cited in *Wolman v. Walter*, 1977, p. 266).

direct and indirect subsidies, or between instructional materials like globes and maps on the one hand and instructional materials like textbooks on the other” (*Wolman v. Walter*, 1977, p. 265). Stevens preferred instead the test explained by Justice Black in *Everson v. Board of Education* (1947): “No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion” (p. 16; as cited in *Wolman v. Walter*, 1977, p. 265). Stevens resisted using the *Lemon* test as a means for deciding Establishment Clause cases because of the results it could produce, especially decisions that skirted the “‘high and impregnable’ wall between church and state” (*Everson v. Board of Education*, 1947, p. 18; as cited in *Wolman v. Walter*, 1977, p. 266).

As noted earlier, Justice Rehnquist also was hesitant about using the *Lemon* test in Establishment Clause disputes. In Rehnquist’s hesitation, he shared the perspective of skepticism with Stevens, but for quite different reasons. Whereas Stevens saw the *Lemon* test as a potential means for watering down a strict separation of church and state in Establishment Clause cases, Rehnquist saw the *Lemon* test as a potential means for limiting an accommodationist approach to the relationship between church and state. In his dissent in *Meek*, which provided the foundation for his opinion in *Wolman v. Walter* (1977), Rehnquist had written:

I am disturbed as much by the overtones of the Court’s opinion as by its actual holding. The Court apparently believes that the Establishment Clause of the First Amendment not only mandates religious neutrality on the part of government but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one. Nothing in the First Amendment or in the cases

interpreting it requires such an extreme approach to this difficult question.... (*Meek v. Pittenger*, 1975, p. 395)

Rehnquist's views thus reflected a growing disenchantment with use the *Lemon* test as an effective means for deciding Establishment Clause disputes.

While the details of the statute considered in *Wolman v. Walter* (1977) seem similar to those found in *Meek v. Pittenger* (1975), so similar, in fact that one may wonder why the Court even chose to consider *Wolman v. Walter* (1977) in the first place, the approach taken by the appellees reflected a different strategy than that found in *Meek*. Justice Blackmun noted:

Appellees seek to avoid *Meek* by emphasizing that it involved a program of direct loans to nonpublic schools. In contrast, the material and equipment at issue under the Ohio statute are loaned to the pupil or his parent. In our view, however, it would exalt form over substance if this distinction were found to justify a result different from that in *Meek*. Before *Meek* was decided by this Court, Ohio authorized the loan of materials and equipment directly to the nonpublic schools. Then, in light of *Meek*, the state legislature decided to channel the goods through the parents and pupils. Despite the technical change in legal bailee, the program in substance is the same as before.... (*Wolman v. Walter*, 1977, p. 250)

Blackmun acknowledged the change in strategy in the appellees' attempt to use government funds for sectarian schools, yet concluded that the effect was the same. Whether the loan of instructional materials and equipment was made to the religious school or to the parents with their students was irrelevant since "the state aid inevitably flows in part in support of the

religious role of the schools” (*Wolman v. Walter*, 1977, p. 250).¹³ The strategic change that was acknowledged in *Wolman v. Walter* (1977) from *Meek v. Pitenger* (1975) regarding the immediate recipient of government aid, that is, students or the religious schools, reflected an increasingly thoughtful concern by the justices about the nature of the religious schools. They began grappling with the question about what it is that defines a school as truly religious. Blackmun wrote in *Wolman*: “Thus, even though the loan [of instructional materials and equipment] ostensibly was limited to neutral and secular instructional material and equipment, it inescapably had the primary effect of providing a direct and substantial advancement of *the sectarian enterprise* [emphasis added]” (*Wolman v. Walter*, 1977, p. 250). Similarly, the *Meek* Court had made the distinction between the secular nature of the goods and services being provided by the government and the religious nature of the nonpublic school recipients of the goods. Stewart had written for the *Meek* Court that

...[t]he very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon v. Kurtzman*, 403 U.S., at 616-617. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to *the sectarian school enterprise as a whole* [emphasis added]. “[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason

¹³ The idea of granting aid to the parents instead of to the religious school was also addressed in *Public Education v. Nyquist* (1973). In that case, the Court decided a case involving, in part, a tuition reimbursement program in which New York would reimburse low-income parents, not the schools, \$50 to \$100 per child (but not more than 50% of the tuition). In *Nyquist*, the Court decided that the tuition reimbursement program to parents violated the Establishment Clause. In *Wolman v. Walter* (1977), Justice Blackmun concluded: “If a grant in cash to parents is impermissible, we fail to see how a grant in kind of goods furthering the religious enterprise can fare any better” (p. 251).

for the school's existence. Within the institution, the two are inextricably intertwined.”
Id., at 657 (opinion of BRENNAN, J.). (*Meek v. Pittenger*, 1975, p. 366; as cited in
Wolman v. Walter, 1977, p. 250).

For Stewart, as reflected in his opinion for the *Meek* Court, and also for Blackmun in the
Wolman Court, the nature of the religious school as one that has a “sectarian enterprise” and
provides “an integrated secular and religious education” represented an important ingredient for
understanding why certain kinds of government aid, such as instructional materials and
equipment, were determined to have the primary effect of advancing religion, according to the
Lemon test. Again, as with the issue of the immediate recipient of government aid discussed
above, this treatment of the importance of the “nature of the institution” (*Wolman v. Walter*,
1977, p. 248) must be weighed against the state's obligation to provide a secular education.

The case *New York v. Cathedral Academy* (1977) involved circumstances similar to, but
not identical to, those in *Lemon v. Kurtzman* (1971) (*Lemon I*) and *Lemon v. Kurtzman* (1973)
(*Lemon II*). In the 6-3 decision, Justice Stewart, the majority opinion's author, outlined the
differences between the current case and the *Lemon* cases. In April of 1972, a New York District
Court ruled that New York's Mandated Services Act, 1970 N. Y. Laws, ch. 138, was
unconstitutional. The Act had allowed New York to reimburse nonpublic schools “for the cost
of certain recordkeeping and testing services required by state law” (*New York v. Cathedral
Academy*, 1977, p. 127). The District Court disallowed any payments whatsoever under the Act,

even if the nonpublic schools had incurred expenses in the second half of the 1971-1972 school year.¹⁴

In response to the District Court's order to permanently enjoin any reimbursement payments by New York to nonpublic schools, including those incurred in the second half of the 1971-1972 school year, the New York State Legislature enacted ch. 996 of the 1972 N. Y. Laws which allowed nonpublic schools to seek reimbursement for expenses incurred prior to June 13, 1972. In his opinion for the Court, Stewart stated plainly that this 1972 enactment by the New York State Legislature "explicitly authorized what the District Court's injunction had prohibited: reimbursement to sectarian schools for their expenses of performing state-mandated services through the 1971-1972 academic year" (*New York v. Cathedral Academy*, 1977, p. 127). This 1972 Act by the New York State Legislature had sought to acknowledge that nonpublic schools relied on the earlier ch. 138 of the 1970 Act by presuming its constitutionality and incurred expenses as a result of this presumption. The 1972 Act further required the New York Court of Claims to audit the claims by the nonpublic schools and make determinations as to the amounts that should be reimbursed to the nonpublic schools (*New York v. Cathedral Academy*, 1977, p. 127).

Under ch. 996 of the 1972 Act, Cathedral Academy sued and the State defended by claiming that the Act was unconstitutional. The Court of Claims found in favor of the State by deciding that ch. 996 of the 1972 Act violated the First and Fourteenth Amendments. The New York Court of Appeals, however, reversed the decision by the Court of Claims and remanded the

¹⁴ The Supreme Court would later affirm the unconstitutionality of the Act, including the prohibition against reimbursement for expenses that were incurred in the second half of the 1971-1972 school year, in *Levitt v. Committee for Public Education* (1973).

case to the Court of Claims to determine the amount of reimbursement to Cathedral Academy. With the decision by the Court of Appeals, the Supreme Court determined that a federal constitution issue had surfaced and accepted the case.

The opinion by Stewart pointed out that the New York state courts and the parties involved in the dispute looked to the decision in *Lemon II* to provide the guiding principles for the case. Prior to *Lemon II*, *Lemon I* had addressed an injunction by the Federal District Court that had disallowed reimbursement payments for specific State-contracted secular services to nonpublic sectarian schools under a Pennsylvania state statute that was declared unconstitutional. After *Lemon I* and on remand, the District Court “enjoined payments under the statute for any services performed after the date of the Court’s decision, *but did not prohibit payments for services provided before the date* [emphasis added]. . . . In *Lemon II* this Court affirmed the trial court’s denial of retroactive injunctive relief against the State. . . .” (*New York v. Cathedral Academy*, 1977, p. 129). What distinguished *Lemon II* from *New York v. Cathedral Academy* (1977), however, was that *Lemon II* had enjoined payments only after a specific date, leaving open the possibility of reimbursement payments for expenses incurred before the date.¹⁵ The District Court in *Cathedral Academy* gave no such date, stating explicitly that any reimbursement payments to the nonpublic schools under the Act were prohibited, regardless of when the nonpublic schools had expended the funds.

¹⁵ *Lemon II* was concerned primarily with correcting the problem of excessive government entanglement that arose from Pennsylvania’s methods for preventing religious influences on the educational services that were reimbursed by the State. Since the payments themselves did not support sectarian activities, they were presumed constitutional. Because expenses related to the State’s supervision had already occurred and would no longer occur, thus posing no further entanglement issues, the Supreme Court allowed reimbursement payments for services contracted before the given date under the concept of “flexibility of equity” (*New York v. Cathedral Academy*, 1977, p. 129). Such payments allowed “the State to keep its bargain” with only the “remote possibility of constitutional harm” (*Lemon v. Kurtzman*, 1973, p. 203).

The majority opinion demonstrated a concern for judicial authority *vis-à-vis* legislative authority. Stewart wrote that the

...state legislature thus took action inconsistent with the court's order when it passed ch. 996 upon its own determination that, because schools like the Academy had relied to their detriment on the State's promise of payment under ch. 138, the equities of the case demanded retroactive reimbursement. To approve the enactment of ch. 996 would thus expand the reasoning of *Lemon II* to hold that a state legislature may effectively modify a federal court's injunction whenever a balancing of constitutional equities might conceivably have justified the court's granting similar relief in the first place....Nothing in *Lemon II*...suggests such a broad general principle. (*New York v. Cathedral Academy*, 1977, p. 130)

Lemon II, then, was not intended to empower state legislatures to enact laws that, despite their good intentions to ensure equitable practices in their respective states, run counter to the Court's decisions. State legislatures have no such authority, Stewart maintained.

In the majority opinion, Stewart recognized that "whether ch. 996 is viewed as an attempt at legislative equity¹⁶ or simply as a law authorizing payments from public funds to sectarian schools, the dispositive question is whether the payments it authorizes offend the First and Fourteenth Amendments" (*New York v. Cathedral Academy*, 1977, p. 130). Ch. 138 was invalidated because "the aid that [would] be devoted to secular functions [was] not identifiable

¹⁶ The Legal Information Institute at Cornell University Law School defines equity in the following way: "In law, the term equity refers to a particular set of remedies and associated procedures. These equitable doctrines and procedures are distinguished from 'legal' ones. Equitable relief is generally available only when a legal remedy is insufficient or inadequate in some way" (<http://www.law.cornell.edu/wex/equity>).

and separable from aid to sectarian activities” (*Levitt v. Committee for Public Education*, 1973, p. 480). The Court found that the consolidated payments could not be aligned with the funds actually spent on the required services and, in addition, there was an unacceptable risk that some of the services, particularly examinations, were susceptible to influences of religious belief. If ch. 138 were constitutionally invalid, then certainly ch. 996 would be invalid, Stewart reasoned (*New York v. Cathedral Academy*, 1977, p. 131). Even if an auditing procedure were used by the state to make such assurances that state funds were spent on services not influenced by religion, sectarian schools would be in a defensive position. Stewart wrote that

...this sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments. In order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials. In order to fulfill its duty to resist any possibly unconstitutional payment...the State as defendant would have to undertake a search for religious meaning in every classroom examination offered in support of a claim. And to decide the case, the Court of Claims would be cast in the role of arbiter of the essentially religious dispute. The prospect of church and state litigating in court about what does or does not have religious meaning touches on the very core of the constitutional guarantee against religious establishment....(*New York v. Cathedral Academy*, 1977, pp. 132-33).

The state’s grant of funds to religious schools is problematic either way, then. A lump-sum payment lacks the ability to be tracked to ensure that public funds are used only for secular

services, thus having the primary effect of promoting religion. At the same time, an auditing process could impermissibly involve the state in religious affairs (*New York v. Cathedral Academy*, 1977, p. 133), leading to the entanglement of church and state, which would violate the third prong of the *Lemon* test. The Court found that ch. 996 violated the First Amendment either way.

Committee for Public Education v. Regan (1980) addressed the continued attempts by the New York state legislature to navigate a permissible path to provide state assistance to religious schools. This case addressed New York's modification of its statute following *Levitt v. Committee for Public Education* (1973). In *Levitt*, the original New York statute was found to violate the Establishment Clause for two reasons. First, the statute had allowed for reimbursement of funds spent by the nonpublic schools for tests that were prepared by teachers. The majority in *Levitt* believed that "despite the obviously integral role of such testing in the total teaching process, no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction" (*Levitt v. Committee for Public Education*, 1973, p. 480). The majority assumed that teachers, in the absence of safeguards, would be in a position¹⁷ to introduce religious instruction into the tests that they create for students. The second problem with the original New York statute addressed in *Levitt* was that "the statute did not provide for any state audit of school financial records that would ensure that public funds were used only for secular purposes" (*Committee for Public Education v. Regan*, 1980, p. 649). The lack of procedures on the part of the state to demonstrate a constitutionally

¹⁷ The teachers would be in such a position not because of any assumed malevolence on the part of the teachers, according to the majority in *Levitt*, but because "the potential for conflict 'inheres in the situation'" (*Levitt v. Committee for Public Education*, 1973, p. 480).

permissible use of state funds in New York's religious schools was a fatal defect for the *Levitt* Court.

The New York legislature modified its statute to reflect the two concerns of the *Levitt* Court. Legislators eliminated teacher-prepared tests as an expense that could be reimbursed and created a procedure to verify that state funds were used only for secular purposes. Writing for the majority in *Committee for Public Education v. Regan* (1980), Justice White acknowledged:

Of signal interest and importance in light of *Levitt I*, the new scheme does not reimburse nonpublic schools for the preparation, administration, or grading of teacher-prepared tests. Further, the 1974 statute, unlike the 1970 version struck down in *Levitt I*, provides a means by which payments of state funds are audited, thus ensuring that only the actual costs incurred in providing the covered secular services are reimbursed out of state funds. (*Committee for Public Education v. Regan*, 1980, p. 652)

The path from *Levitt I* and *Committee for Public Education v. Regan* (1980) had detours along the way. Between the *Levitt* case in 1973 and the current case in 1980, the case *Meek v. Pittenger* (1975) had been decided by the Supreme Court. The District Court had relied on *Meek v. Pittenger* (1975) to invalidate the revised New York statute in the 1976 case *Committee v. Public Education v. Levitt* (1976) (*Levitt II*). *Levitt II* was appealed to the Supreme Court, which viewed the case in light of *Wolman v. Walter* (1977). White recalled that

...[o]n remand the District Court ruled that under *Wolman* “state aid may be extended to [a sectarian] school’s educational activities if it can be shown with a high degree of certainty that the aid will only have a secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious

views.” (*Committee for Public Education v. Levitt*, 1978, p. 1127; as cited in *Committee for Public Education v. Regan*, 1980, pp. 652-53)

With *Wolman v. Walter* (1977) providing the guiding principles that would be used to decide the constitutionality of the modified New York scheme, the Supreme Court ultimately found that the New York statute, with its revisions, did not violate the Establishment Clause.

Stone v. Graham (1980) addressed a Kentucky statute that required that a copy of the Ten Commandments be posted on the wall of each public school classroom in the state. The Ten Commandments were only posted, not read aloud. The copies of the Ten Commandments were purchased using voluntary private funds. In a *per curiam* 5-2 decision, the Court found that the statute violated the Establishment Clause. Using the *Lemon* test, the majority found that the Kentucky statute did not have a secular legislative purpose, despite the state’s assertion to the contrary. The Court noted:

The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, [footnote omitted] and no legislative recitation of a supposed secular purpose can blind us to that fact....If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause. (*Stone v. Graham*, 1980, pp. 41-42)

Chief Justice Rehnquist disagreed with the Court’s rejection of a secular purpose that had been asserted by a state legislature was novel. In his dissent, he wrote:

The Court's summary rejection of a secular purpose articulated by the legislature and confirmed by the state court is without precedent in Establishment Clause jurisprudence. The Court regularly looks to legislative articulations of a statute's purpose in Establishment Clause cases and accords such pronouncements the deference they are due....The fact that the asserted secular purpose may overlap with what some may see as a religious objective does not render it unconstitutional. (*Stone v. Graham*, 1980, pp. 43-44)

Despite the "novelty" of such an approach, the Court nevertheless decided in a liberal direction, but not without a dissenting opinion by Rehnquist that demonstrated that the justices lacked consensus on how to apply the principles of the *Lemon* test to specific cases.

In *Widmar v. Vincent* (1981), the Court considered the interplay of both the Establishment Clause and the Free Exercise Clause. At the University of Missouri at Kansas City, which was a state university, registered student groups were permitted to use university facilities for the groups' activities. One registered group named Cornerstone, a religious group at the university, had been allowed to use university facilities for its meetings from 1973 until 1977. Cornerstone was informed in 1977 that it could no longer use university facilities because it was a religious group. The prohibition came about as a result of a 1972 regulation by the Board of Curators that did not permit use of university facilities for religious purposes. Cornerstone's meetings, the university said, fell within the range of prohibited activities in university facilities. Members of Cornerstone claimed a violation of their Free Exercise rights as well as Free Speech under the First Amendment.

The District Court upheld the university's regulation, stating that its action was required by the principles of the Establishment Clause. The Court stated:

Under *Tilton v. Richardson*, 403 U.S. 672 (1971), the court reasoned, the State could not provide facilities for religious use without giving prohibited support to an institution of religion....The District Court rejected the argument that the University could not discriminate against religious speech on the basis of content. It found religious speech entitled to less protection than other types of expression. (*Widmar v. Vincent*, 1981, p. 267)

The decision by the Court of Appeals, which was affirmed by the Supreme Court, found that the "content-based exclusion" based on the religious content of Cornerstone's activities amounted to "content-based discrimination against religious speech, for which it could find no compelling justification..." (*Widmar v. Vincent*, 1981, p. 267). The university's explanation that its "compelling justification," or "compelling state interest," was the preservation of strict separation of church and state engendered by the Establishment Clause was rejected by the Supreme Court, which stated that the Establishment Clause, as expressed by the *Lemon* test, and an "equal access" policy are not incompatible with one another.

The majority opinion written by Justice Powell explained that an "equal access" policy by the university would not conflict with any of the three prongs of the *Lemon* test. Relative to the first and third prongs of *Lemon*, such a policy would have a secular purpose and would not entangle church and state. The prong in question was the second prong, and both the university and District Court argued that allowing Cornerstone access to the public forum would lead the

university to have the “primary effect” of advancing religion. Powell, however, rejected this argument as missing the point:

The University’s argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content to their speech....In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion. (*Widmar v. Vincent*, 1981, p. 273)

Powell went on to explain that while there may be some effect on religion, the effect is not the main one that would be created by the “equal access” policy by the university:

We are not oblivious to the range of an open forum’s likely effects. It is possible – perhaps even foreseeable – that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization’s enjoyment of merely “incidental” benefits does not violate the prohibition against the “primary advancement” of religion.... (*Widmar v. Vincent*, 1981, p. 273)

The university is required to remain “content-neutral” despite the reality that its “open access” policy may provide “incidental” benefits to religious groups.

The majority evidently believed that religion should be considered one voice among others deserving of equal treatment by the university since the university had an “open access” policy. In addition, the majority’s opinion accepts that religious worship is a type of protected speech, particularly since the university’s open forum policy includes “nondiscrimination against

religious speech” (*Widmar v. Vincent*, 1981, p. 272). The fact that the voice of Cornerstone has religious content should be irrelevant within the context of the university’s policy.

In *Valley Forge College v. Americans United for Separation of Church and State* (1982), the majority achieved a narrow 5-4 victory by rendering a conservative decision based on respondents’ standing. Congress has passed the Federal Property and Administrative Services Act of 1949 that allowed the federal government to transfer to public or private entities government property that is no longer useful to the government. The Secretary of Health, Education, and Welfare was authorized to sell surplus property to nonprofit, tax-exempt educational organizations and could consider any past or future benefit to the government that results from the transfer of the surplus property. The Secretary had allowed the transfer of a former military hospital to a church-related college as surplus government property. The value of the property had been \$577, 500, but the Secretary had calculated a public benefit allowance, with the end result that the church-related college received the property without making any payment. Respondents claimed that the Establishment Clause had been violated and that their tax dollars had not been used in a constitutional or fair manner (*Valley Forge College v. Americans United for Separation of Church and State*, 1982, p. 464).

Referring to Article III of the Constitution, Justice Rehnquist described the majority’s view about how the concept of standing applied to this case:

...at an irreducible minimum, Art. III requires the party who invokes the court’s authority to “show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,” (*Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury “fairly can be traced to the challenged action”

and “is likely to be redressed by a favorable decision,” *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). (*Valley Forge College v. Americans United for Separation of Church and State*, 1982, p. 472).

Rehnquist further noted that according to Article III of the Constitution, the “exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is therefore restricted to litigants who can show ‘injury in fact’ resulting from the action which they seek to have the court adjudicate” (*Valley Forge College v. Americans United for Separation of Church and State*, 1982, p. 473). Stating that the Court’s authority was limited by the Constitution in this case and not wishing to exceed constitutional limits granted to the judiciary, the majority rendered its decision not to grant standing to the respondents.

Without offering its own comments, the Supreme Court’s decision in *Treen v. Karen B.* (1982) affirmed the judgment of the United States Court of Appeals for the Fifth Circuit in *Karen B. v. Treen* (1981). The case involved parents of public school students who appealed a decision by the District Court that held that a Louisiana statute and regulation of Jefferson Parish allowing student and teacher prayers in public schools did not violate the First Amendment. The Louisiana statute contained two sections. Subsection A allowed students and teachers to observe a moment of silent meditation at the beginning of the school day. Subsection A was not a challenged component of the statute. Subsection B, however, was challenged as violating the Establishment Clause. The Court of Appeals noted that Subsection B

...provides that a school board may authorize the appropriate school officials to allow each classroom teacher to ask whether any student wishes to offer a prayer and, if no student volunteers, to permit the teacher to pray....In the event a student in classroom

objects or the student's parent or legal guardian objects in writing to the proper school authority, subsection B provides that the student may not be required to participate or to be present during the time prayer is being offered. (*Karen B. v. Treen*, 1981, para. 3)

The Jefferson Parish School Board provided more specific guidance for the implementation of the Louisiana statute in the parish's public schools:

The Jefferson Parish School Board has adopted a resolution establishing guidelines to implement section 17:2115(B) in parish schools. These guidelines provide that each school day will begin at the regular time with a minute of prayer followed by a minute of silent meditation. Under the school board guidelines, each teacher must ask if any student wishes to volunteer a prayer, and, if no student wishes to do so, the teacher may offer a prayer of his own. . . . Jefferson Parish has also made elaborate provisions for excusing students who do not want to participate in the prayer portion of the morning exercises. (*Karen B. v. Treen*, 1981, para. 4).

The Court of Appeals analyzed both the specific implementation of Subsection B in Jefferson Parish as well as the Louisiana statute that provided the foundation for the parish's regulation.

The Court of Appeals used the *Lemon* test as it had been developed by the Supreme Court. In addressing the first prong of the *Lemon* test, the Court of Appeals rejected the District Court's argument that Subsection B regarding prayer had a secular legislative purpose. The legislators called to support the claim of the statute's legislative purpose "stated that the purpose of the school prayer program was to increase religious tolerance by exposing school children to beliefs different from their own and to develop in students a greater esteem for themselves and others by enhancing their awareness of the spiritual dimensions of human nature" (*Treen v.*

Karen B., 1981, para. 8). The Court of Appeals, however, whose judgment was affirmed by the Supreme Court, did not accept this argument. The Court of Appeals stated: “Even if the avowed objective of the legislature and school board is not itself strictly religious, it is sought to be achieved through the observance of an intrinsically religious practice. The unmistakable message of the Supreme Court’s teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interests” (*Treen v. Karen B.*, 1981, para. 12). Prayer, because it is an “intrinsically religious practice,” cannot be used as the means to satisfy the first prong of the *Lemon* test.

The Court of Appeals also found that the statute violated the second prong of the *Lemon* test, rejecting the District Court’s argument that there was no violation. The District Court had concluded there was no violation based “upon the judge’s conviction that the prayer offered by a student or by a teacher could very well comprehend some secular objective. Thus, the district court asserted that the prayers could ‘relate to anything from sports to the weather to religion’” (*Treen v. Karen B.*, 1981, para. 14). The Court of Appeals, though, finding such an explanation “disingenuous,” relied again on “the inherently religious character of the exercise” (*Treen v. Karen B.*, 1981, para. 15) of prayer to conclude that such a practice does serve to promote religion. Such religious promotion through prayer violated the second prong of the *Lemon* test, according to the Court of Appeals.

The District Court concluded that the statute did not violate the third prong of the *Lemon* test of excessive government entanglement with religion, “based on the provision for affirmative voluntary participation” (*Treen v. Karen B.*, 1981, para. 21). The Court of Appeals, however, found that the voluntary nature of participation in the school prayer “does not cure the

constitutional infirmity” (*Treen v. Karen B.*, 1981, para. 21). In response to the District Court’s finding, the Court of Appeals reasoned:

State and school officials point out that student participation in the daily prayer session is allowed to be wholly voluntary. This fact is not relevant to the Establishment Clause inquiry. As the Supreme Court said in *Engel*, “Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the Establishment Clause....” 370 U.S. at 430, 82 S. Ct. at 1266-67, 8 L.Ed.2d 607. (*Treen v. Karen B.*, 1981, para. 20).

While the Court of Appeals did not assert that the statute led to entanglement, it did reject the District Court’s argument that voluntary participation in school prayer prevented such entanglement. The Court of Appeals, thus, found that the statute and the related Jefferson Parish regulations violated the Establishment Clause as expressed in the *Lemon* test.

Bob Jones University v. United States (1983)¹⁸ concerned a claim by the university that the Internal Revenue Service (IRS) had violated the university’s Free Exercise rights by revoking the university’s tax-exempt status for denying admission to applicants who had entered into an interracial marriage or who were known to advocate interracial marriage or dating. The IRS had granted tax-exemption status to private schools regardless of their racial discrimination policies until 1970 under 501(c)(3) of the Internal Revenue Code. However, in 1970, the District Court in the District of Columbia “issued a preliminary injunction prohibiting the IRS from according tax-exempt status to private schools in Mississippi that discriminated as to admissions on the basis of race.... Thereafter, in July 1970, the IRS concluded that it could ‘no longer legally justify

¹⁸ *Goldsboro Christian Schools, Inc. v. United States* (1983) was also decided by this Court.

allowing tax-exempt status [under 501(c)(3)] to private schools which practice racial discrimination.’ IRS News Release, July 7, 1970, reprinted in App. In No. 81-3, p. A235....” (*Bob Jones University v. United States*, 1983, p. 578). In the following year, the District Court wrote its opinion in which it “approved the IRS’s amended construction of the Tax Code. The court also held that racially discriminatory private schools were not entitled to exemption under 501(c)(3) and that donors were not entitled to deductions for contributions to such schools under 170...” (*Bob Jones University v. United States*, 1983, p. 578). Adoption of the non-discrimination policy

...was formalized in Revenue Ruling 74-447, 1971-2 Cum. Bull. 230:

“Both the courts and the Internal Revenue Service have long recognized that the statutory requirement of being ‘organized and operated exclusively for religious, charitable,...or educational purposes’ was intended to express the basic common law concept [of ‘charity’]....All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy.” (*Bob Jones University v. United States*, 1983, p. 579).

Chief Justice Burger, the author of the majority opinion, further noted that

Based on the “national policy to discourage racial discrimination in education,” the IRS ruled that “a [private] school not having a racially nondiscriminatory policy as to students is not ‘charitable’ within the common law concepts reflected in sections 170 and 501(c)(3) of the Code....The application of the IRS construction of these provisions to petitioners, two private schools with racially discriminatory admissions policies, is now before us. (*Bob Jones University v. United States*, 1983, p. 579).

Burger noted that it was the application of the policy *as set forth by the IRS* that needed to be decided by the Court.

In its decision in favor of the U.S. government, the majority explained that the discrimination policy of Bob Jones University disqualified it from tax-exempt status. Burger first explained the requirements for receiving tax-exempt status:

Section 501(c)(3) therefore must be analyzed and construed within the framework of the Internal Revenue Code and against the background of the congressional purposes. Such an examination reveals unmistakable evidence that, underlying all relevant parts of the Code, is the intent that entitlement to tax exemption depends on meeting certain common-law standards of charity – namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy. (*Bob Jones University v. United States*, 1983, p. 586).

Burger and the majority acknowledged congressional intent to ensure tax benefits to those organizations that have charitable purposes, “to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind” (*Bob Jones University v. United States*, 1983, p. 588). Having a benefit to the public is central to an organization’s tax-exempt status. In addition, benefiting the public and maintaining tax-exempt status assumes that the organization’s policies and activities fall within the law. Burger wrote: “A corollary to the public benefit principle is the requirement, long recognized in the law of trusts, that the purpose of a charitable trust may not be illegal or violate established public policy....The institution’s purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be

conferred” (*Bob Jones University v. United States*, 1983, pp. 591-92). Burger clarified that while organizations with tax-exempt status may serve a public good, they must also be lawful and abide by public policy to maintain tax-exempt status.

The majority believed that Bob Jones University no longer fit the description of an institution that is “charitable” because of its admissions policy. Particularly since the landmark case *Brown v. Board of Education* (1954) that prohibited racial segregation and discrimination in public education, “there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice” (*Bob Jones University v. United States*, 1983, p. 592). The majority believed that Bob Jones University engaged in racial discrimination in its admissions policy, disqualifying it from being considered “charitable” and thereby eligible to have its tax-exempt status revoked.

In addressing the Free Exercise claim made by Bob Jones University, the Court used a strict scrutiny approach. Burger recalled that “[t]his Court has long held the Free Exercise clause of the First Amendment to be an absolute prohibition against governmental regulation of religious beliefs” (*Bob Jones University v. United States*, 1983, p. 603), yet also added that “[o]n occasion this Court has found certain governmental interests so compelling as to allow even regulations prohibiting religiously based conduct” (*Bob Jones University v. United States*, 1983, p. 603). Regarding the case at hand, Burger continued:

The governmental interest at stake here is compelling....[T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education [footnote omitted]—discrimination that prevailed, with official approval, for the first 165 years of this Nation’s constitutional history. *That governmental interest substantially*

outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs [emphasis added]. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest.... (*Bob Jones University v. United States*, 1983, p. 604)

Burger made it clear that the majority rejected the Free Exercise claim by the petitioners because the government's interest in eliminating racial discrimination outweighed the religious burden placed on Bob Jones University.

Mueller v. Allen (1983) is a case that bears resemblance to prior cases, such as *Everson v. Board of Education* (1947) and *Committee for Public Education and Religious Liberty v. Nyquist* (1973), but contained details that made it unique in comparison to other governmental aid cases and deserving of consideration by the Court. The details of the case, which was narrowly decided by a 5-4 majority, provided the opportunity for the two primary viewpoints on the Court with regard to the relationship between church and state, namely the separationist and accommodationist viewpoints, to be further elaborated. The case involved a Minnesota statute, 290.09, subd. 22, that allowed taxpayers in that state to claim a tax deduction on state income taxes for certain actual expenses for the education of their children. These expenses were limited to "tuition, textbooks, and transportation" for taxpayers' dependents who attended elementary or secondary schools and could not exceed \$500 per child in grades kindergarten through six and \$700 per child in grades seven through 12 (Minn. Stat. 290.09, subd. 22, 1982; as quoted in *Mueller v. Allen*, 1983, p. 391). Certain Minnesota taxpayers claimed that the statute violated the Establishment Clause because it provided financial assistance to sectarian institutions, a claim

rejected by both the District Court and the Court of Appeals and, ultimately, a slim majority of the Supreme Court.

Recognizing that cases such as *Mueller v. Allen* (1983) presented “no exception to our oft-repeated statement that the Establishment Clause presents especially difficult questions of interpretation and application,” (*Mueller v. Allen*, 1983, p. 392), the Court used the accepted three-prong *Lemon* test as the tool to analyze and decide the case. Both the majority and dissenting justices agreed that the statute had a secular legislative purpose, satisfying the first prong of the *Lemon* test. Similarly, there was no dispute about the application of the third prong of the *Lemon* test. Rehnquist wrote: “Turning to the third part of the *Lemon* inquiry, we have no difficulty in concluding that the Minnesota statute does not ‘excessively entangle’ the State in religion” (*Mueller v. Allen*, 1983, p. 403). The only potential source for entanglement lay with the state’s determination of whether or not certain textbooks would qualify for a tax deduction, based on whether or not the textbooks could be used for religious indoctrination or worship. However, in *Board of Education v. Allen* (1968), “the Court upheld the loan of secular textbooks to parents or children attending nonpublic schools; though state officials were required to determine whether particular books were or were not secular, the system was held not to violate the Establishment Clause” (*Mueller v. Allen*, 1983, p. 403). The state’s role in determining whether or not textbooks would qualify for a tax deduction in the Minnesota statute would not “excessively entangle” the state with religion, thereby satisfying the third prong of the *Lemon* test.

The second prong of the *Lemon* test was the battleground for the separationist and accommodationist viewpoints that were present on the Court for *Mueller v. Allen* (1983). In fact,

Rehnquist's victory would provide him the opportunity to lay the philosophical foundation for future cases, such as *Witters v. Washington Department of Services for the Blind* (1986), *Zobrest v. Catalina Foothills School District* (1993), and the landmark *Zelman v. Simmons-Harris* (2002), that addressed governmental aid to sectarian institutions.

Rehnquist began his argument with the assumption that government assistance to a religious institution does not automatically mean that the Establishment Clause has been violated. He wrote: "One fixed principle in this field is our consistent rejection of the argument that 'any program which in some manner aids an institution with a religious affiliation' violates the Establishment Clause. *Hunt v. McNair*, 413 U.S. 734, 742 (1973)" (*Mueller v. Allen*, 1983, p. 393). The Court must undertake a careful analysis of each case to determine whether or not the details lead to an Establishment Clause violation. Some decisions, such as *Board of Education v. Allen* (1968) and *Everson v. Board of Education* (1947), allowed for governmental aid to religious institutions, while others, such as *Lemon v. Kurtzman* (1971), *Committee for Public Education v. Nyquist* (1973), *Levitt v. Committee for Public Education* (1973), *Meek v. Pittenger* (1975), and *Wolman v. Walter* (1977), contained elements that the Court determined did violate the Establishment Clause. In the current case, the Court must "decide whether Minnesota's tax deduction bears greater resemblance to those types of assistance to parochial schools we have approved, or to those we have struck down" (*Mueller v. Allen*, 1983, p. 394). Although narrowly decided, the majority ultimately concluded that *Mueller* bore a greater resemblance to the cases that had been approved by the Court than to those that had not been approved (*Mueller v. Allen*, 1983, p. 394).

In addressing the question of whether or not the Minnesota statute had the primary effect of advancing religion, Rehnquist observed that the statute is constitutional partly because the statute is not limited to tax deductions for expenses incurred by parents who send their children to religious schools. Rehnquist wrote:

...an essential feature of Minnesota's arrangement is the fact that 290.09, subd. 22, is only one among many deductions—such as those for medical expenses...and charitable contributions...available under the Minnesota tax laws....Under our prior decisions, the Minnesota Legislature's judgment that a deduction for educational expenses fairly equalizes the tax burden of its citizens and encourages desirable expenditures for educational purposes is entitled to substantial deference. (*Mueller v. Allen*, 1983, p. 396)

Rehnquist's *Mueller* opinion also advanced a federalist viewpoint by acknowledging the importance of showing "deference" to the state legislature. Just as the religious school exemption is one among others, Rehnquist also wrote that the exemption is available to all Minnesota citizens who incurred educational exemptions. Rehnquist wrote:

Most importantly, the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools. Just as in *Widmar v. Vincent*, 454 U.S. 263, 274 (1981), where we concluded that the State's provision of a forum neutrally "available to a broad class of nonreligious as well as religious speakers" does not "confer any imprimatur of state approval,"...so here: "[t]he provision of benefits to so broad a spectrum of groups is *an important index of secular effect* [emphasis added]." [footnote omitted] *Ibid.* (*Mueller v. Allen*, 1983, p. 397)

For Rehnquist, because the tax deduction is available to all parents, and not just those whose children attend religious schools, the statute cannot be said to have the primary effect of advancing religion. Unlike *Nyquist*, in which “public assistance amounting to tuition grants was provided only to parents of children in nonpublic schools,” a statute such as that adopted by the Minnesota legislature “that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge in the Establishment Clause” (*Mueller v. Allen*, 1983, p. 398). Rehnquist’s use of the idea of a benefit, derived from a neutral statute, that is available to a “broad class” of people as evidence that a statute does not have the primary effect of advancing religion is one that will occur again in future cases, such as *Zelman v. Simmons-Harris* (2002).

Rehnquist also believed that because the statute provided assistance to the parents and not to religious schools, reflective of the child benefit theory, the statute did not have the primary effect of advancing religion. Rehnquist wrote:

We also agree with the Court of Appeals that, by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject. It is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children. It is also true, however, that under Minnesota’s arrangement public funds become available only as a result of numerous private choices of individual parents of school-age children. (*Mueller v. Allen*, 1983, p. 399)

When aid is granted to parents and not to the schools, as in the Minnesota statute, parents may choose to use the benefit to provide funds to religious schools, but such a choice comes about

“only as a result of decisions of individual parents” and cannot be construed as the state having given its approval for “any particular religion, or on religion generally” (*Mueller v. Allen*, 1983, p. 399). Even if parents’ private choices in spending their money that they received as a result of the tax deduction do lead to additional money going to parochial schools, the statute does not violate the Establishment Clause. Rehnquist found it significant “to compare the attenuated financial benefits flowing to parochial schools from the [Minnesota statute] to the evils against which the Establishment Clause was designed to protect” (*Mueller v. Allen*, 1983, p. 399).

Rehnquist recalled the words of Justice Powell, who wrote in *Wolman v. Walter* (1977):

At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights....The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. (p. 263; as cited in *Mueller v. Allen*, 1983, p. 400).

Applying Powell’s logic, Rehnquist believed about the Establishment Clause that it was not intended to prevent

the type of tax deduction established by Minnesota. The historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case. (*Mueller v. Allen*, 1983, p. 400).

Rehnquist's discussion of an "attenuated financial benefit" to religious schools with reference to the "historic purposes" of the Establishment Clause reflected not only an originalist perspective, but also a growing discomfort with the *Lemon* test as the most effective method to decide Establishment Clause disputes. Rehnquist and the four justices who joined him had already found that the statute did not violate any of the three prongs of the *Lemon* test, which would have been sufficient data to decide the constitutionality of the statute. Yet Rehnquist's return to the first principles found in the Framers' intent in writing the Establishment Clause to provide the ultimate justification for his decision revealed Rehnquist's belief that the *Lemon* test was inadequate in expressing what the Framers had intended when they wrote the Clause.

Marsh v. Chambers (1983) is an Establishment Clause dispute about prayer offered by a chaplain at the beginning of each legislative session in Nebraska. The chaplain was paid with public funds. The 6-3 majority decided that the prayers offered by the chaplain did not violate the Establishment Clause. In addition, paying the chaplain with public funds and having the same chaplain for the previous 16 years did not violate the Establishment Clause, according to the Court's majority (*Marsh v. Chambers*, 1983, pp. 783-84).

Chief Justice Burger placed great emphasis on the role of history when he wrote the majority opinion in *Marsh*. Burger wrote:

The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. (*Marsh v. Chambers*, 1983, p. 786).

Considering the testimony of history is particularly important because it sheds light on what the Framers intended when they wrote the Religion Clauses of the First Amendment. Burger continued:

Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.... This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged. (*Marsh v. Chambers*, 1983, pp. 790-91).

Considering the intent of the Framers by looking at the precedent set by them in their own practices allowed the Court's majority to issue a conservative decision. Illuminating the *intent* of the Framers will become an increasingly important strategy for the justices as they issue their opinions about Religion Clause disputes.

Both the intent of the Framers and the effectiveness and validity of the *Lemon* test as reflective of that intent were central considerations by some justices in *Wallace v. Jaffree* (1985). This case addressed a 1981 Alabama statute, 16-1-20.1, that had permitted a period of silence for one minute in all the state's public schools. The purpose of the period of silence was "for meditation or voluntary prayer." While the District Court found that the statute did not violate the Establishment Clause, both the Court of Appeals and Supreme Court found that the Alabama statute was a law that did respect the establishment of religion, thus violating the Establishment

Clause. In the 6-3 decision, the majority opinion, authored by Justice Stevens, used the *Lemon* test to analyze the statute. Referring to the application of the *Lemon* test to the case, Stevens wrote:

It is the first of these criteria that is most plainly implicated by this case. As the District Court correctly recognized, no consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose. For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion...the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion. (*Wallace v. Jaffree*, 1985, p. 56)

Determining the legislative purpose of the statute, using the first prong of the *Lemon* test, was not a daunting task in this case. The sponsor of the bill, Senator Donald Holmes, stated for the legislative record that the purpose of the bill was “to return voluntary prayer” to the public schools. Stevens further noted:

Later Senator Holmes confirmed this purpose before the District Court. In response to the question whether he had any purpose for the legislation other than returning voluntary prayer to the public schools, he stated: “No, I did not have no other purpose in mind.”

The State did not present evidence of any secular purpose. (*Wallace v. Jaffree*, 1985, p. 57).

Stevens pointed out that a 1978 statute, 16-1-20, which was the predecessor to the statute in the current case, already protected every student’s right to pray voluntarily at a moment of silence during the school day. In fact, there was nothing that prevented students in Alabama public schools from voluntarily praying during the school day at an appropriate time designed as a

moment of silence. Recognizing this right that public school students already enjoyed, Stevens commented:

The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday....Appellants have not identified any secular purpose that was not fully served by 16-1-20 before the enactment of 16-1-20.1. Thus, only two conclusions are consistent with the text of 16-1-20.1: (1) the statute was enacted to convey a message of state endorsement and promotion of prayer; or (2) the statute was enacted for no purpose. No one suggests that the statute was nothing but a meaningless or irrational act. (*Wallace v. Jaffree*, 1985, p. 59).

In the absence of an identifiable secular purpose, and, in fact, in the face of evidence that the bill's purpose was explicitly religious, the majority found that the 16-1-20.1 violated the first prong of the *Lemon* test. Stevens concluded:

The legislature enacted 16-1-20.1, despite the existence of 16-1-20 for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each schoolday. The addition of "or voluntary prayer" indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion. (*Wallace v. Jaffree*, 1985, p. 60).

The majority's decision rested on the "well-supported concurrent findings of the District Court and the Court of Appeals—that 16-1-20.1 was intended to convey a message of state approval of prayer activities in public schools..." (*Wallace v. Jaffree*, 1985, p. 61). Such state endorsement

of a religious practice clearly violated the first prong of the *Lemon* test that required a statute to have a secular legislative intent, according to the majority.

While the *Lemon* test was used by the majority to decide the case, the test itself was harshly criticized in *Wallace v. Jaffree* (1985) by the three dissenting Justices Burger, White, and Rehnquist. Such criticism reflected the belief among some justices that the *Lemon* test was ineffective and should be jettisoned. Burger wrote:

The Court's extended treatment of the "test" of *Lemon v. Kurtzman*... suggests a naïve preoccupation with an easy, bright-line approach for addressing constitutional issues. We have repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide "signposts."... In any event, our responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion. Given today's decision, however, perhaps it is understandable that the opinions in support of the judgment all but ignore the Establishment Clause itself and the concerns that underlie it. (*Wallace v. Jaffree*, 1985, p. 89).

Burger's concern was that an unnecessary emphasis on adhering to the principles of the *Lemon* test had led to the ignoring of the original purpose of the Establishment Clause, which was to preserve religious liberty for all. Applying this perspective to the Alabama statute, Burger wrote that the "notion that the Alabama statute is a step toward creating an established church borders on, if it does not trespass into, the ridiculous. The statute does not remotely threaten religious liberty; it affirmatively furthers the values of religious freedom and tolerance that the Establishment Clause was designed to protect" (*Wallace v. Jaffree*, 1985, p. 89). Burger

believed that the Establishment Clause called for “benevolent neutrality” with regard to the state’s attitude toward religion, an attitude that is threatened when the *Lemon* test becomes a substitute for the purpose of the Establishment Clause, namely, the prevention of establishing a state church.

Rehnquist’s criticism of the use of the *Lemon* test reached a new pinnacle in *Wallace v. Jaffree* (1985). Whereas in previous church-state cases using the *Lemon* test he had tolerated and consented to its use as a tool for deciding the case, he expressed hostility to the test in *Wallace v. Jaffree* (1985). In *Jaffree*, Rehnquist used an originalist argument to outline his opposition to the use of the *Lemon* test which, he believed,

...has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize. Even worse, the *Lemon* test has caused this Court to fracture into unworkable plurality opinions...depending upon how each of the three factors applies to a certain state action. The results from our school services cases show the difficulty we have encountered in making the *Lemon* test yield principled results. (*Wallace v. Jaffree*, 1985, p. 110)

Even more problematic than the practical realities associated with the use of the *Lemon* test, such as the resulting “unworkable plurality opinions” and lack of “principled results,” was Rehnquist’s belief that the “three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to serve” (*Wallace v. Jaffree*, 1985, p. 110). The “doctrine” that Rehnquist believed was faulty was the wall theory attributed to Thomas Jefferson, the acceptance of which had led to the creation of the *Lemon* test as a means of determining its applicability. For Rehnquist, “the *Lemon* test has

no more grounding in the history of the First Amendment than does the wall theory upon which it rests” (*Wallace v. Jaffree*, 1985, p. 110). Rehnquist used his dissent in *Jaffree* to explain his rejection of the *Lemon* test as a useful tool to decide Establishment Clause cases based on his historical interpretation of the meaning of the Religion Clauses of the First Amendment.

Rehnquist explained that *Everson v. Board of Education* (1947), the case that provided the foundation for the Court’s Establishment Clause jurisprudence, had mistakenly embraced Jefferson’s idea of a “wall of separation between church and state” (Jefferson, p. 113), which he had written in a letter to the Danbury Baptist Association. *Everson* quoted *Reynolds v. United States* (1879) to state the *Everson* Court’s philosophy: “In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State’” (*Reynolds v. United States*, 1879, p. 164). Rehnquist believed that the purpose of Jefferson’s sentiment was to protect the church from state interference, not the state from church interference. Because Jefferson intended his remarks to apply to the notion of religious freedom, it was inappropriate to use Jefferson’s words to decide an Establishment Clause case, according to Rehnquist. Rehnquist wrote: “It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson’s misleading metaphor for nearly 40 years” (*Wallace v. Jaffree*, 1985, p. 92). Because *Everson* had mistakenly appropriated Jefferson’s writing, the decisions of numerous Establishment Clause disputes since then, including *Wallace v. Jaffree* (1985), rested on misconceptions about what was intended by the idea of separation of church and state, at least by Thomas Jefferson, Rehnquist believed.

Rehnquist used other historical arguments to demonstrate that it was illogical to use Jefferson's writings to justify the Court's philosophy of a "wall of separation of church and state." Rehnquist wrote:

Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment. (*Wallace v. Jaffree*, 1985, p. 92)

Rehnquist preferred instead to look to James Madison to provide the historical and philosophical foundation for his church-state jurisprudence. In support of his view that Madison's writings should take precedence over Jefferson's, Rehnquist wrote:

[Madison] had two advantages over Jefferson in this regard: he was present in the United States, and he was a leading Member of the First Congress. But when we turn to the record of the proceedings in the First Congress leading up to the adoption of the Establishment Clause of the Constitution, including Madison's significant contributions thereto, we see a far different picture of its purpose than the highly simplified "wall of separation between church and State" (*Wallace v. Jaffree*, 1985, p. 92).

Rehnquist continued to examine the historical record of the debates on the floor of the House in 1789, particularly over the proposed wording of the Religion Clauses of the First Amendment. Madison had proposed the following amendment as part of the Bill of Rights: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national

religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed” (Annals of Cong., p. 434). His proposed amendment eventually came to be accepted by both the House and Senate as part of the First Amendment to the Constitution: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” (U.S. Const., amend. I). The process of crafting the final accepted amendment was influenced largely by Madison, Rehnquist noted, a process that was motivated more by the necessity for political compromise to achieve ratification of the Constitution than by a concern for addressing the relationship between church and state. Rehnquist wrote:

...James Madison was undoubtedly the most important architect among the Members of the House of the Amendments which became the Bill of Rights, but it was James Madison speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution. His sponsorship of the Amendments in the House was obviously not that of a zealous believer in the necessity of the Religion Clauses, but of one who felt it might do some good, could do no harm, and would satisfy those who had ratified the Constitution on the condition that Congress propose a Bill of Rights. (*Wallace v. Jaffree*, 1985, pp. 97-98)

Not only does Madison’s *purpose* in contributing to the language of the First Amendment, namely that of political compromise to bring about ratification by the states, show that Madison did not intend to propose a strict separation between church and state, the evolution of the language he used also served to emphasize his lack of intent to create a church-state separation. Rehnquist continued:

His original language “nor shall any nation religion be established” obviously does not conform to the “wall of separation” between church and State idea which latter-day commentators have ascribed to him. His explanation on the floor of the meaning of his language—“that Congress should not establish a religion, and enforce the legal observation of it by law” is of the same ilk. When he replied to Huntington in the debate over the proposal which came from the Select Committee of the House, he urged that the language “no religion shall be established by law” should be amended by inserting the word “national” in front of the word “religion.” (*Wallace v. Jaffree*, 1985, p. 98)

Such an examination of the House proceedings from 1789 led Rehnquist to conclude that Madison had a very narrow purpose in proposing the amendment that became part of the First Amendment. Rehnquist wrote:

It seems indisputable from these glimpses of Madison’s thinking, as reflected by actions on the floor of the House in 1789, that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion. (*Wallace v. Jaffree*, 1985, p. 98).

If it is erroneous to believe that Jefferson’s “wall of separation of church and state” is a useful metaphor for understanding the Framers’ intent with regard to the First Amendment, then it is certainly erroneous to use Jefferson’s statement as a foundation for Court decisions, Rehnquist boldly proclaimed. He wrote:

Thus the Court’s opinion in *Everson*—while correct in bracketing Madison and Jefferson together in their exertions in their home State leading to the enactment of the Virginia

Statute of Religious Liberty—is totally incorrect in suggesting that Madison carried these views onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights. . . . The repetition of this error in the Court’s opinion. . . . does not make it any sounder historically. (*Wallace v. Jaffree*, 1985, pp. 98-99)

Rehnquist further clarified the meaning he had extrapolated from the historical record.

Continuing with his originalist perspective, Rehnquist wrote:

None of the other Members of Congress who spoke during the August 15th debate expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require the Government be absolutely neutral as between religion and irreligion. *The evil to be aimed at, so far as those who spoke were concerned, appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concerned about whether the Government might aid all religions evenhandedly* [emphasis added]. (*Wallace v. Jaffree*, 1985, p. 99).

Rehnquist might have been able to admit a certain usefulness of “this theory of rigid separation,” such as that found in *Everson*, if such a theory had benefited the Court’s decision making process. He argued, however, there had been more detriment than benefit, however.

Expressing outright disdain for the *Everson* interpretation, both for its negative impact on the Court’s ability to make “principled” and “unified” decisions as well as its departure from the Framers’ intent, Rehnquist noted:

Notwithstanding the absence of a historical basis for this theory of rigid separation, the wall idea might well have served as a useful albeit misguided analytical concept, had it led this Court to unified and principled results in Establishment Clause cases. The opposite, unfortunately, has been true; in the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified....Whether due to its lack of historical support or its practical unworkability, the *Everson* “wall” has proved all but useless as a guide to sound constitutional adjudication....But the greatest injury of the “wall” notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights (*Wallace v. Jaffree*, 1985, p. 106)

Taking into account the historical intent and events leading up to the ratification of the First Amendment and *Everson*'s misapplication of the Religion Clauses of the First Amendment, Rehnquist came to believe that the *Lemon* test did not have the usefulness that it was supposed to have. Against the backdrop of the events leading up to the creation of the *Lemon* test, Rehnquist criticized the test:

These difficulties arise because the *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service. *The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize* [emphasis added]. Even worse, the *Lemon* test has caused this Court to fracture into unworkable plurality opinions...depending upon how

each of the three factors applies to a certain state action. (*Wallace v. Jaffree*, 1985, p. 110)

Further commenting on the failure of the *Lemon* test as a useful tool for the Court, Rehnquist wrote that “[i]f a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it” (*Wallace v. Jaffree*, 1985, p. 113). While Rehnquist will continue to use the *Lemon* test in future cases regarding Religion Clause disputes, his motive for doing so might be further examined, knowing that Rehnquist outlined his philosophical rejection of the *Lemon* test in this case.

Other justices’ opinions in this case also reflect growing disdain for the *Lemon* test.

Justice White wrote his own dissent in the case and agreed in part with Rehnquist. White wrote:

I appreciate Justice Rehnquist’s explication of the history of the Religion Clauses of the First Amendment. Against that history, it would be quite understandable if we undertook to reassess our cases dealing with these Clauses, particularly those dealing with the Establishment Clause. Of course, I have been out of step with many of the Court’s decisions dealing with this subject matter, and it is thus not surprising that I would support a basic reconsideration of our precedents. (*Wallace v. Jaffree*, 1985, p. 91).

While White echoed Rehnquist’s call for a rejection of the *Lemon* test, Justice O’Connor presented a more nuanced approach to addressing her discomfort with the test. She wrote:

Justice Rehnquist today suggests that we abandon *Lemon* entirely, and in the process limit the reach of the Establishment Clause to state discrimination between sects and government designation of a particular church as a “state” or “national” one....Perhaps because I am new to the struggle, I am not ready to abandon all aspects of the *Lemon* test.

I do believe, however, that the standards announced in *Lemon* should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment. (*Wallace v. Jaffree*, 1985, pp. 68-69).

O'Connor's "refinement" was her so-called endorsement test which allowed for both adherence to the historical purposes of the First Amendment as well as the ability to apply the test consistently across cases. O'Connor's endorsement test, which she introduced in *Lynch v. Donnelly* (1984),

...suggested that the religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religion practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community" (*Lynch v. Donnelly*, 1984, 688). (*Wallace v. Jaffree*, 1985, p. 69)

Using the endorsement test, which "does not preclude government from acknowledging religion or from taking religion into account in making law and policy" (*Wallace v. Jaffree*, 1985, p. 70), O'Connor concurred in the judgment that the Alabama statute violated the Establishment Clause because Alabama "intentionally crossed the line between creating a quiet moment during which those so inclined may pray, and affirmatively endorsing the particular religious practice of prayer" (*Wallace v. Jaffree*, 1985, p. 84). Ultimately, however, her suggested "refinement" of the *Lemon* test was not sufficient to persuade Rehnquist to modify his interpretation of the Establishment Clause.

In *Grand Rapids School District v. Ball* (1985), the school district in the city of Grand Rapids, Michigan, had adopted two programs, the Shared Time program and the Community Education program, to provide instruction to students enrolled in nonpublic schools, using public funds to do so. In both programs, classes were offered in classrooms that were leased from the nonpublic schools and that were located in the nonpublic schools. The total number of nonpublic schools involved in the programs was 41, with 40 of the schools being classified as religious. Teachers in both programs were hired by the public school district (*Grand Rapids School District v. Ball*, 1985, p. 375).

In the Shared Time program, classes were offered during normal school hours and were supplemental to the core courses required by the State of Michigan for accredited elementary schools, although one course was the remedial Math Topics, taught at the secondary level. Details about the supplemental courses included:

Among the subjects offered are “remedial” and “enrichment” mathematics, “remedial” and “enrichment” reading, art, music, and physical education. A typical nonpublic school student attends these classes for one or two class periods per week; approximately “ten percent of any given nonpublic school student’s time during the academic year would consist of Shared Time instruction.” *Americans United for Separation of Church and State v. School Dist. of Grand Rapids*, 546 F.Supp. 1071, 1079 (WD Mich. 1982). (*Grand Rapids School District v. Ball*, 1985, p. 375).

The courses offered as part of the Shared Time program in the nonpublic schools were substantially the same as courses offered in the public schools, with all teaching supplies and materials being supplied by the public school district. Teachers employed by the public school

district to work in the Shared Time program were full time employees of the school district. About 10% of the Shared Time teachers had worked previously in nonpublic schools, and many among that 10% were working in the nonpublic school where they had previously taught (*Grand Rapids School District v. Ball*, 1985, p. 376).

In the Community Education program, classes were taught in schools and in other locations for the benefit of both children and adults. The classes under scrutiny in this case were those that were taught in the nonpublic elementary schools and occurred at the end of normal school hours. Classes in the Community Education program included “Arts and Crafts, Home Economics, Spanish, Gymnastics, Yearbook Production, Christmas Arts and Crafts, Drama, Newspaper, Humanities, Chess, Model Building, and Nature Appreciation” (*Grand Rapids School District v. Ball*, 1985, pp. 376-77). Not every Community Education class taught in the nonpublic school was offered in the public school as part of the Community Education program, but such classes were available in some form as part of the public school’s ordinary curriculum during a normal school day (*Grand Rapids School District v. Ball*, 1985, p. 377).

Teachers in the Community Education program were part time employees of the public school district. Classes taught in the Community Education were voluntary and a minimum enrollment of 12 students was required for the class to commence. The program’s success depended in part on the ability of well-known teachers to attract students to the classes. As a result, the public school district gave preference to hiring teachers who were already well-known within the nonpublic schools. Such nonpublic school teachers, needed to attract students to the classes, were ordinarily already full time teachers employed by the nonpublic schools.

In both programs, classrooms used for instruction were determined by the nonpublic school administrators. Classrooms were “leased” by the public school system for six dollars per classroom per week. Each classroom had to be free of any religious symbols and had to contain a sign stating that the classroom was a “public school classroom.” Any adjoining spaces, such as hallways or restrooms, were not required to contain such signs and could contain religious symbols. In addition, students enrolled in either program were considered “part-time public school students.” In practice, only those students enrolled in the nonpublic school enrolled in either program at the nonpublic school site. The District Court also noted that while public schools were neighborhood based and enrollment was determined by a student’s residence, the nonpublic schools, since they were religious schools, had enrollments that were determined by the religious preferences of the students with no reference to the location of their residence (*Grand Rapids School District v. Ball*, 1985, pp. 378-79). Further, the 40 religious schools¹⁹ were described as “pervasively sectarian” because their missions were to advance the doctrines of their religions. Parents whose children were enrolled in the schools were either required to accept the doctrinal statements of the schools or at least permit the schools to teach their children according to the doctrinal statements of the schools (*Grand Rapids School District v. Ball*, 1985, p. 379).

Writing for the 6-3 majority, Justice Brennan invoked the *Lemon* test to decide the case. Seemingly as a response to Rehnquist’s problems with the *Lemon* test, particularly as he expressed them in *Wallace v. Jaffree* (1985), and O’Connor’s attempts to modify the *Lemon* test,

¹⁹ “Twenty-eight of the schools are Roman Catholic, seven are Christian Reformed, three are Lutheran, one is Seventh Day Adventist, and one is Baptist” (*Grand Rapids School District v. Ball*, 1985, p. 398).

Brennan established that the *Lemon* test is the test that should and will be used to decide *Grand Rapids School District v. Ball* (1985). He reviewed the merits of the *Lemon* test and pointed to the Court’s use of the test in prior Establishment Clause disputes as the justification for the test’s use in the present case. Brennan wrote:

We have noted that the three-part test first articulated in *Lemon v. Kurtzman*... guides “[t]he general nature of our inquiry in this area,” *Mueller v. Allen*, 463 U.S. 388, 394 (1983).... These tests “must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired.” *Meek v. Pittenger*, 421 U.S. 349, 359 (1975). We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children. The government’s activities in this area can have a magnified impact on impressionable young minds, and the occasional rivalry of parallel public and private school systems offers an all-too-ready opportunity for divisive rifts along religious lines in the body politic.... The *Lemon* test concentrates attention on the issues—purposes, effect, entanglement—that determine whether a particular state action is an improper “law respecting an establishment of religion.” *We therefore reaffirm that state action alleged to violate the Establishment Clause should be measured against the Lemon criteria* [emphasis added]. (*Grand Rapids School District v. Ball*, 1985, pp. 382-83)

In addition to his pointing to the merits of the *Lemon* test itself, Brennan noted its importance for education cases involving Establishment Clause disputes. He likely referenced the education cases as being particularly in need of the *Lemon* test to counter Rehnquist’s belief that the Court

had been inconsistent in its past approach to Establishment Clause disputes, especially when compared to the present case. Rehnquist wrote:

But one wonders how the teaching of “Math Topics,” “Spanish,” and “Gymnastics,” which is struck down today, creates a greater “symbolic link” than the municipal crèche upheld in *Lynch v. Donnelly*, 465 U.S. 668 (1984), or the legislative chaplain upheld in *Marsh v. Chambers*, 463 U.S. 783 (1983). (*Grand Rapids School District v. Ball*, 1985, p. 401)

Rehnquist implied that there is no greater “symbolic link” in the present education case than in the other two non-education cases, yet the decisions had different outcomes, providing further evidence to Rehnquist that the *Lemon* test leads to “unprincipled” decisions.

The grounds for using the *Lemon* test having thus been established by Brennan, the secular legislative purpose of both programs was undisputed. “Both the District Court and the Court of Appeals found that the purpose of the Community Education and Shared Time programs was ‘manifestly secular’” (546 F.Supp., 1085; as cited in *Grand Rapids School District v. Ball*, 1985, p. 383). However, the programs were found to have the effect of impermissibly promoting religion. The Court held that the secular education of the schools could not be separated from the religious missions of the schools. In fact, the integration of the secular and religious aspects was expected in many of the schools. Brennan wrote:

At the religious schools here—as at the sectarian schools that have been the subject of our past cases—“the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools’ existence. Within that institution, the two are inextricably intertwined” [footnote omitted]. *Lemon v. Kurtzman*,

supra, at 657 (opinion of Brennan, J.). (*Grand Rapids School District v. Ball*, 1985, p. 384)

Given that the character of 40 of the nonpublic schools was “pervasively sectarian,” as evidenced especially by the integration of their religious missions with the entire educational enterprise of the school, the two public school programs violated the second prong of the Establishment Clause. The violation occurred in three ways:

First, the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs. Second, the programs may provide a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to support the religious denomination operating the school. Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected. (*Grand Rapids School District v. Ball*, 1985, p. 385)

The principles used to decide the present case were the same as those used to decide *Meek v. Pittenger* (1975). In that case,

...the Court invalidated a statute providing for the loan of state-paid professional staff—including teachers—to nonpublic schools to provide remedial and accelerated instruction, guidance counseling and testing, and other services on the premises of the nonpublic schools....The program in *Meek*, if not sufficiently monitored, would simply have entailed too great a risk of state-sponsored indoctrination. The programs before us today share the defect that we identified in *Meek*. (*Grand Rapids v. Ball*, 1985, p. 386)

In *Meek*, as well as in other previous cases, the Court believed that teachers were particularly vulnerable to allowing religion to influence their teaching of secular subjects. As seen before, Rehnquist was willing to give teachers the benefit of the doubt and assume that they would act in good faith unless proven otherwise. However, Brennan and the majority in the present case were wary of such a perspective. As if responding to Rehnquist himself, Brennan wrote:

We do not question that the dedicated and professional religious school teachers employed by the Community Education program will attempt in good faith to perform their secular mission conscientiously....Nonetheless, there is a substantial risk that, overtly or subtly, the religious message they are expected to convey during the regular schoolday will infuse the supposedly secular classes they teach after school. (*Grand Rapids School District v. Ball*, 1985, p. 387)

Further, Brennan referred to the “pressures of the environment” (*Wolman v. Walter*, 1977, p. 247) and the idea that the “conflict of functions inheres in the situation” (*Lemon v. Kurtzman*, 1971, p. 617) as additional evidence, although unproven, Rehnquist might say, that teachers in religious schools simply cannot avoid promoting religion. Despite the good intentions of the teachers in the religious schools, the programs will lead to religious indoctrination by the state.

Not only is there is “substantial risk” that the teachers will indoctrinate students, the “symbolic union” of church and state violated the second prong of the *Lemon* test, according to Court’s majority. Brennan wrote that

...an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the

nonadherents as a disapproval, of their individual religious choices....In this environment, the students would be unlikely to discern the crucial difference between the religious school classes and the “public school” classes, even if the latter were successfully kept free of religious indoctrination....[E]ven the student who notices the “public school” sign [footnote omitted] temporarily posted would have before him a powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day. (*Grand Rapids School District v. Ball*, 1985, pp. 390-92)

In explaining the “symbolic union” of church and state that was present in the two programs, Brennan showed particular concern for the fact that children may be influenced by the perception of the “symbolic union,” perhaps again to respond to Rehnquist’s assertion that the Court was demonstrating inconsistency in applying the principles of the *Lemon* test. Brennan wrote:

The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years....The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice. (*Grand Rapids School District v. Ball*, 1985, p. 390)

While the environment itself created by the programs was sufficient to warrant deciding that they violated the Establishment Clause, Brennan and the majority believed that the fact that the environment impacted impressionable children was of particular concern.

The majority believed that the programs provided impermissible aid to the religious schools, providing further evidence that the programs had the effect of promoting the religious missions of the schools. Brennan wrote:

In *Meek* and *Wolman*, we held unconstitutional state programs providing for loans of instructional equipment and materials to religious schools, on the ground that the programs advanced the “primary, religion-oriented educational function of the sectarian school.” *Meek*, supra, at 364; *Wolman*, supra, at 248-251....The programs challenged here, which provide teachers in addition to the instructional equipment and materials, have a similar—and forbidden—effect of advancing religion. This kind of direct aid to the educational function of the religious school is indistinguishable from the provision of a direct cash subsidy to the religious school that is most clearly prohibited under the Establishment Clause. (*Grand Rapids School District v. Ball*, 1985, p. 395)

As in prior cases, the majority found that providing non-cash aid to religious schools is synonymous with providing direct cash aid to religious schools, thereby violating the Establishment Clause. In addition, the majority rejected the proposition that the aid “flows primarily to the students, not to the religious schools” (*Grand Rapids School District v. Ball*, 1985, p. 395), referring to the so-called child benefit theory. The majority demonstrated its rejection of such a theory, calling it “a fiction” that “would validate all forms of nonideological aid to religious schools” while “masking it as aid to individual students” (*Grand Rapids School District v. Ball*, 1985, p. 395).

While Rehnquist’s dissent in the case was relatively brief, Brennan’s opinion explained the decision using themes, such as child benefit theory and the assumption of good faith on the

part of teachers, that were increasingly important to Rehnquist as evidenced by his discussion of such themes in prior cases. The majority's addressing such themes without Rehnquist's even mentioning them in his written dissent implies that Rehnquist's ideas were thought to be a force to be reckoned with, as Justice Brennan demonstrated in *Grand Rapids School District v. Ball* (1985). Justices seemed to have a growing understanding of what Rehnquist was thinking without his having to write a dissent, and sought to respond to what they may have assumed he was thinking. Thus, Rehnquist was emerging as a leader among his colleagues on the Court, with some justices writing their opinions as if responding to him directly. Justices' opinions reflect that Rehnquist's opinion was emerging as a standard either to be agreed with or disagreed with.

Aguilar v. Felton (1985) was a case that was decided the same day as *Grand Rapids School District v. Ball* (1985). In *Aguilar*, justices considered Title I of the Elementary and Secondary Education Act of 1965, which permitted the Secretary of Education to give financial assistance to local school districts to offer instructional services for "educationally deprived children from low-income families." The local school districts were to set up the local programs and had to be approved by state education agencies. As long as certain statutory conditions were met, such as the children being "educationally deprived" and living in an area with a large number of low income families, as well as the educational program's requirement to "supplement" and not "supplant" educational programs that would exist outside of Title I funding, students attending religious schools could benefit from Title I services in their own religious schools. In New York, six taxpayers sued, claiming that the Title I program in New York City violated the Establishment Clause (*Aguilar v. Felton*, 1985, pp. 405-407).

In a narrow 5-4 decision, the Court decided that the New York program violated the Establishment Clause by using the *Lemon* test. Writing for the majority, Justice Brennan explained that in its attempt to avoid violating the second prong, namely, that the statute may not have the effect of promoting religion, the New York statute introduces the problem of entanglement, violating the third prong of the *Lemon* test. Brennan wrote:

...the supervision in this case would assist in preventing the Title I program from being used, intentionally or unwittingly, too inculcate the religious beliefs of the surrounding parochial school. But appellants' argument fails in any event, because the supervisory system established by the City of New York inevitably results in the excessive entanglement of church and state, an Establishment Clause concern distinct from that addressed by the effects doctrine. (*Aguilar v. Felton*, 1985, p. 409)

Brennan further noted that the “pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement” (*Aguilar v. Felton*, 1985, p. 413). For the majority, New York City’s plan to address the problem of promoting religion was itself problematic because it entangled both church and state.

The dissent by Justice Rehnquist is important because it will be under his tenure as Chief Justice that *Aguilar v. Felton* (1985) will be overturned by *Agostini v. Felton* (1997). Relying on the foundation he laid in his dissent in *Wallace v. Jaffree* (1985), Rehnquist wrote further:

In this case the Court takes advantage of the “Catch-22” paradox of its own creation...whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause entanglement. The Court today strikes down nondiscriminatory

nonsectarian aid to educationally deprived children from low-income families. The Establishment Clause does not prohibit such sorely needed assistance; we have indeed traveled far afield from the concerns which prompted the adoption of the First Amendment when we rely on gossamer abstractions to invalidate a law which obviously meets an entirely secular need. (*Aguilar v. Felton*, 1985, pp. 420-21)

Rehnquist's dissent represented yet another example of the growing disdain for the *Lemon* test. Not only does Rehnquist point to what he thought the Framers of the First Amendment intended, he also referred to the problem of inconsistency that was created by the Court itself by its application of the *Lemon* test, particularly with the entanglement prong. Rehnquist's belief about the meaning of the Establishment Clause will become increasingly influential on the Court, evidenced in part by his role in the overturning of *Aguilar* in 1997.

Witters v. Washington Department of Services for the Blind (1986) considered whether or not a grant of aid to a student attending a private Christian college in Washington violated the Establishment Clause. The aid was for the purpose of vocational rehabilitation at the college where the petitioner, who suffered from vision impairment, sought to become a minister. The Court used the *Lemon* test to decide the case, with a special focus on whether or not the second prong was violated. The Court considered whether or not the aid would impermissibly promote religion since the student would use the aid at a college in pursuit of a religious degree (*Witters v. Washington Department of Services for the Blind*, 1986, p. 483).

The Court unanimously rendered a conservative decision by deciding that the aid did not violate the Establishment Clause. Delivering the majority opinion, Justice Marshall wrote:

It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. . . . On the facts we have set out, it does not seem appropriate to view any aid ultimately flowing to the Inland Empire School of the Bible as resulting from a state action sponsoring or subsidizing religion. Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion. (*Witters v. Washington Department of Services for the Blind*, 1986, pp. 486, 488)

While presenting yet another example of the questions that arose as a result of the *Lemon* test, this case had the unanimous decision that the aid program in Washington did not impermissibly promote religious education. Notably, *Witters* involved a student attending a post-secondary educational program. It thereby was an easier case to resolve than Establishment Clause conflicts arising in K-12 settings.

In *Bender v. Williamsport Area School District* (1986), justices considered whether or not an individual member of the school board in Williamsport, Pennsylvania who was also a parent of a student in the school district had standing for his case. In that school district, a group of high school students had created a club with a religious purpose and had sought permission from the school principal to meet on the school's property during regular school hours during student activity periods. The principal sought advice from the superintendent, who, after seeking legal advice, denied the student group permission to meet on school property during regular school hours. Following the denial of permission, the students wrote an appeal to the school board, who upheld the superintendent's decision based on the same legal advice. Students then sued the

school district for violation of their free speech rights under the First Amendment, a case which they won in District Court. From the perspective of the school district, the District Court decision stated that the legal advice it had received was incorrect (*Bender v. Williamsport Area School District*, 1986, pp. 538-39).

In response to the decision by the District Court, the school board filed no appeal. Its decision was to comply with the decision and allow the student group to meet on the school property during school hours. An individual member of the school board named John C. Youngman, Jr., however, did file an appeal. Justice Stevens, writing for the Court's majority, explained:

...we noticed that neither the Board nor any of the defendants except Mr. Youngman opposed the students' position and that only Mr. Youngman had challenged the District Court's judgment by invoking the jurisdiction of the Court of Appeals. We therefore find it necessary to answer the question whether Mr. Youngman had a sufficient stake in the outcome of the litigation to support appellate jurisdiction. The parties and the amici have identified three different capacities in which Mr. Youngman may have had standing to appeal—as an individual, as a member of the Board, and as a parent. (*Bender v. Williamsport Area School District*, 1986, pp. 540-41)

In a 5-4 decision, the Court found that Mr. Youngman did not have standing to sue in any capacity, so the case was dismissed. The dissenting justices believed that Youngman had standing, and that the case should have been decided with regard to the Establishment Clause. Asserting the belief that the purpose of the Establishment Clause is to create state neutrality toward religion, not state hostility to religion, the dissenting justices desired that the case be

heard based on its merits so that the student group might have the opportunity to be granted “equal access to the student activity forum” (*Bender v. Williamsport Area School District*, 1986, p. 554).

Ohio Civil Rights Commission v. Dayton Schools (1986) concerned the termination of an employee by Dayton Christian Schools, Inc., and court system’s jurisdiction to interfere in a religious dispute. A female teacher was found by Dayton to be in violation of the school’s “internal dispute resolution doctrine” as well as the school’s required adherence to the doctrine that mothers should remain at home with children who were of preschool age. The fired teacher filed a complaint with the Ohio Civil Rights Commission for unlawful sex discrimination. The Commission began proceedings against Dayton, who claimed that the Commission violated the Religion Clauses of the First Amendment by conducting with such proceedings and sought an injunction against the Commission in District Court. The District Court refused to issue an injunction, while the Court of Appeals reversed this decision, stating that the Commission’s actions violated both the Free Exercise and Establishment Clauses of the First Amendment (*Ohio Civil Rights Commission v. Dayton Schools*, 1986, pp. 619-20).

In a 9-0 liberal decision, the Supreme Court found that the federal court system did in fact have jurisdiction over the Commission. However, the Court found that the District Court should have adjudicated the case differently because it relied erroneously on the wrong case, *Younger v. Harris* (1971), to guide its decision. In that case, the Court’s decision “was based on concerns for comity and federalism” (*Ohio Civil Rights Commission v. Dayton Schools*, 1986, p. 620), not the Religion Clauses of the First Amendment. The Court’s jurisdiction having been decided, Rehnquist wrote for the majority:

We have no doubt that the elimination of prohibited sex discrimination is a sufficiently important state interest to bring the present case within the ambit of the cited authorities. We also have no reason to doubt that Dayton will receive an adequate opportunity to raise its constitutional claims. (*Ohio Civil Rights Commission v. Dayton Schools*, 1986, p. 628).

The majority believed that the claim by Dayton that its First Amendment rights were violated deserved to be addressed in the Court, in future litigation, and that the sex discrimination claim by the fired employee was important enough to fall within the oversight of appropriate state authorities.

Edwards v. Aguillard (1987) involved Louisiana's Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act, otherwise known as the Creationism Act. The Act prohibited teachers from teaching the theory of evolution in Louisiana's public schools unless the instruction also included teaching about a religiously themed "creation science." School were not required to teach either evolution or creation science, but if one was taught, then the other must be taught. Appellee parents of children in Louisiana public schools, teachers, and religious leaders claimed that the Act violated the Establishment Clause. Louisiana officials who implemented the Act claimed that the Act served the purpose of protecting academic freedom (*Edwards v. Aguillard*, 1987, p. 581).

In its 7-2 liberal decision, the Court found that the Act violated the Establishment Clause. The justices used the *Lemon* test to decide the case, focusing on its first prong regarding the secular legislative purpose. Writing for the majority, Justice Brennan wrote:

...the Act's stated purpose is to protect academic freedom....[T]he Act does not further this purpose. The goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science....It is clear from the legislative history that the purpose of the legislative sponsor, Senator Bill Keith, was to narrow the science curriculum. (*Edwards v. Aguillard*, 1987, pp. 586-87)

Because the Act limited science instruction about the origins of humanity to a choice between no teaching or teaching evolution alongside creation science, true academic freedom was no longer maintained. Justice Brennan went further to assign a disingenuous motive to Louisiana legislators when he wrote:

In this case, the purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint....[T]he legislature passed the Act to give preference to those religious groups which have as one of their tenets the creation of humankind by a divine creator....[T]he Creationism Act is designed either to promote the theory of creation science which embodies a particular religious tenet by requiring that creation science be taught whenever evolution is taught or to prohibit the teaching of a scientific theory disfavored by certain religious sects by forbidding the teaching of evolution when creation science is not also taught. (*Edwards v. Aguillard*, 1987, p. 593)

According to the majority, the Act did not have a secular legislative purpose. Rather, the majority believed that the Creationism Act was designed to promote a particular religious belief, leading to the finding that the Act violated the Establishment Clause.

Corporation of Presiding Bishop v. Amos (1987) addressed a claim of an Establishment Clause violation in the application of section 702²⁰ of Title VII of the Civil Rights Act of 1964. When an employee at Deseret Gymnasium, a nonprofit facility that was run by the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints (CPB) and the Corporation of the President of The Church of Jesus Christ of Latter-day Saints (COP), was fired because he did not receive certification that verified his membership in the Church and permitted him to attend its temples, he, with others, sued the Corporations for religious discrimination. The CPB and COP claimed that 702 of Title VII protected them against a claim of religious discrimination because that section provided an exemption for religious organizations from discrimination in employment based on religion. Appellees in turn claimed that if section 702 was interpreted to allow religious employers to exercise religious discrimination in employment practices for jobs that were not religious in nature, then that section violated the Establishment Clause (*Corporation of Presiding Bishop v. Amos*, 1987, pp. 330-31).

In its unanimous decision, the Court used the *Lemon* test to find that section 702 did not violate the Establishment Clause. The Court held:

There is ample room under that Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference....It is a permissible legislative purpose (as here) to alleviate significant governmental interference with the ability of religious organizations to define and carry out their

²⁰ In part, section 702 of Title VII states: "This subchapter shall not apply...to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities" (Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1).

religious missions....A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose....702 does not impermissibly entangle church and state. Rather, it effects a more complete separation of the two. (*Corporation of Presiding Bishop v. Amos*, 1987, pp. 327-28)

In its unanimous ruling, the Court thus issued a conservative decision by using the familiar *Lemon* test as the tool to evaluate the merits of the dispute.

Karcher v. May (1987) was a case that was decided based on standing to sue. The New Jersey legislature had enacted a statute in 1982 that required elementary and secondary public school students to participate in a moment of silence at the beginning of each school day. Within one month of becoming effective, a public school teacher, public school students, and parents claimed in federal court that the statute violated the Establishment Clause. With the state's attorney general being unwilling to defend the statute, the two presiding officers of the legislature, Karcher, Speaker of the New Jersey General Assembly, and Orechio, President of the New Jersey Senate, received permission from the District Court to defend the statute. Using the *Lemon* test, the district court found the statute violated the Establishment Clause according to all three prongs of the test (*Karcher v. May*, 1987, pp. 74-75).

In their official capacities as presiding officers of the New Jersey legislature, Karcher and Orechio appealed the District Court's decision. The Court of Appeals affirmed the District Court's decision on December 24, 1985. Karcher and Orechio were replaced as presiding officers on January 14, 1986 by Hardwick and Russo, respectively, yet appealed the decision by the Court of Appeals to the Supreme Court. Both Hardwick and Russo then withdrew the

legislature's appeal, leaving the Supreme Court to decide whether or not there was a case to decide based on the new officers' withdrawal of appeal (*Karcher v. May*, 1987, p. 76).

In a unanimous 8-0 decision, the justices decided that Karcher and Orechio lost their right to appeal the decision by the Court of Appeals when they lost their roles as presiding officers in the New Jersey legislature. Writing for the majority, Justice O'Connor wrote that "Karcher and Orechio participated in this lawsuit in their official capacities as presiding officers of the New Jersey Legislature, but since they no longer hold those offices, they lack authority to pursue this appeal on behalf of the legislature" (*Karcher v. May*, 1987, p. 81). Because the new presiding officers had the authority to pursue the appeal but chose not to do so, the decision by the Court of Appeals stood and any appeal by Karcher and Orechio based on their positions as individual legislators was declared invalid.

In *Catholic Conference v. Abortion Rights Mobilization* (1988), the Court faced a decision regarding the limits of judicial authority. After being dismissed as parties, the United States Catholic Conference and the National Conference of Catholic Bishops had been held in contempt for refusing to comply with District Court subpoenas for documents to support the claim by Abortion Rights Mobilization, Inc. (ARM) that the Conferences had violated rules regarding its tax-exempt status. ARM claimed that the Conferences violated the anti-electioneering sections of the tax-exempt requirements by participation in elections favoring anti-abortion political candidates. The Conferences objected to issuance of the process, arguing, *inter alia*, that the District Court lacked subject matter jurisdiction in the underlying suit. The District Court and Court of Appeals for the Second Circuit rejected this argument, ruling that a nonparty witness's jurisdictional challenge is limited to a claim that the District

Court lacks even colorable jurisdiction, a standard not met here. The U.S. Supreme Court granted certiorari to resolve whether a nonparty witness may defend against a civil contempt adjudication by challenging the subject matter jurisdiction of the district court. The Court held that the nonparty witness may raise such a claim, and reversed (*Catholic Conference v. Abortion Rights Mobilization*, 1988, pp. 74-75).

In an 8-1 conservative decision, the Supreme Court remanded the case to the Court of Appeals which ordered it to determine whether the District Court had such jurisdiction in the underlying action. It held that if subpoenas were void the contempt citation must be reversed. Justice Kennedy wrote for the majority:

The challenge in this case goes to the subject-matter jurisdiction of the court and hence its power to issue the order. The distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the government, must respect the limits of their authority. (*Catholic Conference v. Abortion Rights Mobilization*, 1988, p. 77).

Justice Kennedy and the majority took the opportunity to reflect on the concept of separation of powers and the limits of judicial authority.

In *Bowen v. Kendrick* (1988), justices considered whether or not the Adolescent Family Life Act (AFLA) violated the Establishment Clause. The AFLA provided for federal funds to be granted to public and nonprofit private agencies, including religious organizations, to provide

services and engage in research about adolescent premarital sexual activity and pregnancy. Grant recipients were required to provide educational and counseling services about adverse consequences related to adolescent premarital sexual activity and pregnancy, information about family support agencies and other aspects of family life. Recipients of grant funds were prohibited from using federal money for certain activities such as the promotion of abortion and services related to family planning (*Bowen v. Kendrick*, 1988, pp. 593-94).

As part of its narrow 5-4 decision, the Court made a decision about the AFLA “on its face” and as applied. In its decision about the AFLA “on its face,” the justices used the *Lemon* test to decide that the AFLA did not violate the Establishment Clause. Chief Justice Rehnquist, by this point an avowed detractor of the *Lemon* test, nevertheless used the test in his majority opinion to arrive at the Court’s narrow conservative decision. Rehnquist noted that the AFLA “was motivated primarily, if not entirely, by a legitimate secular purpose—the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood” (*Bowen v. Kendrick*, 1988, p. 602). In addition, “this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs” as long as “the aid is made available regardless of whether it will ultimately flow to a secular or sectarian institution” (*Bowen v. Kendrick*, 1988, p. 609). Finally, while the use of grant funds to all grantees, public and nonpublic alike, will involve supervision by government employees, such supervision will not lead to “excessive entanglement” since the recipient religious organizations are not necessarily “pervasively sectarian” in the same way that religious schools in prior education cases were held to be

“pervasively sectarian” (*Bowen v. Kendrick*, 1988, p. 617). On its face, the AFLA satisfied each prong of the *Lemon* test and did not violate the Establishment Clause, according to the majority.

In considering the AFLA as applied, the majority remanded the case for further consideration as to whether it violated the Establishment Clause. Rehnquist wrote:

On the merits of the “as applied” challenge, it seems to us that the District Court did not follow the proper approach in assessing appellees’ claim that the Secretary is making grants under the Act that violate the Establishment Clause of the First Amendment. . . . If the District Court concludes on the evidence presented that grants are being made by the Secretary in violation of the Establishment Clause, it should then turn to the question of the appropriate remedy. (*Bowen v. Kendrick*, 1988, pp. 620-21).

Even when reconsidering the AFLA as applied, the majority required that the *Lemon* test be used to determine whether or not the AFLA violated the Establishment Clause, particularly the second prong addressing the AFLA’s effect of promoting religion.

While not a K-16 education case, *Employment Division v. Smith* (1990) provided a framework for understanding the application of the Free Exercise Clause among Supreme Court justices, both in general terms and more specifically with regard to K-16 education cases. Justice Scalia wrote the majority opinion of the Court, which was joined by Rehnquist, along with White, Stevens, and Kennedy. The case involved two employees whose employment was terminated by a private drug rehabilitation institution because they had taken peyote, an illegal narcotic, as part of a religious ceremony in their Native American Church. Use or possession of peyote was a felony by Oregon’s controlled substance law. After being fired, the two employees applied for unemployment compensation. Their applications were denied by the State of Oregon

because their terminations had been due to misconduct related to their work. The employees claimed that the denial of unemployment compensation was a violation of their Free Exercise rights. The Court found that the State of Oregon was permitted within the boundaries of the Free Exercise Clause both to ban the possession or use of peyote and to deny employment compensation to the former employees who had been fired for use of peyote.

This case represented a departure from the accepted jurisprudence that had been established by *Sherbert*, described above, in 1963. In that case, an adherent of the Seventh-day Adventist Church left her job because she was required to work on her Saturday Sabbath. She applied for unemployment compensation and was initially denied, which the Court found to be in violation of the Free Exercise Clause. While the *Sherbert* case initially generated optimism for the cause of the Free Exercise Clause, its application was mostly limited to cases involving unemployment compensation. The single exception to this application was the *Yoder* case in 1972 (Wasserman, 2014).

While the respondents attempted to base their claim for Free Exercise violation on *Sherbert*, the majority found the two cases differed because of the conduct of the individuals that led to their separations from employment. The main difference, according to the opinion, was that *Smith* involved conduct that was illegal under state law whereas *Sherbert* did not. The respondents in *Smith* claimed that because their use of peyote was for religious purposes, the Free Exercise Clause would permit them to use the substance without being in violation of the state law banning the use or possession of such substances. The Court, however, in drawing a parallel to other cases involving claims that paying taxes is a violation of the Free Exercise Clause because of one's belief that supporting organized government violates one's religious

beliefs, stated that the Free Exercise Clause is not violated if the law's intent is not to violate the Clause, it is generally applicable, and is otherwise a valid law. In addition, there are practical considerations for allowing religious exemptions to laws that are generally applicable. Referring again to the tax laws as a way to illustrate the point, the decision noted that if religious adherents objected to the collection of taxes or the way taxes were spent, the American tax system could not operate.

The case's decision noted that its interpretation of the Free Exercise Clause and neutral laws with general applicability was consistent with the history of Free Exercise Clause jurisprudence in the Supreme Court. Scalia wrote: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate" (*Employment Division v. Smith*, 1990, pp. 878-79). One has certain obligations to society, such as obeying certain generally applicable laws, that do not become invalid because of one's religious beliefs. The only religious exemptions that had been allowed were in those hybrid cases where the Free Exercise Clause was considered along with other constitutionally protected rights. The *Yoder* case was one such hybrid case since the rights of parents to direct the education of their children was combined with Free Exercise claim. *Smith* is not a hybrid case, thus making the case subject to fact that the conduct in question was lawfully prohibited by the State of Oregon, and the reality that religious convictions were involved was merely incidental to the case.

The respondents in *Smith* claimed that their case should be subject to the *Sherbert* test, under which the government would be required to show a compelling interest for its action as it is weighed against, or balanced with, the burden that is placed on religious practice. Scalia wrote

that the only cases, of which there were three, where the *Sherbert* test had been used involved state unemployment compensation rules “that conditioned the availability of benefits upon an applicant’s willingness to work under conditions forbidden by his religion” (*Employment Division v. Smith*, 1990, p. 883). While *Smith* did involve unemployment compensation, the *Sherbert* test was applied to different aspects of each case. The unemployment compensation cases mentioned by Scalia addressed requiring workers to work under circumstances that would have violated their free exercise, whereas *Smith* addressed seeking an exemption from a criminal law that is neutral to religion and generally applicable to all people. Scalia noted that even if the Court were to decide to extend the application of the *Sherbert* test beyond the issue of unemployment compensation, it still would not do so to address cases such as *Smith* that seek an exemption from a generally applicable criminal law.

In addition to refusing to apply the compelling state interest requirement to the *Smith* based on the facts of the case, Scalia elaborated on the implications of the injudicious use of this concept. His elaboration gives further insight into the philosophy behind the use of a compelling state interest argument, not only for Scalia himself, but for others like Rehnquist who joined the opinion. Scalia referred to the intent of the compelling state interest argument, which was to promote equal treatment and free speech as constitutional rights. Its intent was never to allow an individual the right to claim exemption from laws that are applicable to everyone. To allow such an application would be not only novel in terms of the history of the Court, but also dangerous to society. If a person’s obligation to obey a legitimate law is “contingent upon the law’s coincidence with [the individual’s] religious beliefs, except where the State’s interest is ‘compelling’ – permitting him, by virtue of his beliefs, ‘to become a law unto himself,’

(*Reynolds v. United States*, 1879)” (*Employment Division v. Smith*, 1990, p. 885), the ultimate result could be “anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them” (*Employment Division v. Smith*, 1990, p. 888). Scalia feared that requiring the rigorous standard of compelling state interest to the regulation of conduct that is motivated by religious belief would be not only difficult to achieve in a practical way, but detrimental to democratic society.

According to Scalia, there are certain fundamental principles that one must accept to live in a democratic society, and a relativistic approach, where each is “a law unto himself,” to adjudicating Free Exercise Clause cases would be harmful to the democratic society. There may be “unavoidable consequences” (*Employment Division v. Smith*, 1990, p. 890) of living in a democratic society, such as having one’s religious practice incidentally burdened by laws that are generally applicable, but such consequences are preferable to living in a society that operates under the principle that each individual’s conscience is the source of all law. In weighing the “social importance of all laws” against “the centrality of all religious beliefs” (*Employment Division v. Smith*, 1990, p. 889), Scalia clearly believed that the “social importance of all laws” is the more important principle for a democratic society. Scalia is concerned that use of the rigorous strict scrutiny standard of compelling state interest “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind” (*Employment Division v. Smith*, 1990, p. 889). Such civic obligations would include paying taxes, serving in the military, social welfare laws, minimum wage laws, and racial equality laws. Participation in democratic society requires adherence to certain obligations to the society and exceptions for the multitude of religious faiths in society cannot be accommodated

for society to operate effectively. Thus, a rational basis, rather than strict scrutiny, was the more appropriate legal standard for determining whether or not the government has violated the Free Exercise Clause when considering criminal laws such as that found in *Smith* that are neutral and are generally applicable, according to the majority.

Westside Community Board of Education v. Mergens (1990) involved the Equal Access Act²¹ and whether or not the Act prohibited Westside High School of Omaha, Nebraska from preventing a student group with a religious purpose from meeting on school property outside of instructional time. If the Act did prohibit Westside High School from denying access to the student group, the Court considered whether or not the Act violated the Establishment Clause. The first part of the decision, namely, the Court considered whether or not the Act prohibited Westside High School from denying access to the student group, relied on the school's maintaining a "limited open forum," that is, if other "noncurriculum related student groups" were also allowed to meet on school property during noninstructional times. Because the Act did not define "noncurriculum related student groups," the Court chose to interpret the phrase to mean "any student group that does not directly relate to the body of courses offered by the school" (*Westside Community Board of Education v. Mergens*, 1990, p. 240). Because the school allowed other "noncurriculum related student groups," such as a chess club or stamp collecting club, to meet on school property during noninstructional times, the school maintained a "limited open forum" and could not deny the religious student group permission to meet on school property during noninstructional times. Writing for the 8-1 majority, Justice O'Connor wrote that the "existence of [noncurriculum related student groups] would create a 'limited open

²¹ 98 Stat. 1302, 20 U.S.C. 4071-4074.

forum' under the Act and would prohibit the school from denying equal access to any other student group on the basis of the content of that group's speech" (*Westside Community Board of Education v. Mergens*, 1990, p. 240). The Act's prohibition against denying equal access applied to religious speech as well.

The statutory question having been decided, the Court then considered whether or not the Act violated the Establishment Clause. The majority relied primarily on the Court's decision in *Widmar v. Vincent* (1981), a case that used the *Lemon* test to decide that a university's "open-forum policy" did not violate the Establishment Clause. Referring to each prong of the *Lemon* test, O'Connor wrote that

...the Act's prohibition of discrimination on the basis of "political, philosophical, or other" speech as well as religious speech is a sufficient basis for meeting the secular purpose prong of the *Lemon* test....To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion....[F]aculty monitors may not participate in any religious meetings, and non-school persons may not direct, control, or regularly attend activities of student groups. (*Westside Community Board of Educators v. Mergens*, 1990, pp. 248-53)

The justices thus rendered a conservative decision by deciding both that the Act did indeed prevent the high school from denying access to the religious student group and the Act itself does not violate the Establishment Clause.

Lee v. Weisman (1992) was an Establishment Clause dispute involving prayers at a public school graduation ceremony in Providence, Rhode Island. Lee, a school principal, had invited a

rabbi to lead prayers at a middle school graduation ceremony for the class of which Weisman was a part. Principal Lee had given the rabbi the pamphlet “Guidelines for Civic Occasions” that had been written by the National Conference of Christians and Jews to guide the rabbi in the composition of nonsectarian prayers that promote inclusivity (*Lee v. Weisman*, 1992, p. 581).

The Court decided with a narrow 5-4 vote that the action violated the Establishment Clause. Justice Kennedy wrote for the majority:

The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school...A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and, from a constitutional perspective, it is as a state statute decreed that the prayers must occur. (*Lee v. Weisman*, 1992, p. 587)

Not only did the principal, an agent of the state, direct that prayers be offered, he gave direction as to the content of the prayers by giving the rabbi a pamphlet encouraging nonsectarian prayers.

Kennedy thus continued:

Though the efforts of the school officials in this case to find common ground appear to have been a good faith attempt to recognize the common aspects of religions, and not the divisive ones, our precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students....The degree of school involvement here made it clear that the graduation prayers bore the imprint of the State, and thus put school-age children who objected in an untenable position. (*Lee v. Weisman*, 1992, p. 590)

While the four dissenting justices pointed out that such practices as prayer before graduations are part of history and tradition and do not constitute government establishment of religion, the majority believed that such action was not compatible with their interpretation of the Establishment Clause, thus leading to their liberal decision.

In *Lamb's Chapel v. Center Moriches School District* (1993), justices considered rules and regulations of the New York school district, particularly Rule 7, which prohibited use of public school facilities by a religious group for a religious purpose. The religious group had sought to show a film series on school property during noninstructional hours regarding family values from a religious perspective. After a denial by the school district to allow the showing of the film series, the group claimed a violation of the Freedom of Speech and Assembly Clauses, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. The District Court and Court of Appeals found that since the school district had not allowed any other religious organizations to use school facilities for religious purposes, the school district's action was viewpoint-neutral and did not violate the Freedom of Speech clause, nor did it show hostility to religion or promotion of nonreligion (*Lamb's Chapel v. Center Moriches School District*, 1993, pp. 389-90).

In a unanimous decision, the Supreme Court found that the school district's ban of all religious use of school property was not, in fact, viewpoint-neutral and violated the Free Speech Clause. Justice White wrote for the majority:

That all religions and all uses for religious purposes are treated alike under Rule 7, however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about

family issues and childrearing except those dealing with the subject matter from a religious standpoint....In our view, denial on that basis was plainly invalid.... (*Lamb's Chapel v. Center Moriches School District*, 1993, pp. 393-94).

Regarding the Establishment Clause, White further wrote that “the posited fears of an Establishment Clause violation are unfounded,” using the *Lemon* test to explain that the school district’s granting permission to the religious group to use the school facilities for its religious purpose would not violate any of the three prongs of the test: “...the challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion” (*Lamb's Chapel v. Center Moriches School District*, 1993, p. 395). While White referred to the *Lemon* test in dispelling fears about any Establishment Clause violation, his use of the test spurred familiar disparaging commentary about the test, as evidenced by Justice Scalia:

As to the Court’s invocation of the *Lemon* test: like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening little children and school attorneys of Center Moriches Union Free School District.

(*Lamb's Chapel v. Center Moriches School District*, 1993, p. 398).

Scalia concurred in the judgment in the case, but his imaginative disparagement of the *Lemon* test continued to reflect the attempt by some justices to find other tools to adjudicate Establishment Clause disputes.

Zobrest v. Catalina Foothills School District (1993) is a landmark case that considered whether or not a public school district could provide a deaf interpreter to a student who attended

a sectarian high school in Tucson, Arizona without violating the Establishment Clause. Both the District Court and Court of Appeals found that such provision did violate the Establishment Clause. James Zobrest, who had been deaf his entire life, claimed that the school district's refusal to provide a deaf interpreter violated the Individuals with Disabilities Education Act (IDEA) and the Free Exercise Clause. In response to the assertion by the Court of Appeals that providing a deaf interpreter would have the primary effect of promoting religion, Zobrest also claimed that providing the interpreter would not violate the Establishment Clause (*Zobrest v. Catalina Foothills School District*, 1993, pp. 3-5).

In a 5-4 decision, the majority decided that the school district's provision of a deaf interpreter did not violate the Establishment Clause. Writing for the narrow majority, Chief Justice Rehnquist noted that "we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit" (*Zobrest v. Catalina Foothills School District*, 1993, p. 8). In addition, Rehnquist discussed the role of the parents, not the public school district, in deciding how the interpreter would be used:

The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "disabled" under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no

financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking. (*Zobrest v. Catalina Foothills School District*, 1993, p. 10)

Because IDEA distributes aid to *students* who have the special educational need and not to the public schools, there is no violation of the Establishment Clause by the public school district by providing the deaf interpreter, nor does the Establishment Clause prevent employees paid by government funds from working in sectarian schools. *Zobrest* also serves as one level of the legal precedent independent variable in the statistical analysis of this study.

In *Board of Education of Kiryas Joel v. Grumet* (1994), the village of Kiryas Joel in New York sought to have the New York legislature create a separate school district for its inhabitants, all of whom were adherents of the Satmar Hasidic branch of Judaism. The motivation for establishing the separate school district, identified as the Kiryas Joel Village School District, was to ensure that any of the village's elementary and secondary school children who needed special education services would be able to receive such services. Parents of children from Kiryas Joel needing special education services were unwilling to send their children to a public school outside the village to receive special education services, citing "emotional trauma" related to leaving their village and interacting with children outside their village, as the reason the children should not attend the public schools (*Board of Education of Kiryas Joel v. Grumet*, 1994, p. 690).

In a 6-3 decision, the Court decided that the New York Act, 1989 N.Y. Laws, ch. 748, creating the separate school district, violated the Establishment Clause. Noting that the New York legislature enacted a separate law to create the school district rather than follow the state's

ordinary course of action to reorganize school districts, the majority found that the state's use of religion as a criterion for its act joined governmental and religious purposes. Writing for the majority, Justice Souter noted:

Because the district's creation ran uniquely counter to state practice, following the lines of a religious community where the customary and neutral principles would not have dictated the same result, we have good reason to treat this district as the reflection of a religious criterion for identifying the recipients of civil authority. Not even the special needs of the children in this community can explain the legislature's unusual Act. . . .

(Board of Education of Kiryas Joel v. Grumet, 1994, p. 700)

By giving preference to a particular religious community, the state's action violated governmental neutrality. By violating governmental neutrality, the majority believed that the state moved beyond the limits of a permissible accommodation (*Board of Education of Kiryas Joel v. Grumet, 1994, p. 708*).

In *Rosenberger v. University of Virginia* (1995), justices considered whether denial of certain payments by the University of Virginia violated a student group's right to free speech and whether or not the Establishment Clause required the university to deny such payments. The University of Virginia, a public university, had allowed payment to outside contractors for printing services of various student publications. However, the University prohibited payment for printing services for one particular student organization, Wide Awake Productions, which promoted a particular religious viewpoint in its publications. At issue for the justices was whether or not the University's regulation and its denial of payment violated the First

Amendment with regard to both the Free Speech Clause and the Establishment Clause

(Rosenberger v. University of Virginia, 1995, p. 821).

In a narrow 5-4 conservative decision, the justices decided that the denial of payment by the University violated the Free Speech Clause and did not violate the Establishment Clause.

Addressing the University's violation of the Free Speech Clause, Justice Kennedy wrote for the majority:

The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.

(Rosenberger v. University of Virginia, 1995, pp. 833-34)

Not only did Kennedy point out that there was a constitutional issue of free speech, the fact that the context of the dispute was a University setting further punctuated the problem of the violation.

In addressing the Establishment Clause dispute, the majority decided that the University's program of payment for printing services was neutral and did not violate the Establishment Clause. Kennedy further noted:

There is no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf.

The latter occurs here....Any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis. Printing is a routine, secular, and recurring attribute of student life. (*Rosenberger v. University of Virginia*, 1995, p. 842)

Kennedy continued to point out that the University's program to pay for printing services preserved the intent of the Establishment Clause when he wrote that "[b]y paying outside printers, the University in fact attains a further degree of separation from the student publication, for it avoids the duties of supervision, escapes the costs of upkeep, repair, and replacement attributable to student use, and has a clear record of costs" (*Rosenberger v. University of Virginia*, 1995, p. 842). The majority thus believed that the University did not need to deny payment for printing services based on the student group's viewpoint to operate within the boundaries of the First Amendment.

Agostini v. Felton (1997) is a landmark case that overturned *Aguilar v. Felton* (1985). In *Aguilar*, the Supreme Court found unconstitutional New York City's implementation of Title I of the Elementary and Secondary Education Act of 1965. The City sent public school teachers into private religious schools for the purpose of providing Title I remedial instructional services to students with special education needs. The Court found that the New York City program violated the Establishment Clause because its process of monitoring the religious content in the Title I classes constituted excessive entanglement of church and state (*Aguilar v. Felton*, 1985, p. 402).

In writing for the 5-4 majority in *Agostini*, Justice O'Connor pointed out that the Court's recent decisions called for a re-evaluation of the *Aguilar* decision. Referring specifically to the problem of excessive entanglement, O'Connor wrote:

...after *Zobrest* we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment. Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that pervasive monitoring of Title I teachers is required. (*Agostini v. Felton*, 1997, p. 234)

The majority recognized that the Court's interpretation of the Establishment Clause as it was reflected in the *Aguilar* decision had "significant[ly] change[d]," evidenced by its decisions in Establishment Clause cases since the *Aguilar* decision.

The overturning of *Aguilar* by the *Agostini* Court represented a victory, albeit delayed for almost 12 years, for Chief Justice Rehnquist. In his dissent in *Aguilar*, Rehnquist had rejected the argument that allowing public school employees to deliver special education instructional services on religious school property led to excessive entanglement in violation of the third prong of the *Lemon* test. Rehnquist had written in *Aguilar*:

In this case the Court takes advantage of the "Catch-22" paradox of its own creation...whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement. The Court today strikes down nondiscriminatory nonsectarian aid to educationally deprived children from low-income families. The Establishment Clause does not prohibit such sorely needed assistance; we have indeed traveled far afield from the concerns which prompted the adoption of the First

Amendment when we rely on gossamer abstractions to invalidate a law which obviously meets an entirely secular need. (*Aguilar v. Felton*, 1985, pp. 420-21)

The Court's decision in *Agostini* reflects Rehnquist's thinking as he had explained it in his dissent in the *Aguilar* decision, demonstrating that by 1997, a majority on the Court had come to agree with Rehnquist on this issue involving excessive entanglement between church and state. In addition to *Zobrest*, explained above, the *Agostini* decision serves as another level of the precedent independent variable in the statistical analysis of this study.

In *City of Boerne v. Flores* (1997), the Court considered the constitutionality of the Religious Freedom Restoration Act (RFRA) that had been enacted by Congress in 1993 in response to the Court's decision in the above mentioned case *Employment Division, Department of Human Resources of Oregon v. Smith* (1990). The RFRA states that its purpose is:

- (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
- (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government. (42 U. S. C. 2000bb(b))

Notably, the RFRA was passed by Congress under its purported authority under section 5 of the Fourteenth Amendment to enforce constitutional provisions.

The RFRA was invoked in this case by the Catholic Archbishop of San Antonio, who had applied for a permit to made additions to a church on Boerne, Texas. City authorities in Boerne, Texas, denied the permit because of a local ordinance that prevented such additions to buildings

in the city's historical district, of which the church was a part. The Archbishop claimed that the RFRA prevented the city from denying him a permit (*City of Boerne v. Flores*, 1997, p. 507).

The religious freedom question that had been settled in the *Smith* decision had the result that

...laws interfering with religious exercise would face low-level rational basis scrutiny, at least when they were neutral and generally applicable, and did not target religious exercise for burdening, or were motivated by a desire to obstruct religion [footnote omitted]. (Wasserman, 2014, p. 97)

In its 6-2 decision, with Justice Souter claiming jurisdictional dissent, the Court concluded that by enacting the RFRA, Congress intended to change in substance what the Court had already decided in *Smith*. Justice Kennedy wrote for the majority:

...RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. (*City of Boerne v. Flores*, 1997, p. 532)

In other words since RFRA passed rested on Congress's power to enforce the constitution and RFRA intended to enforce rights which the Supreme Court has said did not exist, Congress exceeded its section 5 powers in passing RFRA as applied to the states.

Stated more strongly with the intent to clarify which branch of government has the right to interpret the Constitution and make such interpretation the applicable law, Kennedy wrote further:

When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed....[I]t is this Court's precedent, not RFRA, which must control. (*City of Boerne v. Flores*, 1997, p. 536)

While the justices who tended to vote in a conservative direction cast votes that had the effect of a liberal outcome, the case reflected a concern by the majority for maintaining the appropriate role of the judiciary *vis-à-vis* the legislative branch of the government.

In *Santa Fe Independent School District v. Doe* (2000), justices considered a school prayer case. At the Santa Fe ISD (Texas) football games, the student council chaplain, who was elected by the student body, led a prayer before varsity football games using the public address system. During the time this action was challenged in District Court, the school district amended its policy regarding prayer before football games to allow, but not mandate, that a student initiate and lead prayer before football games. The District Court further mandated that such student-led prayers must be “nonsectarian and nonproselytising,” and that the district’s high school students must vote on whether or not a student should lead prayer before the football games and who that student should be (*Santa Fe Independent School District v. Doe*, 2000, p. 299).

In a 6-3 decision, the Court decided that the school district’s action violated the Establishment Clause. Justice Stevens, writing the majority opinion, explained that “while Santa Fe’s majoritarian election might ensure that most of the students are represented, it does nothing to protect the minority; indeed it likely serves to intensify their offense. Moreover, the District

has failed to divorce itself from the religious content in the invocations” (*Santa Fe Independent School District v. Doe*, 2000, p. 305). Noting that the history of the case indicated that the purpose of the District’s policy was obviously to maintain its support for the practice of praying before football games, Stevens further wrote:

The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly—that this policy is about prayer. . . . We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer. (*Santa Fe Independent School District v. Doe*, 2000, p. 315).

While the facts of the case focus on the particular issue of school prayer, the dissenting opinion written by Chief Justice Rehnquist reflected a more subtle principle that was being debated among the justices. Rehnquist wrote:

But even more disturbing than its holding is the tone of the Court’s opinion; it bristles with hostility to all things religious in public life. Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause. . . . (*Santa Fe Independent School District v. Doe*, 2000, p. 318).

This school prayer case represented yet another manifestation of the dispute over the relationship between church and state and over the very meaning of the Establishment Clause itself.

Decisions regarding this ongoing dispute continued along increasingly conservative lines under the leadership of Chief Justice Rehnquist, the current case notwithstanding.

Mitchell v. Helms (2000) is a case involving school aid that made use of the new *Agostini* criteria for deciding Establishment Clause disputes. A federal school aid program known as

Chapter 2 allowed for the distribution of federal funds to state and local education agencies so that these agencies could lend instructional materials and equipment to private, including sectarian schools. The enrollment of each school determined the level of aid that it received. The Court considered specifically whether or not Chapter 2, as it was applied in Jefferson Parish, Louisiana, violated the Establishment Clause. Many of the private schools in Jefferson Parish that received Chapter 2 aid were religious schools (*Mitchell v. Helms*, 2000, p. 801).

In its 6-3 conservative decision, the Court decided that Chapter 2 as applied in Jefferson Parish did not violate the Establishment Clause. With the case's 15 years of litigation history, during which time the District Court's chief judge retired and the new judge reversed the original judge's order to exclude religious schools from receiving Chapter 2 materials and equipment, Justice Thomas, writing for the majority, began by pointing out that the "case's tortuous history over the next 15 years indicates well the degree to which our Establishment Clause jurisprudence has shifted in recent times, while nevertheless retaining anomalies with which the lower courts have had to struggle" (*Mitchell v. Helms*, 2000, p. 804). Thomas specifically discusses the impact of *Agostini* on deciding school aid cases such as this one. He wrote:

Whereas in *Lemon* we had considered whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion...in *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined on the first and second factors....We acknowledged that our cases discussing excessive entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's

effect....We also acknowledged that our cases had pared somewhat the factors that could justify a finding of excessive entanglement. (*Mitchell v. Helms*, 2000, p. 808).

Agostini limited the inquiry to either purpose or effects, even when there is an examination of excessive entanglement. *Mitchell* did not dispute the purpose of Chapter 2, leaving the Court only to decide whether the federal aid program had the effect of impermissibly promoting religion. According to the *Agostini* criteria and new cases, the government is prohibited from providing aid that results in “religious indoctrination” or that identified recipients of the aid by religion. The majority in *Mitchell v. Helms* (2000) decided that Chapter 2 did neither, thus finding that the federal program did not violate the Establishment Clause.

Good News Club v. Milford Central School (2001) concerned a claim by the Good News Club, a private religious organization for children, that its free speech rights were violated when Milford Central School denied the club’s request to hold weekly meetings after school on school grounds. The school had denied the request based on the club’s intended purpose of engaging in religious activities, such as singing religious songs, discussing scripture, and praying, during their meetings. The school claimed that such activities amounted to religious worship, which was prohibited by the school’s community use policy. Milford Central School further claimed that its policy of preventing such activities as those proposed by the Good News Club was in place to avoid violation of the Establishment Clause (*Good News Club v. Milford Central School*, 2001, p. 102).

In a 6-3 decision, the Court decided that Milford Central School had violated the free speech rights of the Good News Club. Justice Thomas wrote for the majority:

Applying *Lamb's Chapel* [footnote omitted], we find it quite clear that Milford engaged in viewpoint discrimination when it excluded the Club from the afterschool forum. In *Lamb's Chapel*, the New York school district similarly had adopted [Section] 414's "social, civic or recreational use" category as a permitted use in its limited public forum. The district also prohibited use "by any group for religious purposes."...Citing this prohibition, the school district excluded a church that wanted to present films teaching family values from a Christian perspective. We held that, because the films "no doubt dealt with a subject otherwise permissible" under the rule, the teaching of family values, the district's exclusion of the church was unconstitutional viewpoint discrimination....Like the church in *Lamb's Chapel*, the Club seeks to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint. (*Good News Club v. Milford Central School*, 2001, p. 109)

The *Lamb's Chapel* case was so similar to *Good News Club* that the same logic applied to both. The only distinction between the two cases, which was "inconsequential," was the fact that the club in *Lamb's Chapel* taught through films, whereas the club in *Good News Club* taught through storytelling and prayer (*Good News Club v. Milford Central School*, 2001, p. 109). In addition, the majority did not accept the school's claim that its policy prevented the school from violating the Establishment Clause. Citing similarities to *Lamb's Chapel*, Thomas wrote that "the Club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members" (*Good News Club v. Milford Central School*, 2001, p. 113). The majority further noted that because the club meetings were held after school, there was little possibility that impressionable elementary-aged children would perceive

that the school was endorsing the religious club, further rejecting the school's claim that its policy of prohibition preserves compliance with the Establishment Clause (*Good News Club v. Milford Central School*, 2001, pp. 113-14).

Zelman, Superintendent of Public Instruction of Ohio v. Simmons-Harris (2002) is a landmark Establishment Clause dispute that involved tuition aid in the Pilot Project Scholarship Program in the Cleveland (Ohio) City School District, a district that had demonstrated poor academic performance according to the state's performance standards. The pilot program provided tuition aid to families with children in kindergarten through third grade, expanding annually through the eighth grade, so that the students could attend either a public or private school that was chosen by the parents. The purpose of this portion of the pilot program was to allow parents to make educational choices about where to send their children to school within a covered district. Any tuition aid granted was done so according to the financial need of the family, with families having an income less than 200% of the poverty line being given priority to receive 90% of a private school's tuition, up to \$2,250. Parents choosing to send their children to private schools received a check, payable to the parents, who in turn endorsed the check and gave the funds to the private school (*Zelman, Superintendent of Public Instruction of Ohio v. Simmons-Harris*, 2002, pp. 645-46).

A second portion of the pilot program provided grants for tutorial assistance to any student in a covered district who chose to remain in a public school. Tutoring with registered tutors was arranged by parents, who submitted the bills for tutoring services to the state for payment. Families with low income were allowed to receive 90% of the amounts charged, not to exceed \$360. Other families not designated as low income could receive 75% of the amounts

charged. Both portions of the pilot program were designed to improve the educational performance of students in Cleveland (*Zelman, Superintendent of Public Instruction of Ohio v. Simmons-Harris*, 2002, p. 646).

A narrow 5-4 majority found that the pilot program did not violate the Establishment Clause. Writing for the majority, Chief Justice Rehnquist explained that the *Lemon* test, now modified according to *Agostini* principles, could be used to decide the case. Since the purpose of the pilot program was to improve the academic performance of low income students in a poorly performing public school system, the program exhibited a legitimate secular purpose. The question decided by the Court was whether or not the pilot program had the impermissible effect of promoting or inhibiting religion. Addressing the program's relationship with religion, Rehnquist relied on the Court's more recent precedents to explain the majority's decision. He wrote:

Mueller, Witters, and Zobrest thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. (*Zelman, Superintendent of Public Instruction of Ohio v. Simmons-Harris*, 2002, p. 652)

The program itself was neutral, it benefited a "broad class of citizens," and the recipients had true choice in the use of the tuition aid. If a religious school benefited from the choice of the

families who received the aid, it was not by the design or purpose of the program. Rehnquist continued:

The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits....We believe that the program challenged here is a program of true private choice, consistent with *Mueller*, *Witters*, and *Zobrest*, and thus constitutional. (*Zelman, Superintendent of Public Instruction of Ohio v. Simmons-Harris*, 2002, p. 653)

With the “excessive entanglement” prong of the original *Lemon* test folded into the second prong of *Lemon*, Rehnquist was able to demonstrate to a majority of justices that the details of the pilot program did not impermissibly promote religion. In addition to *Zobrest*, and *Agostini*, both explained above, *Zelman* serves as an independent variable in the statistical analysis of this study.

Locke v. Davey (2004) concerned the denial by Washington State of a scholarship to Davey, who was pursuing a theological degree from Northwest College, a private, religious college in Washington. Washington State had established the Promise Scholarship Program to assist eligible students in the pursuit of postsecondary education degrees, as long as the degrees were not theological or devotional. Davey, desiring to pursue a double major in pastoral ministries and business management/administration, was informed that he could not use the scholarship to pursue his theological degree and was denied the scholarship funds after refusing to provide certification that he was not seeking to earn a theological degree. Davey claimed that

the action by Washington State violated both the Establishment Clause and Free Exercise Clause (*Locke v. Davey*, 2004, pp. 715-17).

In a 7-2 decision, the Court found that the action by Washington State in denying the scholarship to Davey violated neither the Establishment Clause nor the Free Exercise Clause. With reference to the Establishment Clause question, Chief Justice Rehnquist, writing for the majority, noted that “[u]nder our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients” (*Locke v. Davey*, 2004, p. 719). Because of the private choice by Davey involved in the use of the funds, there was no Establishment Clause violation. With respect to the Free Exercise Clause question, Rehnquist referred to the “play in the joints” (*Walz v. Tax Commission*, 1970, p. 669) that can exist between the two Religion Clauses. Rehnquist wrote:

...there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause. This case involves that “play in the joints” described above. The question before us, however, is whether Washington, pursuant to its own constitution, which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry...can deny them such funding without violating the Free Exercise Clause. (*Locke v. Davey*, 2004, p. 719)

According to the majority, Washington State “has merely chosen not to fund a distinct category of instruction” (*Locke v. Davey*, 2004, p. 720), that is, religious instruction for the purpose of engaging in ministry. Such a choice, however, is “not evidence of hostility toward religion” (*Locke v. Davey*, 2004, p. 721). In fact, Rehnquist and the majority believed that the State of Washington demonstrated an amicable view toward religion when he wrote:

...we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits [footnote omitted]. The program permits students to attend pervasively religious schools, so long as they are accredited....And under the Promise Scholarship Program's current guidelines, students are still eligible to take devotional theology courses. (*Locke v. Davey*, 2004, pp. 724-25).

Because the program did not suggest hostility toward religion, the State had a substantial interest by awarding scholarships for degrees in secular professions and not religious ones, and there was only a minor burden on otherwise eligible applicants for the Promise Scholarship, the majority believed that the "play in the joints" permitted Washington to maintain its program without running afoul of First Amendment strictures.

In *Elk Grove Unified School District v. Newdow* (2004), Newdow claimed that the school district in California violated the Establishment Clause and the Free Exercise Clause by requiring his daughter to recite the Pledge of Allegiance daily in her elementary school as required by the school district. Newdow sued in behalf of, or as "next friend" of, his daughter. Newdow believed that the words "under God" amounted to religious indoctrination of his daughter. As it progressed through the judicial system, the case was complicated by the fact that the girl's mother, Banning, claimed that she had sole legal custody of the girl and that the daughter should not be a party in the lawsuit. Thus, the case became a question of standing (*Elk Grove Unified School District v. Newdow*, 2004, p. 1).

In an 8-0 decision, with Scalia not taking part in the case, the Court decided that Newdow did not have standing to sue. Writing for the majority, Justice Stevens explained Newdow's lack of prudential standing²²:

In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law. (*Elk Grove Unified School District v. Newdow*, 2004, pp. 17-18).

The majority found that the domestic relations issue regarding custodial rights of the daughter was controlled by California state law. Stevens then explained that “[o]ur custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located” (*Elk Grove Unified School District v. Newdow*, 2004, p. 16). Because the interpretation of California's law regarding Newdow's status as “next friend” granted him no standing, the Supreme Court deferred to that interpretation, thus denying Newdow standing to sue.

In *McCreary County v. ACLU of Kentucky* (2005), justices considered whether or not posting a version of the Ten Commandments on courthouse walls in Kentucky violated the

²² Regarding prudential standing, Stevens noted: “Although we have not exhaustively defined the prudential dimensions of the standing doctrine, we have explained that prudential standing encompasses ‘the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked’” (*Allen v. Wright*, 1984, p. 751).

Establishment Clause. After suits were filed, each county had adopted resolutions to erect more extensive exhibits to explain the role of the Ten Commandments in the legal history of Kentucky. The exhibits underwent modifications, and the history of the modifications was taken into consideration by the justices to help determine the purpose of the displays (*McCreary County v. ACLU of Kentucky*, 2005, pp. 850-51).

In a 5-4 decision, the justices decided that the displays had a religious purpose, thus violating the Establishment Clause. The majority opinion by Justice Souter held that the placement of the text of the Ten Commandments in county courthouses was “an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction” (*McCreary County v. ACLU of Kentucky*, 2005, p. 869). Applying the *Lemon* test, the Court ruled that there was *no valid secular purpose to justify the display*, even with the post-lawsuit steps taken by the counties to supplement the display with other historical American documents (*McCreary County v. ACLU of Kentucky*, 2005, p. 869). Justice Souter’s majority opinion stressed that the history of the county’s actions left no doubt that it was acting with the purpose of advancing religion in violation of the first prong of the *Lemon* test. Justice Souter stated: “When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides” (*McCreary County v. ACLU of Kentucky*, 2005, p. 860). Although joining the majority opinion, Justice O’Connor wrote separately to emphasize her alternative “endorsement” test for the Establishment Clause, concluding that the counties’ display of the Ten Commandments “conveys an unmistakable message of endorsement [of a set of religious beliefs] to the reasonable observer” (*McCreary*

County v. ACLU of Kentucky, 2005, pp. 883-84). Demonstrating the ongoing dispute over the justices' beliefs about the relationship between church and state, Justice Scalia, in dissent, joined by three other members of the Court at least in part, argued that "the Court's oft repeated assertion that the government cannot favor religious practice is false" and *criticized the majority's adoption of a "heightened requirement that the secular purpose 'predominate' over any purpose to advance religion"* (*McCreary County v. ACLU of Kentucky*, 2005, p. 901). In addition, Scalia did not hesitate to state his hostility to the *Lemon* test, stating, presumably with the knowledge that his accusation could be broadly applied to all his colleagues despite their ideological leanings:

As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve. Today's opinion is no different. In two respects it modifies *Lemon* to ratchet up the Court's hostility to religion. (*McCreary County v. ACLU of Kentucky*, 2005, p. 900).

While reflecting again the tug-of-war that existed among justices about the relationship between church and state and about the very tools that should be used to decide such disputes, the justices ended by rendering a not pro religion decision regarding the posting of the Ten Commandments in county courthouses.

Hein v. Freedom From Religion Foundation (2007) concerned a claim by the Freedom From Religion Foundation that the directors of federal offices created by executive orders of the President violated the Establishment Clause because members of the offices had organized conferences that promoted religion. The conferences were organized as a function of the President's Faith-Based and Community Initiatives program. The case was a standing case. The

Freedom From Religion Foundation claimed it had Article III²³ standing because its members were federal taxpayers who opposed the use of funds that had been appropriated by Congress for the Executive Branch to organize the conferences (*Hein v. Freedom From Religion Foundation*, 2007, p. 2559). The Foundation believed that, “having paid lawfully collected taxes into the Federal Treasury at some point, they have a continuing, legally cognizable interest in ensuring that those funds are not used by the Government in a way that violates the Constitution” (*Hein v. Freedom From Religion Foundation*, 2007, p. 2563). The main issue for the Court to consider was whether the Foundation’s claim fell within the requirements of Article III standing.

In a 5-4 decision, the Court decided that the Foundation did not have standing to sue. The Foundation’s claim was “too generalized and attenuated to support Article III standing” (*Hein v. Freedom From Religion Foundation*, 2007, p. 2563). Responding to the Foundation’s claim of Article III standing, Justice Alito wrote:

It has long been established, however, that the payment of taxes is generally not enough to establish standing to challenge an action taken by the Federal Government. In light of the size of the federal budget, it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm. (*Hein v. Freedom From Religion Foundation*, 2007, p. 2559).

The Court explained that because Article III of the Constitution requires that a plaintiff suffer actual injury, and in this case the Foundation suffered no such injury, it had no standing. The narrow exception to rule of federal taxpayer standing that was granted in *Flast v. Cohen* (1968),

²³ Regarding Article III standing, the Court had previously stated: “A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief” (*Allen v. Wright*, 1984, p. 751).

noted above, did not apply in this case since the *Flast* exception applied only to expenditures authorized by Congress under its Article I powers. The expenditures for the conferences in the present case came out of general Executive Branch appropriations and were not the result of any specific congressional action (*Hein v. Freedom From Religion Foundation*, 2007, p. 2568), thus rendering the *Flast* exception inapplicable. Therefore, the Court's majority was able to render a pro religion vote by rejecting the standing claim by the Foundation.

Salazar v. Buono (2010) involved a Latin cross that had been placed on a rock in the Mojave Desert in California. The cross had been placed on the rock in 1934 to honor American soldiers who had died in World War I. Buono had filed suit claiming that the government had violated the Establishment Clause by allowing the cross to be present on federal land and sought an injunction to have the cross removed by the government (*Salazar v. Buono*, 2010, p. 700). The case proceeded in four stages.

In the first stage (*Buono I*), the District Court used only the second prong of the *Lemon* test to find that the presence of the cross on federal land gave the impression of government endorsement of religion and required that the government no longer display the cross in the Preserve since it was federal land. The Court of Appeals (*Buono II*), also considering only the second prong of the *Lemon* test, affirmed the District Court's injunction. During the course of the proceedings, Congress passed individual statutes²⁴ that prohibited the use of government funds to remove the cross, designated the cross and surrounding land as a national memorial, and

²⁴ Justice Kennedy noted the dilemma faced by Congress: "It could not maintain the cross without violating the injunction, but it could not remove the cross without conveying disrespect for those the cross was seen as honoring....Deeming neither alternative to be satisfactory, Congress enacted the statute here at issue" (*Salazar v. Buono*, 2010, p. 711).

provided for the transfer of the land designated as a national memorial to the VFW and, in return, the VFW's transfer of a comparable tract of land to the government. This final act of Congress, namely, the land-transfer statute, became the central issue in the case (*Salazar v. Buono*, 2010, pp. 702-04). In *Buono III*, the District Court considered the land-transfer statute, particularly whether the statute was a good faith effort to comply with the injunction issued in *Buono I*, as claimed by the government, or merely an attempt to keep the cross in place, as claimed by Buono. Both the District Court and the Court of Appeals found that the statute was an attempt to keep the cross in place, leading the case to the Supreme Court in its final stage (*Salazar v. Buono*, 2010, p. 705).

In a 5-4 decision, the Supreme Court issued a pro religion decision by finding that the District Court in *Buono III* acted improperly in its decision because it did not adequately investigate the facts related specifically to the land-transfer statute. Kennedy wrote:

Even assuming the propriety of the original relief, however, the question before the District Court in *Buono III* was whether to invalidate the land transfer. Given the sole reliance on perception as a basis for the 2002 injunction, one would expect that any relief grounded on that decree would have rested on the same basis. But the District Court enjoined the land transfer on an entirely different basis: its suspicion of an illicit governmental purpose. (*Salazar v. Buono*, 2010, p. 714)

The majority rejected the idea that the reason for granting the 2002 injunction against the display of the cross, namely, that the display gave the perception of governmental promotion of religion, could be used as the same reason for granting an injunction against the land-transfer statute. The Supreme Court remanded the case to the District Court with instructions to consider any future

challenge to the land-transfer statute with the “proper inquiry” into the implementation of the statute (*Salazar v. Buono*, 2010, p. 717).

In *Arizona Christian School Tuition Organization v. Winn* (2011), a group of Arizona taxpayers challenged a provision of the Arizona Tax Code²⁵ that allowed a tax credit to be given to those who made contributions to a school tuition organization (STO). These contributions to the STOs were then used to provide scholarships to students to attend private schools, including religious schools. The Arizona taxpayers claimed that the tax credit violated the Establishment Clause. The case concerned standing of the Arizona taxpayers, who claimed that they had standing based on their status as Arizona taxpayers (*Arizona Christian School Tuition Organization v. Winn*, 2011, ___, 131 S. Ct. 1440 (2011)).

In a 5-4 decision with a pro religion outcome, the Court found that the group of Arizona taxpayers did not have standing to sue. Justice Kennedy, writing for the majority, recalled that to have Article III standing a party must demonstrate some harm from the violation. In this case, the Arizona taxpayers must show harm from the alleged Establishment Clause violation.

Kennedy wrote:

For their part, respondents contend that they have standing to challenge Arizona’s STO tax credit for one and only one reason: because they are Arizona taxpayers. But the mere fact that a plaintiff is a taxpayer is not generally deemed sufficient to establish standing in federal court. (*Arizona Christian School Tuition Organization v. Winn*, 2011, ___, 131 S. Ct. 1440 (2011)).

²⁵ 1997 Ariz. Sess. Laws Ss43-1087, codified, as amended, Ariz. Rev. Stat. Ann. Ss43-1089 (West Supp. 2010).

Kennedy explained that the exception to the standing rule created in *Flast v. Cohen* (1968) did not apply in this case. The *Flast* exception, which is defined narrowly, must refer to a governmental expenditure. Kennedy wrote:

It is easy to see that tax credits and governmental expenditures can have similar economic consequences, at least for beneficiaries whose tax liability is sufficiently large to take full advantage of the credit....*The distinction between governmental expenditures and tax credits refutes respondents' assertion of standing* [emphasis added]. When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the State has collected from respondents or from other taxpayers. (*Arizona Christian School Tuition Organization v. Winn*, 2011, ___, 131 S. Ct. 1447 (2011)).

Because the *Flast* exception only applies to government expenditures and the tax credit in Arizona cannot be defined as an expenditure, the majority believed that the exception to taxpayer standing did not apply. Article III standing in Establishment Clause disputes, as well as other constitutional principles, requires there to be “substance and meaning when explained, elaborated, and enforced in the context of actual disputes” (*Arizona Christian School Tuition Organization v. Winn*, 2011, ___, 131 S. Ct. 1449 (2011)). The narrow majority believed no such “context of actual disputes” existed in this case, leading to a rejection of the standing argument by the Arizona taxpayers.

In *Hosanna-Tabor v. EEOC* (2012), the Court considered whether or not a “ministerial exemption” allowed Hosanna-Tabor Evangelical Lutheran Church and School to terminate the employment of Perich, one of the church’s ministers. Perich was considered by the church to be a “called” teacher, a designation she received after the appropriate training and commissioning as

a minister by the church. During the 2004-2005 school year, Perich was diagnosed with narcolepsy and was placed on disability leave. After attempting to return to her job in February, the school principal and congregation denied her the ability to return to teaching, asking for her resignation. The congregation revoked her “called” status and terminated her employment, after which Perich filed a grievance with the Equal Employment Opportunity Commission, claiming that she had been fired in retaliation for her stated intention to file an Americans with Disability Act (ADA) lawsuit. Hosanna-Tabor claimed a “ministerial exemption” by stating that its status as an employer which is a religious group allowed it to terminate the employment of one of the group’s ministers without interference by the government on the ground of an ADA violation (*Hosanna-Tabor v. EEOC*, 2012, ___, 132 S. Ct. 701 (2012)).

In a unanimous 9-0 decision, the Court held that Hosanna-Tabor can claim a “ministerial exception,” thus preventing interference by the government in this particular employment decision. Writing for the majority, Chief Justice Roberts referred to both Religion Clauses of the First Amendment. Explaining that Hosanna-Tabor possessed a “ministerial exemption” in this case, Roberts wrote:

The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments. According the state the power

to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions. (*Hosanna-Tabor v. EEOC*, 2012, ___, 132 S. Ct. 706 (2012))

Roberts used both the Establishment Clause and the Free Exercise Clause to emphasize that the government may not interfere with an internal matter of a church. Taking a broader view, Roberts further wrote that:

The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way. (*Hosanna-Tabor v. EEOC*, 2012, ___, 132 S. Ct. 710 (2012))

The firing of Perich was considered by the justices to be an internal matter of the church. The church was thus shielded from government intervention by virtue of the church's "ministerial exemption."

In *Town of Greece, New York v. Galloway* (2014), justices considered whether or not the practice by the town of Greece, N. Y., of beginning its monthly board meetings with a prayer violated the Establishment Clause. The practice had been in place since 1999. The town used volunteer prayer leaders who were provided by members of congregations listed in a local directory. The vast majority of prayer leaders were Christian, although members of other faiths had also led the prayer. The town did not preview the prayers in advance and it did not provide

direction regarding the content of the prayers, refusing to exercise any control whatsoever over the prayers (*Town of Greece, New York v. Galloway*, 2014, ___, 134 S. Ct. 1816 (2014)).

In a 5-4 decision, the Court issued a conservative decision by finding that the practice did not violate the Establishment Clause. Referring to a prior similar case, Justice Kennedy wrote:

In *Marsh v. Chambers*, 463 U.S. 783, the Court found no First Amendment violation in the Nebraska Legislature’s practice of opening its sessions with a prayer delivered by a chaplain paid from state funds. The decision concluded that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. As practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society. (*Town of Greece, New York v. Galloway*, 2014, ___, 134 S. Ct. 1818 (2014))

According to the majority, what makes the practice of legislative prayer, both in *Marsh* and *Greece* is the historical role that such prayer has played. Kennedy continued:

Yet *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted “by reference to historical practices and understandings.” (*County of Allegheny*, 492 U.S., at 670 (Kennedy, J., concurring in judgment in part and dissenting in part)). That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgement

of religion's role in society. (*Town of Greece, New York v. Galloway*, 2014, ___, 134 S. Ct. 1819, (2014))

More specific to the Town of Greece, Kennedy noted that the prayers occurred during a “ceremonial” part of the monthly board meetings. This portion of the meeting served a civic function. The role of prayer during this “ceremonial” portion serving primarily to acknowledge the important role that religion and its institutions play in the lives of those present at the meetings and not to impose religious belief on nonbelievers nor to exclude nonbelievers (*Town of Greece, New York v. Galloway*, 2014, ___, 134 S. Ct. 1828 (2014)).

Summary

The literature reviewed above contains historical information and research relevant to this study. The primary areas reviewed were a history of the First Amendment, research about Establishment Clause and Free Exercise Clause jurisprudence, an explanation of Supreme Court cases that involve “play in the joints,” research about factors in judicial decision making, and a review of the Supreme Court cases that are used in this study. The existing research and history supports the assertion by Epstein et al. (2013) that “ideology does influence Justices’ judicial votes, and thus the Court’s outcomes...” (p. 103). In the range of years for this study, namely, 1947-2014, the literature reveals a gradual shift to a more conservative outlook by the Court with regard to the Establishment Clause and K-12 education. The following sections will analyze how ideology influences judicial voting and what measures of ideology provide the most reliability in predicting judicial voting in Establishment Clause cases involving K-12 education and other such cases that impact K-12 education.

Chapter 3

Research Design

In light of the foregoing investigations, I expect that: (1) party affiliation of the nominating president (serving as a surrogate for justices' ideology); (2) justices' religious affiliation; (3) justices' ideology as measured by their Segal-Cover ideology scores; and (4) precedential eras relative to the *Zobrest* (1993) case, *Agostini* (1997) case, and *Zelman* (2002) case will have a significant impact on the justices' voting. As noted in the literature review, party affiliation of the appointing president, justices' religious affiliation, and justices' Segal-Cover ideology scores represent aspects of the attitudinal model of judicial behavior and, as such, are expected to influence voting by the justices in either a conservative or liberal direction. The precedential eras also are not expected to impact the voting behavior of the justices relative to conservative and liberal votes, particularly in light of the prevalence of the attitudinal model explained in the literature review. In contrast to voting according to the attitudinal approach, voting according to precedent reflects the legalist approach, in which justices claim to apply the law much like an umpire applies the rules of baseball, as famously noted by Chief Justice John Roberts (Epstein et al., 2013, p. 101).

The data sets for the analyses below were derived from the 68 United States Supreme Court decisions involving First Amendment Establishment Clause disputes, including cases where standing was contested, starting with *Everson v. Board of Education* (1947) emanating from K-12 public school settings, or which decisions substantially affect such settings.

All decisions applying these provisions and published in the Westlaw data bases covering the period 1947 through 2014 were analyzed. A schedule of those cases appears in Appendix A,

which includes the case name, citation, year of the decision and the case holding. The potential number of votes in the data base was 628, and the actual number of votes included in the analysis was 610. The difference between the potential number of votes and actual number of votes is due to the fact that in some instances, justices were serving on the Court at the time certain cases were heard, but did not participate in the discussion and/or the decision of the case. In such instances, those justices' votes are treated as missing data in the data base.

Independent Predictors for Individual Voting

Justice-Level Variables

Political Ideology

The first independent (predictor) variable was ideology, with party-of-the-appointing-president (P-A-P) serving as a proxy for the conservative or liberal ideology of each justice. For this study, P-A-P is one of two independent variables that reflect justices' ideology. The political ideology predictor was coded "1" and "0" for justices nominated by Republican and Democratic presidents, respectively. The second ideology measure, Segal-Cover Ideology score, is discussed below.

Religious Affiliation

The levels of the second independent variable, justices' religious affiliation, were set up by categorizing justices according to the religious groups which have been represented on the Court: Catholic, Protestant and Jewish. Protestant denominations were grouped together as one level of the religious affiliation variable, since Protestant justices who have served on the Court have come from mainline denominations and previous researchers have observed no meaningful

differences in the voting patterns among the Mainline Protestant denominations (Songer & Tabrizi, 1999).

Two dummy variables were created to enable comparisons for the religious affiliation variable. To make the comparisons for the Mainline Protestants, Catholics were coded “1” if the justice was a Catholic and “0,” if “otherwise.” Similarly, Jewish was coded “1” and “0” if “otherwise.” This methodology set up the “other” category, Mainline Protestants, as the reference group.

Segal-Cover Scores

The third and fourth independent variables were the justices’ Segal-Cover ideology and qualification scores. These variables are continuous independent variables. As noted above, the Segal-Cover ranking method was introduced by Segal and Cover (1989) to score nominees before their confirmations along a continuum according to nominees’ political ideologies and qualifications. Segal and Cover (1989) used newspaper editorials to create a database about the nominees’ political ideologies and qualifications. Ideology scores are listed as positive values ranging from 0 (most conservative) to 1 (most liberal). Qualification scores are listed as positive values ranging from 0 (least qualified) to 1 (most qualified)

(<http://www.stonybrook.edu/commcms/polisci/jsegal/QualTable.pdf>).

Extrinsic Variables

Precedential Era

The fifth, sixth, and seventh independent variables were the eras during which decisions were rendered relative to the *Zobrest* (1993), *Agostini* (1997), and *Zelman* (2002) precedential decisions. The three decisions demarcating the precedential eras for this study are landmark

Establishment Clause cases impacting K-12 education (Crisafulli, 2003). In *Zobrest* (1993), the Court found that the Establishment Clause, pursuant to the Individuals with Disabilities Education Act (IDEA), did not prevent a public school district in Arizona from providing a sign-language interpreter for a deaf student while he attended classes in a Catholic high school. In *Agostini* (1997), the Court overturned *Aguilar v. Felton* (1985) by finding that a federally funded program that assisted disadvantaged children by providing them with remedial instruction by government employees on a sectarian school's property did not violate the Establishment Clause. In *Zelman* (2002), the Court found that a school district in Cleveland, Ohio, may provide tuition assistance for students with financial need to attend public or private schools as designated by the parents without violating the Establishment Clause. Decisions issued before *Zobrest* were coded as a "0," while decisions issued after *Zobrest* were coded as a "1." Decisions issued before *Agostini* were coded as a "0," while decisions issued after *Agostini* were coded as a "1." Decisions issued before *Zelman* were coded as a "0," while decisions issued after *Zelman* were coded as a "1."

Dependent Measures

Individual Voting: Conservative and Liberal

A binary, or dichotomous, dependent measure, conservative or liberal vote, was selected for the justices' P-A-P, religious affiliation, Segal-Cover qualification and ideology scores, and precedential era independent variables. A vote was classified as "conservative" and coded with a "1" if it rejected the assertion that a government action violated the Establishment Clause. A vote was classified as "liberal" and coded with a "0" if it accepted the claim that the government

action violated the Establishment Clause

(<http://scdb.wustl.edu/documentation.php?var=decisionDirection>).

Data Analysis

When the dependent variable is binary, as is the case in the analysis for this study, ordinary least squares regression is not the appropriate statistical test (Aldrich & Nelson, 1995). For this study, binary logistic regression techniques were used to estimate the parameters of the models because the data satisfy each of the assumptions for this technique. Binary logistic regression was selected as the appropriate statistic. Specifically, logistic regression does not assume a linear relationship between the dependent and independent variables; the dependent variable must be binary or dichotomous; the independent variable(s) are not required to be interval, or normally distributed, or related in a linear fashion, or of equal variance in each grouping; the categories must be mutually exclusive (a case can only be in one of the two groups) and exhaustive (every case must be a member of one of the two groups). Further, linear regression requires larger samples since the maximum likelihood estimates are large sample estimates. Logistic regression, used in the present study, is the most effective and appropriate statistic for analysis of binary dependent variables (Tabachnick & Fidell, 2013). Logistic regression is also the conventional method of examining judicial voting. Because logistic regression is typically used to examine judicial voting, comparisons with other studies may also be made.

Logistic regression (“logit”) generates estimates of a model’s independent variables with reference to the contribution each variable makes to the odds that the dependent variable will fall into one of the designated categories (Tabachnick & Fidell, 2013, p. 439). In this study, the

designated categories are represented in a binary fashion, conservative or liberal. Logistic regression forms a best fitting equation or function using the maximum likelihood method (MLM). MLM maximizes the probability of classifying the observed data into the appropriate category. This technique allows for a determination whether each independent variable improves the model in relation to the model without that independent variable (Tabachnick & Fidell, 2013, pp. 440-42).

Individual Voting

Ten regressions were run for this study. In the first equation, the justices' political ideology by party of the appointing president, religious affiliation (the justice-level variables), precedential eras (pre- and post-*Zobrest* (1993), pre- and post-*Agostini* (1997), and pre- and post-*Zelman* (2002)), and Segal-Cover qualification scores were set up as independent predictors of the dependent binary measure of justices' 610 individual votes rendered in the Establishment Clause cases comprising the entire data base.

In the second equation, the justices' religious affiliation (the justice-level variables), precedential eras (pre- and post-*Zobrest* (1993), pre- and post-*Agostini* (1997), and pre- and post-*Zelman* (2002)), and Segal-Cover qualification scores were set up as independent predictors of the dependent binary measure of justices who were appointed by Democratic presidents. Voting by these justices resulted in 209 votes in the logistic equation.

In the third equation, the justices' religious affiliation (the justice-level variables), precedential eras (pre- and post-*Zobrest* (1993), pre- and post-*Agostini* (1997), and pre- and post-*Zelman* (2002)), and Segal-Cover qualification scores were set up as independent predictors of

the dependent binary measure of justices who were appointed by Republican presidents. Voting by these justices resulted in 419 votes in the logistic equation.

In the fourth equation, the party-of-appointing president (justice-level variables), the precedential eras (pre- and post-*Zobrest* (1993), pre- and post-*Agostini* (1997), and pre- and post-*Zelman* (2002)), and Segal-Cover qualification scores were set up as independent predictors of the dependent binary measure of justices who had a Protestant religious affiliation. Voting by these justices resulted in 450 votes in the logistic equation.

In the fifth equation, the party-of-appointing president (justice-level variables), the precedential eras (pre- and post-*Zobrest* (1993), pre- and post-*Agostini* (1997), and pre- and post-*Zelman* (2002)), and Segal-Cover qualification scores were set up as independent predictors of the dependent binary measure of justices who had a Catholic religious affiliation. Voting by these justices resulted in 133 votes in the logistic equation.

In the sixth equation, the justices' religious affiliation (the justice-level variables), the precedential eras (pre- and post-*Zobrest* (1993), pre- and post-*Agostini* (1997), and pre- and post-*Zelman* (2002)), and Segal-Cover qualification scores and ideology scores were set up as independent predictors of the dependent binary measure of justices. Voting by these justices resulted in 610 votes in the logistic equation.

In the seventh equation, the justices' religious affiliation (the justice-level variables), the precedential eras (pre- and post-*Zobrest* (1993), pre- and post-*Agostini* (1997), and pre- and post-*Zelman* (2002)), and Segal-Cover qualification scores and ideology scores were set up as independent predictors of the dependent binary measure of justices who were appointed by Democratic presidents. Voting by these justices resulted in 209 votes in the logistic equation.

In the eighth equation, the justices' religious affiliation (the justice-level variables), the precedential eras (pre- and post-*Zobrest* (1993), pre- and post-*Agostini* (1997), and pre- and post-*Zelman* (2002)), and Segal-Cover qualification scores and ideology scores were set up as independent predictors of the dependent binary measure of justices who were appointed by Republican presidents. Voting by these justices resulted in 419 votes in the logistic equation.

In the ninth equation, the party of the appointing president (justice-level variables), the precedential eras (pre- and post-*Zobrest* (1993), pre- and post-*Agostini* (1997), and pre- and post-*Zelman* (2002)), and Segal-Cover qualification scores and ideology scores were set up as independent predictors of the dependent binary measure of justices who had a Protestant religious affiliation. Voting by these justices resulted in 450 votes in the logistic equation.

In the tenth equation, the party of the appointing president (justice-level variables), the precedential eras (pre- and post-*Zobrest* (1993), pre- and post-*Agostini* (1997), and pre- and post-*Zelman* (2002)), and Segal-Cover qualification scores and ideology scores were set up as independent predictors of the dependent binary measure of justices who had a Catholic religious affiliation. Voting by these justices resulted in 133 votes in the logistic equation.

Data Collection

Case-Level Variables

An initial list of Supreme Court decisions involving Establishment Clause disputes that have impacted K-12 education was derived from the appendix of *Religion and the American Constitutional Experiment* (Witte & Nichols, 2011). Data was then collected from Westlaw, www.supreme.justia.com, and www.oyez.org to supplement the initial list of decisions derived from Witte and Nichols (2011).

The data collection included 68 Supreme Court cases involving the Establishment Clause and K-12 education or other such cases impacting K-12 education. Cases comprising the data base were decided during the years 1947-2014. For each case, a summary was written (see above). In addition, Appendix A contains information about each of the 68 cases including the case name, case number, decisional date, and holding.

A spreadsheet was created to collect and organize data for use in statistical tests. There were 6,280 unique data entries in the spreadsheet. Each decision had its own row with entries in each data column. The spreadsheet had 11 columns representing the independent and dependent variables critical to the study. For column 1, I assigned the Supreme Court case number. Column 2 was the case name. The name of the natural court²⁶ during which the case was decided comprised column 3. Column 4 was comprised of the date the Supreme Court rendered its decision. Column 5 was comprised of the names of the individual justices who participated in the case's decision. In those instances where a justice was serving on the Court during the case's decision but did not participate in the case's deliberations or decision, such information was noted in the data base and was treated as missing data in the analysis of the data. Individual justice vote direction, coded conservative as "1" or liberal as "0," was listed in column 6. The case type, either as a state-support or in-school devotional case, comprised column 7. The basis on which the case decision was made, either merits or standing, was listed in column 8. Column 9 was comprised of data regarding the precedential era relative to the *Zobrest* case in 1993. "0" was used as the code for a pre-*Zobrest* decision and "1" was used as the code for a post-*Zobrest*

²⁶ A natural court is defined as "a period during which no personnel change occurs" (<http://scdb.wustl.edu/documentation.php?var=naturalCourt>).

decision. Column 10 was comprised of data regarding the precedential era relative to the *Agostini* case in 1997. “0” was used as the code for a pre-*Agostini* decision and “1” was used as the code for a post-*Agostini* decision. Column 11 was comprised of data regarding the precedential era relative to the *Zelman* case in 2002. “0” was used as the code for a pre-*Zelman* decision and “1” was used as the code for a post-*Zelman* decision. To verify data entry, an independent (paid) consultant was used to cross-check and verify the data.

Justice-level variables

From the list 68 Supreme Court cases, a separate spreadsheet containing a list of all Supreme Court justices who were serving on the Court at the time the case was decided was created. The years of the cases that were considered were 1947-2014. The list yielded a data base with 37 justices who served on the Supreme Court while the 68 K-12 Religion Clause cases were decided.

A spreadsheet of justice-level variables was created to collect and organize data for use in statistical tests. There were 252 unique data entries in the spreadsheet. For each justice-level entry, every justice had his/her own row with entries in each data column. The spreadsheet had seven columns representing the independent variables critical to the study. For column 1, I assigned the last name of the Supreme Court justice. Column 2 was the Segal-Cover ideology score ranging from 0 to 1, with 0 representing the most conservative ideology and 1 representing the most liberal ideology. Column 3 was the Segal-Cover qualification score ranging from 0 to 1, with 0 representing the least qualified and 1 representing the most qualified. The religion of each justice comprised column 4 and, as noted above, “dummy” variables were assigned to justices for their religious affiliations to enable comparisons among the justices. Column 5 was

comprised of the names of the presidents who appointed each justice. The political party of the appointing president for each justice was listed in column 6. Column 7 contained data about whether the majority party of the Senate, who confirms Supreme Court justices, was the same or different as that compared to the appointing president. To verify data entry, an independent (paid) consultant was used to cross-check and verify the data.

Chapter 4

Results

This study begins with the premise articulated by Sisk and Heise (2005) that research “has become increasingly focused upon studies that suggest the influence of ideological or partisan variables on the outcome of court case” (p. 744). In addition, Sisk and Heise (2005) made the following important observation:

Social science evidence that one factor has a statistically significant influence upon the decisions made by an institution does not negate the potential importance of other factors nor the unique contributions made at the level of particularity by an individual actor.

(Sisk & Heise, 2005, p. 746)

Accepting that multiple factors may influence judicial voting behavior, this study investigates the influences of Supreme Court justices’ political ideology, qualifications, religious affiliation, and certain legal precedents on voting at the United States Supreme Court in K-12 Establishment Clause decisions at the U.S. Supreme Court rendered between 1947 and 2014. The study uses binary logistic regression as its main statistical tool. This section presents the application of both descriptive and inferential statistical procedures. The descriptive statistics present frequency counts and percentages of justices’ voting according to judge-level and case-level factors. The inferential statistics present results from logistic regression analysis using judge-level and case-level factors. Both tables and text present data showing how changes in both the binary and continuous independent variables lead to variations in conservative voting by the justices in K-12 Establishment Clause decisions between 1947 and 2014.

Individual Voting/Descriptive Tables

Table 4.1 shows the frequency distribution of the 610 votes cast in the Establishment Clause cases included in the database. Votes were categorized as conservative or liberal. The percentage next to each group indicates the percentage of votes cast by Republican-appointed or Democratic-appointed justices. Of the 610 votes, 407 votes were cast by Republican-appointed justices and 203 were cast by Democratic-appointed justices. Fifty-four percent of votes cast by Republican-appointed justices were conservative and 34% of the votes cast by Democratic-appointed justices were conservative. This indicates about a 20% difference in conservative voting between the two groups. This result was expected based on the existing research. As reported below, logit analysis was used to further examine these findings.

Table 4.1 Frequency Distribution of Voting in Establishment Clause Cases by Party-of-the-Appointing President: 1947-2014

<i>Party Ideology</i>	<i>Conservative</i>	<i>Liberal</i>	<i>Total</i>
<i>Republican</i>	<i>221 (54.3%)</i>	<i>186 (45.7%)</i>	<i>407(100%)</i>
<i>Democrat</i>	<i>69 (34%)</i>	<i>134 (66%)</i>	<i>203 (100%)</i>
<i>Total</i>	<i>290 (47.5%)</i>	<i>320 (52.5%)</i>	<i>610 (100%)</i>

Table 4.2 looks at religious affiliation and direction of voting. There were 610 total votes in the database. One hundred thirty one were cast by Catholics, 435 were cast by Mainline Protestants, and 44 votes were cast by Jewish justices. When categorized by justices' religious affiliation, Table 4.2 reveals that, for the period under study, Catholics cast 78 conservative votes indicating that 59.5% of the time they voted conservative. Protestants cast 206 conservative

votes corresponding to 47.4% in a conservative direction. Jewish justices cast only 6 conservative votes which accounts for 13.6% of the total Jewish vote. The differences between the Jewish justices' voting and those by Catholic and Protestant justices appear to be meaningful, but further study was conducted with a logistic regression to determine whether these differences are significant.

Table 4.2 Frequency Distribution of Voting in Establishment Clause Cases by Religious

Affiliation of Justices: 1947-2014

<i>Religious Affiliation</i>	<i>Conservative</i>	<i>Liberal</i>	<i>Total</i>
<i>Catholic</i>	78 (59.5%)	53 (40.5%)	131 (100%)
<i>Mainline Protestant</i>	206 (47.4%)	229 (52.6)	435 (100%)
<i>Jewish</i>	6 (13.6%)	38 (86.4%)	44 (100%)
<i>Total</i>	290 (47.5%)	320 (52.5%)	610 (100%)

Table 4.3 shows the direction of the voting in the Establishment Clause cases included in the database by whether the decision entailed a merits or mere standing determination. In standing cases, a decision to deny standing means that a litigant is not the proper person to present a legal challenge at the Court (Chemerinsky, 2006, p. 60).²⁷ More specific to Establishment Clause disputes, a decision to deny standing is a *de facto* conservative decision since the litigant is prevented from proceeding with an Establishment Clause challenge which

²⁷ Chemerinsky (2006) further noted: “The Court has not consistently articulated a test for standing; different opinions have announced varying formulations for the requirements for standing in federal court [footnote omitted]. Moreover, many commentators believe that the Court has manipulated standing rules based on its views of the merits of particular cases [footnote omitted]” (pp. 60-61).

could result in a liberal decision. Therefore, a vote to deny standing is coded as a conservative vote and a vote to grant standing is coded as a liberal vote. The percentage next to each group indicates the percentage of votes cast in each category of decision type. Of the 610 votes, 513 were merits determinations and 97 were votes on standing. Among the merits determinations 45.6% of the votes were cast in a conservative direction while 54.3% votes were cast in a liberal direction. Among the standing votes 56.7% were cast conservatively, meaning the vote was to deny standing, and 43.3% were cast in a liberal direction, meaning that those justices considered the conflict before the Court to be justiciable. As reported below, descriptive statistics were used to further examine these findings and relate them to justices' ideology as identified by party-of-the-appointing-president, a binary variable.

Table 4.3 Frequency Distribution of Voting in Establishment Clause Cases Decided on the Merits and Standing Criteria: 1947-2014

<i>Merits/Standing</i>	<i>Conservative</i>	<i>Liberal</i>	<i>Total</i>
<i>Merits</i>	234 (45.6%)	279 (54.3%)	513 (100%)
<i>Standing</i>	55 (56.7%)	42 (43.3%)	97 (100%)
<i>Total</i>	289 (47.3%)	321 (52.6%)	610 (100%)

Table 4.4 shows the frequency of voting according to P-A-P in Establishment Clause dispute based on standing criteria. As noted above, in standing cases, a decision to deny standing means that a litigant is not the proper person to present a legal challenge at the Court (Chemerinsky, 2006, p. 60) and is recorded as a conservative decision in the database. The percentage next to each group indicates the percentage of votes cast in each category of decision

type. Of the 97 votes in standing cases, 56.7% were cast in a conservative direction, meaning that standing was denied. Among Republican-appointed justices, 76.4% of votes were conservative. Among Democratic-appointed justices, 23.6% were conservative. Results showed that Republican-appointed justices cast conservative votes in standing cases significantly more often than Democratic-appointed justices.

Table 4.4 Frequency Distribution of Voting in Establishment Clause Cases Decided on Standing Criteria by Party-of-Appointing President: 1947-2014

<i>P-A-P</i>	<i>Conservative</i>	<i>Liberal</i>	<i>Total</i>
<i>Republican</i>	42 (76.4%)	19 (45.2%)	61 (62.9%)
<i>Democratic</i>	13 (23.6%)	23 (54.8%)	36 (37.1%)
<i>Total</i>	55 (100%)	42 (100%)	97 (100%)

Table 4.5 shows the direction of the voting in the Establishment Clause cases included in the database by whether the decision entailed contested in-school devotional activities or state-funded religious support. Votes were categorized as conservative or liberal. The percentage next to each group indicates the percentage of votes cast in each decisional category. Of the 610 votes, 289 involved devotional activities and 321 state-funded support issues. Among the devotional cases 51.9% of the votes were cast in a liberal direction while 42.4% were cast in a conservative direction. While there is approximately a 15% difference between the number of conservative and liberal votes cast, further logistic regression was needed to determine if the difference is statistically significant. Among the state-support votes, 48.1% were cast liberally while 57.6% were cast in a conservative direction. While there is approximately a 9% difference

between the number of conservative and liberal votes cast, further logistic regression was needed to determine if the difference is statistically significant. As reported below, logit analysis was used to further examine these findings and relate them to justices' ideology as identified by party-of-the-appointing-president and Segal-Cover ideology and qualification scores, which are continuous independent variables.

Table 4.5 Frequency Distribution of Voting in Establishment Clause Cases by Conflict Type [In-School Devotional Activities v. State-Support] and Ideology: 1947-2014

<i>Outcome</i>	<i>Devotional</i>	<i>State-Support</i>	<i>Total</i>
<i>Conservative</i>	123 (42.4%)	167 (57.6%)	290 (100%)
<i>Liberal</i>	166 (51.9%)	154 (48.1%)	320 (100%)
<i>Total</i>	289 (47.4%)	321 (52.6%)	610 (100%)

Table 4.6 shows the frequency of voting by P-A-P for in-school devotional Establishment Clause cases. The results show that when disaggregated according to P-A-P, Republican-appointed justices voted in a conservative direction 82.1% of the time among in-school devotional cases. In contrast, Democratic-appointed justices voted in a conservative direction 17.9% of the time among in-school devotional cases.

Table 4.6 Frequency Distribution of Voting in In-School Devotional Establishment Clause Cases
by Party-of-Appointing-President: 1947-2014

<i>Outcome</i>	<i>Devotional</i>	<i>State-Support</i>	<i>Total</i>
<i>Conservative</i>	123 (42.4%)	167 (57.6%)	290 (100%)
<i>Liberal</i>	166 (51.9%)	154 (48.1%)	320 (100%)
<i>Total</i>	289 (47.4%)	321 (52.6%)	610 (100%)
<i>P-A-P</i>	<i>Conservative</i>	<i>Liberal</i>	<i>Total</i>
<i>Republican</i>	101 (82.1%)	95 (57.2%)	196 (67.8%)
<i>Democratic</i>	22 (17.9%)	71 (42.8%)	93 (32.2%)
<i>Total</i>	123 (100%)	166 (100%)	289 (100%)

Table 4.7 shows the frequency of voting by P-A-P in state-support Establishment Clause cases. The results show that when disaggregated according to P-A-P, Republican-appointed justices voted in a conservative direction 71.9% of the time among state-support cases. In contrast, Democratic-appointed justices voted in a conservative direction 28.1% of the time among state-support cases. In comparison to in-school devotional cases, Republican-appointed justices voted slightly less conservatively in school-support cases, while Democratic-appointed justices voted slightly more conservatively in school-support cases.

Table 4.7 Frequency Distribution of Voting in State-Support Establishment Clause Cases by Party-of-Appointing President: 1947-2014

<i>P-A-P</i>	<i>Conservative</i>	<i>Liberal</i>	<i>Total</i>
<i>Republican</i>	120 (71.9%)	91 (59.1%)	211 (65.7%)
<i>Democratic</i>	47 (28.1%)	63 (40.9%)	110 (34.3%)
<i>Total</i>	167 (100%)	154 (100%)	321 (100%)

Table 4.8 shows the frequency distribution of votes cast in K-12 Establishment Clause cases by *Republican*-appointed justices as a function of their religious affiliation. There were 407 votes cast by Republican-appointed justices. Overall, 54.3% of those votes were conservative. There were no Jewish justices appointed by Republican presidents. When looking at religious affiliation, the Catholic-Republican-appointed justices voted conservatively 61% of the time while Protestant-Republican-appointed justices voted conservatively 51.4% of the time. Logistical regression was later used to determine if these differences were statistically significant.

Table 4.8 Voting by Republican-Appointed Justices in Establishment Clause Cases by Justices'

	Religious Affiliation		
<i>Religious Affiliation</i>	<i>Conservative</i>	<i>Liberal</i>	<i>Total</i>
<i>Catholic</i>	75 (61.0%)	48 (39.0%)	123 (100%)
<i>Mainline Protestant</i>	146 (51.4%)	138 (48.6%)	284 (100%)
<i>Jewish</i>	0	0	0
<i>Total</i>	221 (54.3%)	186 (45.7%)	407 (100%)

Table 4.9 shows the frequency distribution of votes cast in K-12 Establishment Clause cases by *Democratic*-appointed justices as a function of their religious affiliation. There were 203 votes cast by Democratic-appointed justices. Overall, 34% of those votes were conservative. When looking at religious affiliation, the Catholic-Democratic-appointed justices voted conservatively 37.5% of the time while Protestant-Democratic-appointed justices voted conservatively 39.7% of the time. The Democratic-appointed Jewish justices voted conservatively only 13.6% of the time.

Table 4.9 Voting by Democratic-Appointed Justices in Establishment Clause Cases by Justices'

Religious Affiliation			
<i>Religious Affiliation</i>	<i>Conservative</i>	<i>Liberal</i>	<i>Total</i>
<i>Catholic</i>	3 (37.5%)	5 (62.5%)	8 (100%)
<i>Mainline Protestant</i>	60 (39.7%)	91 (60.3%)	151 (100%)
<i>Jewish</i>	6 (13.6%)	38 (86.4%)	44 (100%)
<i>Total</i>	69 (34%)	134 (66%)	203 (100%)

Tables 4.10, 4.11 and 4.12 display the frequency distribution of conservative votes as a function of three legal precedents: the *Zobrest* (1993), *Agostini* (1997) and *Zelman* (2002) decisions.

Table 4.10 reveals that during the pre-*Zobrest* era 212 or 46.2% of the 459 votes cast were in a conservative direction while 247 or 53.8% were cast in a liberal direction. During the *Zobrest* and later period 78 or 51.7% of the 151 votes were cast in a conservative direction while

73 or 48.3% were cast in a liberal direction. Although these differences did not appear to be significant this observation was tested by further analysis using regression techniques.

Table 4.10 Voting During the Pre-and Post-*Zobrest* Precedential Eras

<i>Precedential Era</i>	<i>Pre-Zobrest</i>	<i>Zobrest and later</i>	<i>Total</i>
<i>Conservative</i>	212 (46.2%)	78 (51.7%)	290 (47.5%)
<i>Liberal</i>	247 (53.8%)	73 (48.3%)	320 (52.5%)
<i>Total</i>	459 (100%)	151 (100%)	610 (100%)

Table 4.11 reveals that during the pre-*Agostini* era 225 or 46.3% of the 486 votes cast were in a conservative direction while 261 or 53.7% were cast in a liberal direction. During the *Agostini* and later period 65 or 52.4% of the 124 votes were cast in a conservative direction while 59 or 47.6% were cast in a liberal direction. Although these differences did not appear to be significant this observation was tested by further analysis using regression techniques.

Table 4.11 Voting During the Pre-and Post-*Agostini* Precedential Eras

<i>Precedential Era</i>	<i>Pre-Agostini</i>	<i>Agostini and later</i>	<i>Total</i>
<i>Conservative</i>	225 (46.3%)	65 (52.4%)	290 (47.5%)
<i>Liberal</i>	261 (53.7%)	59 (47.6%)	320 (52.5%)
<i>Total</i>	486 (100%)	124 (100%)	610 (100%)

Table 4.12 reveals that during the pre-*Zelman* era 251 or 47.4% of the 530 votes cast were in a conservative direction while 279, or 52.6% were cast in a liberal direction. During the *Zelman* and later period 39 or 48.8% of the 80 votes were cast in a conservative direction while

41 or 51.2% were cast in a liberal direction. Although these differences did not appear to be significant this observation was tested by further analysis using regression techniques.

Table 4.12 Voting During the Pre-and Post-Zelman Precedential Eras

<i>Precedential Era</i>	<i>Pre-Zelman</i>	<i>Zelman and later</i>	<i>Total</i>
<i>Conservative</i>	251 (47.4%)	39 (48.8%)	290 (47.5%)
<i>Liberal</i>	279 (52.6%)	41 (51.2%)	320 (52.5%)
<i>Total</i>	530 (100%)	80 (100%)	610 (100%)

Individual Voting/Logistic Regressions

Preliminary to running the logistic regression equations discussed in this section, I undertook a frequency count of the number of votes cast by justices participating in the decisions under review showed that justices casting more than 40 votes included: Justices Rehnquist [52], White [48], Brennan [47], Marshall [43], Blackmun [43] and Stevens [40]. Justices casting 30 or more but less than 40 votes were: Burger [32], O'Connor [32], and Powell [31]. The repeated and unequal voting participation by each justice was accounted for in the logistic regression analyses.²⁸

In addition a frequency distribution of *ex ante* Segal-Cover ideology scores assigned to each justice was determined prior to running these statistical analyses. The frequency distribution appears in Figure 4.1 below with scores ranging from 0.0, indicating most conservative, to 1.0, meaning most liberal. For the 610 votes cast the mean ideology rating was

²⁸ This study used statistical techniques that account for correlated voting patterns that arise from repeated observations of the same justice.

.462 and the standard deviation was .340. Moreover, each justice’s Segal-Cover ideology score was considered in connection with each vote cast in the regression analysis performed on the data set.

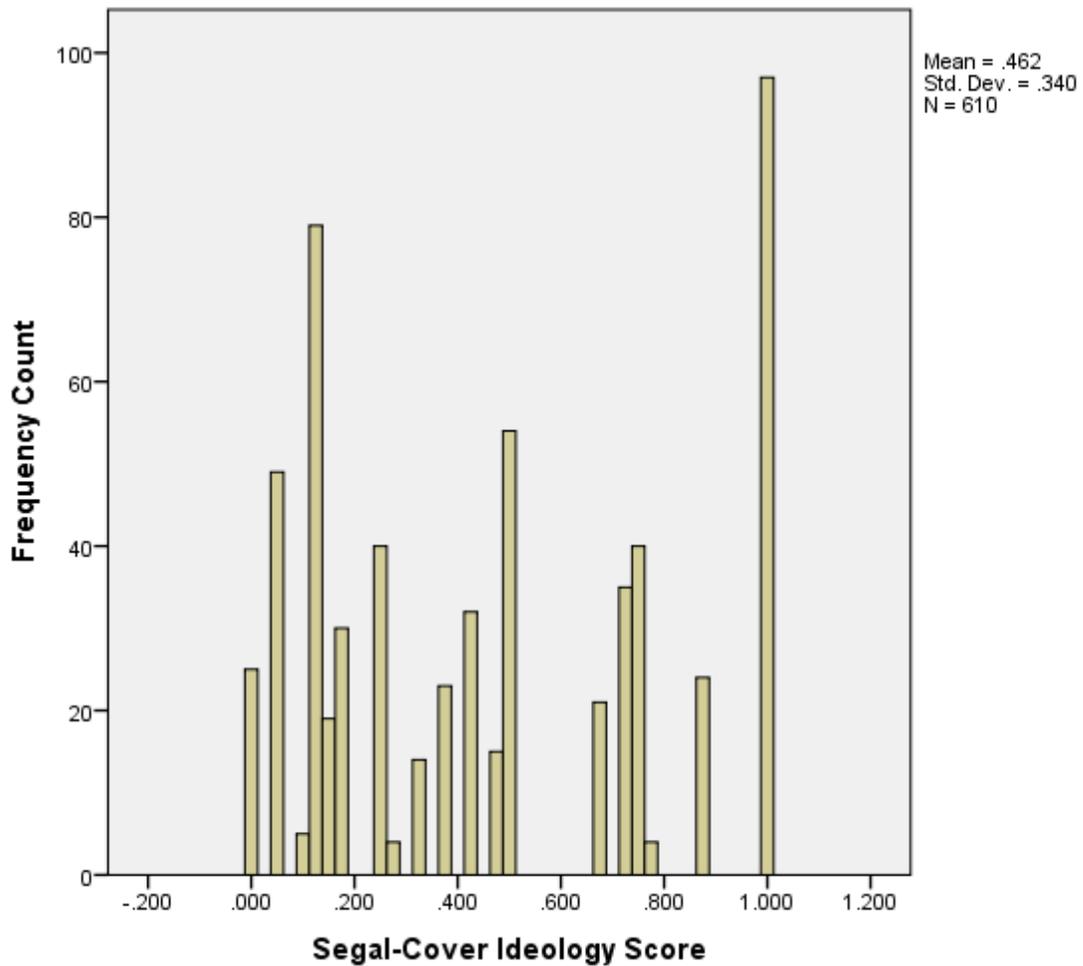


Figure 4.1 Frequency Distribution of *ex ante* Segal-Cover Ideology Scores

The frequency distribution of *ex ante* Segal-Cover qualification scores assigned to each justice appears in Figure 4.2 below. Potential scores range from 0.0, indicating the least qualified, to 1.0, meaning the most qualified. For the 610 votes cast the mean qualification score

was .844 and the standard deviation was .210. Each justice's Segal-Cover qualification score was considered in connection with each vote cast in the regression analysis performed on the data set.

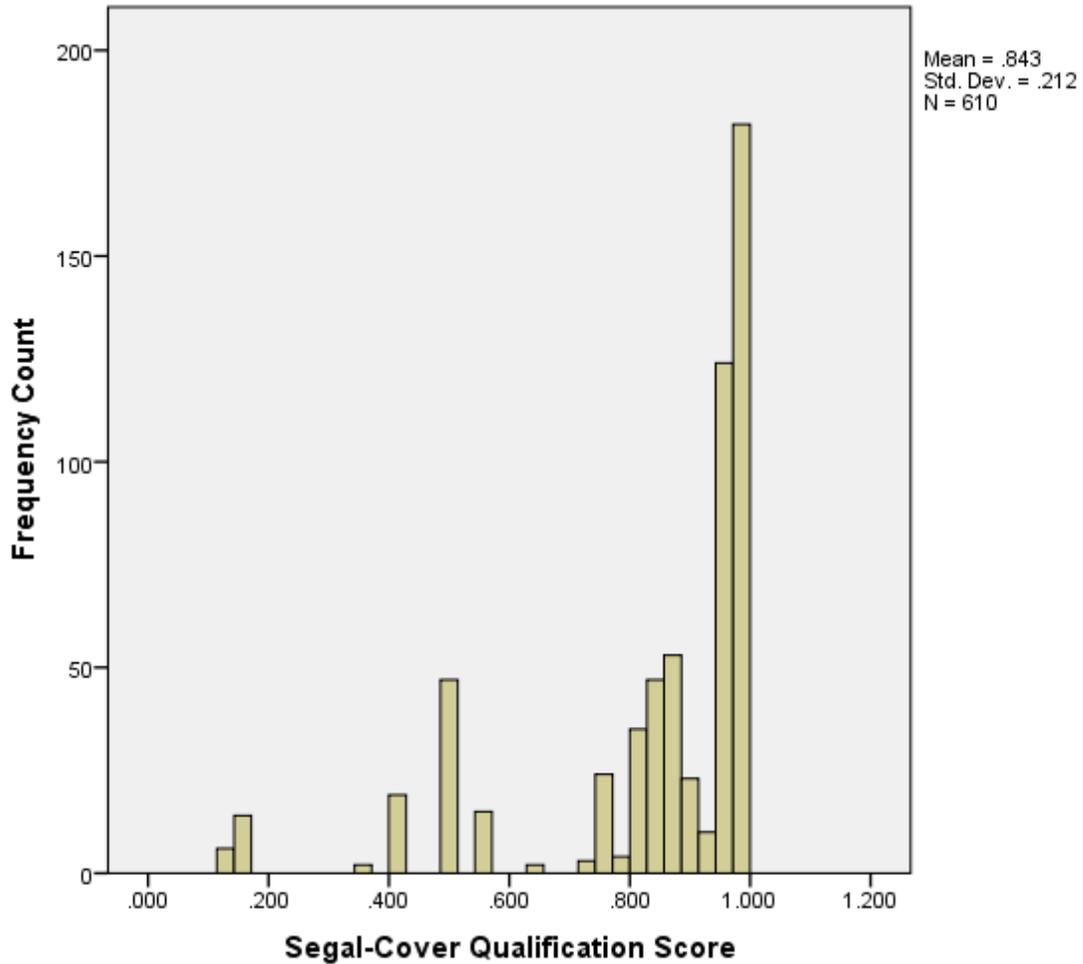


Figure 4.2 Frequency Distribution of ex ante Segal-Cover Qualification Scores
Combined Democratic-Appointed and Republican-Appointed Justice Database by Party-of-Appointing-President Ideology Measure

Table 4.13 shows the results of the logistic regression analysis performed on the 610 individual votes cast out of a pool of 628 potential votes, in K-12 Establishment Clause cases

from 1947 to 2014 for the combined Republican-appointed and Democratic-appointed data base where party-of-the-appointing president served as the justices' ideology measure. Eighteen potential votes were treated as missing cases for purposes of the regression analyses where the justices either recused themselves or otherwise did not participate in the cases considered.

A test of the full model against a constant only model was statistically significant, indicating that the predictors as a set reliably distinguished between conservative and liberal votes of the individual Supreme Court justices ($\chi^2=53.058$, $p< .001$ with $df=7$). Overall, the prediction success was 56.9%. Variability in the dependent measure accounted for by the independent variables was .11 as measured by Nagelkerke's R square test. The table gives the Wald statistic, degree of freedom, probability, and effect sizes for each independent variable.

Table 4.13 Logit Analysis on the Odds of Conservative Voting in K-12 Establishment Clause

Decisions at United States Supreme Court: 1947-2014

<i>Independent Variables</i>	<i>B</i>	<i>SE</i>	<i>Wald</i>	<i>df</i>	<i>Sig</i>	<i>Exp(B)</i>
<i>Religion (P v. J)</i>	-1.422	.527	7.273	1	.007	.241
<i>Religion (P v. C)</i>	.202	.227	.795	1	.373	1.224
<i>P-A-P</i>	-.963	.265	13.229	1	.000	.382
<i>S-C Qualification</i>	-1.674	.529	10.037	1	.002	.187
<i>Zobrest (1993)</i>	-.091	.425	.046	1	.830	.913
<i>Agostini (1997)</i>	.737	.537	1.884	1	.170	2.089
<i>Zelman (2002)</i>	-.443	.429	1.065	1	.302	.642
<i>Constant</i>	1.593	.520	9.388	1	.002	4.917

For the *ideology variable* as measured by P-A-P, Republican appointees were significantly more likely to vote in a conservative direction than Democratic appointees with the odds differences attaining significance at the .05 alpha level ($p < .01$). The odds of Republican-appointed justices voting in a conservative direction was 2.617 times greater than the odds of the Democratic-appointed justices voting in a conservative direction, with all other variables controlled.

For the *religious affiliation variable*, justices in the Protestant reference group were significantly more likely to vote in a conservative direction than the Jewish justices, with the odds differences attaining significance at the .05 alpha level ($p < .01$). The odds of Protestant justices in the reference group voting in a conservative direction was 4.149 times greater than the odds of Jewish justices voting in a conservative direction, with all other variables controlled. Catholic justices' voting did not differ significantly from the Protestant reference group in the direction of their voting ($p > .05$).²⁹

For the *Segal-Cover qualification variable*, lower qualification ratings were associated with more conservative voting, with the differences attaining significance at the .05 alpha level ($p < .01$). The effect size for this variable revealed that for each 0.1 increase in the Segal-Cover qualification score, the odds of a conservative vote decreased by a factor of .86.

None of the legal precedent variables attained significance of the .05 alpha level. This meant that post-*Zobrest*, post-*Agostini*, and post-*Zelman* voting did not differ significantly on the conservative-liberal dimension when compared to the earlier periods.

²⁹ When Catholic justices served as the reference group, Protestant justice voting did not differ significantly from the Catholic reference group ($p > .05$). However, Jewish justice voting did differ significantly from the Catholic reference group ($p < .05$).

Democratic-Appointed Database

Table 4.14 shows the results of the logistic regression analysis performed on the 203 individual votes cast out of a pool of 209 potential votes, in K-12 Establishment Clause cases from 1947 to 2014 for the Democratic-appointed data base where party-of-the-appointing president served as the justices' ideology measure. Six potential votes were treated as missing cases for purposes of the regression analyses where the justices either recused themselves or otherwise did not participate in the cases considered.

A test of the full model against a constant only model was statistically significant, indicating that the predictors as a set reliably distinguished between conservative and liberal votes of the individual Supreme Court justices ($\chi^2=21.450$, $p<.002$ with $df=6$). Overall, the prediction success was 62.1%. Variability in the dependent measure accounted for by the independent variables was .139 as measured by Nagelkerke's R square test. The table gives the Wald statistic, degree of freedom, probability, and effect sizes for each independent variable.

Table 4.14 Logit Analysis on the Odds of Conservative Voting for Democratic-Appointed Justices in K-12 Establishment Clause Decisions at United States Supreme Court: 1947-2014

<i>Independent Variables</i>	<i>B</i>	<i>SE</i>	<i>Wald</i>	<i>df</i>	<i>Sig</i>	<i>Exp(B)</i>
<i>S-C Qualification</i>	-1.497	.641	5.464	1	.019	.224
<i>Zobrest (1993)</i>	.153	1.325	.013	1	.908	1.165
<i>Agostini (1997)</i>	-.624	1.441	.187	1	.665	1.866
<i>Zelman (2002)</i>	-1.965	1.089	3.257	1	.071	.140
<i>Religion</i>			2.309	2		.315
<i>Religion(1)</i>	.444	.898	.244	1	.621	1.558
<i>Religion(2)</i>	-1.026	.831	1.522	1	.217	.359
<i>Constant</i>	.535	.439	1.489	1	.222	1.708

For the *Segal-Cover qualification variable*, lower qualification ratings were associated with more conservative voting, with the differences attaining significance at the .05 alpha level ($p < .019$). The effect size for this variable revealed that for each 0.1 increase in the Segal-Cover qualification score, the odds of a conservative vote decreased by a factor of .86.

For the *religious affiliation variable* among the Democratic-appointed justices, religious affiliation did not attain significance ($p > .05$). This meant that voting according to religious affiliation did not differ significantly among the Democratic-appointed justices.

None of the *legal precedent variables* attained significance at .05 alpha level. This meant that post-*Zobrest*, post-*Agostini*, and post-*Zelman* voting by Democratic-appointed justices did not differ significantly from one another when compared to the earlier periods.

Republican-Appointed Database

Table 4.15 shows the results of the logistic regression analysis performed on the 407 individual votes cast out of a pool of 419 potential votes, in K-12 Establishment Clause cases from 1947 to 2014 for the Republican-appointed database where party-of-the-appointing president served as the justices' ideology measure. Twelve potential votes were treated as missing cases for purposes of the regression analyses where the justices either recused themselves or otherwise did not participate in the cases considered.

A test of the full model against a constant only model was statistically significant, indicating that the predictors as a set reliably distinguished between conservative and liberal votes of the individual Supreme Court justices ($\chi^2=13.145$, $p<.022$ with $df=5$). Overall, the prediction success was 52.8%. Variability in the dependent measure accounted for by the independent variables was .042 as measured by Nagelkerke's R square test. The table gives the Wald statistic, degree of freedom, probability, and effect sizes for each independent variable.

Table 4.15 Logit Analysis on the Odds of Conservative Voting for Republican-Appointed Justices in K-12 Establishment Clause Decisions at United States Supreme Court: 1947-2014

<i>Independent Variables</i>	<i>B</i>	<i>SE</i>	<i>Wald</i>	<i>df</i>	<i>Sig</i>	<i>Exp(B)</i>
<i>S-C Qualification</i>	-1.881	.968	3.777	1	.052	.153
<i>Zobrest (1993)</i>	-.142	.450	.099	1	.753	.868
<i>Agostini (1997)</i>	.647	.564	1.314	1	.252	1.910
<i>Zelman (2002)</i>	-.087	.475	.034	1	.854	.916
<i>Religion(1)</i>	.190	.236	.654	1	.419	1.210
<i>Constant</i>	1.775	.935	3.603	1	.058	5.898

For the *religious affiliation variable* among the Republican-appointed justices, religious affiliation did not attain significance ($p > .05$). This meant that the odds of Republican Protestants voting in a conservative direction did not differ significantly from Republican Catholics.

None of the *legal precedent variables* attained significance at the .05 alpha level. This meant that post-*Zobrest*, post-*Agostini*, and post-*Zelman* voting by Republican-appointed justices did not differ significantly from one another when compared to the earlier periods.

Unlike the Democratic-appointed justices, for the *Segal-Cover qualification variable*, lower qualification ratings were not associated with more conservative voting for the Republican-appointees when significance was set at the .05 alpha level.

Protestant Database

Table 4.16 shows the results of the logistic regression analysis performed on the 435 individual votes cast out of a pool of 450 potential votes, in K-12 Establishment Clause cases

from 1947 to 2014 for the Protestant database where party-of-the-appointing president served as the justices' ideology measure. Fifteen potential votes were treated as missing cases for purposes of the regression analyses where the justices either recused themselves or otherwise did not participate in the cases considered.

A test of the full model against a constant only model for the Protestant justices was statistically significant, indicating that the predictors as a set reliably distinguished between conservative and liberal votes of the individual Supreme Court justices ($X^2=12.486$, $p<.029$ with $df=5$). Overall, the prediction success was 54%. Variability in the dependent measure accounted for by the independent variables was .038 as measured by Nagelkerke's R square test. The table gives the Wald statistic, degree of freedom, probability, and effect sizes for each independent variable.

Table 4.16 Logit Analysis on the Odds of Conservative Voting for Protestants in K-12 Establishment Clause Decisions at United States Supreme Court: 1947-2014

<i>Independent Variables</i>	<i>B</i>	<i>SE</i>	<i>Wald</i>	<i>df</i>	<i>Sig</i>	<i>Exp(B)</i>
<i>S-C Qualification</i>	<i>-1.058</i>	<i>.627</i>	<i>2.847</i>	<i>1</i>	<i>.092</i>	<i>.347</i>
<i>Zobrest (1993)</i>	<i>-.865</i>	<i>.564</i>	<i>2.356</i>	<i>1</i>	<i>.125</i>	<i>.421</i>
<i>Agostini (1997)</i>	<i>.558</i>	<i>.716</i>	<i>.607</i>	<i>1</i>	<i>.436</i>	<i>1.747</i>
<i>Zelman (2002)</i>	<i>-.444</i>	<i>.662</i>	<i>.449</i>	<i>1</i>	<i>.503</i>	<i>.642</i>
<i>P-A-P</i>	<i>-.900</i>	<i>.291</i>	<i>9.591</i>	<i>1</i>	<i>.002</i>	<i>.406</i>
<i>Constant</i>	<i>1.164</i>	<i>.610</i>	<i>3.643</i>	<i>1</i>	<i>.056</i>	<i>3.204</i>

Among Protestant justices where ideology was determined by party-of-the-appointing-president, ideology attained significance at the .05 alpha level ($p<.002$). The effect size for this

variable revealed that for the Protestant justices, the odds of a conservative vote is 2.463 times greater for Protestant Republican appointees than for Protestant Democratic appointees.

None of the *legal precedent variables* attained significance at .05 alpha level. This meant that post-*Zobrest*, post-*Agostini*, and post-*Zelman* voting by Protestant justices did not differ significantly from one another when compared to the earlier periods. Similarly, for the Protestant justices, significance was not attained at the .05 alpha level for the *Segal-Cover qualification variable* ($p > .05$).

Catholic Database

Table 4.17 shows the results of the logistic regression analysis performed on the 131 individual votes cast out of a pool of 133 potential votes, in K-12 Establishment Clause cases from 1947 to 2014 for the Catholic database where party-of-the-appointing president served as the justices' ideology measure. Two potential votes were treated as missing cases for purposes of the regression analyses where the justices either recused themselves or otherwise did not participate in the cases considered.

A test of the full model against a constant only model was statistically significant, indicating that the predictors as a set reliably distinguished between conservative and liberal votes of the individual Catholic justices ($X^2=36.685$, $p < .000$ with $df=5$). Overall, the prediction success was 74%. Variability in the dependent measure accounted for by the independent variables was .330 as measured by Nagelkerke's R square test. The table gives the Wald statistic, degree of freedom, probability, and effect sizes for each independent variable.

Table 4.17 Logit Analysis on the Odds of Conservative Voting for Catholics in
K-12 Establishment Clause Decisions at United States Supreme Court: 1947-2014

<i>Independent Variables</i>	<i>B</i>	<i>SE</i>	<i>Wald</i>	<i>df</i>	<i>Sig</i>	<i>Exp(B)</i>
<i>S-C Qualification</i>	-3.562	1.619	4.843	1	.028	.028
<i>Zobrest (1993)</i>	2.071	1.118	3.434	1	.064	7.935
<i>Agostini (1997)</i>	.578	1.507	.147	1	.701	1.783
<i>Zelman (2002)</i>	-1.332	1.124	1.405	1	.236	.264
<i>P-A-P</i>	-1.869	.911	4.209	1	.040	.154
<i>Constant</i>	3.016	1.584	3.626	1	.057	20.405

For the Catholic justices, ideology as determined by party-of-the-appointing-president attained significance at the .05 alpha level ($p < .040$). The effect size for this variable revealed that the odds of a conservative vote is 6.494 times greater for Catholic Republican appointees than Catholic Democratic appointees.

For the *Segal-Cover qualification variable* among Catholic justices, lower qualification ratings were associated with more conservative voting, with the differences attaining significance at the .05 alpha level ($p < .028$). The effect size for this variable revealed that for each 0.1 increase in the Segal-Cover qualification score, the odds of a conservative vote by Catholic justices decrease by a factor of .7.

None of the *legal precedent variables* attained significance at .05 alpha level. This meant that post-*Zobrest*, post-*Agostini*, and post-*Zelman* voting by Catholic justices did not differ significantly from one another when compared to the earlier periods.

Combined Democratic-Appointed and Republican-Appointed Justice Database Using Segal-Cover Ideology Score

Table 4.18 shows the results of the logistic regression analysis performed on the 610 individual votes cast out of a pool of 628 potential votes, in K-12 Establishment Clause cases from 1947 to 2014 for the combined Republican-appointed and Democratic-appointed data base where the Segal-Cover ideology measure was employed as a predictor of justices' voting. Replacing the P-A-P, a binary independent variable, with the Segal-Cover ideology score, a continuous independent variable, as representative of the justices' ideology was the only change made in the predictors compared to the model contained in Table 4.10 above. Eighteen potential votes were treated as missing cases for purposes of the regression analyses, where the justices either recused themselves or otherwise did not participate in the cases considered.

A test of the full model against a constant only model was statistically significant, indicating that the predictors as a set reliability distinguished between conservative and liberal votes of the individual Supreme Court justices ($X^2=113.142$, $p < .001$ with $df=7$). Overall, the prediction success was 68.0%. Variability in the dependent measure accounted for by the independent variables was .226 as measured by Nagelkerke's R square test. This was an improvement over the model which used the binary party-of-appointing-president predictor as the ideology measure. Using the continuous variable Segal-Cover ideology score approximately doubled the variability accounted compared to the previous model. The table gives the Wald statistic, degree of freedom, probability, and effect sizes for each independent variable.

For the *Segal-Cover ideology variable*, higher conservative ratings (lower scores on the scale) were associated with greater conservative voting with the differences attaining

significance at the .05 alpha level ($p < .01$). The effect size for this variable revealed that for each 0.1 increase in the Segal-Cover ideology score, the odds of a conservative vote decreased by a factor of .78.

For the *religious affiliation variable*, justices in the Protestant reference group were significantly more likely to vote in a conservative direction than the Jewish justices, with the odds differences attaining significance at the .05 alpha level ($p < .05$). The odds of justices in the Protestant reference group voting in a conservative direction was 3.125 times greater than the odds of Jewish justices voting in that direction, with all other variables controlled.

For the *religious affiliation variable*, Catholic justices were significantly more likely to vote in a conservative direction than the Protestant reference group, with the odds differences attaining significance at the .05 alpha level ($p < .01$). The odds of Catholic justices voting in a conservative direction was 2.617 times greater than the odds of justices in the Protestant reference group voting in that direction, with all other variables controlled.

For the *Segal-Cover qualification variable*, lower qualification ratings were associated with more conservative voting, with the differences attaining significance at the .05 alpha level ($p < .01$). The effect size for this variable revealed that for each 0.1 increase in the Segal-Cover qualification score, the odds of a conservative vote decreased by a factor of .88.

None of the legal precedent variables in the second regression run attained significance at the .05 alpha level. This meant that post-*Zobrest*, post-*Agostini*, and post-*Zelman* voting did not differ significantly from one another on the conservative-liberal dimension when compared to their respective earlier periods.

Table 4.18 Logit Analysis on the Odds of Conservative Voting in K-12 Establishment Clause

Decisions at United States Supreme Court: 1947-2014

<i>Independent Variables</i>	<i>B</i>	<i>SE</i>	<i>Wald</i>	<i>df</i>	<i>Sig</i>	<i>Exp(B)</i>
<i>Religion (P v. J)</i>	-1.140	.509	5.016	1	.025	.320
<i>Religion (P v. C)</i>	.962	.258	13.849	1	.000	2.617
<i>S-C Ideology</i>	-2.482	.308	64.985	1	.000	.084
<i>S-C Qualification</i>	-1.249	.431	8.388	1	.004	.287
<i>Zobrest (1993)</i>	-.629	.449	1.967	1	.161	.533
<i>Agostini (1997)</i>	.762	.557	1.868	1	.172	2.142
<i>Zelman (2002)</i>	-.647	.447	2.090	1	.148	.524
<i>Constant</i>	2.027	.429	22.343	1	.000	7.588

Democratic-Appointed Database

Table 4.19 shows the results of the logistic regression analysis performed on the 203 individual votes cast out of a pool of 209 potential votes, in K-12 Establishment Clause cases from 1947 to 2014 for the Democratic-appointee data base where the Segal-Cover ideology score served as the justices' ideology measure. Six potential votes were treated as missing cases for purposes of the regression analyses where the justices either recused themselves or otherwise did not participate in the cases considered.

A test of the full model against a constant only model was statistically significant, indicating that the predictors as a set reliably distinguished between conservative and liberal votes of the Supreme Court's Democratic appointees ($X^2=34.506$, $p<.000$ with $df=7$). Overall, the prediction success was 74.4%. Variability in the dependent measure accounted for by the

independent variables was .216 as measured by Nagelkerke's R square test. The table gives the Wald statistic, degree of freedom, probability, and effect sizes for each independent variable.

Table 4.19 Logit Analysis on the Odds of Conservative Voting for Democratic-Appointed Justices in K-12 Establishment Clause Decisions at United States Supreme Court: 1947-2014

<i>Independent Variables</i>	<i>B</i>	<i>SE</i>	<i>Wald</i>	<i>df</i>	<i>Sig</i>	<i>Exp(B)</i>
<i>S-C Qualification</i>	-.490	.725	.457	1	.499	.612
<i>Zobrest (1993)</i>	-.309	1.340	.053	1	.818	.734
<i>Agostini (1997)</i>	.645	1.456	.196	1	.658	1.907
<i>Zelman (2002)</i>	-1.961	1.102	3.164	1	.075	.141
<i>S-C Ideology</i>	-3.082	.887	12.088	1	.001	.046
<i>Religion</i>			4.276	2	.118	
<i>Religion(1)</i>	.974	.927	1.105	1	.293	2.649
<i>Religion(2)</i>	-1.169	.829	1.989	1	.158	.311
<i>Constant</i>	2.107	.637	10.939	1	.001	8.227

The *Segal-Cover ideology score* for Democratic appointees attained significance at the .05 alpha level ($p < .001$). The effect size for this variable revealed that for each 0.1 increase in the Segal-Cover ideology score, the odds of a conservative vote decreased by a factor of .73.

For the *religious affiliation variable* among the Democratic-appointed justices, religious affiliation did not attain significance ($p > .05$). This meant that conservative voting in Establishment Clause conflicts according to religious affiliation did differ significantly among the Democratic-appointed justices.

None of the *legal precedent variables* attained significance at .05 alpha level. This meant that post-*Zobrest*, post-*Agostini*, and post-*Zelman* voting by Democratic-appointed justices did not differ significantly from one another when compared to the earlier periods. Similarly, for the *Segal-Cover qualification variable*, higher ratings did not significantly impact the direction of conservative or liberal voting ($p < .499$).

Republican-Appointed Database

Table 4.20 shows the results of the logistic regression analysis performed on the 407 individual votes cast out of a pool of 419 potential votes, in K-12 Establishment Clause cases from 1947 to 2014 for the Republican-appointed data base where the Segal-Cover ideology score served as the justices' ideology measure. Twelve potential votes were treated as missing cases for purposes of the regression analyses where the justices either recused themselves or otherwise did not participate in the cases considered.

A test of the full model against a constant only model was statistically significant, indicating that the predictors as a set reliably distinguished between conservative and liberal votes of the individual Supreme Court justices ($\chi^2=60.960$, $p < .000$ with $df=6$). Overall, the prediction success was 65.1%. Variability in the dependent measure accounted for by the independent variables was .186 as measured by Nagelkerke's R square test. The table gives the Wald statistic, degree of freedom, probability, and effect sizes for each independent variable.

Table 4.20 Logit Analysis on the Odds of Conservative Voting for Republican-Appointed Justices in K-12 Establishment Clause Decisions at United States Supreme Court: 1947-2014

<i>Independent Variables</i>	<i>B</i>	<i>SE</i>	<i>Wald</i>	<i>df</i>	<i>Sig</i>	<i>Exp(B)</i>
<i>S-C Qualification.</i>	-1.136	1.088	1.090	1	.297	.321
<i>Zobrest (1993)</i>	-.651	.481	1.833	1	.176	.522
<i>Agostini (1997)</i>	.700	.594	1.390	1	.238	2.014
<i>Zelman (2002)</i>	-.351	.504	.484	1	.486	.704
<i>S-C Ideology</i>	-2.611	.404	41.691	1	.000	.073
<i>Religion(1)</i>	1.057	.297	12.686	1	.000	2.879
<i>Constant</i>	1.881	1.044	3.250	1	.071	6.562

For the *religious affiliation variable* among the Republican-appointed justices, religious affiliation attained significance at the .05 alpha level ($p < .000$). This meant that voting according to religious affiliation differed significantly among the Republican-appointed justices. The effect size for this variable revealed that the odds for a conservative vote is 2.879 times greater among Catholic justices as compared to Protestant justices. For the *Segal-Cover ideology score*, a higher Segal-Cover ideology conservatism rating (a lower score) was associated with more conservative voting, with the differences attaining significance at the .05 alpha level ($p < .000$). The effect size for this variable revealed that for each 0.1 increase in the Segal-Cover ideology score, the odds of a conservative vote by Catholic-Republican justices decreased by a factor of .77 as compared to Protestant-Republican justices.

None of the *legal precedent variables* attained significance at .05 alpha level. This meant that post-*Zobrest*, post-*Agostini*, and post-*Zelman* voting by Republican-appointed justices did

not differ significantly from one another when compared to the earlier periods. For the *Segal-Cover qualification variable* among Republican-appointed justices, higher ratings did not statistically distinguish between conservative and liberal voting ($p < .297$).

Protestant Database

Table 4.21 shows the results of the logistic regression analysis performed on the 435 individual votes cast out of a pool of 450 potential votes, in K-12 Establishment Clause cases from 1947 to 2014 for the Protestant database where the Segal-Cover ideology score served as the justices' ideology measure. Fifteen potential votes were treated as missing cases for purposes of the regression analyses where the justices either recused themselves or otherwise did not participate in the cases considered.

A test of the full model against a constant only model was statistically significant, indicating that the predictors as a set reliably distinguished between conservative and liberal votes of the individual Supreme Court justices ($\chi^2=34.321$, $p < .000$ with $df=5$). Overall, the prediction success was 62.3%. Variability in the dependent measure accounted for by the independent variables was .101 as measured by Nagelkerke's R square test. The table gives the Wald statistic, degree of freedom, probability, and effect sizes for each independent variable.

Table 4.21 Logit Analysis on the Odds of Conservative Voting for Protestants in
K-12 Establishment Clause Decisions at United States Supreme Court: 1947-2014

<i>Independent Variables</i>	<i>B</i>	<i>SE</i>	<i>Wald</i>	<i>df</i>	<i>Sig</i>	<i>Exp(B)</i>
<i>S-C Qualification</i>	-.724	.500	2.100	1	.147	.485
<i>Zobrest (1993)</i>	-.977	.566	2.981	1	.084	.376
<i>Agostini (1997)</i>	.615	.721	.727	1	.394	1.850
<i>Zelman (2002)</i>	-.435	.667	.425	1	.515	.647
<i>S-C Ideology</i>	-1.912	.353	29.289	1	.000	.148
<i>Constant</i>	1.402	.504	7.744	1	.005	4.064

For the *Segal-Cover ideology score*, a higher Segal-Cover ideology conservatism rating (a lower score) was associated with more conservative voting, with the differences attaining significance at the .05 alpha level ($p < .000$). The effect size for this variable revealed that for each 0.1 increase in the Segal-Cover ideology score, the odds of a conservative vote decreased by a factor of .83.

For the Protestant justices, none of the *legal precedent variables* attained significance at .05 alpha level. This meant that post-*Zobrest*, post-*Agostini*, and post-*Zelman* voting by Protestant justices did not differ significantly from one another when compared to the earlier periods. For the *Segal-Cover qualification variable*, higher qualification ratings did not predict conservative or liberal voting for the Protestant justices ($p < .147$).

Catholic Database

Table 4.22 shows the results of the logistic regression analysis performed on the 131 individual votes cast out of a pool of 133 potential votes, in K-12 Establishment Clause cases from 1947 to 2014 for the Catholic database where the Segal-Cover ideology score served as the justices' ideology measure. Two potential votes were treated as missing cases for purposes of the regression analyses where the justices either recused themselves or otherwise did not participate in the cases considered.

A test of the full model against a constant only model was statistically significant, indicating that the predictors as a set reliably distinguished between conservative and liberal votes of the individual Supreme Court justices ($\chi^2=57.627$, $p<.000$ with $df=5$). Overall, the prediction success was 82.4%. Variability in the dependent measure accounted for by the independent variables was .481 as measured by Nagelkerke's R square test. The table gives the Wald statistic, degree of freedom, probability, and effect sizes for each independent variable.

Table 4.22 Logit Analysis on the Odds of Conservative Voting for Catholics in
K-12 Establishment Clause Decisions at United States Supreme Court: 1947-2014

<i>Independent Variables</i>	<i>B</i>	<i>SE</i>	<i>Wald</i>	<i>df</i>	<i>Sig</i>	<i>Exp(B)</i>
<i>S-C Qualification</i>	-1.543	1.362	1.283	1	.257	.214
<i>Zobrest (1993)</i>	.343	1.225	.079	1	.779	1.410
<i>Agostini (1997)</i>	.579	1.508	.147	1	.701	1.784
<i>Zelman (2002)</i>	-1.363	1.121	1.478	1	.224	.256
<i>S-C Ideology</i>	-3.449	.806	18.304	1	.000	.032
<i>Constant</i>	3.675	1.409	6.801	1	.009	39.464

For the *Segal-Cover ideology score*, higher Segal-Cover ideology conservatism ratings (lower scores) were associated with more conservative voting among Catholic justices, with the differences attaining significance at the .05 alpha level ($p < .000$). The effect size for this variable revealed that for each 0.1 increase in the Segal-Cover ideology score, the odds of a conservative vote decreased by a factor of .71.

None of the *legal precedent variables* attained significance at .05 alpha level. This meant that post-*Zobrest*, post-*Agostini*, and post-*Zelman* voting by Catholic justices did not differ significantly from one another when compared to the earlier periods. For the *Segal-Cover qualification variable*, higher qualification ratings did not predict conservative or liberal voting for the Catholic justices ($p < .257$).

Summary

Using both descriptive tables and inferential statistics, this section assumed that ideological variables, specifically, P-A-P and Segal-Cover ideology scores (Siske & Heise, 2005), influence justices' votes in court cases in K-12 Establishment Clause disputes and other such disputes impacting K-12 education at the Supreme Court. Logistic regression was used to test how P-A-P, a binary independent variable, and justices' Segal-Cover ideology scores, a continuous independent variable, may predict Supreme Court justices' votes in K-12 Establishment Clause cases and other such cases that impact K-12 education. It was expected that ideology as measured by the continuous independent variable Segal-Cover ideology score would be more powerful in predicting voting outcomes than the binary independent variable P-A-P. This expectation was confirmed by the observed outcomes. Ideological and other variables, namely, qualifications, religious affiliation, and legal precedents, were considered factors in outcomes of court cases, as presented in both descriptive tables and regression analyses. The following section will discuss the predictability of voting outcomes based on the results from the regression analyses.

Chapter 5

Discussion

Introduction

This study compared the two *ex ante* measures, party-of-appointing-president (P-A-P), and the Segal-Cover ideology score, relative to one another and to other independent variables, in their ability to predict how Supreme Court justices will vote in Establishment Clause cases involving K-12 education and other such cases that impact K-12 education. P-A-P is a binary independent measure and Segal-Cover ideology score is a continuous independent measure. This chapter analyzes and discusses descriptive and inferential statistics results reported in Chapter 4 based on the databases using the P-A-P and Segal-Cover ideology measures, respectively.

Descriptive Results

Of the 610 votes cast in K-12 Establishment Clause disputes reaching the United States Supreme Court between 1947 and 2014, 407 votes were cast by Republican appointees and 203 by Democratic appointees. Since Republican appointees voted conservatively 54% of the time whereas Democratic appointees did so only 34% of the time, the descriptive data suggested a strong ideological influence in the voting with Republican appointees voting conservatively more often than the Democrats.

Catholic, Mainline Protestant and Jewish justices cast 131, 435, and 44 of the votes between 1947 and 2014 in the cases under review. Catholics cast 59.5% of their votes in a conservative direction while Mainline Protestants and Jewish justices voted conservatively 47.4% and 13.6% of the time. This suggested meaningful differences in ideology exist between

the Catholic and Mainline Protestant justices on the one hand and the Jewish justices on the other hand with the Catholic and Mainline Protestant justices voting more conservatively compared to the Jewish justices.

Five hundred thirteen votes were cast on the merits of the Establishment Clause claims while 97 entailed standing determinations. On the merits, 45.6% of the votes were cast conservatively while 56.7% of the standing decisions went in a conservative direction see Table 4.3). Of the 97 votes in standing cases, 56.7% were cast in a conservative direction, meaning that standing was denied. When voting was disaggregated according to P-A-P, results showed that among Republican-appointed justices, 76.4% of votes were conservative. Among Democratic-appointed justices, 23.6% were conservative. Results showed that Republican-appointed justices cast conservative votes in standing cases significantly more often than Democratic-appointed justices (see Table 4.4). These results give indication that ideology plays a significant role even in procedural voting, that is, merits or standing determination.

Among the 610 votes studied 298 involved in-school devotional activities such as school prayer and 312 addressed state financial support of religion conflicts (see Table 4.5). In-school devotional disputes are those that consider whether the activities led to government-led religious indoctrination, which are distinguished from those cases alleging mere financial support of religious schools by the government. In the first category 43.3% of the votes were cast conservatively while in the second category 51.6% of the votes were made conservatively. These differences were studied more closely when the logistic regression equations were run.³⁰

³⁰ To understand the effects of the three legal precedents on school aid cases alone, given that the three legal precedents are themselves school aid cases, a separate regression was run to test for effects on the school aid cases. Results showed no meaningful differences between effects of the three legal precedents *Zobrest* (1993), *Agostini*

Examining the 407 votes cast within the Republican appointee group across religious affiliations showed that Catholic Republicans voted conservative 61% of the time whereas Mainline Protestants did so 51.1% of the time (see Table 4.8). Within the Republican group there were 123 Catholic and 284 Mainline Protestant votes cast. There were no Jewish justices appointed by Republican presidents. An approximately 10% difference between Catholic and Protestant voting suggested that the differences should be tested. Results from the tests of this difference are presented below.

Among the 203 Democratic-appointed justices 39.7% and 37.5% of the Mainline Protestants and Catholics cast conservative votes. By contrast only 13.6% of the votes of Democratic Jewish justices went in a conservative direction, suggesting religious ideology may have distinguished Jewish justices' voting from that of the Protestant and Catholic justices (see Table 4.9).

It will be recalled that three key judicial eras were examined based on significant decisions rendered by the U.S. Supreme Court. Descriptive analysis showed that for the 610 votes made during the entire period under study 46.2% were cast in a conservative direction pre-*Zobrest* while 51.7% were case conservative post-*Zobrest* (see Table 4.10).

During the pre-*Agostini* era 225 or 46.3% of the 486 votes cast were in a conservative direction while 261 or 53.7% were cast in a liberal direction. During the *Agostini* and later

(1997), and *Zelman* (2002) on the entire database of cases (school aid cases and devotional cases) and effects on school aid cases alone (*Zobrest* (1993): $B=-.756$, $S.E.=.540$, $Wald=1.958$, $df=1$, $Sig=.162$, $Exp(B)=.469$; *Agostini* (1997): $B=1.166$, $S.E.=.775$, $Wald=2.264$, $df=1$, $Sig=.132$, $Exp(B)=3.209$; *Zelman* (2002): $B=-.685$, $S.E.=.689$, $Wald=.990$, $df=1$, $Sig=.320$, $Exp(B)=.504$). Among the 321 votes cast in the financial cases, only P-A-P and the Segal-Cover qualification score attained significance (P-A-P: $B=-1.418$, $S.E.=.378$, $Wald=14.059$, $df=1$, $Sig=.000$, $Exp(B)=.242$; S-C Qualification: $B=-4.034$, $S.E.=.910$, $Wald=19.638$, $df=1$, $Sig=.000$, $Exp(B)=.018$).

period 65 or 52.4% of the 124 votes were cast in a conservative direction while 59 or 47.6% were cast in a liberal direction (see Table 4.11).

Finally, during the pre-*Zelman* era 251 or 47.4% of the 530 votes cast were in a conservative direction while 279, or 52.6% were cast in a liberal direction. During the *Zelman* and later period 39 or 48.8% of the 80 votes were cast in a conservative direction while 41 or 51.2% were cast in a liberal direction (see Table 4.12). While the descriptive data suggests that voting data in each of the precedential eras did not differ meaningfully from one another, further testing was done below to explore possible differences.

Inferential Analyses using Party-of-Appointing President as the Measure of Justices' Ideology
Main Effects/Entire Data Base Included

The principal findings reflected in the logistic regression analysis using party-of-appointing president as the measure of justices' ideological disposition were that:

(1) Republican appointees were significantly more likely to vote in a conservative direction than Democratic appointees with the odds differences attaining significance at the .05 alpha level ($p < .01$). The odds of Republican-appointed justices voting in a conservative direction was 2.617 times greater than the odds of the Democratic-appointed justices voting in a conservative direction, with all other variables controlled.

(2) For the combined Republican-appointed and Democratic-appointed databases, justices in the Protestant reference group were significantly more likely to vote in a conservative direction than the Jewish justices, with the odds differences attaining significance at the .05 alpha level ($p < .01$). The odds of justices in the Protestant reference group voting in a conservative direction was 4.149 times greater than the odds of Jewish justices, with all other variables

controlled. This finding is consistent with Bornstein and Miller's (2009) research using appellate court decisions, including the Supreme Court, which led them to write that Jewish justices usually reflect liberal voting "because of their stronger identification with the downtrodden and disenfranchised, owing to their own outsider status [footnote omitted]" (p. 115). Within the combined Republican-appointed and Democratic-appointed databases, Catholic justices' voting did not differ significantly from the Protestant reference group in the direction of their voting ($p > .05$ alpha level).

(3) For the *Segal-Cover qualification variable*, lower qualification ratings were associated with more conservative voting, with the differences attaining significance at the .05 alpha level ($p < .01$). The effect size for this variable revealed that for each 0.1 increase in the Segal-Cover qualification score, the odds of a conservative vote decrease by a factor of .85.³¹ Since the association between Segal-Cover qualification was based on the combined voting of Democratic and Republican appointees it is difficult to interpret these results relative to our main area of interest: ideology. The relationship between P-A-P and Segal-Cover qualification scores is considered below.

(4) None of the legal precedent variables attained significance of the .05 alpha level. This meant that post-*Zobrest*, post-*Agostini*, and post-*Zelman* voting did not differ significantly on the conservative-liberal dimension when compared to the earlier periods. In essence, legal precedent had no material effect on the 610 votes cast by the justices (see Table 4.13). This

³¹ Tabachnik and Fidell (2013) note: "Odds ratios greater than 1 reflect the increase in odds of an outcome of 1 (the "response" category) with a one-unit increase in the predictor; odds ratios less than one reflect the decrease in odds of that outcome with a one-unit change" (p. 463).

suggests that overall voting was driven substantially by political ideology with legal precedent playing a modest role in determining the justices' voting.

Democratic-Appointed Justice Database

Among the predictors used in the modeling for the Democratic appointees only the *Segal-Cover qualification variable attained significance* (see Table 4.14). The effect size for this variable revealed that for each 0.1 increase in the Segal-Cover qualification score, the odds of a conservative vote decreased by a factor of .86.

Among Democratic-appointed justices in the current study, lower Segal-Cover qualification scores were associated with more conservative voting. In his own study measuring non-legal factors in changes to Supreme Court justices' ideology from 1950 – 2008, Glennon (2011), showed an association between higher Segal-Cover qualification scores and liberal voting, suggesting that a reason for the association may be due to justices' entrenchment in their beliefs at the time of their appointment, being less prone to drift from the policy preferences of their presidential appointers after their confirmation as justices. The results of the current study are similar to those in the study by Glennon (2011). Justices who were appointed by Democratic presidents tended to reflect the policy preferences of the Democratic presidents who appointed them and showed little drift from where they were presumed to start. Other reasons that may account for the association between lower Segal-Cover qualification scores and conservative voting could include the types of constitutional disputes considered, the salience of anti-Establishment principles to Democratic appointees, and the methodology used to rank justices according to their qualifications. The findings of this study also suggest that justices with higher

Segal-Cover qualification scores may demonstrate more reliability in their voting preferences than less qualified justices (Glennon, 2011, p. 112).

Among the Democratic-appointed justices neither *religious affiliation nor legal precedential era attained significance* ($p > .05$). This meant that voting according to religious affiliation did not differ significantly among Democratic-appointed justices. By narrowing of the ideological spectrum through disaggregation according to P-A-P, focusing on the Democratic-appointed database resulted in the elimination of differences in voting according to religious affiliation which had appeared in the combined Democratic-appointed and Republican-appointed databases. This result may suggest that, among Democratic-appointed justices, ideology, as measured by P-A-P, trumps religious affiliation as a determinant of Democratic-appointed justices' voting.

Voting among the Democratic-appointed justices was apparently not materially affected by Establishment Clause precedents, indicating a lack of interactive effect of the three legal precedents. Songer and Tabrizi (1999) had stated that “judicial decisions appear to be the result of the interactions among a complex set of forces including judicial values, legal forces, and contextual pressures” (p. 520). The three “legal forces” employed by this study were the *Zobrest* (1993) case,³² the *Agostini* (1997) case,³³ and the *Zelman* (2002) case.³⁴ These three cases were

³² *Zobrest* (1993) held that the Establishment Clause was not violated when the state provided an interpreter to a disabled student who attended a religious high school.

³³ *Agostini* (1997), in overturning *Aguilar* (1985), held that the state may provide Title I remedial services to students on religious school property since the presence of a state employee on religious school property does not itself violate the Establishment Clause.

³⁴ *Zelman* (2002) held that a school voucher program did not violate the Establishment Clause. The program had a valid secular purpose of assisting economically disadvantaged students in failing public schools, it was neutral with regard to religion, and parents used private choice in the use of the government aid.

landmark cases concerning government aid to religious schools. While the conclusion that legal precedents do not matter in judicial voting behavior is too sweeping to be warranted, at least the three landmark cases in this study among Democratic-appointed justices, using P-A-P as the identifier of ideology, were not statistically significant. Future research should test what other legal precedents, if any, do provide the necessary “legal forces” to influence judicial voting among justices who were appointed by Democratic presidents, where P-A-P serves as the identifier of the justices’ ideology.

Republican-Appointed Justice Database

For the Republican only database, neither religious affiliation, legal precedent nor Segal-Cover qualification measure attained significance at the .05 alpha level (see Table 4.15). For the *Segal-Cover qualification variable*, higher qualification ratings were not associated with more liberal voting when significance was attained at the .05 alpha level (see Table 4.15). Thus, Republican appointees’ conservative voting appeared consistent with expectation and not influenced by other factors including Segal-Cover qualification ratings. The narrowing of the ideological spectrum in the Republican-appointed database resulted in the elimination of differences in voting according to religious affiliation which appeared in the combined Democratic-appointed and Republican-appointed database. This result may suggest that, among Republican-appointed justices, ideology, as measured by P-A-P, trumps religious affiliation as a determinant of Republican-appointed justices’ voting. Since no Jewish justices appeared in the Republican database and the differences between Protestants and Catholics was not material in the combined database, this result is not surprising. In addition, the results indicate that there are no interaction effects among the Republican-appointed justices.

Protestant Database

In the Protestant database, where ideology was determined by party-of-the-appointing-president, the Republican appointees voted more conservatively than the Democratic appointees with the difference being significant at the .05 alpha level ($p < .002$). The effect size for this variable revealed that the odds of a conservative vote is 2.463 times greater for Protestant Republican appointees than for Protestant Democratic appointees. Thus, the Protestant justices voted in a fashion that was consistent with the results observed for the entire population of justices (see Table 4.16). For the Protestants, no statistically significant differences were observed for the legal precedent nor the Segal-Cover qualification variables. Again, ideology appears to trump other predictors, in this case for the Protestant justices.

Catholic Database

Among the 131 votes cast by the Catholic justices, ideology, as determined by party-of-the-appointing-president, attained significance at the .05 alpha level ($p < .040$) with Republican appointees voting more conservatively than the Democratic appointees. At the .05 alpha level, the effect size for this variable revealed that the odds of a conservative vote is 6.494 times greater for Catholic Republican appointees than Catholic Democratic appointees.

For the *Segal-Cover qualification variable* among Catholic justices, lower qualification ratings were associated with more conservative voting, with the differences attaining significance at the .05 alpha level ($p < .028$). The effect size for this variable revealed that for each 0.1 increase in the Segal-Cover qualification score, the odds of a conservative vote decrease by a factor of .7 (see Table 4.17). This result stands in contrast to the Protestant database where Segal-Cover qualification scores failed to attain significance.

For the Catholics, none of the *legal precedent variables* attained significance at .05 alpha level. This meant that post-*Zobrest*, post-*Agostini*, and post-*Zelman* voting by Catholic justices did not differ significantly from one another when compared to the earlier periods.

Pseudo R Squares and Variance Explained

A non-pseudo R square is a statistic that is used as a goodness-of-fit measure in ordinary least squares regression. In a logistic regression, however, there is no statistic that is equivalent to R squared. Pseudo R-squares are thus used to evaluate the goodness-of-fit models of logistic regressions, appearing similar to R-squared by being represented on a scale from 0 to 1 with higher values demonstrating a better model fit. For this study, Nagelkerke's pseudo R-square is used so that a larger R-squared represents an improvement from the null model to the fitted model (http://www.ats.ucla.edu/stat/mult_pkg/faq/general/Psuedo_RSquareds.htm).³⁵

When ideology is represented as P-A-P, the model used for the main effects results in an estimated 11.1% variance accounted for. The Democratic-appointed database showed improvement over the main effects model at 13.9% and the Catholic data base showed the most improvement over the main effects database at an estimated 33% variance accounted for, indicating that the model using the Catholic database was the best fit among the models discussed in this section. Both the Republican-appointed database and the Protestant database

³⁵ The approach used by Nagelkerke's R-squared is described by the Institute for Digital Research and Education at UCLA as: "The denominator of the ratio can be thought of as the sum of squared errors from the null model--a model predicting the dependent variable without any independent variables. In the null model, each y value is predicted to be the mean of the y values. Consider being asked to predict a y value without having any additional information about what you are predicting. The mean of the y values would be your best guess if your aim is to minimize the squared difference between your prediction and the actual y value. The numerator of the ratio would then be the sum of squared errors of the fitted model. The ratio is indicative of the degree to which the model parameters improve upon the prediction of the null model. The smaller this ratio, the greater the improvement and the higher the R-squared" (http://www.ats.ucla.edu/stat/mult_pkg/faq/general/Psuedo_RSquareds.htm).

were less effective than the main effects database at 4.2% and 3.8% variance accounted for respectively.

Inferential Analyses using Segal-Cover Ideology Scores as the Measure of Justices' Ideology

Main Effects/Entire Data Base Included

The principal findings reflected in the logistic regression analysis using the Segal-Cover ideology score as the measure of justices' ideological disposition were that:

(1) higher conservatism ratings (lower scores) were associated with greater conservative K-12 Establishment Clause voting with the differences attaining significance at the .05 alpha level ($p < .01$). Whereas the odds of Republican-appointed justices voting in a conservative direction was 2.617 times greater than the odds of the Democratic-appointed justices voting in a conservative direction when ideology was represented by P-A-P, the effect size for the Segal-Cover ideology score, a continuous variable, revealed that for each 0.1 increase in the Segal-Cover ideology score, the odds of a conservative vote decrease by a factor of .78.

(2) As was the case when P-A-P represented ideology, justices in the Protestant reference group were significantly more likely to vote in a conservative direction than the Jewish justices, with the odds differences attaining significance at the .05 alpha level ($p < .05$). Whereas the odds of justices in the Protestant reference group voting in a conservative direction was 4.149 times greater than the odds of Jewish justices when P-A-P represented ideology, the odds of justices in the Protestant reference group voting in a conservative direction was 3.125 times greater than the odds of Jewish justices voting in that direction when the Segal-Cover ideology score represented ideology, with all other variables controlled.

(3) For the main effects, Catholic justices were significantly more likely to vote in a conservative direction than the Protestant reference group, with the odds difference attaining significance at the .05 alpha level ($p < .01$). Whereas Catholic justices' voting did not differ significantly from the Protestant reference group when ideology was represented by P-A-P, the odds of Catholic justices voting in a conservative direction was 2.617 times greater than the odds of justices in the Protestant reference group voting in that direction, with all other variables controlled, when ideology was represented by the Segal-Cover ideology score.

(4) As was the case when P-A-P represented ideology, lower Segal-Cover qualification ratings were associated with more conservative voting, with the differences attaining significance at the .05 alpha level ($p < .01$). The effect size for this variable revealed that for each 0.1 increase in the Segal-Cover qualification score, the odds of a conservative vote decrease by a factor of .88. This figure may be compared to the effect size when P-A-P represented ideology, where the effect size revealed that for each 0.1 increase in the Segal-Cover qualification score, the odds of a conservative vote decreased by a factor of .85. Thus, Segal-Cover qualification ratings produced very similar changes in conservative voting irrespective of whether P-A-P or Segal-Cover ideology scores served as the measure of ideology.

(5) As was the case when P-A-P represented ideology, when the Segal-Cover ideology score represented ideology, post-*Zobrest*, post-*Agostini*, and post-*Zelman* voting did not differ significantly from one another on the conservative-liberal dimension when compared to their respective earlier periods (see Table 4.18).

Democratic-Appointed Justice Database

For the *Segal-Cover ideology scores* for Democratic appointees, higher conservative ratings (lower scores) were associated with more conservative voting in the Establishment Clause decisions under review, with the differences attaining significance at the .05 alpha level ($p < .001$). The effect size for this variable revealed that for each 0.1 increase in the Segal-Cover ideology score, the odds of a conservative vote decreased by a factor of .73.

In contrast to the results where P-A-P represented ideology, when ideology was represented by Segal-Cover ideology scores, higher ratings in the *Segal-Cover qualification variable* did not significantly impact the direction of conservative or liberal voting by the Democratic appointees ($p < .499$).

When P-A-P represented ideology, the effect size had revealed that among the Democratic appointees for each 0.1 increase in the Segal-Cover qualification score, the odds of a conservative vote decreased by a factor of .86. Similarly, when Segal-Cover ideology scores represented ideology for Democratic appointees, religious affiliation did not attain significance ($p > .05$) in the conservative direction of the voting for this group, just as it did not attain significance when P-A-P represented ideology. Moreover, none of the *legal precedent variables* attained significance at .05 alpha level. As was the case when P-A-P represented ideology, post-*Zobrest*, post-*Agostini*, and post-*Zelman* voting by Democratic-appointed justices did not differ significantly from one another when compared to the earlier periods (see Table 4.19).

Republican-Appointed Justice Database

For the Republican-appointed justices, a higher conservative rating (lower score) relative to the Segal-Cover ideology score was associated with more conservative voting, with the

differences attaining significance at the .05 alpha level ($p < .000$). The effect size for this variable revealed that for each 0.1 increase in the Segal-Cover ideology score (a decrease in the conservatism rating), the odds of a conservative vote decreased by a factor of .77 (see Table 4.20).

For the *religious affiliation variable* among the Republican-appointed justices, religious affiliation attained significance at the .05 alpha level ($p < .000$). This result stands in contrast to the result attained when ideology was represented by P-A-P, where religious affiliation did not attain significance among the Republican appointees.

Thus, for the Segal-Cover ideology component of this study, Republican-appointed Catholics voted significantly more conservatively than their Protestant colleagues. The effect size for this variable revealed that the odds of a conservative vote is 2.879 times greater among Catholic justices as compared to Protestant justices. This outcome may be explained by the combined effect of eliminating liberal leaning Democratic-appointed Catholics and the appointment during the Reagan, Bush I, and Bush II administrations of conservative Catholics.

None of the *legal precedent variables* attained significance at .05 alpha level. This result is similar to that reached when ideology was represented by P-A-P. This meant that post-*Zobrest*, post-*Agostini*, and post-*Zelman* voting by Republican-appointed justices did not differ significantly from one another when compared to the earlier periods when ideology was represented by the continuous variable Segal-Cover ideology score.

For the *Segal-Cover qualification variable* among Republican-appointed justices, higher ratings did not statistically distinguish between conservative and liberal voting ($p < .297$). This

result is similar to that for the Republican-appointed justices when P-A-P represented justices' ideology ($p=.052$).

Protestant Database

For the *Segal-Cover ideology score*, a continuous independent variable, a higher conservative rating (lower score) relative to the Segal-Cover ideology score was associated with more conservative Establishment Clause voting, with the differences attaining significance at the .05 alpha level ($p<.000$). When ideology was represented by P-A-P, the odds of a conservative vote was 2.463 times greater for Protestant Republican appointees than for Protestant Democratic appointees. When ideology is represented by the Segal-Cover ideology score, the effect size revealed that for each 0.1 increase in the Segal-Cover ideology score, the odds of a conservative vote decrease by a factor of .83.

Similar to the results attained when ideology was represented by P-A-P, none of the *legal precedent variables* attained significance at .05 alpha level. This meant that post-*Zobrest*, post-*Agostini*, and post-*Zelman* voting by Protestant justices did not differ significantly from one another when compared to the earlier periods. In addition, for the *Segal-Cover qualification variable*, higher qualification ratings did not predict conservative or liberal voting for the Protestant justices ($p<.147$) (see Table 4.21), which was also the case then ideology was represented by P-A-P.

Catholic Database

For the *Segal-Cover ideology score*, a continuous independent variable, higher conservative ratings (lower scores) relative to the Segal-Cover ideology scores were associated with more conservative voting among Catholic justices, with the differences attaining

significance at the .05 alpha level ($p < .000$). The effect size for this variable revealed that for each 0.1 increase in the Segal-Cover ideology score, the odds of a conservative vote decrease by a factor of .71. These results are compared to those attained when ideology was measured by P-A-P, where the odds of a conservative vote was 6.494 times greater for Catholic Republican appointees than Catholic Democratic appointees.

Similar to results when ideology was represented by P-A-P, none of the *legal precedent variables* attained significance at .05 alpha level. This meant that post-*Zobrest*, post-*Agostini*, and post-*Zelman* voting by Catholic justices did not differ significantly from one another when compared to the earlier periods. For the *Segal-Cover qualification variable*, higher qualification ratings did not predict conservative or liberal voting for the Catholic justices ($p < .257$) (see Table 4.22). This result stands in contrast to results attained for Catholic justices when ideology was represented by P-A-P, where the effect size revealed that for each 0.1 increase in the Segal-Cover qualification score, the odds of a conservative vote decreased by a factor of .7.

Pseudo R Squares and Variance Explained for Segal-Cover Ideology Database

When ideology is represented by the Segal-Cover ideology score, the model used for the main effects database comprised of all 610 votes results in 22.6% variance accounted for. Only the model using the Catholic database showed improvement over the main effects model at 48.1% variance accounted for, indicating that the Catholic database was the best fit among the models. Both the Democratic-appointed and Republican-appointed databases as well as the Protestant database were less effective than the main effects database at 21.6%, 18.6%, and 10.1% variance accounted for respectively.

Comparison of Models Using P-A-P and Segal-Cover Ideology Measure

When ideology is represented by the Segal-Cover ideology score, the main effects model and each of the disaggregated group models showed improvement over all the models when ideology was represented by P-A-P. For P-A-P, variance accounted for in the main effects was 11%, whereas for the Segal-Cover ideology score, variance accounted for was 22.6%. The R square doubles with the use of the Segal-Cover ideology score, thereby improving the effectiveness of the model. This resulting improvement in the goodness of fit test might be accounted for by Segal-Cover's more nuanced measurement of ideological differences and power as a continuous measure. With increased sensitivity to changes in the ideology variable, the Segal-Cover ideology score is a more reliable predictor of judicial voting behavior. The continuous variable Segal-Cover ideology score is able to more reliably detect variations within each disaggregated group, rather than assuming that all members of a group are ideologically identical.

Summary

Results from this study reveal that ideology makes a significant impact on voting by Supreme Court justices in Establishment Clause cases that affect K-12 education and other such cases. In fact, among the factors investigated, namely, ideology, religious affiliation, Segal-Cover qualification scores, and legal precedents, ideology was the factor that demonstrated the highest degree of influence on judicial voting, even on procedural voting to determine standing. Between the two measures of ideology considered in this study, the Segal-Cover ideology score, a continuous variable, is a more powerful predictor of judicial voting than party-of-appointing-president, a binary variable. In this study, the attitudinal model, especially as expressed through

measures of ideology, is shown to be an effective interpretive lens with predictive power in judicial voting. Such a conclusion stands in contrast to that reached by considering the legal model, as expressed by the *Zobrest* (1993), *Agostini* (1997), and *Zelman* (2002) cases, which were shown to have no significant effects. The results of this study do not support the legal model that was reflected in the assertion by Justice Kagan made during her nomination hearings that it is the “law all the way down.” Rather, the results of this study support research by Sisk and Heise (2012) that it is ideology “all the way down” in both merits cases and standing cases. In this study focusing on Establishment Clause cases and other such cases impacting K-12 education at the Supreme Court during the years 1947-2014, the law did not appear to be a significant factor in judicial voting in the decisions under review. Instead, it was ideology that served as the key factor in judicial voting.

Implications

The results from this study support the contention by researchers such as Epstein et al. (2013) that justices’ ideology influences their voting. This study showed that ideology influenced the voting of Supreme Court justices in their voting in K-12 Establishment Clause cases and other such cases that impact K-12 education. An implication of this study is that ideology may influence Supreme Court justices’ voting in other First Amendment controversies such as those involving the free exercise of religion, freedom of speech, and freedom of the press (U.S. Const. amend. I) and in high salience cases involving statutory interpretation such as the Religious Freedom Restoration Act and other enactments which protect the rights of religious adherents.

An additional area of policy that could be impacted by the implications from this study includes school vouchers and neovouchers.³⁶ Welner (2008) wrote:

If states continue to pursue voucher and neovoucher policies, the Supreme Court may soon consider equal protection issues surrounding Blaine amendment³⁷ challenges. The Court's decision in such a case will have a powerful repercussions for those Americans living under state constitutions erecting higher walls of separation than the Supreme Court recognized in *Zelman*. (p. 78)

This study implies that ideology may influence justices at all levels of the judicial system and legislators in their respective levels of involvement of such policies.

The two measures of ideology in this study revealed that a continuous dependent variable, the Segal-Cover ideology score, was more sensitive in detecting variations in judicial voting than a binary dependent variable, the party-of-appointing-president. While P-A-P is a simpler measure, it is not necessarily the more effective predictor of the justices' voting habits. The results of this study imply that simpler measures, while perhaps easier to discuss in anecdotal terms, do not provide the most useful information for policy makers who may rely on accurate data to write meaningful policy. This implies that although P-A-P may be equally effective in some contexts to Segal-Cover ideological measures, such equality should not be assumed. Therefore, when conducting research on Supreme Court justices' voting, both types of

³⁶ "Neovouchers" is a term used by Welner (2008) to describe tuition tax credits. He writes: "Tuition tax credit systems are designed to provide government support for private schooling but do so without any direct state payments" (p. 6).

³⁷ Blaine amendments are named after Maine congressman James Blaine, who led an initiative to amend the U.S. Constitution in 1875 that would have prohibited grants or other aid to religious organizations or institutions. After the failed amendment, 35 states plus Puerto Rico adopted Blaine amendments in their state constitutions between 1875 and 1900 (Welner, 2008, p. 67).

measures should be employed to maximize success in accounting for variance in the justices' conservative or liberal voting.

Recommendations for Further Study

Because evidence from this study supports the contention by researchers such as Epstein et al. (2013) that Supreme Court justices' ideology influences their voting, further research should be done to determine the extent of this influence. This study considered Establishment Clause disputes and other such cases impacting K-12 education. Future research should consider different types of First Amendment disputes, including those involving the free exercise of religion, freedom of speech, and freedom of the press (U.S. Const. amend. I). In addition, those who desire to understand the role of ideology on First Amendment disputes may wish to examine separately higher education settings since college and university environments vary significantly from K-12 public schools, most especially in the fact that students in the latter setting are adults, and traditions of academic freedom are broader in higher education. Moreover, there is no reason to assume that ideological influences in the Courts of Appeals will necessarily be the same in different issue areas as they are at the Supreme Court.

This study used party-of-appointing president and Segal-Cover ideology scores to measure ideology. Other measures of ideology should be tested to understand the role of ideology in judicial voting behavior as well as the ability of such measures to predict voting outcomes at all levels of the judicial system. One example of a measure of ideology that should be examined further is the Common Space Score, which “combines a more precise estimate of presidential ideology with information about the preferences of home-state Senators to reflect the influence of the latter in the federal judicial appointments process [footnote omitted]” (Fischman

& Law, 2009, p. 173). As more powerful predictors of judicial ideology are developed, such predictors should be tested in a variety of cases to more fully understand the role of the ideology of justices and its impact on voting, both independently and as it interacts with other case-level and justice-level dependent variables. For researchers interested in educational leadership and policy, case-level variables should include types of disputes that impact educational policy.

Limitations of Study

An additional limitation discovered in the logistic regression analyses of this study is the inequality of the number of votes of justices. Justices who have served on the Supreme Court for a longer period of time have had more votes cast than those who have served on the Supreme Court for less time. Such inequality in the numbers of votes cast impacts the reliability of the results, since more votes cast allows for a more powerful correlation between judicial attitudes and actual votes than less votes cast. The issue of more votes cast by some justices and fewer votes cast by other justices may also provide some explanation for inconsistent results, particularly when the groups were disaggregated according to P-A-P and religious affiliation. In addition, numbers of votes may impact the apparent influence of ideology on judicial voting behavior. Future studies will benefit from the increased numbers of votes by justices who are currently in office since, with the passage of time, the increased number of individual votes will lead to more statistical power in the regression analyses.

Appendix A

Establishment Clause Disputes in K-12 Education and Other Such Cases That Impact K-12
Education (1947-2014)

Case #	Supreme Court Case	Decision Date	Holding
330 U.S. 1	Everson v. Board of Education	2-10-1947	The case applied the Establishment Clause to the states by way of the Fourteenth Amendment. States may provide school bus transportation to children attending public or religious schools without violating the Establishment Clause.
333 U.S. 203	Illinois ex rel. McCollum v. Board of Education	3-8-1948	Public school “release time” program that allowed public school students to attend religious classes on public school property during the school day violated the Establishment Clause.
342 U.S. 429	Doremus v. Board of Education	3-3-1952	Party did not have standing to challenge reading the Bible in public school since the student had already graduated.
343 U.S. 306	Zorach v. Clauson	4-28-1952	The decision permitted students to be given release time from public school classes to attend religious services or education.
367 U.S. 488	Torcaso v. Watkins	6-19-1961	The requirement that public officials recite an oath affirming belief in God as a condition of holding office is unconstitutional.
370 U.S. 421	Engel v. Vitale	6-25-1962	State program requiring daily prayer in public schools violated the Establishment Clause.

374 U.S. 203	Abington School District v. Schemp	6-17-1963	A state program that required reading of the Bible in public schools violated the Establishment Clause.
377 U.S. 402	Chamberlin v. Dade County Board of Public Instruction	6-1-1964	Reciting the Lord's Prayer and reading the Bible in public schools violated the Establishment Clause.
392 U.S. 83	Flast v. Cohen	6-10-1968	Under the Establishment Clause, a federal taxpayer had standing to challenge the use of federal funds to benefit religious schools.
392 U.S. 236	Board of Education v. Allen	6-10-1968	A state law that required secular textbooks be provided to all the students in the state, both in public and private (including religious) schools, did not violate the Establishment Clause and was upheld.
393 U.S. 97	Epperson v. Arkansas	11-17-1968	A state law that criminalized the teaching of evolution in public schools and universities violated the Establishment Clause.
397 U.S. 664	Walz v. Tax Commission	5-4-1970	A state property tax exemption for church property did not violate the Establishment Clause.
403 U.S. 602	Lemon v. Kurtzman (I)	6-28-1971	Establishment Clause required that laws have a secular purpose, a primary effect that neither advances nor prohibits religion, and no excessive entanglement of church and state. A program that reimbursed religious schools

			for the cost of teaching secular subjects violated the Establishment Clause because of excessive entanglement.
403 U.S. 672	Tilton v. Richardson	6-28-1971	Permitted federal grants for the construction of buildings for library, science, and arts at both religious and secular colleges.
405 U.S. 319	Cruz v. Beto	3-20-1972	A Buddhist prisoner must be allowed the free exercise of religion within “reasonable” limits.
406 U.S. 205	Wisconsin v. Yoder	5-15-1972	Under the Free Exercise Clause, an Amish community was granted an exemption from full compliance with the state’s compulsory school attendance law.
411 U.S. 192	Lemon v. Kurtzman (II)	4-2-1973	Lemon v. Kurtzman (I) may not be applied retroactively.
413 U.S. 455	Norwood v. Harrison	6-25-1973	States may loan secular textbooks to religious schools. However, the recipient religious schools may not engage in racial discrimination.
413 U.S. 472	Levitt v. Committee for Public Education and Religious Liberty	6-25-1973	Under the Establishment Clause, states may not reimburse religious schools for most costs associated with standardized testing and state-required record keeping.
413 U.S. 734	Hunt v. McNair	6-25-1973	The issuance of revenue bonds for religious colleges did not violate the Establishment Clause.
413 U.S. 756	Committee for Public	6-25-1973	Several state programs violated

	Education and Religious Liberty v. Nyquist		the Establishment Clause: reimbursements to low income parents for a portion of religious school tuition; tax deduction for low-income parents whose children attend religious schools; direct grants to private (including religious) schools; direct grants for maintenance and repair costs to private (including religious) schools who enrolled low- income students.
413 U.S. 825	Sloan v. Lemon	6-25-1973	State program that reimbursed parents for a portion of religious school tuition violated the Establishment Clause.
415 U.S. 361	Johnson v. Robison	3-4-1974	A statute that granted education benefits to military draftees but denied such benefits to draftees who performed alternate civilian service is constitutional.
415 U.S. 391	Hernandez v. Veterans' Administration	3-4-1974	A Ninth Circuit dismissal was vacated for lack of jurisdiction. A former conscientious objector had challenged the statute at issue in Johnson v. Robison (1974). Case was remanded in light of decision in Johnson v. Robison (1974).
421 U.S. 349	Meek v. Pittenger	5-19-1975	The state may loan textbooks to religious schools. However, the state may not loan other supplies, films, counseling services, or other personnel.
426 U.S. 736	Roemer v. Maryland Public	6-21-1976	A state construction grant

	Works Board		program that supported religious colleges in addition to secular colleges was not unconstitutional.
433 U.S. 229	Wolman v. Walter	6-24-1977	The state may not loan instructional materials to private schools or parents, nor may it provide transportation services to private schools for field trips. The state may provide diagnostic services, standardized testing, and various personnel to private schools or parents.
434 U.S. 125	New York v. Cathedral Academy	12-6-1977	Reimbursement to religious schools for state-mandated record keeping was unconstitutional.
444 U.S. 646	Committee for Public Education and Religious Liberty v. Regan	2-20-1980	Reimbursement to religious schools for the “actual costs” of state-mandated testing and reporting was constitutional.
449 U.S. 39	Stone v. Graham	11-17-1980	A state statute that required public schools to post a plaque of the Ten Commandments on the wall of each classroom violated the Establishment Clause.
454 U.S. 263	Widmar v. Vincent	12-8-1981	A state university created a limited public forum that was open to voluntary student groups. Religious groups must be given “equal access” to the limited public forum.
454 U.S. 464	Valley Forge Christian College v. Americans United for Separation of Church and State	1-12-1982	A federal taxpayer lacked standing under the Free Exercise Clause to challenge a donation of property by the

			federal government to religious organizations.
455 U.S. 913	Treen v. Karen B.	1-25-1982	Without comment, the decision affirmed a Fifth Circuit decision that had prohibited a state statute allowing student volunteers to lead prayer in public school classrooms.
461 U.S. 574	Bob Jones University v. United States	5-24-1983	The IRS was allowed to rescind federal tax-exempt status from a religious university that used racial discrimination, based on its religious beliefs, in enrollment and employment practices.
463 U.S. 388	Mueller v. Allen	6-29-1983	A state law was upheld that allowed parents of private (including religious) school children to claim a state income tax deduction for costs related to “tuition, transportation, and textbooks.”
463 U.S. 783	Marsh v. Chambers	7-5-1983	Against an Establishment Clause challenge, a state practice was upheld that appointed legislative chaplains to lead prayers at the General Assembly.
472 U.S. 38	Wallace v. Jaffree	6-4-1985	A state statute allowing for a moment of silence for prayer or meditation in public schools violated the Establishment Clause.
473 U.S. 373	Grand Rapids School District v. Ball	7-1-1985	States were prohibited from sending public school employees to teach remedial and enrichment classes in religious schools.

473 U.S. 402	Aguilar v. Felton	7-1-1985	States were prohibited from using public school teachers to teach remedial classes to educationally disadvantaged students in classrooms leased from religious schools.
474 U.S. 481	Witters v. Washington Department of Services for the Blind	1-27-1986	A state program was upheld that allowed for an aide to be provided to a visually impaired student to attend a Christian college for vocational education.
475 U.S. 534	Bender v. Williamsport Area School District	3-25-1986	In his capacity as a parent, a school board member had no standing to appeal the school board's decision that affected the religious rights of his child in the public school.
477 U.S. 619	Ohio Civil Rights Commission v. Dayton Christian School	6-27-1986	Federal district courts may not adjudicate pending state court cases before a federal plaintiff has had the opportunity to bring his constitutional claim to the federal court.
482 U.S. 578	Edwards v. Aguillard	6-19-1987	A state statute that required public schools to teach both evolution and creation where any theory of the origin of the universe was taught at all was unconstitutional.
483 U.S. 327	Corporation of Presiding Bishop v. Amos	6-24-1987	A religious school's decision to discriminate on the basis of religion was upheld on the basis of its exemption from the civil rights prohibition enabled by the Free Exercise Clause. The religious employer was not required to continue to

			employ an individual who had fallen away from the faith.
484 U.S. 72	Karcher v. May	12-1-1987	State legislators were prohibited from appealing a particular Establishment Clause case for which they had voted. The state legislature had decided not to appeal the decision regarding a law instituting a moment of silence.
487 U.S. 72	United States Catholic Conference v. Abortion Rights Mobilization	6-20-1988	A nonparty witness had been held in contempt. The witness had standing to dispute the jurisdiction over the case by the federal court.
487 U.S. 589	Bowen v. Kendrick	6-29-1988	In implementing the Adolescent Family Life Act, federal funding for Catholic counseling centers assisting pregnant teenagers was constitutional.
494 U.S. 872	Employment Division, Oregon v. Smith	4-17-1990	The Free Exercise Clause was not violated when unemployment compensation benefits were denied to a Native American who had been terminated for sacramental use of peyote, a proscribed narcotic.
496 U.S. 226	Board of Education of the Westside Community Schools v. Mergens	6-4-1990	The Equal Access Act does not violate the Establishment Clause. The EAA applies Widmar v. Vincent (1981) rule to public high schools.
505 U.S. 577	Lee v. Weisman	6-24-1992	The Establishment Clause was violated when a rabbi led an ecumenical prayer service at a

			public middle school graduation ceremony.
508 U.S. 384	Lamb's Chapel v. Center Moriches Union Free School District	6-7-1993	When a public school opens its school facilities to voluntary community groups during non-school hours, the school may not prohibit religious groups from using the facilities. Rather, the school must give equal access to the religious groups.
509 U.S. 1	Zobrest v. Catalina Foothills School District	6-18-1993	The Establishment Clause was not violated when the state provided an interpreter to a disabled student who attended a religious high school.
512 U.S. 687	Board of Education of Kiryas Joel Village School District v. Grumet	6-27-1994	The Establishment Clause was violated when the state created a separate public school district within a community that was comprised exclusively of the Satmar Hasidic religious group.
515 U.S. 819	Rosenberger v. Rector and Visitors of the University of Virginia	6-29-1995	Voluntary student religious groups must be granted equal access to funding by a state university just as are voluntary student nonreligious groups.
521 U.S. 203	Agostini v. Felton	6-23-1997	Aguilar v. Felton (1985) was overturned. The state may provide Title I remedial services to students on religious school property since the presence of a state employee on religious school property does not itself violate the Establishment Clause.
521 U.S. 507	City of Boerne v. Flores	6-25-1997	Religious Freedom Restoration

			Act (1993) was declared unconstitutional as applied to the states. RFRA had required that the compelling state interest test be used in Free Exercise Clause cases.
530 U.S. 290	Santa Fe ISD v. Doe	6-19-2000	The Establishment Clause was violated when a public high school instituted a policy promoting student-led and student-initiated prayers before the school's football games.
530 U.S. 793	Mitchell v. Helms	6-28-2000	Meek v. Pittenger (1975) and Wolman v. Walter (1977) were overturned. The Establishment Clause was not violated when a federally funded, state policy allowed educational materials to be lent to public and private schools, even though many of the private schools receiving the assistance were religious.
533 U.S. 98	Good News Club v. Milford Central School	6-11-2001	A public school may not prohibit a religious children's club from meeting on the school's property during non-school hours since such prohibition is viewpoint discrimination. Such a prohibition was unnecessary in attempting to avoid unconstitutional establishment of religion.
536 U.S. 639	Zelman v. Simmons-Harris	6-27-2002	A school voucher program did not violate the Establishment Clause. The program had a valid secular purpose of assisting economically

			disadvantaged students in failing public schools. The program was neutral with regard to religion. The government aid was used by parents to reflect their “true private choices.”
540 U.S. 712	Locke v. Davey	2-25-2004	The Free Exercise Clause was not violated when a state’s scholarship program, created to provide economic assistance to students with high academic achievement for their postsecondary education expenses, denied assistance to students who pursued a theological degree.
542 U.S. 1	Elk Grove Unified School District v. Newdow	6-14-2004	A noncustodial parent lacked standing to sue under the Establishment Clause on behalf of his minor child who was enrolled in a public school that required teacher-led recitation of the Pledge of Allegiance, which contains the phrase “one nation under God.”
545 U.S. 844	McCreary County v. ACLU	6-27-2005	The Establishment Clause was violated when a county displayed the Ten Commandments in the courthouse. The county’s purpose for the display was religious.
551 U.S. 587	Hein v. Freedom From Religion Foundation	6-25-2007	Plaintiffs lacked standing, under Flast v. Cohen (1968), to bring an Establishment Clause challenge against the use of

			federal funds by a federal agency to assist “faith-based initiatives.”
559 U.S. 700	Salazar v. Buono	4-28-2010	In a dispute where the plaintiff sought enforcement of an injunction to remove a cross from a national park, the case was remanded. The decision to remand was made even though Congress had enacted a statute to sell the land to a private citizen.
563 U.S. ____ 131 S. Ct. 1436	Arizona Christian School Tuition Organization v. Winn	4-4-2011	Under the Establishment Clause, party did not have standing to sue because any damages or harm claimed by the taxpayer in his capacity as a taxpayer would be merely speculative. The case involved a tax credit, not a government expenditure.
563 U.S. ____ 132 S. Ct. 694	Hosanna-Tabor v. EEOC	1-11-2012	Under the ministerial exception, religious organizations are exempt from certain equal employment laws under the Free Exercise Clause.
572 U.S. ____ 134 S. Ct. 1811	Town of Greece, N.Y. v. Galloway	5-5-2014	The Establishment Clause was not violated when a town permitted volunteer chaplains to open town board meetings with prayer. The practice is consistent with congressional and state legislative tradition.

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