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Blaine Amendments and the Judiciary: An Analysis of Government Aid to Religious Schools

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Blaine Amendments and the Judiciary: An Analysis of Government Aid to Religious Schools.

by

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DEDICATION

For my family, whose love and encouragement gave me the strength for this endeavor.

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ABSTRACT

First introduced in 1875, Blaine Amendments restrict private, parochial schools from utilizing publicly acquired funds. While the federally proposed Blaine Amendment died on the Senate floor, 37 states have adopted constitutional language that limits and/or bars religious schools from receiving public funds. Fraught with bigotry and labeled as discriminatory, such measures have not gone without challenge and the judicial system has delivered numerous decisions on funding public and private schools. However, jurisprudence reveals significant shifts in court decisions over time. Through analysis of Supreme Court cases from *Everson v. Board of Education* (1947) to *Espinoza v. Montana* (2020), this work sought to explain the historical relevance of Blaine Amendments, explore prominent caselaw specific to publicly funding parochial schools, identify socio-political factors associated with changes in judicial ideology since the late 19th century, and indicate potential consequences of eliminating Blaine Amendments.

CHAPTER ONE:

INTRODUCTION

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.

United States Constitution

Amendment I

Research Problem

The First Amendment of the United States Constitution stands as a significant pillar of democracy. Members of the judiciary are tasked with applying the First Amendment in a manner that respects and protects the liberties it guarantees. The First Amendment draws litigation on a wide variety of issues in education; perhaps none more volatile than tensions between government and religious schools (McCarthy, 2009). Specifically, school funding has long been an area of contentious debate. Conflicting political ideologies have polarized school funding discourse at the local, state, and federal levels. Of the issues embedded within school funding, allowing religious schools to receive public funds remains as a heavily controversial subject.

Strict separation between church and state was once a widely held precedent of the courts but judicial interpretations have shifted over the past 70 years. Beginning with *Everson v. Board of Education* (1947), under the leadership of Justice Black, the Court emphasized a "high and

impregnable" wall of separation between church and state. More recently, under the leadership of Chief Justice Roberts, the Supreme Court of the United States has moved towards viewing the exclusion of parochial schools from receiving public funds as discriminatory, "odious to our Constitution" and in violation of the Free Exercise Clause (*Trinity Lutheran v. Comer*, 2017). Additionally, a study conducted by Epstein and Posner (2021), revealed "Plainly, the Roberts Court has ruled in favor of religious organizations, including mainstream Christian organizations, more frequently than its predecessors" (p. 18).

Established by The Judiciary Act of 1789, the Supreme Court of the United States is relied upon to delineate legal matters of specific circumstance and fabricate a partition between constitutional and unconstitutional acts. As we consider current issues in education funding, an area receiving a considerable amount of attention calls to question the extent to which religious schools may receive public aid. Generally speaking, education funding is regulated by laws and policies at the federal and state levels. At the state level, 37 states have a Blaine Amendment, or a state provision that prohibits religious schools from receiving public funds (Burke & Stepman, 2014). Of primary effect, Blaine Amendments have historically fortified a barrier between church and state.

While similar to the Establishment Clause of the First Amendment in that Blaine Amendments seek to distance relationships between church and state, Alexander and Alexander (2019) held that Blaine Amendments are "explicitly stronger" than language within the First Amendment (p. 233). Many oppose legislation that actively prohibits religious education institutions from accessing public funds, viewing such amendments as an unconstitutional impediment to school choice (Burke & Stepman, 2014). While not addressing Blaine Amendments specifically, former President Trump (2017), speaking at the Faith and Freedom

Coalition, weighed in on religion and schools stating, “Schools should not be a place that drives out faith and religion, but that should welcome faith and religion with wide, open, beautiful arms… It is time to put a stop to the attacks on religion.” However, Trump does not stand alone in this action as former George W. Bush articulated his intentions for an Office of Faith-Based programs shortly after his inauguration (Feldman, 2002).

The idea of lessening restrictions on the separation between church and state is far from widely accepted. It is also argued that eliminating Blaine Amendments will weaken the barrier between church and state and allow for unconstitutional funding of religious schools (Alexander & Alexander, 2019). Through analysis of historical documents and caselaw, it is clear the judiciary has not championed one ideological lens for viewing cases pertaining to religion and public schools.

Purpose of Study

This study examined the origin of Blaine Amendments, analyzed the factors contributing to shifts in judicial interpretation of relinquishing public funds to religious schools and depicted the impact that removing Blaine Amendments may have on education institutions. Table 1 depicts the research questions addressed.

Table 1.1

Research Questions and Corresponding Research Methods

Research Questions	Research Methods
1. What social or political factors, if any, have contributed to ideological shifts in the judiciary? a. What trends, if any, can be found through analysis of litigation in the area of religion and public schools?	• Document analysis • Legal research
2. What are the consequences, if any, for education institutions if Blaine Amendments are found to be unconstitutional?	• Document analysis • Legal research

An overview of the Religion Clauses embedded within the First Amendment, and specific cases, served as the genesis of this work. Following a look at the First Amendment is an exploration of the history of Blaine Amendments. Trailing a historical overview is a summary of pertinent caselaw, inclusive of an analysis of *Trinity Lutheran v. Comer* (2017) and *Espinoza v. Montana Department of Revenue* (2020) which shed light on the Supreme Court of the United States' current interpretation of relinquishing public funds to parochial schools.

The literature reviewed can be classified into three categories: seminal works, recent articles, and court cases. Seminal works were selected based upon their significant influence on the field of church-state law. The category of recent articles is comprised of a variety of works put forth by legal scholars and attorneys. Finally, much attention is given to caselaw determining the

constitutionality of allocating public funds to religious institutions. Each of the three aforementioned literature categories played a crucial role in addressing the research questions outlined above.

Definition of Terms

Caselaw: law established by judicial decisions in cases (see https://www.merriam-webster.com/dictionary/caselaw).

Parochial: of or relating to a church parish (see https://www.merriam-webster.com/dictionary/parochial).

Religion: "a belief system that postulates the existence of an immortal afterlife" (Diamond, 2013)

Socio-political: of, relating to, or involving a combination of social and political factors (see https://www.merriam-webster.com/dictionary/socio-political).

Funding: a sum of money or other resource whose principal interest is set apart for a specific objective (see https://www.merriam-webster.com/dictionary/funding).

Significance of Study

Each section of this work appears to support the claim that shifts in judicial ideology have significantly impacted the Court's interpretation of publicly funding religious schools. Emphasis is placed on the role that strict separation between church and state has played throughout history and the viewpoint that Blaine Amendments, although seemingly born of bigotry, attempt to fortify a robust barrier between church and state (Duncan, 2003; Alexander & Alexander, 2019). Thorough review and identification of trends in historic caselaw may indicate the direction of the Court in future cases involving funding and religion and public schools. Pending judicial interpretation, removal of constitutional language prohibiting religious institutions from

acquiring public aid has led to a weakening or sheer abandonment of the barriers between church and state. Furthermore, this study sought to identify consequences for education institutions due to the deterioration of the barrier between church and state.

Overview of Research Study

Exploration of the aforementioned research questions was done through careful analysis of documents and legal research methods. Review of Supreme Court caselaw highlighted shifts in judicial ideology and provided data necessary to determine trends. Using Thro's (1994) waves of school finance litigation, this study identified trends in litigation and judicial ideology specific to funding religious schools. An analysis of trends was used to predict the consequences of removing Blaine language from state constitutions.

Researcher Positionality

The passion behind this inquiry is not so organic that it is free of assumptions. My lens adopted for this research is influenced by my lived experiences and belief systems. Professionally, I serve as an assistant principal at a public elementary school in Florida. Over the span of nearly fourteen years, I have held many positions within the same public school system. My personal experiences with school are also specific to the public school system. Although nearly all of my personal and professional experiences were in public schools, I do not have an aversion to religious education. For the purposes of this work, however, I interpret the First Amendment of the United States Constitution to be a balance of strict separation and accommodation between church and state. While the aim of this work was to remain neutral throughout my inquiry, I understand that my experiences and beliefs surface during the course of this study.

Summary

Publicly funding America's schools is a noteworthy topic generating much debate since the founding of the Boston Latin School on April 23, 1635 (Rexine, 1987). A subcategory of this debate is the issue of dispersing publicly acquired funds to parochial schools. At the inception of government funded schools, the issue of allocating public tax dollars for parochial schools was seemingly less controversial. However, school funding issues specific to the Religion Clauses of the First Amendment surfaced in the mid-twentieth century and remain a critical matter. Recent judicial shifts away from separationism have furthered entanglement between church and state. This study explored these shifts in judicial ideology pertaining to Blaine Amendments, identified social and political factors contributing to the shifts, and predicted consequences if Blaine Amendments are removed.

CHAPTER TWO:

LITERATURE REVIEW

This literature review explored the historical, social, and political contexts under which Blaine Amendments arose and explore courts' interpretations of relinquishing government aid to public schools. To begin, a review of the First Amendment's Establishment Clause in the United States Constitution provides insight into federal protection from state-sponsored religion. After thorough review of the Establishment Clause, a historical analysis of Blaine Amendments at the federal and state level is provided. From there, prominent Blaine Amendment Classification theories are explained (Borders, 2018; Kemerer, 1998). Following classification theories, emphasis is placed on the waves of school finance litigation set forth by Thro (1994) and extended by various scholars (McMillan, 1998).

First Amendment – Religion Clauses

Prior to an exploration of Blaine Amendments or religious education funding issues, it is necessary to examine the First Amendment's religion provisions in the United States Constitution as it serves as the framework for provisions that prohibit publicly funding religious institutions. The opening sentence of the First Amendment reads, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise therof..." (U.S. Const. amend. I). Since its inception in 1791, multiple examinations of these words, formally referred to as the Establishment Clause and the Free Exercise Clause have led to a wide array of interpretations. Highlighting "the duality created by these two clauses," Wood and Petko (2000) argued Religion Clauses prohibit the government from advancing religion, but also should not

impede an individual from practicing a religion of their choice (p. 1). Adopting and embracing these interpretations has led to disagreements within the judiciary. Specifically, there is substantial disagreement regarding the clause's limits (Boyer, 2009). Depicting the relationship between the Religion Clauses of the First Amendment, Geier (2020) posited the clauses "construct a perfect environment for conflict between church and state to arise in public schools" (p. 287). Defining the limits of the Establishment Clause and Free Exercise Clause is a task the Supreme Court of the United States continues to grapple with as shifts judicial ideology establish new precedent.

Establishment Clause

After decades of debate, the meaning of the Establishment Clause remains difficult to identify plainly (Barclay et al., 2019). Shifts in judicial ideology continue to alter the interpretation and application of the Establishment Clause. An early interpretation by Choper (1968), identified the Establishment Clause "sought to protect taxpayers from being forced by the federal government to support religion" (p. 267). More recent scholarship on the First Amendment has espoused McConnell's (2003) Establishment Clause definition of, "the promotion and inculcation of a common set of beliefs through government authority" (p. 2131). Further, establishment is not uniform in nature. Establishment of religion may present itself in various forms from narrow to broad (McConnell, 2003). To date, the Court has not developed a framework for reviewing Establishment Clause issues, nor has it recognized any procedures for relying upon history (Genshaft, 2001). This, in part, represents the reality that our nation's guiding documents recognize a deity.

Free Exercise Clause

Similar to the Establishment Clause, the Free Exercise Clause has fluctuated between strict and flexible interpretations (Ray, 2018). As highlighted by Gressman and Carmella (1996), "The sparse language of the Free Exercise Clause makes it one of the many majestic generalities of the constitution (p. 69). A shift in the interpretation of the Free Exercise Clause was established in *Employment Division v. Smith* (1990). In *Smith*, "a facially neutral and generally applicable law does not receive strict scrutiny, even if it substantially burdens the claimant's exercise of religion" (Walker, 2007, p. 412). Responding to the judicial precedent set forth in Smith, Congress passed, and President Bill Clinton signed into law the Religious Freedom Restoration Act (RFRA). Among many things, RFRA "restored strict scrutiny to the law of free exercise" (Walker, 2007, p. 412). In the case of Espinoza, the Court expressed the "Free Exercise Clause 'protects religious observers against unequal treatment' and against 'laws that impose special disabilities on the basis of religious status'" (*Espinoza v. Montana*, 2020).

Interpreting Religion Clauses

This study focused on two interpretations of the Religion Clauses; strict separation and accomodationism. Each played a significant role in establishing Supreme Court precedent and continue to be ideological frameworks for ruling on education cases involving the Religion Clauses. Although the two interpretations of the Religion Clauses may seem polarizing, the Court has been repeatedly relied upon to find the equilibrium between strict separation and religious accommodation (McCarthy, 1981).

Additionally, the interpretations explained below represent two distinct ideological camps, but they do not stand as the only interpretations of the Religion Clauses. Described in the

classification theories of Blaine Amendments, Frank Kemmerer (1998) and Mark DeForrest (2003) expanded upon these interpretations in their respective theories.

Strict Separation

Strict separation between church and state was a judicial ideology promoted in both the 19th and 20th centuries. Perhaps the most influential interpretation of the Religion Clauses of the First Amendments to the United States Constitution is Thomas Jefferson's (1802) 'separation of church and state.' Jefferson was a leading advocate for the 'separation principle' which sought to distance religion from other issues of the state (Alexander & Alexander, 2019). In his final letter written to the Danbury Baptists, Jefferson (1802) expressly stated, "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion…thus building a wall of separation between Church & State."

In analyzing the wall of separation, Sughrue (2017) highlighted that a "strict separation approach is grounded in a no aid whatsoever relationship between government and religion" (p.5). The theme for the remainder of this work is perhaps best found in the words of Alexander and Alexander (2019) as they argued "the issue of separation and interrelationship between religion and government retains its characteristic preeminence as perhaps the most divisive issue in American society" (p. 199).

Crucial to the development of Blaine Amendments, judicial interpretation of the extent to which the Bill of Rights applies to individual states shifted over a series of decades. Delivering the majority opinion in the case of *Permoli v. Municipality No.1 of the City of New Orleans*, 1845, Justice Cantron argued;

> The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states. (*Permoli v. Municipality No.1 of the City of New Orleans*, 1845)

The adoption of the 14th Amendment in 1868 is the origin of the incorporation doctrine which prohibited states from implementing "any law which shall abridge the privileges or immunities of citizens of the United States" (U.S. Const. amend. XIV). However, it was not until the early-mid 20th century that the Supreme Court of the United States, in *Cantwell v. Connecticut* (1940), gave legal recognition to the incorporation doctrine. In *Cantwell*, the Court held "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws" (*Cantwell v. Connecticut,* 1940).

In 1947, nearly 156 years post the inception of the First Amendment, Jeffries and Ryan (2001) recognized a shift in judicial interpretation and application that they refer to as the "modern Establishment Clause" (p. 284). The Court's ideological shift is first seen in the case of *Everson v. Board of Education* (1947) (Jeffries & Ryan, 2001). Of significance, *Everson* (discussed in greater detail below) stands as the first time the Court accepted and utilized a strict separationist theory when ruling on an Establishment Clause case (Jeffries & Ryan, 2001). While *Everson* served as a turning point for the application of the Establishment Clause, it failed to institute widespread use of strict separationist (Jeffries & Ryan, 2001).

Accommodation

Although strict separation is a foundational concept employed in many mid-twentieth century church-state education funding cases, the principle of accommodation predates the strict

separation set forth by *Everson*. Accommodationist, as explained by Carolyn Deverich (2006), allow "church-state interface as long as it does not interfere with a citizens freedom of religious exercise" (p. 215). Accordingly, the Supreme Court has held that parochial institutions may receive public aid, so long as the aid benefits the student and does not further religious institutions (McCarthy, 1981). Historical examples include, but are not limited to, *Mueller v. Allen* (1982), *Agostini v. Felton* (1997), and *Mitchell v. Helms* (2000).

Differing from strict separation, as highlighted by Alexander & Alexander (2019) is that "Supreme Court precedents of today hold that government aid to religion simply be 'nonpreferential,' not that there should be complete separation" (p. 236). This is evidenced by caselaw at both the local and federal levels. Moving past the concept of prohibiting relationships between church and state, the Supreme Court has lessened the linkage between modern doctrine and original intent (Jeffries & Ryan, 2001). Further, religious accommodation does not exist as fixed point. For the purposes of this research, religious accommodation is the antithesis of strict separation, encompassing all breaches in the wall of separation between church and state.

More recent cases of Trinity *Lutheran v. Comer* (2017) and *Espinoza v. Montana* (2020) signal the Court's acceptance of funding secular components of parochial schools. The Court's embracement of "accommodationist neutrality," a phrase introduced by Massaro (2005), refers to the idea that secular and non-secular ideas "receive 'neutral' treatment within the public sphere (p. 936). The Court's current embracement of neutrality is coupled with the politically conservative effort to confront religious discrimination.

History of Blaine Amendments

The relationship between religion and schools has a long-standing history that was not always fraught with controversy. Entanglement between religion and public education has not

always been interpreted as unconstitutional and in many instances society favored and expected religion to be taught in schools (Viteritti, 1998). Blaine Amendments did not emerge unprompted. Social and political happenings around the nation cultivated an environment conducive to the development and proliferation of state amendments that prohibit the public funding of parochial schools. To appropriately frame this historical perspective, this literature review explored the social and political history of the early to late 19th century. In the following commentary, the author reflects on the relatively recent birth of our nation as well as the societal influences, domestic and abroad, that shape our laws.

Until the early 19th century, linkages between religion and morality were widely accepted by many Americans (Green, 1992). Although there is much debate over George Washington's Christian beliefs and practices, he championed the importance of religion and morality, viewing them as necessary components of happiness and "essential for ensuring the sanctity of oaths" (Hall, p. 2019, p. 35). Further still, John Adams, a self-proclaimed devout Christian who entertained a profession in the clergy, held deeply that religion was the most crucial foundational aspect of acquiring moral happiness (Fea, 2016). America's founders embracement of religion was specific to the Christian denomination of Protestantism. Consequently, early forms of public education were predominantly Protestant and made reading from the King James Bible a common practice (Green, 1992; Komer, 2018). Tensions specific to religion and public schools spawned in the mid to late 19th century (Borders, 2018). In an attempt to stifle Protestantism's establishment as the dominant religion in public schools the United States saw an increase in Catholic schools (Sondergard, 2018). Once established, Catholic school leaders advocated for public support in the form of monetary aid (Green, 1992).

Although Catholicism was a minority religion at that time, shifts in immigration had a tremendous effect on America's development. The United States of America saw a rapid increase of immigrants during the mid-19th century (Burke & Stepman, 2014; Borders, 2018). Irish and German immigrants expressly advocated for their children to learn Catholic beliefs and values from the Douay Version of the Bible (Adams, 2011). The sharp influx in Catholic immigrants was met with strong anti-Catholic viewpoints by much of America (Sondergard, 2018). As Duncan (2003) highlighted, Catholics were not well accepted by members of the established Protestant faith and received an immense amount of hatred. Disdain for the Catholic faith was met with the perception that Catholic immigrants were "un-American" (Jeffries & Ryan, 2001, p. 303). Further, the separation between Protestantism and Catholicism extended past theological differences and incorporated political, cultural, and racial disparities (Jeffries & Ryan, 2001). Many state constitutions strictly prohibited Catholics from holding a political office by requiring political actors to be Protestants (Komer, 2018). One political party in particular, the Know-Nothings, an anti-Catholic party, led the battle against Southern European immigrants (Adams, 2011). Primarily existing in secrecy, the Know-Nothing party was named after its organizational catch phrase of "I know nothing," which the party used when questioned about the party (Adams, 2011).

The rise in the Catholic population was followed by a significant increase in the Catholic church's political power (DeForrest, 2013). This increase in political power also aided the establishment of Catholic schools. Just as the more dominant Protestant schools, Catholic school leadership sought government aid to develop and maintain its schools (Flowers, 2005). However, even with the momentum of rising political power in the 1840s, Catholics were not successful in advancing education efforts in the early 19th century (DeForrest, 2013). Not only were such

efforts unsuccessful, but they were also largely met with threats or acts of physical violence and severe property damage. A prominent example occurred in 1842 after a Catholic bishop of New York promoted allocating public funds for sectarian schools. In light of the bishop's advocacy, a mob succeeded in burning down his residence and state troops were deployed to ward off cathedral attacks (Viteritti, 1998). Another frequently referenced example of what can be classified as anti-Semitic behavior was the expulsion of Bridget Donahue in 1854. As is noted in the case of *Donahoe v. Richards*, (1854) Donahoe was expelled from school in response to her refusal to read from the King James Version of the Bible. As a substitute, Donahoe proposed the school allow her to read from the Duay Bible but her request was denied (*Donahoe v. Richards*, 1854). Upon hearing the facts of the case, the Supreme Court of Maine upheld Bible reading and argued that the school has the authority to select instructional materials and discipline students (*Donahoe v. Richards*, 1854). Further, the court held that the King James Version is not sectarian, and the school was not required to provide a religious accommodation (DeForrest, 2013).

Following the Civil War, Catholicism continued to gain momentum and broaden its political influence (Green, 1992; DeForrest, 2013). Nearly 15 years after the Donahoe case, the Cincinnati School Board passed a pair of resolutions intended to cease Bible reading and religious instruction in public schools (Green, 1992). The resolutions generated strong Protestant opposition. Prior to implementation of the resolutions, a group of Protestants acquired an injunction with the trial court (Green, 1992). The trial court's decision to uphold the injunction was heavily contested by the Cincinnati School Board. On appeal, the Ohio Supreme Court accepted the case (*Board of Education of Cincinnati v. Minor*, 1872). After thorough review of the facts of the case, the Ohio Supreme Court reversed the injunction and restored the school

board's resolutions citing "broad school board authority over educational matters" (Green, 1992, p. 46). The court's decision to reinstate the school board's resolutions made clear that the state legislature was permitted to pass laws with the intent of protecting all religions; however, Protestantism was not the only protected religion (Green, 1992). The Ohio Supreme Court's decision was far from popular and fueled strong opposition to Catholicism, specifically the public funding of Catholic schools.

Emergence of the Proposed Federal Blaine Amendment

While the term Blaine Amendment is frequently used to describe state constitutional amendments that prohibit religious schools from receiving public aid, it is important to recognize that 14 states (Michigan, Florida, Wisconsin, Indiana, Ohio, Massachusetts, Oregon, Minnesota, Kansas, South Carolina, Illinois, Virginia, and Pennsylvania) had established Blaine language prior to the introduction of the federal amendment in 1875 (Green, 1992; Burke & Stepman, 2014).

Senator James Blaine is credited as the primary driving force behind the federally proposed and multi-state adopted Blaine Amendments. In his time spent in politics, Blaine attempted to obtain the presidency on three separate occasions (Burke & Stepman, 2014). Although Blaine led the attempt to establish a constitutional amendment that barred public funding of religious schools, he himself was of Irish Catholic ancestry (Alexander & Alexander, 2019). Moreover, "Blaine's mother was Catholic… Blaine attended Catholic religious services as a child, and had probably been baptized in the Catholic Church" (Alexander & Alexander, 2019, p. 234). Per the request of his mother, Blaine adopted and practiced the religious beliefs of his father, a known Protestant (Klinkhamer, 1956). While Blaine did not attend Catholic services in his adult life he was known for his "Catholic sympathies" (Green, 2003, p. 195). Instead of

attending protestant-dominant public schools he enrolled his daughters in Catholic boarding schools (Green, 2003).

Analysis of the political landscape during the mid-late 19th century highlighted a speech delivered by Ulysses S. Grant to The Society of the Army of Tennessee in 1875. In his speech, then President Grant spoke of unity and his desire to end divisiveness between northern and southern states (Alexander & Alexander, 2019). Placing significant emphasis on unifying the nation, Grant predicted "that the dividing line will not be Mason and Dixon's, but between patriotism and intelligence on the one side and superstition, ambition and ignorance on the other." In the latter portion of his speech, Grant illuminated his vision for American schools. Adopting a strict separationist viewpoint, former President Grant argued;

> Encourage free schools and resolve that not one dollar of money appropriated to their support, no matter how raised, shall be appropriated to the support of any sectarian school. Resolve that the state or Nation or both combined shall furnish, to every child growing up in the land, the means of acquiring a good common-school education, unmixed with sectarian, pagan, or atheistic tenets. Leave the matter of religion to the family altar, the church, and the private school supported entirely by private contributions. Keep the church and state forever separate (Swisher, 1925, p. 413 (Swisher, 1925)).

Given the turmoil leading up to Grant's speech, his words were well received to the extent that he was featured in then prominent periodicals, the *Chicago Tribune* and *Christian Advocate* (Green, 1992). However, expansion of federal power was not hailed by all. In opposition to the federal government determining states' rights, McGreevy (2003) expressed, "Catholics and southerners alike constantly warned of an expanding federal state" (p. 111). Additionally, much

of Grant's speech was in step with partisan politics. Although he preached of unity and opposition to conflict-ridden rhetoric, Grant's message "clearly aligned the Republican Party with the Protestant cause" (Green, 1992, p. 48).

Grant's hostility towards government funding of religious schools was coupled with his advocacy for "good common school education," or "common schools" (DeForrest, 2013, p. 558). Led by Horace Mann, Massachusetts' Secretary of Education, the purpose of common schools was to provide "explicitly religious moral instruction," inclusive of daily Bible reading, recitation of the Lord's Prayer, and singing of religious songs (Duncan, 2003). Although common schools were proposed on the basis that they are free of sectarianism, their curricula were inclusive of protestant ideology (DeForrest, 2013). Not only was Protestantism the established, dominant Christian denomination of schooling, Viteritti (1998) described common schools as "intolerant of those who are non-believers" (p. 666). Built on the premise that no sectarian schools would receive public aid, it was soon evident the common schools initiative was designed with the intent of excluding Catholic schools from public aid (Viteritti, 1998).

Grant's speech, coupled with James Blaine's desire to obtain the presidency is attributed to inciting motivation for the development of the proposed federal amendment (Lantta, 2004; Alexander & Alexander, 2019). Blaine Amendments arose as an attempt to close every path by which public aid might flow to religious institutions (Jeffries & Ryan, 2001). As Alexander and Alexander (2019) argued, the original, federally proposed Blaine Amendment was designed specifically to "deter religious intolerance that threatened the unity of the nation" (p. 235). Still, Lantta (2004) claimed that Blaine intentionally attached himself to anti-Catholic rhetoric in an attempt to gain support from Protestant communities. Given his Irish Catholic ancestry, questions swirled about Blaine's current religious affiliation to the extent that some referred to

him as a “closet Catholic” (Alexander & Alexander, 2019, p. 234). The federal amendment in its original language is as follows:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations. (4 Cong. Rec. 5558, 5595 (1876))

Accordingly, “Protestants hailed the amendment, but the Catholic Church bitterly contested it” (Adams, 2012). While the federal amendment was received well in the House of Representatives and passed by an overwhelming majority, it failed to gain support from Democrats in the Senate and perished on a party line vote (Adams, 2012). The failure is largely attributed to two key changes that were made by the Senate Judiciary Committee (Komer, 2018). The first of the two changes involved a provision stating the bill is not a deterrent to Bible reading in public schools (Komer, 2018). A second change came as the Senate Judiciary Committee “expanded the proscription on use of school funds for sectarian schools to the proscription on use of any public funds” (Komer, 2018, p. 570). The Senate’s iteration of the Blaine Amendment emerged as an attempt to eliminate religion from common schools but fell short of prohibiting Bible reading altogether (Jeffries & Ryan, 2001).

Should the amendment have passed, it would have been the 16th Amendment to the United States Constitution. Of significance is that a congressionally-approved Blaine Amendment would have applied the Establishment Clause of the First Amendment to states, and of greater significance, would have strengthened the barrier between church and state by barring

state governments from allocating public funds to religious organizations (DeForrest, 2013). Following the collapse of the federal Blaine Amendment, no subsequent federal proposal achieved the necessary two-thirds majority in each chamber of congress (Klinkhamer, 1956).

The Rise of State Blaine Amendments

As previously mentioned, prior to the federally proposed Blaine Amendment, 14 states had constitutional language that prohibited publicly funding parochial schools. New York was the first state to implement constitutional language restricting religious schools from receiving public aid (Duncan, 2003). Although the rise and fall of the federal Blaine Amendment was brief, its ideological undertones were received well by many states (Conklin & Vache, 1985; Jeffries & Ryan, 2001; Lantta, 2004). In response to the failed federal amendment, 15 more states had adopted Blaine language by 1890. Appendix A provides Blaine language found in 37 state constitutions. In spite of a failed constitutional amendment, Congress found secondary means to further hinder parochial schools from accessing public funds.

In 1876, Congress required each territory joining the Union to include Blaine language in their state constitutions (Jeffries & Ryan, 2001; DeForrest, 2003; Swan, 2003; Adams, 2012). Established in 1889, the Enabling Act was proposed and approved, permitting the Dakotas, Montana, and Washington State to draft a state constitution but required them to include language that prohibits sectarian schools from receiving public aid (Jeffries & Ryan, 2001). Absent congressional consent, state Blaine Amendments could not be redacted or renounced (Jeffries & Ryan, 2001). Consequently, every state west of Iowa, inclusive of Alaska and Hawaii, has Blaine language in its constitution (Burke & Stepman, 2014). Since their establishment, most Blaine Amendments have largely remained untouched (Schwartz, 2008). To date, Louisiana is the only state to repeal their Blaine Amendment. In 1973 voters approved a

new state constitution that replaced Blaine Amendment language with language from the Establishment Clause and Free Exercise Clause (Komer, 2018). Conversely, Michigan stands as the only state that has strengthened its Blaine Amendment since its inception (Komer, 2018).

Although a federal Blaine amendment, consisting of a singular body of language, would have unilaterally drawn a line between what is constitutionally permissible and impermissible, language of state Blaine Amendments varies considerably (Borders, 2018).

Classification Theories

In review of state Blaine Amendments, it appears that two primary classification theories emerge (Borders, 2018). Viewing state Blaine Amendments as categorical, Frank Kemerer established classifications of restrictive, permissive, and uncertain (Kemerer, 1998). Similarly, Mark DeForrest (2003) defined Blaine Amendments as existing on a continuum, spanning from narrow restriction to broad restriction. Each of the classification theories represent categories ranging from strict separation to accommodation.

Kemerer's Approximations

Early in his explanation, Kemerer (1998) eagerly urges readers to view Blaine classifications as "approximations" (p. 162). Beginning with restrictive state constitutions, Kemerer (1998) claimed that such states prohibit vouchers and furthermore, proscribe direct and indirect aid to religious schools. Further explaining the separation of restrictive states from an alternative category is what Kemerer (1998) referred to as "political purpose doctrine" (p. 169). Plainly, political purpose doctrine mandates that public funds must be earmarked for public use (Kemerer, 1998). Oklahoma's strict constitutional language serves as an example of what Kemerer (1998) defined as restrictive. Oklahoma's Blaine language reads,

> No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such. Oklahoma Const. Art. II, § 5

Following the category of restrictive states, Kemerer (1998) moved to identify permissive Blaine language in state constitutions that do not contain an anti-establishment provision. Largely, state supreme courts in permissive states have not interpreted the state constitution as "an impediment to educational programs encompassing sectarian private schools" (Kemerer, 1998, p. 171). However, it is not uncommon for permissive states to refrain from providing direct aid to religious institutions (Kemerer, 1998). In review of state constitutional language, Alabama's constitution contains permissive Blaine language. The Alabama amendment states,

> No appropriation shall be made to any charitable or educational institution not under the absolute control of the state, other than normal schools established by law for the professional training of teachers for the public schools of the state, except by a vote of two-thirds of all the members elected to each house. Alabama Const. Art. IV, § 73

Noting the shift from restrictive language, Alabama's permissive amendment does not openly prohibit indirect aid to religious institutions. Further, it potentially allows for direct funding pending a two-thirds majority vote in each house.

Moving from states classified as permissive, Kemerer's (1998) final category is recognized as uncertain. Certain states have constitutional provisions prohibiting disbursement of direct aid to religious institutions but refrain from making a determination regarding the constitutionality of indirect funding. As Kemerer (1998) cited, state constitutions recognized as

uncertain may contain "ambiguous constitutional terminology" or lacking "authoritative caselaw" (p. 174). In comparison to restrictive and permissive, Kemerer (1998) identified the majority of state constitutional language falls within the uncertain approximation. Exemplifying constitutional language classified as uncertain, Arizona's state constitution holds, "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment" Arizona Const. Art. II, § 12.

In sum, Kemerer (1997) found 17 states to have restrictive language in their state constitution, an additional 14 states were permissive, and the remaining 19 states had a classification of uncertain.

DeForrest's Continuum

More recently, Mark DeForrest (2003) recognized state Blaine Amendments as existing on a continuum running from narrow restriction to broad restriction. Narrow restrictions were defined as those that hinder "indirect assistance or aid to private religious or sectarian education" (DeForrest, 2003, p. 577). Blaine Amendments with narrow restrictions function under the umbrella of two basic concerns:

1. Public schools of all levels are free of religious education.
2. There is no direct allocation of public funds to religious schools. (DeForrest, 2003)

Using the criteria put forth by DeForrest (2003), two states fall in the narrow restrictions category; New Jersey and Massachusetts. Both New Jersey and Massachusetts allow for specific instances in which students attending a parochial school may receive assistance (e.g., transportation in New Jersey, higher education grants in Massachusetts) (DeForrest, 2003). An excerpt from the Massachusetts state constitution explains, "Nothing herein contained shall be construed to prevent the Commonwealth from making grants-in-aid to private higher educational

institution or to students or parents or guardians of students attending such institutions" (Massachusetts Const. Amend. Art. XVIII, § 2).

Stepping away from narrow restrictions, DeForrest (2003) defined the next group of Blaine Amendments as "moderate" (p. 578). The ends of the moderate category are far more expansive than that of the narrow restriction. This is, in part, due to the wide variation of language used between each state (DeForrest, 2003). It is not uncommon for states in this category to strictly prohibit direct, public aid to parochial schools but fail to establish the constitutionality of indirect funding in the form of school vouchers (DeForrest, 2003). An example of DeForrest's (2003) moderate language is found in Delaware's constitution. The Delaware state constitution holds,

> No portion of any fund now existing, or which may hereafter be appropriated, or raised by tax, for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school; provided, that all real or personal property used for school purposes, where the tuition is free, shall be exempt from taxation and assessment for public purposes. Delaware Const. Art X, § 3

This classification is most relatable to Kemerer's (1998) approximation of uncertain.

The third and final category of Blaine language is referred to by DeForrest (2003) as "most restrictive" (p. 587). States with most restrictive language have far reaching constraints on direct and indirect forms of religious aid (DeForrest, 2003). Advancing the definition of moderate provisions, most restrictive provisions move past religious schools to ensure that religious institutions as a whole are prohibited from receiving public aid (DeForrest, 2003). State constitutional encompassing religious entities beyond educational institutions can be found in Florida. Florida's state constitution demands,

> No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution. Florida Const. Art. I, § 3

In summation of the clearly defined continuum, DeForrest (2003) highlighted, "State Blaine Amendments do not exist in a vacuum" (p. 602). This sentiment resonates with Kemerer's (1998) urge for consideration of Blaine classifications as approximations. Both scholars shed light on the fluidity of interpretation pending the circumstances encompassing a specific instance. To date, the Court has not formally acknowledged or established either of the categorical theories presented above. A compilation of all state Blaine language can be found in Appendix A.

Impeding Religious Schools

This body of work would not be complete without a thorough review of the two points held by proponents of Blaine Amendments, religious discrimination and a barrier to school choice. Given the socio-political history leading up to the development of Blaine Amendments, it comes as no surprise that many Blaine opponents stand strong in their united front against religious intolerance (Viteritti, 1998; DeForrest, 2003; Adams, 2011). Upon review of State Blaine Amendments, DeForrest (2003) argued that most discriminate against religion and therefore violate of the First Amendment. Commenting on Blaine language embedded within state constitutions, Sondergard (2018) posited current interpretations of the separation of church and state will potentially lead to "unfair discrimination against religions organizations," making it increasingly difficult for parents to choose a religious schooling option (p. 780). Similarly, Viteritti (1998) clearly articulated his opposition to Blaine Amendments by identifying them as "religious bigotry" put forth by "nativist political leaders" in response to an influx in Catholic

immigration (p. 658). Collectively, State Blaine Amendments are unconstitutional as they intentionally and effectively penalize religious institutions, strictly because they are religiously affiliated, by prohibiting them from acquiring public assistance (Duncan, 2003).

Additionally, much research is dedicated to Blaine Amendments' infringement upon a child's parent or legal guardian to make educational decisions (Sondergard, 2018; Burke & Stepman, 2014; Borders, 2018). The school choice movement is characterized by individuals and groups seeking to expand educational offerings in a variety of settings. Defining Blaine Amendments as "ignoble," Burke and Stepman (2014) view such language as an obstruction to school choice. Similarly, Komer (2018) went as far to say that Blaine Amendments have a "pernicious effect" of disallowing parents the opportunity to make educational choices (p. 611). Of particular significance, as argued by Burke and Stepman (2014) is the extent to which Blaine language serves as a barrier that prohibits students with special needs from obtaining necessary services. Further, Burke and Stepman (2014) contest the discriminatory intent and effect of Blaine Amendments and urge states to "enact policies that allow parents to direct their child's share of funding to any education service or provider of choice (p. 638).

Waves of School Finance Litigation

Waves of litigation emerged as a result of the judiciary struggling to define and limit its capacity (McMillan, 1998). William Thro (1994) argued that school finance litigation can be classified into three eras. The first wave is situated in the 1960s through 1973 and according to Thro (1994) is comprised of equality suits or, litigation "premised on the belief that more money meant a better education and on a lack of tolerance for any differences in money or opportunities" (p. 601). Following the first wave, the second wave of school finance litigation spans from 1973 to 1989 and remained focused on equality however, through the means of state

constitutions. The third and final wave defined by Thro (1994) encompasses litigation from 1989 through the late 1990s and has three core tenets:

- All children are entitled to an education of a certain quality
- Primarily focused on education clauses in individual states
- Courts have cast wider decisions and demonstrated "willingness to take control of the financing of education" (p. 603).

Although each of the aforementioned waves are characterized by trends in school finance litigation, this research explored the extent to which similarly themed waves can be identified in religion and public schools litigation. Similarly, judicial ideology derived from the cases highlighted below will be used to examine historical and current issues involving religion and public schools.

Exploring School Finance Waves

The first wave is characterized by two prominent cases in the early 1970s: *Serrano v. Priest* (1971) and *San Antonio Independent School District v. Rodriguez* (1973). In Rodriguez, appellees' argued that Texas' public education finance system violated the Equal Protection Clause set forth by the Fourteenth Amendment to the United States Constitution. Delivering the opinion of the Court, Justice Powell proclaimed,

> Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. Nor, indeed, in view of the infinite variables affecting the educational process, can any system assure equal quality

> of education except in the most relative sense. (*San Antonio Independent School District v. Rodriguez*, 1973)

The Court's 5-4 decision in *Rodriguez* rejects the argument that variance in funding formulas due to geographic location adversely affects a specific subgroup of individuals; furthermore, unequal expenditures do not inherently violate the Equal Protection Clause of the Fourteenth Amendment.

Moving into the second wave, in response to impasse at the federal level, school finance reform efforts targeted state equal protection claims and were litigated in state courts. Although litigation shifted from federal to state, McMillan (1998) highlighted, "plaintiffs' claims generally arose from identical circumstances of disparity and were argued in the same manner as the claims in the first wave (p. 1872)."

The beginning of the second wave of school finance litigation is marked by New Jersey Supreme Court case, *Robinson v. Cahill* (1973). In *Robinson*, the plaintiffs argued the New Jersey school financing system violated the education provision of the New Jersey Supreme Court (Alexander & Alexander, 2019). Specifically, the New Jersey State Constitution stated that "the legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools" (N.J. Const. art. 8, § 4). Plaintiffs argued that under the State equal protection clause, "thorough and efficient" advanced education as a fundamental interest and "directly under the education clause, arguing that the guarantee of a thorough and efficient education was not being met in property-poor districts" (Martell, 1977, p. 147). While the court found that plaintiffs had been denied a thorough and efficient education, it did not uphold the supposition of an equal protection clause violation (Martell, 1997).

The third wave is signified by the judiciaries discernable pivot from equality standards in education finance. As identified by Thro (1994) cases situated in the third wave of school finance litigation are distinguished by three primary characteristics:

- Children are entitled to an education of a certain quality
- Cases are "based exclusively on the education clauses of individual states' constitutions"
- "Courts have been more sweeping in their pronouncements and their willingness to take control of the financing of education" (p. 603).

In mid-January 1989, *Helena Elementary Sch. Dist. No. 1 v. State* (1989) marked the shift from the second to third wave. In *Helena*, plaintiffs' argue against the constitutionality of the funding methods used for public schools in the state of Montana, citing significant wealth disparities among schools. Affirming the District Court's decision, the Supreme Court of Montana found the Montana school funding system to be unconstitutional.

Although the third wave saw an enormous amount of support from various stakeholders, it does not mark the terminus of school finance waves (McMillan, 1998). As McMillan (1998) highlighted, "The third wave is not immune from judicial scrutiny (p. 1882)." As the third wave began, it was anticipated that courts would play a vital role in determining standards of adequacy. It is also argued that fourth wave spanning from the early 2000s to present day encompasses cases distinguished by the extent that unequal education funding creates greater separation between racial and socio-economic classes (McMillan, 1998). As McMillian (1998) noted, the beginning of the fourth wave may very well be marked by *Sheff v. O'Neill* (1996). In Sheff, the plaintiffs allege the unequal funding of Connecticut schools influenced racial inequities in education and violated State Constitution amendments. In a 4-3 ruling in favor of the plaintiffs, Judge C. J. Peters argued, "The uncontested evidence of the severe racial and

ethnic isolation of Hartford's schoolchildren demonstrates that the state has failed to fulfill its affirmative constitutional obligation to provide all of the state's schoolchildren with a substantially equal educational opportunity (*Sheff v. O'Neill*, 1996).

While the previously determined waves (Thro, 1994) are specific to school finance litigation, this work seeks to identify similar trends within litigation specific to religion and public schools. Judicial ideology within the aforementioned waves will be considered when analyzing shifts in religion and public schools cases. As this work explored factors contributing to ideological shifts in the judiciary, Thro's (1994) waves served as reference points for judicial ideology specific to school funding.

CHAPTER THREE:

METHODOLOGY

Methodologies employed in this study were qualitative in nature. The aforementioned research questions were explored through traditional legal research and document analysis. Specifically, data related to judicial ideologies were captured through traditional legal research. This study adopted the definition of 'ideology' by (Merriam-Webster., n.d.)-Webster as "a manner or the content of thinking characteristic of an individual, group, or culture" (see https://www.merriam-webster.com/dictionary/ideology). Additionally, the origin of Blaine Amendments was captured through review of historical documents and scholarly works. Caselaw specific to religion and public schools was the primary data source used to identify trends and waves in litigation.

Table 3.1

Types and Kinds of Sources and Artifacts

Source Type	Artifact
Primary Sources	• Caselaw • Congressional records
Secondary Sources	• Law review articles • Books on topic
Tertiary Sources	• Textbooks • Books on topic

Data Collection

While traditional legal research uses precedent to forecast judicial interpretation, what "it does not, and cannot, do is go beyond the law to consider the attitudes, values, and beliefs of those affected by legal decisions. A critical attribute of traditional legal research is that the "primary source of information is the law itself" (Russo, 2015, p. 6). Further, "it is a systematic investigation involving the interpretation and explanation of the law" (Russo, 2015, p. 6) Finally, "legal research employs a timeline that looks to the past, present, and future for a variety of purposes" (Russo, 2015, p. 6).

Data collection began with ascertaining historical and legal references that could be used to portray the development and inception of Blaine Amendments. Such references included scholarly writing on Blaine Amendments and issues around the intersection of religion and public schools as well as historical legal documents. Additionally, caselaw specific to the Supreme Court of the United States was analyzed to determine judicial shifts in ideology.

Waves of finance litigation outlined by Thro (1994) served as a theoretical framework for identifying trends in United States Supreme Court Cases involving funding of religious schools. Specifically, this work assisted in identifying major shifts in the judiciary. Religious education funding cases were not directly compared to time periods established by Thro (1994); instead, cases were related to the ideology of each wave. The socio-political factors identified in each era were also used to make connections and determine themes across nearly 73 years of litigation.

Specific criteria were established to aid in the selection of cases for review. The cases selected met two primary standards:

1. The decision was granted by the Supreme Court of the United States.
2. A religious funding issue is a focal point of litigation.

Focusing on litigation in the United States Supreme Court allowed for a sample of cases that carried a high level of significance. While there were many Supreme Court cases dealing with religion and public schools, each of the sample cases selected were specific to religious *funding* issues.

Data Analysis

Prominent Supreme Court cases were subjected to document analysis. D (Frey, 2018) document analysis is systematic and repeated review, examination, and interpretation of data (Frey, 2018). As identified by Bowen (2009), document analysis "requires that data be examined and interpreted in order to elicit meaning, gain understanding, and develop empirical knowledge" (p. 27). Documents considered for analysis were classified as caselaw and identified by Cardno (2018) as "strategic level documents" (p. 630). Although document analysis can be applied in a variety of ways, it was specifically used in this work to "track change and development" (Bowen, 2009, p. 30).

While Cardno (2018) provided a framework for conducting document analysis in the education policy arena, the processes she outlined have been adapted for analyzing caselaw. Although policy and caselaw differ, there is symmetry in their institutional effect. In highlighting policy document analysis, Cardno (2018) described it as "a method for investigating the nature of a policy document in order to look at both what lies behind it and within it" (p. 625). Specific to policy document analysis, Cardno's (2018) five categories were as follows:

1. Document production and location
2. Authorship and audience
3. Policy context
4. Policy text

5. Policy consequences

When conducting document analysis for this study, categories and questions identified by Cardno (2018) were adopted as a guide for analyzing each Supreme Court opinion. Most notably, the word *policy* in categories three through five in Table 3.2 is replaced with *caselaw*. Coupled with the adaptations of each category, corresponding questions were developed and served as a guide for analyzing targeted areas of Cardno's (2018) framework. The revised categories and their corresponding questions are detailed in the table below.

Table 3.2

Document Analysis Categories and Corresponding Questions

Category	Corresponding Questions
Document production and location	What level of court delivered the opinion and when?
Authorship and audience	Who authored the opinion? What is their position, and do they have a bias?
Caselaw context	What ideologies or values guide the opinion?
Caselaw text	How is the opinion structured? What are the key elements of the opinion? What is absent from the text?
Caselaw consequences	What is the intended overall impact of the opinion?

Each category provided a specific lens from which trends in data were gleaned. For this work, document production and location is specific to the Supreme Court of the United States. Moving into the second category, authorship and audience, this work paid careful attention to the justices penning the decisions and backgrounds of all parties involved. Transitioning to caselaw

context, this work examined the factors driving the relevancy of the case. Following caselaw context, the actual text of each case will undergo examination. The fifth category, identified as caselaw consequences, explored the social and political effects of each case.

Data collected in relation to each category were compared across Supreme Court opinions issued in the cases selected for study. Focusing on the five distinct categories of analysis for each case allowed for identification of distinct shifts in judicial ideology. When analyzing majority opinions selected for review, consistent application of the aforementioned categorical questions provided a framework for tracking judicial ideology and caselaw consequences. While the Supreme Court of the United States is a multi-member judiciary, for the purposes of this research the majority opinion was identified as one body.

Information acquired was then used to portray the institution of Blaine Amendments, distinguish trends in religious education litigation, and identify shifts in judicial ideology. Using the document analysis categories outlined by Cardno (2018), comparable data were acquired for opinions issued in cases selected for study. Once relatable datasets were obtained, specific trends in judicial ideology were identified. Data specific to the identification of trends in the judiciary were aggregated to construct waves of litigation in funding parochial schools.

Additionally, supplemental sources were used to provide greater breadth and depth in the areas of authorship and audience, and caselaw consequences. The introduction and incorporation of secondary and tertiary sources aided in depicting the judicial ideology contributing to the case as well as the impact of the majority opinion. Although, once published, Supreme Court opinions remain unchanged, shifts in scholarly and judicial interpretation of caselaw language are to be expected. Recognizing this phenomenon, this work captured caselaw interpretations from various scholars in the field of education law.

It is important to highlight that frequency-counting was not a component of this method. As identified by George (2009), a frequency indicator is "the number of times one or more content characteristics occur" (p. 154). Throughout the document analysis process conducted for this study, a greater emphasis was placed on context and interpretation.

Limitations

This study was limited by the depth and breadth of litigation it covers. By selecting only United States Supreme Court cases, this study did not encompass lower-level state and district court cases that addressed the stated research questions but had a narrow scope. The sample of Supreme Court cases selected was used to identify trends and potential consequences but was not inclusive of every opinion on the subject of school funding and Religion Clauses. Additionally, the intent of this research was to highlight broad shifts in jurisprudence impacting the Nation at large. While a narrow sample of cases from a particular State court may have provided insight on socio/political shifts within the state, it would not be appropriate or academically responsible to assume such cases are representative of a national opinion.

Summary of Methodology

Through analysis of documents and caselaw, this research explained the history of Blaine Amendments and identified shifts in judicial ideology pertaining to funding religious schools. Analysis of each case began with a brief synopsis of the legal issue and subsequent Court ruling. Specific caselaw was selected based on criteria referenced above. Judicial rationale across multiple cases was compared to ideologies expressed in the waves in school finance litigation defined by Thro (1994). While the time periods associated with the waves set forth by Thro (1994) were representative of school finance litigation as a whole, the waves in this research were indicative of large-scale shifts in the ideology of the judiciary. This comparison identified

the extent to which trends were apparent in litigation pertaining to funding religious schools and, furthermore, gave insight as to future direction of the Court.

CHAPTER FOUR:

FINDINGS

This study focused on identifying socio-political shifts in the judiciary and trends in the judicial ideology specific to publicly funding parochial schools. Data collected were also used to determine consequences for educational institutions if Blaine Amendments are found to be unconstitutional. Data collection involved thorough analysis of caselaw exclusively addressing issues related to religion and school funding. Data analysis was conducted using an adapted version of Cardno's (2018) policy analysis framework. The framework was adapted to precisely address caselaw using an established set of categories.

United States Supreme Court Caselaw

A review of nearly 73 years of caselaw from the Supreme Court of the United States suggests that the Court has wavered from the hard line of strict separation to a more flexible interpretation and application of the Establishment Clause. The *Trinity* decision made clear that religious institutions cannot be denied public aid strictly because they are religiously affiliated (*Trinity Lutheran v. Comer*, 2017). Although the decision was narrowed by footnote 3, the breadth of the decision may be overwhelming as the Court looks to establish precedent. As we look to a new era of litigation on school funding, the permeability of the 'wall of separation' remains in question and may very well collapse under the gavel of the court.

Caselaw

The Court has granted the hearing of a variety of cases dealing with issues regarding entanglement between public aid and religious institutions. Outlined below are ten cases on which the Supreme Court of the United States delivered an opinion. While these cases do not stand as the only judicial interpretations of resources being allocated for religious schools, their time and substance portray the Court's jurisprudence over 70 years. Within the ten cases outlined below, emphasis is placed on jurisprudence and the majority opinions. The final case, *Espinoza v. Montana (2020)* stands as the most recent Supreme Court of the United States decision specific to issues of publicly funding parochial schools.

Table 4.1

United States Supreme Court Cases for Analysis

Case	Area of Litigation	Opinion Author	Bench Spread
Everson v. Board of Education, 1947	First Amendment – Establishment Clause	Hugo Black	5-4
Lemon v. Kurtzman, 1971	First Amendment – Establishment Clause	Warren Burger	8-0
Mueller v. Allen, 1982	First Amendment – Establishment Clause	William H. Rehnquist	5-4
Aguilar v. Felton, 1985	First Amendment – Establishment Clause	William Brennan	5-4
Agostini v. Felton, 1997	First Amendment – Establishment Clause	Sandra Day O'Connor	5-4
Mitchell v. Helms, 2000	First Amendment – Establishment Clause	Clarence Thomas	6-3
Zelman v. Simmons-Harris, 2002	First Amendment – Establishment Clause	William H. Rehnquist	5-4
Locke v. Davey, 2004	First Amendment – Free Exercise Clause	William H. Rehnquist	7-2
Trinity Lutheran v. Comer, 2017	First Amendment – Free Exercise Clause	John G. Roberts	7-2
Montana v. Espinoza, 2020	First Amendment – Free Exercise Clause	John G. Roberts	5-4

Everson v. Board of Education of the Township of Ewing, 330 U.S. 1 (1947)

In *Everson*, the Court reviewed a New Jersey Law that allowed for reimbursements of costs associated with transportation at public and nonpublic schools (*Everson v. Board of Education*, 1947). In a 5-4 decision authored by Justice Hugo Black, the Court found the New Jersey Law did not violate the Establishment Clause of the First Amendment of the United Sates Constitution. The Court held that individuals of a particular religious faith could not be deprived a public benefit due to their religious ascriptions (*Everson v. Board of Education*, 1947).

Authorship and Audience

Justice Hugo Black, a rural Alabama native, was born on February 27, 1886 (Perry, 1989). While in his younger years in Alabama, Black was heavily involved in the Baptist church. Upon moving to Washington, Black significantly diminished his participation in the church (Perry, 1989).

Perhaps the most controversial aspect of Justice Black's past was his open involvement with the Ku Klux Klan. Black's relationship with the Klan began when he formally joined in Alabama in 1923 (Newman, 1997). Although Justice Black reportedly sympathized with the Klan's values, he was particularly drawn by their stentorian anti-Catholicism (Bertucio, 2020). Reflecting on this topic, Justice Black's son Hugo Jr. recalled, "The Ku Klux Klan and Daddy, so far as I could tell, only had one thing in common. He suspected the Catholic church" (Black, 1975, p. 104).

Caselaw Context

Prior to the Supreme Court hearing *Everson*, multiple state courts had taken up the issue of direct payments to non-public schools and found them to be unconstitutional in light of state Blaine Amendments (Kauper, 1973). In *Everson*, a New Jersey statute allowed direct

reimbursement for personal school transportation monies expended by parents. As was highlighted in the case,

> Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools. These church schools give their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith. The superintendent of these schools is a Catholic priest. (*Everson v. Board of Education*, 1947)

Everson, acting as the appellant in the case, argued the statute violated the Federal and State constitutions. Upon hearing the case, the State court found reimbursements for travel associated with parochial schools to be unconstitutional. On appeal the New Jersey Court of Errors and Appeals reversed, "holding that neither the statute or resolution passed pursuant to it was in conflict with the State constitution or the provisions of the Federal Constitution in issue" (Everson v. Board of Education, 1947). On November 20, 1946 the case was argued at the Supreme Court of the United States. The alleged constitutional violation was specific to the Establishment Clause in First Amendment.

Caselaw Text

In framing the decision, Justice Black offered the sentiment below as a reminder of the institutional power and political wars between various religions.

> The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had

> persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them. (*Everson v. Board of Education*, 1947)

Attempting to find balance between the rights of individuals and equal access to a generally available benefit, Justice Black argued,

> 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. (*Everson v. Board of Education*, 1947)

Finding no constitutional violation, Justice Black closed his argument stating, "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). While the Court found that providing bus fare reimbursements for students attending parochial schools was constitutional, the closing phrase in the majority emboldens the wall of separation between church and state.

Caselaw Consequences

Although the majority found reimbursement for transportation fares to be constitutional, the Court's opinion established the foundation for strict separation (Beerworth, 2004). The *Everson* ruling "nationalized the restrictions" within the Establishment Clause and unearthed "comprehensive surveillance" of statutory and local regulations specific to religion (Kauper, 1973, p.307). Of significance, Everson had a direct effect on the interpretation of state constitutional provisions (Kauper, 1973). Ideology utilized in *Everson* established judicial precedent relied upon by the Court for future Establishment Clause cases.

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

Nearly 24 years later, the Court was faced with yet another Establishment Clause issue in *Lemon v. Kurtzman* (1971). In *Lemon*, the Court addressed the constitutionality of Pennsylvania and Rhode Island school funding statutes that allow for public funding of church-related elementary schools. While Rhode Island sought to "authorize state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools," the Pennsylvania statute expressly allowed for nonpublic schools to receive public aid (*Lemon v. Kurtzman*, 1971). Petitioners claim the statutes are in clear violation of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment (*Lemon v. Kurtzman*, 1971). Written by Chief Justice Burger, an 8-0 majority in the Pennsylvania case, and 8-1 in the Rhode Island case found such amendments to be unconstitutional.

Authorship and Audience

Born in St. Paul Minnesota in 1907, Justice Burger experienced a customary 20th century upbringing. Although Justice Burger was presented with the opportunity to attend Princeton

University on scholarship, he rejected the offer as he felt obligated to support his family (McLellan, 1996). After attending a night law school, Justice Burger enjoyed a successful law career and became involved with Republican politics (Rehnquist, 1987). Moving on from practicing law, he worked in the Justice Department under President Eisenhower before transitioning to the Court of Appeals for the District of Columbia Circuit (Rehnquist, 1987). Justice Burger's rise through the Republican Party continued when President Richard Nixon nominated Burger for Chief Justice of the Supreme Court of the United States in 1969 (McLellan, 1996). President Nixon nominated Warren Burger in fulfillment of his campaign promise to reverse Warren court precedent (Tobias, 1996).

Caselaw Context

The Rhode Island statute was enacted in 1969 and the Pennsylvania statute was established in 1968. While the Pennsylvania and Rhode Island Statutes are bundled, there are distinct differences between them. In an attempt to improve the educational experience of students in nonpublic secular schools, the Statute allowed for state officials to supplement salaries of teachers at nonpublic schools by a maximum of 15%, so long as their annual salary did not exceed that of a public school teacher (*Lemon v. Kurtzman*, 1971). The following criteria were requirements for teachers to receive the salary supplement:

- The teacher works at a nonpublic school.
- School financial documents are reviewed.
- Teachers must only teach subjects offered in public schools, using the same materials public school teachers use.
- Cannot teach a course in religion.

Similarly, Pennsylvania's statute, the Pennsylvania Nonpublic Elementary and Secondary Education Act (1968) was enacted with the intention of addressing the financial deficit facing nonpublic secular schools. The act was originally funded by a tax on horse racing before transitioning to a funding source generated by cigarette tax (*Lemon v. Kurtzman*, 1971).

Caselaw Text

The Court heard oral arguments in *Lemon* on March 3, 1971 and rendered judgement on June 28, 1971. Following the facts of the case, Justice Burger transitioned into isolated statements on both the Rhode Island and Pennsylvania statutes. Addressing the Rhode Island statute, the Court echoed the ruling of the lower court. Strengthening the First Amendment, the Court held, "we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude and religion and thus conflict with the Religion Clauses" (*Lemon v. Kurtzman*, 1971).

Specific to the Pennsylvania statute, "the State directly reimburses nonpublic schools solely for their actual expenditures for teachers' salaries, textbooks, and instructional materials" (*Lemon v. Kurtzman*, 1971). In comparison to Rhode Island, the Court found the Pennsylvania statute "has the further defect of providing state financial aid directly to the church-related school" and "creates an intimate and continuing relationship between church and state" (*Lemon v. Kurtzman*, 1971).

After an overview of the Pennsylvania and Rhode Island statutes, Justice Burger quickly moved to precedent set by Black in *Everson*. Recognizing the delicacy of the subject at hand, Justice Burger stated, "Candor compels acknowledgement, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law" (*Lemon v. Kurtzman*, 1971).

Justice Burger highlighted that although review of the legislative procedures did not reveal an intent to advance religion. However, "the statutes themselves clearly state that they are intended to enhance the quality of secular education in all schools" (*Lemon v. Kurtzman*, 1971).

Recognizing that church and state are not parallel and free of intersection, Justice Burger highlighted that "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" (*Lemon v. Kurtzman*, 1971). In many instances, this is evidenced by federal and state agencies providing services for religious institutions (e.g., police, fire, mail, etc.). Justice Burger furthered his ideology by delving into the visual metaphor of the wall of separation. Highlighting the permeability of the wall of separation, Justice Burger argued "Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is blurred, indistinct, and a variable barrier depending on all the circumstances of a particular relationship" (*Lemon v. Kurtzman*, 1971).

Justice Burger then transitioned to providing a more thorough explanation of the Court's opinion on the Rhode Island statute. Although restrictions were put in place to help ensure neutrality…

> We do not assume, however, that parochial schoolteachers will be unsuccessful in their attempts to segregate their religious beliefs from their secular educational responsibilities. But the potential for impermissible fostering of religion is present. The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. (*Lemon v. Kurtzman*, 1971)

Closing a majority opinion consistent with strict separationist theory, Chief Justice Burger argued,

> Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn. (*Lemon v. Kurtzman*, 1971)

Caselaw Consequences

Of particular significance, the Lemon Test was derived in light of the Court's opinion. The Lemon Test, used to assess the constitutionality of statutes, is comprised of three components:

1. It must not have a secular legislative purpose.
2. It must not advance or inhibit the existence of religion.
3. It must not "foster excessive entanglement with religion" (*Walz v. Tax Commission of the City of New York*, 1970).

In his authorship of the majority opinion, Justice Burger was joined by Hugo Black. A careful read of *Lemon* reveals judicial ideologies that parallel those of Justice Black's *Everson*. As is evidenced in *Mueller v. Allen* (1982), application and interpretation of the *Lemon* test contributes to the permeability of the wall of separation between church and state. While *Lemon* proved to be highly referenced framework for ruling on Establishment Clause cases, the elements of the test are subjective and require the ideological lens of the judiciary (Flowers, 2005).

***Mueller v. Allen*, 463 U.S. 388, (1982)**

The state of Minnesota allows for taxpayers to deduct a portion of the expenses accrued from educating their children. In accordance with state law, Minn. Stat. §§ 120.06, 120.72 (1982), deductions can be made in the areas of "tuition, textbooks, and transportation" (*Mueller v. Allen,* 1982). Parents who elected to send their children to parochial school were also permitted to receive the tax deduction. Petitioners argue the tax deduction violated the Establishment Clause by advancing religion through the use of public funds (*Mueller v. Allen,* 1982). In a 5-4 decision delivered by Justice Rehnquist, the court held the tax deduction program did not have "the primary effect of advancing the sectarian aims of the nonpublic schools" (*Mueller v. Allen*, 1982). Relying on precedent set forth in *Lemon v. Kurtzman* (1971), the Court found no Establishment Clause violation.

Authorship and Audience

William Rehnquist was born in Milwaukee, Wisconsin on October 1st, 1924. As Schmidt (2014) recounts, Justice Rehnquist grew up in an "anti-New Deal Republican" family (p. 275). Firm in his conservative, Republican beliefs, Rehnquist enrolled in Kenyon College in Gambier, Ohio (Schmidt, 2014). Rehnquist's academic endeavors were interrupted when, after one semester at Kenyon, he enlisted in the United States Army. Upon returning home in 1946, Rehnquist attended Stanford University while working part time and receiving academic aid through the G.I. Bill (Schmidt, 2014).

In 1969 he was appointed to the position of Assistant Attorney General in the Office of Legal Counsel, United States Department of Justice (Riggs & Proffitt, 1983). In October of 1971 Nixon nominated Rehnquist for his position on the Supreme Court of the United States. Nearly two months later, Rehnquist was confirmed with a Senate vote of 68-26.

In review of each case participated in by Justice Rehnquist, David Shapiro (1976) identified three categories reflecting the Justice's ideology. The categories are as follows,

1. Conflicts between an individual and the government should, whenever possible, be resolved against the individual;
2. Conflicts between state and federal authority, whether on an executive, legislative or judicial level, should, whenever possible, be resolved in favor of the states; and
3. Questions of the exercise of federal jurisdiction, whether on the district court, appellate court, or Supreme Court level, should, whenever possible, be resolved against such exercise. (Shapiro, 1976, p. 294)

Caselaw Context

The United States Court of Appeals for the Eighth Circuit found no constitutional violation. Specifically, the lower court positioned the tax deduction implemented by the state of Minnesota as a generally available benefit to all taxpayers. The Supreme Court agreed to hear the case in light of a conflicting opinions from the Courts of Appeals for the First and Eighth Circuits. To aid the Court in objectively navigating opposing lower court decisions, *Mueller* was decided using the aforementioned Lemon test derived from *Lemon v. Kurtzman* (1971).

Caselaw Text

Similar to Justice Burger recognizing the delicacy of *Lemon*, Justice Rehnquist framed the ideology of the Court stating, "It is not at all easy… to apply this Court's various decisions construing the Clause to governmental programs of financial assistance to sectarian schools and the parents of children attending those schools" (*Mueller v. Allen*, 1982).

> A State's decision to defray the cost of educational expenses incurred by parents — regardless of the type of schools their children attend — evidences a purpose that is both

> secular and understandable. An educated populace is essential to the political and economic health of any community, and a State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well educated. (*Mueller v. Allen*, 1982)

Justice Rehnquist made many references to *Lemon* and specifically stated the "justifications are readily available to support §§ 120.06, subd. 22, and each is sufficient to satisfy the secular purpose of *Lemon*" (*Mueller v. Allen*, 1982). It is clear that *Lemon* remained as standard legal precedent.

In addressing the components of *Lemon*, Justice Rehnquist wrote specifically on the state-wide access and application of the deduction, regardless of the educational setting. In highlighting this point, Justice Rehnquist argued, "Most importantly, the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools and those children attend nonsectarian private schools or sectarian private schools" (*Mueller v. Allen*, 1982). Justice Rehnquist then moved into defending the Court's opinion that there is no Establishment Clause violation by stating,

> The Establishment Clause of course extends beyond prohibition of a state church or payment of state funds to one or more churches. We do not think, however, that its prohibition extends to 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*, 1982).

In closing, Justice Rehnquist reasoned,

> Making decisions such as this does not differ substantially from making the types of decisions approved in earlier opinions of this Court. In *Board of Education* v. *Allen,* 392 U. S. 236 (1968), for example, 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. The same result follows in this case. (*Mueller v. Allen*, 1982)

Caselaw Consequences

The Minnesota law affording taxpayers the opportunity to deduct education related expenses from their state income tax, even in instances of private, parochial schools, did not violate the Establishment Clause. Echoing *Everson*, the Court held that a generally available benefit with the intent of aiding the individual, not a religious institution, is constitutional. The Court did, however, recognize the deduction could not be used for a deduction of educational materials specific to a religious doctrine. Addressing this point, the Court stated, "state officials must disallow deductions taken for 'instructional books and materials used in the teaching of religious tenets, doctrines of worship, the purpose of which is to inculcate such tenets, doctrines or worship'" (*Mueller v. Allen*, 1982).

***Aguilar v. Felton*, 473 U.S. 402, (1985)**

In question is New York City's use of Title 1 funds under the Elementary and Secondary Education Act (ESEA) of 1965. Under ESEA guidance, the state of New York allowed parochial schools to serve as beneficiaries of Title 1 funds. Petitioners argue this practice violates the Establishment Clause of the First Amendment. Specifically, petitioners contend that using Title 1 appropriations to fund salaries of employees in parochial schools violates the Establishment

Clause of the First Amendment. In a 5-4 majority, the Court found the New York Title 1 allocation to be unconstitutional.

Authorship and Audience

Justice William J. Brennan was born in Newark, New Jersey in 1906. After graduating from Harvard Law School and serving in the military during World War II, Justice Brennan was nominated for a position on the New Jersey Supreme Court (Marion, 1997). In 1956, former President Nixon nominated William Brennan to the Supreme Court of the United States (Wermiel, 1998). Throughout his thirty-four years on the Court, Justice Brennan routinely incorporated human dignity in his opinions (Wermiel, 1998).

Caselaw Context

In order to qualify for Title 1 funding in New York, statutory law required the following criteria:

- Children being served are educationally deprived.
- Children live in an area of low income.
- Title 1 funds are used in addition to generally available educational services. (*Aguilar v. Felton*, 1985)

Any school meeting the aforementioned criteria was eligible to apply for funding, inclusive of parochial schools. Parochial schools that meet the criteria were able to partner with public school teachers who provided assistance with core academic subjects. Title 1 funds were used to supplement the salaries of public school teachers that provided academic services for parochial schools. The Court of Appeals for the Second Circuit found paying public school personnel to provide services in parochial schools to be unconstitutional.

Caselaw Text

In his opening statements, Justice Brennan made clear the dangers of entanglement between government and religious entities. He argued that a favorable act by the government toward religion, in turn threatens the ideals and beliefs of individuals that do not ascribe to that specific faith. Outlining the pitfalls of entanglement, Justice Brennan contended,

> The principle that the state should not become too closely entangled with the church in the administration of assistance is rooted in two concerns. When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by government intrusion into sacred matters. (*Aguilar v. Felton*, 1985)

As Justice Brennan continued, he highlighted that while systems are in place to ensure the academic offerings remain secular, the current policies "require a permanent and pervasive state presence in the sectarian schools receiving aid" (*Aguilar v. Felton*, 1985). The Court concluded that assigning a state official to a position of this capacity fostered entanglement and clearly violated the Establishment Clause. Articulating this viewpoint, Justice Brennan wrote,

> In short, the religious school, which has as a primary purpose the advancement and preservation of a particular religion must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought. (*Aguilar v. Felton*, 1985)

In closing, the Court recognized that while the primary effect of the program was to assist students, it also created entanglement between a government agency and religiously affiliated schools. Using separatist ideology, Justice Brennan argued,

> Despite the well-intentioned efforts taken by the City of New York, the program remains constitutionally flawed owing to the nature of the aid, to the institution receiving the aid, and to the constitutional principles that they implicate — that neither the State nor Federal Government shall promote or hinder a particular faith or faith generally through the advancement of benefits or through the excessive entanglement of church and state in the administration of those benefits. (*Aguilar v. Felton*, 1985)

Caselaw Consequences

Aguilar stands as yet another example of separationism informing judicial ideology. Similar to *Lemon*, the Court reinforced that funding which directly benefits religious education institutions is unconstitutional, even in instances where the benefit is secular in intent. In response to *Aguilar*, the state of New York ceased the use of Title 1 funds to pay public school teachers providing support and services to students on parochial school grounds. Accordingly, New York implemented systems in which such services were provided in secular locations away from the campuses of religious schools.

***Agostini v. Felton*, 521 U.S. 203 (1997)**

Agostini was brought to the Court in light of the *Aguilar v. Felton* (1985) decision nearly 12 years earlier (*Agostini v. Felton*, 1997). At issue in both cases is the constitutionality of utilizing public funds to pay salaries for teachers in parochial schools (*Aguilar v. Felton*, 1985). In *Aguilar*, the U.S. Court of Appeals for the Second Circuit found that using public funds for parochial schoolteachers' salaries violates the Establishment Clause of First Amendment of the

United States Constitution (*Aguilar v. Felton*, 1985). In 1997, the Court revisited this issue in *Agostini* and ultimately reversed their opinion in *Aguilar* (*Agostini v. Felton*, 1997). Writing for the majority, Justice O'Connor stated, "Not all entanglements, of course, have the effect of advancing or inhibiting religion" and "We agree with petitioners that *Aguilar* is not consistent with our subsequent Establishment Clause" (*Agostini v. Felton*, 1997).

Authorship and Audience

Justice Sandra Day O'Connor, one of Aguilar's staunchest dissenters, authored the majority opinion in *Agostini v. Felton* (1997). In 1930, Justice O'Connor was born to a family of ranchers in Texas (Sullivan, 2006). Her journey into a career in law was fraught with sex discrimination. After working in a local prosecutor's office, she and her husband opened a law firm in Phoenix, Arizona (Sullivan, 2006). Appointed in 1981, Justice O'Connor holds the distinction of being the first female Supreme Court justice.

Caselaw Context

The significance of *Agostini* is that it reconsiders the constitutionality of public school teachers providing services for students in parochial schools. A question initially raised in Aguilar v. Felton (1985) in which the Court affirmed clearly violated the Establishment Clause. In response to *Aguilar*, "the District Court for the Eastern District of New York entered a permanent injunction" (*Agostini v. Felton*, 1997). As in many cases before it, *Agostini* referenced Establishment Clause violation criteria set forth in *Lemon*. However, in its application of the Lemon test, the Court did not consider the third prong of entanglement.

Caselaw Text

In *Agostini*, the Court once again was reliant on precedent set forth in *Lemon*. Justice O'Connor expressly stated the Court has "abandoned the presumption…that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion" (*Agostini v. Felton*, 1997).

Additionally, Justice O'Connor argued the Court "departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid" (*Agostini v. Felton*, 1997). She continued, highlighting that location of academic services should not be solely relied upon to indicate religious coercion. Public school teachers providing instruction in the classrooms of parochial schools does not inherently advance religion. In articulating this point, Justice O'Connor stated,

> We do not see any perceptible (let alone dispositive) difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside. (*Agostini v. Felton*, 1997).

Justice O'Connor also argued that new York's allocation of Title 1 funds is kin to accommodations set forth in the Individuals with Disabilities Act. She contested that "In all relevant respects, the provision of instructional services under Title I is indistinguishable from the provision of sign-language interpreters under the IDEA. Both programs make aid available only to eligible recipients" (*Agostini v. Felton*, 1997).

Finding further fault with Aguilar, Justice O'Connor revisited the belief that location has no bearing on the constitutional permissiveness of providing academic services. In summary of this point, she stated,

> What is most fatal to the argument that New York City's Title I program directly subsidizes religion is that it applies with equal force when those services are provided off campus, and *Aguilar* implied that providing the services off campus is entirely consistent with the Establishment Clause. (*Agostini v. Felton*, 1997).

The majority opinion, penned by Justice O'Connor determined the Court erred in the *Aguilar* decision. In closing, Justice O'Connor expressed discontent with *Aguilar*, viewing it as an unnecessary barrier inhibiting disadvantaged students from accessing support and services. In summation of this point, Justice O'Connor stated,

> Indeed, under these circumstances, it would be particularly inequitable for us to bide our time waiting for another case to arise while the city of New York labors under a continuing injunction forcing it to spend millions of dollars on mobile instructional units and leased sites when it could instead be spending that money to give economically disadvantaged children a better chance at success in life by means of a program that is perfectly consistent with the Establishment Clause. (*Agostini v. Felton*, 1997).

Caselaw Consequences

Agostini effectively reversed *Aguilar* by allowing for public school employees to be compensated for services provided in private schools. Arguments in this case were built on the premise that not all transactions between church and state directly advance religion. Critical to this decision, the Court did not advocate for direct funding for private schools. The Court made

it clear their opinion does not grant religious schools the opportunity to receive direct public support (Wood & Petko, 2000).

Mitchell v. Helms, 530 U.S. 793 (2000)

In *Mitchell v. Helms* (2000), the Court was tasked with determining if Chapter 2 of the Education and Consolidation Improvement Act of 1981 violated the Establishment Clause of the First Amendment of the United States Constitution. Under Chapter 2, local government agencies received federal funds and used them to provide educational materials and equipment for public and private schools (*Mitchell v. Helms*, 2000). Respondents view private schools receiving public assistance as an Establishment Clause violation. In a 6-3 plurality decision, the Court held that Chapter 2 of the Education and Consolidation Improvement Act of 1981 does not violate the Establishment Clause (*Mitchell v. Helms*, 2000).

Authorship and Audience

Justice Clarence Thomas served as the author of *Mitchell v. Helms* (2000). Born in 1948, Justice Thomas was raised by his maternal grandparents in Pin Point, Georgia (Gerber, 2011). A Harvard graduate with a conservative leaning, Justice Thomas work for U.S. Senator John C. Danfroth, a Republican from Missouri (Gerber, 2011). Nearly seven years later, in 1986 Justice Thomas was appointed to the position of assistant secretary for civil rights in the U.S. department of Education by former President Ronald Reagan (Gerber, 2011). Five years later, following the retirement of Justice Thurgood Marshall, Justice Thomas was nominated to the U.S. Supreme Court by former President George Bush (Overby, et al., 1992).

Caselaw context.

Mitchell endured a 15 year battle in the judicial system. In 1985, respondents alleged, "among other things, that Chapter 2, as applied in Jefferson Parish, violated the Establishment

Clause of the First Amendment of the Federal Constitution" (*Mitchell v. Helms*, 2000). Citing judicial precedent set in *Lemon*, the District Court for the Eastern District "issued an order permanently excluding pervasively sectarian schools in Jefferson Parrish from receiving any Chapter 2 materials or equipment" (*Mitchell v. Helms*, 2000). On appeal, the Court of Appeals for the Fifth Circuit ruled Ch. 2 unconstitutional.

Caselaw Text

In *Mitchell*, the Court heavily relied upon precedent set in *Agostini*. In framing this case, Justice Thomas argued,

> Like the provision at issue in *Agostini,* Chapter 2 channels federal funds to local educational agencies (LEA's), which are usually public school districts, via state educational agencies (SEA's), to implement programs to assist children in elementary and secondary schools. (*Mitchell v. Helms*, 2000)

Justice Thomas continued, arguing the majority found no Establishment Clause violation. After a brief summation of the facts of the case, Justice Thomas opined,

> Considering Chapter 2 in light of our more recent caselaw, we conclude that it neither results in religious indoctrination by the government nor defines its recipients by reference to religion. We therefore hold that Chapter 2 is not a "law respecting an establishment of religion." (Mitchell v. Helms, 2000)

The majority opinion relied heavily on the principle of neutrality. In his explanation of how the principle of neutrality affects this case, Justice Thomas wrote,

> In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the

> religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. (Mitchell v. Helms, 2000)

Addressing the exclusion of religious institutions from generally available programs, Justice Thomas articulated, "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow" (*Mitchell v. Helms*, 2000).

Affirming the ruling of the Court of Appeals for the Fifth Circuit, Justice Thomas closed stating,

> Accordingly, we hold that Chapter 2 is not a law respecting an establishment of religion. Jefferson Parish need not exclude religious schools from its Chapter 2 program. To the extent that *Meek* and *Wolman* conflict with this holding, we overrule them. (*Mitchell v. Helms*, 2000)

Caselaw Consequences

In *Mitchell*, the Court held that religious institutions may benefit from secular, nonideological educational materials, and Chapter 2 of the Education and Consolidation Improvement Act of 1981 did not violate the Establishment Clause of the First Amendment. Ruling in favor of respondents, the Court heavily relied upon precedent set in *Agostini*. In finding Chapter 2 constitutional, the Court's majority highlighted neutrality as a guiding principle in its decision. Arguing for neutrality, Justice Thomas stated, "we have consistently turned to the principle of neutrality upholding aid that is offered to a broad range of groups or persons without regard to their religion" (*Mitchell v. Helms*, 2000). In analysis of the Court's basis of neutrality, Davis (2002) posited that "neutrality will reorder discrimination such that those religious groups that are more willing to accept government aid will be subsidized to a greater degree than those groups that are less willing to accept aid" (p. 1067).

Zelman v. Simmons-Harris, 536 U.S. 639 (2002)

In *Zelman*, the Court took up the issue of an Ohio school voucher program that respondents argue is in violation of the Establishment Clause of the First Amendment of the United States Constitution. In light of low academic performance the state of Ohio enacted the Pilot Project Scholarship Program which provides financial assistance for families to attend a school of their choice as well as aid tutorial aid for students (*Zelman v. Simmons-Harris*, 2002). The Pilot Program allowed parents to select religious education institutions. Respondents claim that families utilizing public funds to attend religious schools violates the First Amendment (*Zelman v. Simmons-Harris*, 2002). In a 5-4 decision, the Court held that Ohio's voucher program does not violate the Establishment Clause (*Zelman v. Simmons-Harris*, 2002).

Authorship and Audience

Justice Rehnquist, further described in *Mueller*, authored the majority opinion in *Zelman*.

Caselaw Context

The Court focused on addressing the Establishment Clause question of "whether Ohio is coercing parents into sending their children to religious schools" (*Zelman v. Simmons-Harris*, 2002). The debate over school vouchers was not isolated to court rooms and judge's chambers. The campaigns of former president George W. Bush and presidential candidate Albert Gore took a definiteive stance on school vouchers (Halstead, 2004). Specifically, the Bush campaign came out in support of vouchers while the Gore campaign remained in staunch opposition (Halstead, 2004).

Caselaw Text

Providing a glimpse into the judicial ideology and rationale behind the majority decision, Justice Rehnquist contended,

> As was true in those cases, the Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, *i. e.,* any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion. The only preference stated anywhere in the program is a preference for low-income families, who receive greater assistance and are given priority for admission at participating schools. (*Zelman v. Simmons-Harris*, 2002)

Specifically adresing the question of Establishment Cluase coercion, the Court held,

> There also is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children. Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools

> does not condemn it as a violation of the Establishment Clause. (*Zelman v. Simmons-Harris*, 2002)

In closing Justice Rehnquist positioned the Court's opinion as a vehicle for ascertainig educational choice. Writing in favor of a generally available benefit, he stated,

> In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. (*Zelman v. Simmons-Harris*, 2002)

The Court's decision was made based on their interpretation of the Pilot Progam granting families the opportunity to exercise "genuine choice" when making educational decisions (*Zelman v. Simmons-Harris*, 2002).

Caselaw Consequences

The Court's decision in Zelman solidified the arguments of proponents of school choice. Effectively, the Court held that "tuition vouchers to religious schools did not violate the Establishment Clause of the United States Constitution" (Halmstead, 2004, p. 148). What the Court did not specify, however, is the extent to which states are required to provide such a program (Halmstead, 2004). Following the *Zellman* decision, parties in multiple states brought forth litigation specific to school vouchers. Challenges were made to state constitutions and petitioners drafted arguments in light of the majority opinion in *Zellman.*

***Locke v. Davey*, 540 U.S. 712 (2004)**

In *Locke*, the Court was tasked with determining if a state can deny a previously awarded scholarship to a student who declares a major in theology. Joshua Davey, respondent, was

awarded a Promise Scholarship through the state of Washington and sought to attend Northwest College (*Locke v. Davey*, 2004). Although Northwestern is non-secular, it is still an allowable institution so long as Davey declares a secular major. Davey intended on pursuing a double major in pastoral ministries and business and was informed that he could not use state scholarship funds when declaring a degree in theology (*Locke v. Davey*, 2004). Writing for the majority, Justice Rehnquist argued, "Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect" (*Locke v. Davey*, 2004).

Authorship and Audience

Justice Rehnquist, further described in *Mueller*, authored the majority opinion in *Locke*.

Caselaw Context

Washington's state funded scholarship outlined allowable use criteria and clearly outlined that eligible students must attend an eligible school in Washington and "a student may not pursue a degree in theology at that institution while receiving the scholarship" (*Locke v. Davey*, 2004). While many cases before *Locke* were specific to Establishment Clause issues, petitioners argued Washington's denial of Davey is a Free Exercise Clause violation (*Locke v. Davey*, 2004). On appeal from the District Court from the Western District, the United States Court of Appeals for the Ninth Circuit "declared Washington's Promise Scholarship Program constitutional (*Locke v. Davey*, 2004).

Caselaw Text

Referencing precedent furthered in *Zelman*, the Court contended, "This case involves that "play in the joints" described above. Under 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).

The Court acknowledged the language within Washington's Constitution was exponentially stronger than that of the Establishment Clause. Embracing Washington's fortification of the Establishment Clause, Justice Rehnquist argued in favor of robust constitutional language devoted to maintaining separation between church and state. In defense of his position he stated,

> Even though the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution, the interest it seeks to further is scarcely novel. In fact, we can think of few areas in which a State's antiestablishment interests come more into play. Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an "established" religion. (*Locke v. Davey*, 2004)

Closing the opinion and defending the position of the Court, Justice Rehnquist argued that states are not required to fund religious instruction through state-sponsored scholarship aid. Justice Rehnquist stated,

> In short, we find neither in the history or text of Article I, § 11, of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus toward religion. Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect. (*Locke v. Davey*, 2004).

The opinion in Locke is uniquely specific to higher education. Justice Rehnquist refrained from signaling the Court's opinion was applicable to K-12 schools.

Caselaw Consequences

As highlighted by Geier (2020), federal caselaw in *Locke* "strengthened the argument that a state's restriction on appropriating public funding to religious organizations may be stricter than federal interpretation" (p. 331). The cases referenced above provide a glimpse into the Supreme Court of the United States' position on school funding from mid 20th century to early 21st century. From *Everson v. Board* (1947) to *Locke v. Davey* (2004) the Court has wavered on the line of strict separation between church and state. The line drawn between what is constitutionally permissible and impermissible is thin and blurred (Jeffries & Ryan, 2001). In a review of each case, it is crucial to remain cognizant of the idea that law is a matter of specific circumstance (Permuth, Mawdsley & Silver, 2015). This theme holds true for the cases of *Trinity* and *Espinoza*, described in greater detail below.

***Trinity Lutheran v. Comer*, 582 U.S.__ (2017).**

Spanning a total of five years, the *Trinity* case began in Missouri in 2012 and was ultimately decided by the Supreme Court of the United States in 2017. The Learning Center, a non-secular pre-school affiliated with Trinity Lutheran Church of Columbia, Inc. applied for the grant program but was denied on the basis of their religious affiliation. Penning the majority opinion, Chief Justice Roberts argued that non-secular entities could not be denied participation in neutral aid programs on the basis of their religious affiliation.

Authorship and Audience

Chief Justice John Roberts served as the author of the majority opinion in *Trinity*. After graduating from Harvard law School, Chief Justice Roberts served as a clerk for federal level judges, Henry Friendly and William Rehnquist (Pomerance, 2018). Following his clerkships, Chief Justice Roberts, while working in the Justice Department, was commissioned by former

Attorney General William French Smith to construct a legislative brief "supporting legislation that would expressly strip the Supreme Court from appellate jurisdiction over abortion, prayer in public schools, bussing" and other topics (Pomerance, 2018, p. 462). While Smith did not move the brief forward, Chief Justice Roberts' work was noted by former president Reagan's administration (Pomerance, 2018). Nominated for Chief Justice of the U.S. Supreme Court in 2005 by George W. Bush (Pomerance, 2019). Once confirmed, Roberts was recognized as the youngest Chief Justice in nearly two centuries (Pomerance, 2019).

Caselaw Context

Controversy arose when Trinity Lutheran Child Learning Center applied for a state playground resurfacing grant offered through Missouri's Department of Natural Resources (DNR). Although Trinity Lutheran's application scored well, ranking fifth among 44 applicants, it was denied in light of Article 1, Section 7 of Missouri's Constitution, which stated, "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion" (Missouri Const. art. I, pt. VII). The aforementioned language is commonly recognized as Missouri's Blaine Amendment.

Caselaw Text

On September 26, 2013 the *Trinity* case began its ascension through the court system (*Trinity Lutheran v. Pauley*, 2013). Ruling in favor of Missouri's DNR, the Federal District Court found,

> Trinity has not cited, and the Court's independent research has not revealed, a case construing the Establishment Clause in the manner urged by Trinity. Accordingly, there is no basis for concluding that Trinity is entitled to relief under the Establishment Clause and this claim must be dismissed. (*Trinity Lutheran v. Pauley*, 2013)

On appeal following dismissal in Missouri's Central Division District Court, the Eighth Circuit Court of Appeals affirmed the lower court's decision (*Trinity Lutheran v. Pauley*, 2015). The Supreme Court of the United States agreed to hear the case and issued a *writ of certiorari* to the United States Court of Appeals for the Eighth Circuit.

In a 7-2 decision favoring Trinity Lutheran, the Court found that excluding organizations with religious identities from secular aid programs strictly because they are religious violates the free exercise clause of the First Amendment. The judgement rendered by the Court of Appeals was reversed and the case was remanded (*Trinity Lutheran v. Comer*, 2017). Writing for the majority, Chief Justice Roberts argued,

> The state has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far. The Department's policy violates the Free Exercise Clause. (*Trinity Lutheran v. Comer*, 2017).

Arguing against discrimination based on religious identity, Justice Roberts closed his argument stating, "the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand" (*Trinity Lutheran v. Comer*, 2017).

While six other justices joined Justice Roberts in the majority opinion, two of the six did not join in footnote three. Footnote three states, "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination" (*Trinity Lutheran v. Comer*, 2017). Justice Gorsuch and Justice Thomas refrained from joining in footnote three and expressed their concern in their concurring opinions. Although they found footnote three to be "entirely correct," they worried

the footnote suggests the Court's ruling should only be applied in issues of child health or safety (*Trinity Lutheran v. Comer*, 2017). Instead, they argued, "the general principles here do not permit discrimination against religious exercise – whether on the playground or anywhere else" (*Trinity Lutheran v. Comer*, 2017).

Two justices, Justice Sotomayor and Justice Ginsburg, refrained from joining the majority opinion. Embedded within their dissent they referenced *Mitchell*, *Zelman*, and *Locke* as precedent and argued for maintaining a strict separation between church and state (*Trinity Lutheran v. Comer*, 2019). Holding the position that the majority opinion was made in error, Justice Sotomayor, the author of the dissent, stated, "This Court has repeatedly warned that funding of exactly this kind — payments from the government to a house of worship — would cross the line drawn by the Establishment Clause" (*Trinity Lutheran v. Comer*, 2017). Justice Sotomayor continued by expressing firm disbelief that allowing Trinity Lutheran to receive public aid would not serve as a religious advancement. She argued, "The Church's playground surface — like a Sunday School room's walls or the sanctuary's pews — are integrated with and integral to its religious mission. The conclusion that the funding the Church seeks would impermissibly advance religion is inescapable" (*Trinity Lutheran v. Comer*, 2017).

Caselaw Consequences

Nearly 72 years later, the Court's decision in *Trinity Lutheran v. Comer* (2017) echoed portions of the *Everson v. Board* (1947) opinion. Undoubtedly, the Trinity ruling has expanded the extent to which religious institutions can receive direct public aid. In a speech given by David Cortman (2017), the attorney representing Trinity Lutheran Church Child Learning Center, he argued "The Court has never held that direct funding to a church or religious organization violates the establishment clause." The Court's decision echoes Cortman's (2017)

sentiment and sheds light on the direction of the judiciary. Discussing the implications of Trinity, Russo and Thro (2017), highlighted that "faith-based institutions cannot be denied aid simply because of their religious characters" (p. 254). Additionally, Russo and Thro (2017) reasoned that "supporters of school choice initiatives, and other forms of aid, can be expected to test the reach of Trinity Lutheran" (p. 255).

Espinoza v. Montana Department of Revenue,* 591 U.S.__ *(2020)

The Montana legislature tasked the Montana Department of Revenue with implementing a "dollar-for-dollar tax credit" contingent on donations made to a Student Scholarship Organization (SSO) (*Espinoza v. Montana Department of Revenue,* 2020). SSOs are but one funding source for "children who attend private schools meeting the definition of Qualified Education Provider (QEP)" *(Espinoza v. Montana Department of Revenue, 2020).* Plaintiffs are identified as parents of students enrolled in religious schools. In a 5-4 decision authored by Chief Justice Roberts, the Court held, "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious" (*Espinoza v. Montana Department of Revenue,* 2020).

Authorship and Audience

Chief Justice Roberts delivered the opinion of the Court.

Caselaw Context

Following the directive of the state, the Montana Department of Revenue enacted the Tax Credit Program. In accordance with Montana's state constitution, the department also felt it necessary to institute Rule 1, which "excluded religiously-affiliated private schools from qualifying as QEPs" (*Espinoza v. Montana Department of Revenue, 2020*).

The Montana Supreme Court addressed the specific question, “Does the Tax Credit Program Violate Article X, Section 6, of the Montana Constitution” (*Espinoza v. Montana Department of Revenue, 2020*). The court found that the Tax Credit Program violates the Establishment Clause and Free Exercise Clause. The plaintiffs appealed to the U.S. Supreme Court and on June 28th, 2019 the Supreme Court of the United States agreed to hear the case and oral argument occurred on June 30th, 2020.

Caselaw Text

Chief Justice Roberts opened the majority opinion reciting the Religion Clauses of the First Amendment and highlighted the “play in the joints” expression used in *Locke* and *Trinity* to metaphorically depict the theoretical space between each Religion Clause. He continued, citing much of the judicial ideology expressed in *Trinity*, specifically advancing the belief that “disqualifying otherwise eligible recipients from a public benefit ‘solely because of their religious character’ imposes ‘a penalty on the free exercise of religion that triggers the most exacting scrutiny’” *Espinoza v. Montana Department of Revenue* (2020).

In addressing the legal challenge at hand, Chief Justice Roberts introduced the issue, stating,

> The question for this Court is whether the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from the scholarship program. For purposes of answering that question, we accept the Montana Supreme Court's interpretation of state law—including its determination that the scholarship program provided impermissible "aid" within the meaning of the Montana Constitution —and we assess whether excluding religious schools and affected families

from that program was consistent with the Federal Constitution. *Espinoza v.* (*Montana Department of Revenue*, 2020)

Seeking distinction from judicial ideology employed in *Locke*, Chief Justice Roberts argued two significant differences. To begin, he noted *Locke*, explained "that Washington had 'merely chosen not to fund a distinct category of instruction': the 'essentially religions endeavor' of training a minister 'to lead a congregation'" (*Espinoza v. Montana Department of Revenue, 2020*). Additionally, he contested that *Locke* "invoked a 'historic and substantial' state interest in not funding the training of clergy" (*Espinoza v. Montana Department of Revenue, 2020*).

In further defense of the position of the Court, Chief Justice Roberts argued,

> Furthermore, we do not see how the no-aid provision promotes religious freedom. As noted, this Court has repeatedly upheld government programs that spend taxpayer funds on equal aid to religious observers and organizations, particularly when the link between government and religion is attenuated by private choices. (*Espinoza v. Montana Department of Revenue, 2020*)

In closing, Chief Justice Roberts argued, "the prohibition before us today burdens not only religious schools but also the families whose children attend or hope to attend them" (*Espinoza v. Montana Department of Revenue, 2020*). Ruling in favor of the plaintiffs, the United States Supreme Court reversed the Montana Supreme Court Decision and remanded it for further consideration.

Caselaw Consequences

Espinoza had the primary intent of advancing accommodationist ideology and maintaining judicial precedent specific to neutral treatment of secular and religious educational institutions eligibility for generally available public aid. In the closing paragraph of the majority

opinion, Chief Justice Roberts scolds the Montana Supreme Court for their rationale and decision in Espinoza, citing neglect of the Supremacy Clause which directs "state courts that they 'must not give effect to state laws that conflict with federal law'" (*Espinoza v. Montana Department of Revenue, 2020*). The closing paragraph reads as a reminder from parent to child of the rules and expectations within a household. Table 4.2 Serves as a summary of the findings of this study.

Waves of Religion and Public Schools Litigation

Interpretation of data revealed the presence of two primary waves of religion and public schools litigation. Distinction between the two waves is specific to the Establishment Clause and the Free Exercise Clause. The first wave, spanning from 1947-2003, embodies two distinct eras. In the first era of Establishment Clause litigation, the Court promoted strict separation between church and state. In the second era, the Court lessened its restrictions and relaxed "its attitude toward the use of state funds for private schools" (McCarthy, 1981). The second identified wave is marked by litigation specific to the Free Exercise Clause. In ruling on issues specific to the Free Exercise Clause, the Court has demonstrated further accommodation for religion and viewed many applications of strict separation as discriminatory.

First Wave

The first identifiable wave is exclusive to litigation citing Establishment Clause violations. In the first era of this wave, petitioners alleged First Amendment's Establishment Clause violations and spanned from 1947-1996. While judicial ideology conveyed in *Everson* is present throughout many of this era's cases, precedent set in *Lemon* proved to have a significant impact on future cases. Specifically, strict separation theory was championed early in this wave and had a significant impact for nearly 50 years. Cases during this era reflected "the notion that

Table 4.2

Summary of Findings

Case	Authorship	Position/Bias	Ideology	Key Element of Opinion	Intended Impact	Potential Consequence
Everson v. Board of Education, 1947	Hugo Black	Protection against establishing religion.	Strict separation of church and state.	Transportation reimbursement is a generally available benefit.	Reimbursement for transportation is constitutionally permissible.	Strict separation lens utilized when interpreting state constitutional provisions.
Lemon v. Kurtzman, 1971	Warren Burger	Protection against establishing religion.	Strict separation of church and state.	Publicly funding parochial schools violates the Establishment Clause.	Three pronged test (*Lemon* test)for Establishment Clause violations.	Strengthening of strict separation principles.
Mueller v. Allen, 1982	William H. Rehnquist	Accommodation of religious institutions.	Reliant on criteria established in *Lemon*.	Public aid directed at students and families enrolled in parochial schools is constitutional.	Education tax credits for families who's child attends a parochial school are constitutional.	Strict separation begins to weaken.

Table 4.2 (Continued)

Case	Authorship	Position/Bias	Ideology	Key Element of Opinion	Intended Impact	Potential Consequence
Aguilar v. Felton, 1985	William Brennan	Protection against establishing religion.	Any aid from the State or Federal government to a religious school creates entanglement.	Public funds may not be used to pay salaries of parochial school teachers.	Dissolve any entanglement between the state and religious schools.	All forms of aid for religious institutions is unconstitutional.
Agostini v. Felton, 1997	Sandra Day O'Connor	Accommodation of religious institutions.	State aid for secular instruction does not advance religion.	Secular aid for religious schools that does not advance religion is constitutional.	Reversal of *Aguilar*.	The Court is more tolerant of parochial schools utilizing public funds for non-religious expenses.
Mitchell v. Helms, 2000	Clarence Thomas	Accommodation of religious institutions.	Principle of neutrality.	Providing secular academic materials for parochial schools does not advance religion.	Publicly funding secular educational materials for parochial schools is constitutional.	Expansion of constitutionally permissible instances in which parochial schools benefit from public aid.
Zelman v. Simmons-Harris, 2002	William H. Rehnquist	Accommodation of religious institutions.	Initiatives that allow families to exercise choice are neutral and do not advance religion.	Voucher programs do not violate the Establishment Clause.	Tuition vouchers do not violate the Establishment Clause.	Further litigation on tuition vouchers as the Court did not specify constitutional limits.

Table 4.2 (Continued)

Case	Authorship	Position/Bias	Ideology	Key Element of Opinion	Intended Impact	Potential Consequence
Locke v. Davey, 2004	William H. Rehnquist	Defined a limit of the Free Exercise Clause.	State provisions specific to publicly funding religious institutions may be stronger than federal law.	Scholarships intended to fund secular instruction are not required to fund secular instruction.	Protection of state antiestablishment legislation that is stricter than federal law.	Defined limits of the Free Exercise Clause.
Trinity Lutheran v. Comer, 2017	John G. Roberts	Accommodation of religious institutions.	Strict separation is discriminatory in effect.	Exclusion of churches from generally available aid programs is discriminatory.	Churches may not be excluded from public programs based on their religious affiliation.	Strict separation efforts are discriminatory.
Espinoza v. Montana, 2020	John G. Roberts	Accommodation of religious institutions.	Strict separation is discriminatory in effect.	Religious institutions may not be excluded from generally available aid programs.	Increase accommodation of religion across all generally available programs.	Strict separation efforts are discriminatory; increased accommodation for religious schools.

Court's job was to protect vulnerable minorities from tyrannical majorities" (Epstein & Posner, 2021, p.4). Although *Lemon* provided the Court with a framework for interpreting Establishing Clause cases, its subjective nature did not account for variances in judicial ideology (Flowers, 2005).

Justice Black's opinion in *Everson* encapsulates the judicial ideology relied upon for the Court's acceptance of strict separation theory. In defining the Establishment Clause, Justice Black contended it means at least this,

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.* *Everson v. Board of Education* (1947)

However, as Andrew Beerworth (2004) argued, strict separation "had already begun to chafe under the yoke of twentieth century social reality" (p. 341).

The dismantling of strict separation is well documented in *Mueller v. Allen* (1982). Judicial ideology relied upon in *Everson* began to fade as the Court signaled its willingness to accept government funds going to religious schools (Flowers, 2005). Shifts in judicial ideology established in *Mueller* championed the belief that government aid flowing "directly to the

student rather than directly or indirectly to the school" is free from Establishment Clause violation (Flowers, 2005, p. 87).

Additionally, the *Mueller* decision also marks the re-emergence of accommodationist neutrality as an ideological lens adopted by the judiciary (Massaro, 2005). As Halstead (2004) highlighted, strict separation relied upon in *Everson* began to weaken with *Mueller*. It is argued the Rehnquist Court defended an accommodationist ideology as it broke ties with separationist precedent set decades earlier.

Beginning with *Agostini* in 1997, judicial variances presented themselves in the second era of the first wave. Although litigation remained specific to the arena of Establishment Clause violations, judicial ideology went through a significant transformation. The second portion of the wave signified a deviation from strict separation theory as the Court took a more tolerant position on publicly funding public schools. The Court responded favorably for non-secular schools receiving public funds to off-set the non-religious aspects of schooling. In comparison to the strict separation wave, this wave of allowable funding for religious schools spanned from 1997-2000. The latter portion of this wave is most notably marked by the shift in judicial ideology from *Aguilar* to *Agostini*. The transition between the cases is further witnessed by the Court's empathic opinions in favor of publicly funding various aspects of parochial schools.

Second Wave

The second and final wave identified in this study is specific to Free Exercise Clause litigation and is delineated by *Locke v. Davey* (2004). Although *Locke* was not decided for *Davey*, Duncan (2006) argued the Court previously recognized "generally applicable and non-discriminatory scholarships and vouchers do not violate the Establishment Clause" (p. 704).

The deviation from Establishment Clause litigation was coupled with a tremendous shift in judicial ideology. Accordingly, utilization of the Establishment Clause's litmus test, the *Lemon* test, significantly diminished as well. Most recently with *Trinity* and *Espinoza*, the Court found exclusion of parochial schools from public programs is, in effect, discriminatory. Discrimination against religion is a central theme in both of the aforementioned cases and frames the ideological underpinnings of the Court's decisions.

Although analysis of the ten aforementioned cases led to the identification of two distinct waves, the Court has viewed tax deduction and tax credit programs as constitutional, regardless of litigation being specific to the Establishment Clause or Free Exercise Clause (*Mueller v. Allen*, 1982; *Espinoza v. Montana*, 2020).

Summary

The cases reviewed in this study revealed a dichotomous transition in litigation from the Establishment Clause to the Free Exercise Clause. Additionally, from *Everson* to *Espinoza*, judicial ideology has undergone significant transformations. Shifts in the interpretation of the Religion Clauses are representative of the Court's deviation from strict separation and adoption of accommodationism. Figure 4.1 depicts a comparison of shifts in state Blaine Amendment language and judicial ideology.

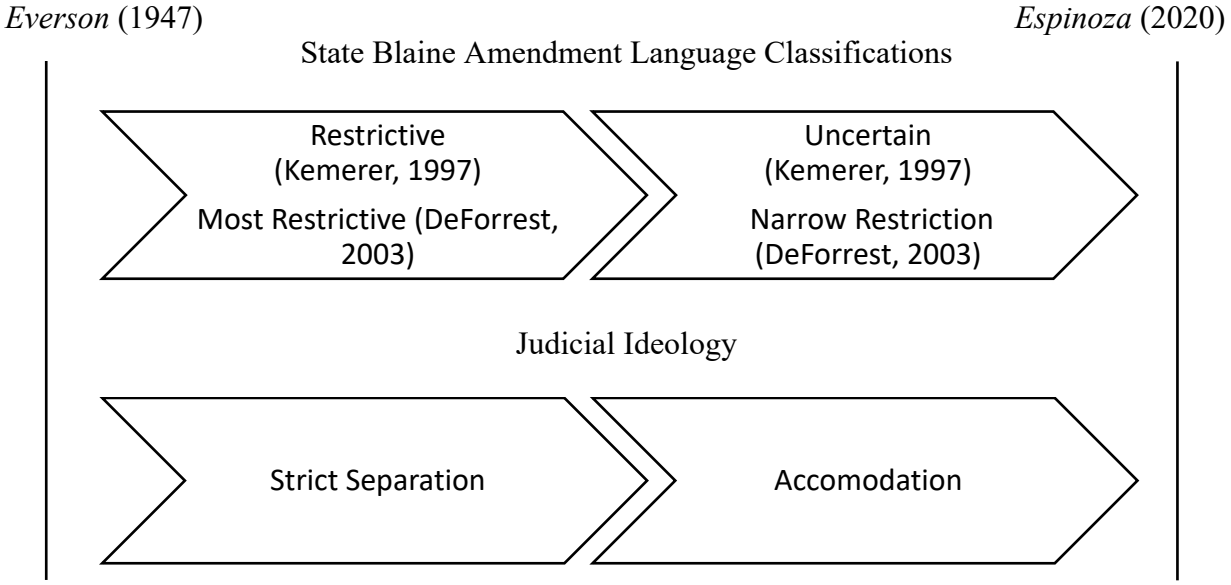

Figure 4.1

Comparison of Shifts in State Blaine Amendment Language and Judicial Ideology

CHAPTER FIVE:

SUMMARY AND DISCUSSION

This research reviewed multiple U.S. Supreme Court cases over a period of 73 years. Constitutional issues were specific to the Religion Clauses embedded within the First Amendment and addressed various school funding questions (e.g., transportation reimbursement, teacher salaries, curriculum resources, tax credits, etc.). Judicial ideology specific to publicly funding parochial schools has shifted over time and this study revealed the Court has grown more tolerant of private, non-secular educational institutions receiving public funds for the neutral aspects of education. In the early cases reviewed in this study, strict separation was not widely viewed as an attack on religion. Judicial ideology used in *Everson* echoed throughout subsequent Establishment Clauses cases. However, as membership shifts occurred on the Court, judicial ideology of the majority moved towards accomodationism. This chapter explains contributing factors behind the ideological shift as well as potential consequences for eliminating separationist language from state constitutions.

Socio-political Influences

Analysis of each case led to the unveiling of socio-political factors that influence judicial ideology. While judicial precedent serves as an influencing factor, research on judicial ideology suggests factors beyond established caselaw effect the decision making of the Court (Epstein & Posner, 2021). Justices lived experiences and belief systems play a significant role in developing

the lens from which they view constitutional questions. Outlined below are the socio-political influences of administrative power, religious beliefs, and discrimination against religion.

Administrative Power

Arguably, the most significant political factor is the nominating power of the President of the United States while supported by the Senate. Former President Nixon confirmed four justices during his five and a half year tenure as president. However, once confirmed, there are instances in which the ideology of a justice deviates from predictions made by administrative and legislative bodies. Although Nixon nominated Warren Burger as Chief Justice in an attempt to reverse precedent, under Justice Burger's leadership, the court "left intact, and even consolidated, much Warren Court jurisprudence" (Tobias, 1996, p. 505).

Interestingly, former President Nixon is not the only president to have nominated multiple Supreme Court justices during his presidency. Both former President Reagan and former President Trump were also afforded the opportunity to nominate multiple justices during the respective terms. Beginning in August of 1981, former President Reagan nominated Sandra Day O'Connor to the Supreme Court. In the proceeding years, Reagan nominated, and congress confirmed, William Rehnquist, Antonin Scalia, and Anthony Kennedy. Similarly, during his presidency Trump nominated, and the congress confirmed, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. These instances in Supreme Court nominating history serve as critical factors influencing the ideological principles of the Court.

Religious Beliefs

Once appointed to the Court, religious belief systems also influence judicial ideology, and their effect is evident in Court opinions. Devout, conservative justices have a higher probability of voting in favor of religion (Epstein & Posner, 2021). Further, not only is there a

documented increase in pro-religion decisions, but the Court has also specifically seen an increase in pro-mainstream Christian decisions (Epstein & Posner, 2021). Currently, six of the nine U.S. Supreme Court justices identify as Catholic, five of which represent the conservative majority (Epstein & Posner, 2021). While theological beliefs of the Court have shifted over time, deeply held, monotheistic viewpoints encapsulate the majority. Although data indicated that religious beliefs heavily influence the ideology of Supreme Court, Epstein and Posner (2021) shared that less than 50% of Americans view religion as an important aspect of their life. In the early years of our nation, religious beliefs were accepted as a primary factor influencing many government systems. However, if society continues to deviate from once commonly held monotheistic beliefs, the religious value systems of the Supreme Court majority may work against local, state, and federal progressive reform efforts.

Discrimination Against Religion

Beginning with Trinity and continuing with Espinoza, the Court feverishly addressed religious discrimination. Much of their adamancy can be attributed to the shift in litigation from the Establishment Clause to the Free Exercise Clause. As stated by Chief Justice Roberts in *Trinity*, "The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church — solely because it is a church — to compete with secular organizations for a grant" (*Trinity Lutheran v. Comer*, 2017). Welcoming accommodationist ideology, the Court may elect to hear more cases involving alleged Free Exercise Clause violations. Given the language used by Chief Justice Roberts in both *Trinity* and *Espinoza*, it is quite clear the Court is poised to dismantle "any generally available benefit" eligibility language that expressly discriminates between public and private educational institutions (*Espinoza v. Montana Department of Revenue*, 2020).

Potential Consequences

State Blaine Amendments have historically served as a robust barrier between public and religious institutions. This barrier has safe-guarded public schools by funneling publicly acquired funds into public schools and ensuring that private, parochial schools do not benefit from government funds. However, recent decisions from the U.S. Supreme Court have lessened the integrity of strict separation language. The cases of *Trinity* and *Espinoza* further denote the Courts disassociation with strict separation. Given the potential longevity of the Court's current composition, the judicial ideologies established and promoted will likely tolerate greater entanglement between religious schools and public aid. Trends in caselaw suggest the Court will favor individuals over the state when ruling on Establishment Clause or Free Exercise Clause cases. This is especially evident in the Court's recent focus on combating religious discrimination specific to the denial of religious organizations participation in generally available programs (*Trinity Lutheran v. Comer*, 2017; *Espinoza v. Montana*, 2020). As it relates to state Blaine Amendments, the Court's embracement of accommodationist ideology signals strict separation amendments may soon crumble.

Funding Inequities

The elimination of Blaine Amendments may widen the already pervasive education funding gaps. The Century Foundation (2020) estimates that U.S. K-12 public schools are underfunded by $150 million. In light of this, extending public funding eligibility opportunities to parochial schools may be detrimental to public school funding in the Unites States. The U.S. Department of Education ranks Mississippi, Oklahoma, Arizona, Idaho, and Utah as the states allocating the least amount of money per pupil (Hansen, 2020). Accordingly, each of the states have adopted Blaine language into their state constitutions. Providing public funding for

religiously affiliated schools in these states could potentially per-pupil funding and diminish the educational experience for students who attend public schools.

Further, the elimination of constitutional provisions prohibiting direct or indirect funding of religious institutions may broaden inequities in educational funding. In analysis of state education funding with consideration of poverty levels, Morgan and Amerikaner (2018) concluded that North Dakota, Florida, South Carolina, Montana, and Michigan spend the least amount of money per pupil between districts serving the most and fewest students in poverty. In review of each state constitution, all five states have constitutional language that can be classified as a Blaine Amendment. Removal of Blaine language in these states will increase the number of educational institutions eligible for public aid and may further decrease per-pupil expenditures at the state level. Consequently, spreading an already thin state education budget across a greater number of schools may negatively affect the educational outcomes of students living in poverty who attended K-12 public schools.

To continue, poverty is not the only factor influencing the divide between public and religions school enrollment. Racial compositions of religious schools have historically been majority White. The National Center for Educational Statistics (NCES) (2019) reported that 66% of students attending Catholic schools were White, while only 8% were Black and 16% were Hispanic. The breakdown of students attending other religious schools was quite similar; 71% White, 10% Black and, 8% Hispanic (NCES, 2019). Considering each of the aforementioned data points, it is reasonable to suggest that removal of strict separation language from state constitutions may increase education access inequities between races. Further still, economic inequities, compounded by racial inequities indicate that publicly funding religious schools will negatively affect public schools serving a more diverse population.

Permissible Language

With Blaine Amendment language differing significantly from state to state, it is unlikely the Court would hold all separation language unconstitutional. Various classifications of Blaine Amendments highlight variances in what each state allows and disallows (Kemerer, 1998; DeFrorrest, 2003). With a shift towards accommodation, the Court may find state separationist language, classified by Kemerer (1998) as restrictive, to be in violation of the Free Exercise Clause. Strict language in California's state constitution, for example, may be deemed unconstitutional. Barring any form of religious aid, California's Blaine Amendment states,

> No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State. California Const. Art. IX, § 8

Prohibition of indirect aid may be an issue that courts address on a broader basis. Diluting state Blaine Amendments to only prohibiting direct aid that establishes religion may be an initial step of the Court. An example of this shift can be seen in Utah's state Blaine language which only prohibits direct aid. Utah's state constitution states that, "Neither the state of Utah nor its political subdivisions may make any appropriation for the direct support of any school or educational institution controlled by any religious organization" (Utah Const. Art. X, § 9).

Religious Preference

Additionally, as identified by Epstein and Posner (2021), the Roberts court has the highest percentage of pro-religion outcomes (81.3%). Data analysis revealed Court has firmly ruled in favor of religious institutions in instances where indirect aid benefits the student and

does not advance religious beliefs. This statistic may signal religious institutions and their advocates to bring forth litigation that seeks to expand the use of public funds in private schools by dismantling state Blaine Amendments.

Dilution of Religion Clauses

McCarthy (1981) articulated the danger and potential "erosion of constitutional freedoms" as the Supreme Court grew accepting of governmental accommodation to religion (p. 394). Much of McCarthy's (1981) foreshadowing of entanglement has been realized in in 21st century caselaw. Dilution of the strict separation once championed by the Court may fracture the structural integrity of the Religion Clauses of the First Amendment. Specifically, U.S. Supreme Court decisions that are sympathetic to the needs of religious schools and argue for increased accommodation may diminish Establishment Clause violation criteria.

Suggestions for Future Research

Results of this study highlighted four prominent areas worthy of future research. Of significance, Louisiana is the only state to date that has repealed its Blaine Amendment (Katz, 2011). Additionally, while this work identified factors influencing judicial ideology, it also highlighted a desire to control the direction of the Court. The sculpting of the Court is heavily influenced by the executive, legislative and judicial branches of government. Although majority opinions are recognized as the law of the land, there are many instances in which the ideology of the dissent is adopted by a majority in future opinions (*West Virginia v. Barnette*, 1943; *Aguilar v. Felton*, 1985). This work covered religious education funding cases spanning the leadership of Chief Justices Vinson, Warren, Burger, Rehnquist, and Roberts. Shifts in the Roberts Court have been unprecedented and warrant further review.

Louisiana's Blaine Amendment – Repealed

To date, Louisiana stands as the only state to have repealed its state Blaine Amendment. In 1973, the Louisiana constitution contained language barring publicly funding religious schools (Katz, 2011). However, after a convening of the state constitutional convention, Louisiana proceeded with removing its Blaine language and presented voters with two versions of the education act, one with separation language and one without (Katz, 2011). Ultimately, a majority of voters selected the education act without Blaine language (Katz, 2011). Specifically, what events led to the repeal of Louisiana's Blaine Amendment, and why haven't other states followed suit in the ensuing 48 years?

Sculpting of the Court

To begin, there is a need for further research on the executive, legislative, and judicial sculpting of the Supreme Court of the United States. In addition to the administrative nominating powers described above, the legislative and judicial branches play an influential role in seating a potential justice. Allegiances between the president and their respective party quite frequently influence the confirmation process. While the president controls the nomination, the United States Senate is charged with confirming the nomination. Since Everson, the majority of U.S. Supreme Court justices have been nominated by conservative presidents.

Additionally, spanning the caselaw explored in this work there have been multiple Supreme Court nominees rejected by congress. These rejections raise questions around influencing factors considered during the nominating process. Acknowledging the influence an individual has over the ideology of the Court, what efforts are made to protect or dismantle the ideology of the majority?

Judicial Dissent

Further still, this research highlighted a need to conduct a review of the dissenting opinions in the cases explained in this work. While this work is primarily focused on majority opinions and their authorship, there is much to be gleaned from dissenting opinions written in opposition to the majority. Specifically, additional research on tracking dissenting ideology and highlighting instances in which a minority opinion is embraced by the majority. As it pertains to this work, an example of this shift can be found in the transition from *Aguilar v. Felton* (1985) to *Agostini v. Felton* (1997). Analyzing the underpinnings of dissenting opinions may also provide a deeper understanding of the ideological reference points that guide the majority.

5-4 Opinions

A bench spread of 5-4 was evidenced in six of the ten cases analyzed in this study. Further research is needed to determine the factors contributing to Court opinions that consist of a 5-4 majority. While 5-4 decisions are not uncommon, they signify a polarizing divide among the justices. The demand for further research in this area reiterates the need for future exploration of dissenting opinions. In addition to dissents, analysis of 5-4 opinions should also evaluate the ideological divergence between the majority and any concurring opinions.

The Roberts Court

This work suggests future research on the era of the Roberts court would also be beneficial. As mentioned above, in comparison to previous Courts, the Roberts Court has frequently ruled in favor religion (Epstein & Posner, 2021). Analysis of the Roberts Court will become increasingly more interesting as the administrative power of the Biden administration takes root. Differences between administrative priorities of the president and ideology of the Court may lead to an increase in executive orders.

Positionality Revisited and Reflections

As an advocate for public education, I am sensitive to the potentially damaging consequences highlighted by this work. In analysis of cases decided in favor of the petitioner, the authors of the majority opinions frequently concentrated on making child-centered decisions. It has become increasingly clear that the best interest of an individual may very well be at odds with the needs of an organization. However, I maintain that a barrier between public funds and parochial schools will wholly will greatly benefit the over 50 million students enrolled in United States public schools (NCES, 2020). Further, the journey of conducting this research has led me to reflect deeply on the contrast between the intent of Blaine Amendments upon inception and their present-day utilization. Specifically, should a proposed federal amendment, fraught with bigotry at birth, remain fixed in state constitutions of the 21st century? To address this concern adequately, it is necessary to recall that not all Blaine Amendments were implemented in single instance with the intent of erecting a barrier between public funds and Catholic schools. Anti-Catholic sentiments are not representative of all ideologies contributing to the development of state Blaine language. As a researcher, this work served as a reminder that the most boisterous narrative rarely represents a broad range of viewpoints.

Conclusion

As the pendulum of church and state judicial ideology continues to swing, the Court must be mindful that it does not cross the equilibrium delineating church and state. Recent U.S. Supreme Court decisions indicate a momentous shift towards accommodating religious institutions. In recent years, this shift has been far from gradual and indicates that state amendments barring religious institutions from receiving public aid, Blaine Amendments, may be dismantled by the Court. The Court's rejection of express discrimination in an attempt to

maintain strict separation signals endorsement of expanding the constitutional permissiveness of publicly funding religious schools. In her dissenting opinion in Trinity, Justice Sotomayor cautions against the deviation from strict separation by highlighting the significance of the decisions made by America's founders.

> The course of this history shows that those who lived under the laws and practices that formed religious establishments made a considered decision that civil government should not fund ministers and their houses of worship. To us, their debates may seem abstract and this history remote. That is only because we live in a society that has long benefited from decisions made in response to these now centuries-old arguments, a society that those not so fortunate fought hard to build. (*Trinity Lutheran v. Comer*, 2017)

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APPENDICES

Appendix A: State Blaine Amendment Language

State	Constitutional language	Citation
Alabama	"No appropriation shall be made to any charitable or educational institution not under the absolute control of the state, other than normal schools established by law for the professional training of teachers for the public schools of the state, except by a vote of two-thirds of all the members elected to each house."	Alabama Const. Art. IV, § 73
	"No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school."	Alabama Const. Art. XIV, § 263
Alaska	"The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution."	Alaska Const. Art. VII, § 1
Arizona	"No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment."	Arizona Const. Art. II, § 12

Figure 1A
State Blaine Amendment Language

State	Constitutional language	Citation
California	"No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State."	California Const. Art. IX, § 8
	"Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI."	California Const. Art. XVI, § 5
Colorado	"No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association."	Colorado Const. Art. V, § 34
	"Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose."	Colorado Const. Art. IX, § 7

Figure 1A (Continued): State Blaine Amendment Language

State	Constitutional language	Citation
Delaware	"No portion of any fund now existing, or which may hereafter be appropriated, or raised by tax, for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school; provided, that all real or personal property used for school purposes, where the tuition is free, shall be exempt from taxation and assessment for public purposes."	Delaware Const. Art X, § 3
Florida	"No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution."	Florida Const. Art. I, § 3
Georgia	"No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution."	Georgia Const. Art. I, § II, ¶ VII
Hawaii	"The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control … nor shall public funds be appropriated for the support or benefit of any sectarian or nonsectarian private educational institution, except that proceeds of special purpose revenue bonds authorized or issued under section 12 of Article VII may be appropriated to finance or assist: 1. Not-for-profit corporations that provide early childhood education and care facilities serving the general public; and 2. Not-for-profit private non-sectarian and sectarian elementary schools, secondary schools, colleges and universities."	Hawaii Const. Art. X, § 1

Figure 1A (Continued): State Blaine Amendment Language

State	Constitutional language	Citation
Idaho	"Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose; provided, however, that a health facilities authority, as specifically authorized and empowered by law, may finance or refinance any private, not for profit, health facilities owned or operated by any church or sectarian religious society, through loans, leases, or other transactions."	Idaho Const. Art. IX, § 5
Illinois	"Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose."	Illinois Const. Art. X, § 3
Indiana	"No money shall be drawn from the treasury, for the benefit of any religious or theological institution."	Indiana Const. Art. 1, § 6
Kansas	"No religious sect or sects shall control any part of the public educational funds."	Kansas Const. Art. 6, § 6(c)
Kentucky	"No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school."	Kentucky Const. § 189

Figure 1A (Continued): State Blaine Amendment Language

State	Constitutional language	Citation
Maryland	"The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance." Maryland Const. Art. VIII, § 1. "The School Fund of the State shall be kept inviolate, and appropriated only to the purposes of Education."	Maryland Const. Art. VIII, § 3
Massachusetts	No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both … and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society. Nothing herein contained shall be construed to prevent the Commonwealth from making grants-in-aid to private higher educational institution or to students or parents or guardians of students attending such institutions	Massachusetts Const. Amend. Art. XVIII, § 2
Michigan	No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose.	Michigan Const. Art. I, § 4
	No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other non-public, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students ….	Michigan Const. Art. VIII, § 2

Figure 1A (Continued): State Blaine Amendment Language

State	Constitutional language	Citation
Minnesota	[N]or shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.	Minnesota Const. Art. I, § 16
	In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.	Minnesota Const. Art. XIII, § 2
Mississippi	No religious or other sect or sects shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropriation is not conducted as a free school.	Mississippi Const. Art. VIII, § 208
Missouri	That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.	Missouri Const. Art. I, § 7
	Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.	Missouri Const. Art. IX, § 8

Figure 1A (Continued): State Blaine Amendment Language

State	Constitutional language	Citation
Montana	The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination. (2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.	Montana Const. Art. X, § 6
Nebraska	Notwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof; Provided, that the Legislature may provide that the state or any political subdivision thereof may contract with institutions not wholly owned or controlled by the state or any political subdivision to provide for educational or other services for the benefit of children under the age of twenty-one years who are handicapped, as that term is from time to time defined by the Legislature, if such services are nonsectarian in nature	Nebraska Const. Art. VII, § 11
Nevada	No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose [sic].	Nevada Const. Art. 11, § 10
New Hampshire	Provided, nevertheless, that no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination.	New Hampshire Const. Pt. SECOND, Art. 83

Figure 1A (Continued): State Blaine Amendment Language

State	Constitutional language	Citation
New Mexico	[N]o part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.	New Mexico Const. Art. XII, § 3
	Provision shall be made for the establishment and maintenance of a system of public schools which shall be open to all the children of the state and free from sectarian control, and said schools shall always be conducted in English.	New Mexico Const. Art. XXI, § 4
New York	Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.	New York Const. Art XI, § 3
North Dakota	A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to ensure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control. This legislative requirement shall be irrevocable without the consent of the United States and the people of North Dakota.	North Dakota Const. Art VIII, § 1
	The legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education.	North Dakota Const. Art VIII, § 2

Figure 1A (Continued): State Blaine Amendment Language

State	Constitutional language	Citation
Oklahoma	No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.	Oklahoma Const. Art. II, § 5
Oregon	No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly.	Oregon Const. Art. I, § 5
Pennsylvania	No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.	Pennsylvania Const. Art. 3, § 15
South Carolina	No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution.	South Carolina Const. Ann. Art. XI, § 4
South Dakota	No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution." South Dakota Const. Art. VI, § 3. "No appropriation of lands, money or other property or credits to aid any sectarian school shall ever be made by the state, or any county or municipality within the state, nor shall the state or any county or municipality within the state accept any grant, conveyance, gift or bequest of lands, money or other property to be used for sectarian purposes, and no sectarian instruction shall be allowed in any school or institution aided or supported by the state.	South Dakota Const. Art. VIII, § 16
Texas	No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes." Texas Const. Art. I, § 7. "The permanent school fund and the available school fund may not be appropriated to or used for the support of any sectarian school.	Texas Const. Art. VII, § 5(c)

Figure 1A (Continued): State Blaine Amendment Language

State	Constitutional language	Citation
Utah	No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.	Utah Const. Art. I, § 4.
	Neither the state of Utah nor its political subdivisions may make any appropriation for the direct support of any school or educational institution controlled by any religious organization	Utah Const. Art. X, § 9
Vermont	And that no person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience ….	Vermont Const. Ch. I, Art. 3
Virginia	The General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society ….	Virginia Const. Art. IV, § 16
Washington	No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment ….	Washington Const. Art. I, § 11
	All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.	Washington Const. Art. IX, § 4
Wisconsin	[N]or shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.	Wisconsin Const. Art. I, § 18
Wyoming	No money of the state shall ever be given or appropriated to any sectarian or religious society or institution.	Wyoming Const. Art. 1, § 19
	No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.	Wyoming Const. Art. 3, § 36

Figure 1A (Continued): State Blaine Amendment Language