Deference or Defiance: State Court Treatment of Blaine Amendments

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Deference or Defiance: State Court Treatment of Blaine Amendments

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by

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INTRODUCTION

In June 2011, James LaRue joined a lawsuit challenging the constitutionality of a school voucher program in Douglas County, Colorado. The lawsuit, filed in state court, came nearly a decade after the United States Supreme Court, in Zelman v. Simmons-Harris, upheld a similar voucher program in Ohio. LaRue explained, “The Supreme Court…made decisions that were based on federal law.” The purpose of the Douglas County lawsuit, then, was “not to redo the Supreme Court case but to say that this is not okay in Colorado” (Lovell 2012).

In LaRue v. Colorado Board of Education No. 11CV4424 (2011), LaRue and his fellow plaintiffs claimed that the Douglas County voucher program unconstitutionally diverted public funds to private, religious schools. Specifically, the plaintiffs argued that the voucher program violated several articles of the Colorado constitution, namely a provision that prohibits state aid to religious schools (Complaint, LaRue v. Colorado Board of Education 2011, 14). While the United States Supreme Court held in Zelman that voucher programs do not offend the federal Establishment Clause, it did not determine whether such programs were constitutional under individual state charters. In August, the Colorado District Court issued a preliminary injunction, preventing the Douglas County School District from implementing the voucher program. The court found the program incompatible with the state constitution’s religion and education clauses (Order, LaRue v. Colorado Board of Education 2011, 24, 25). Thus, even though the United States Supreme court ruled that such voucher programs were consistent with the federal Constitution, here the Colorado District Court found that the Colorado state constitution’s religion and education clauses provided greater protection. In that way, LaRue demonstrates

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1 This information and some phrasing was borrowed from an article written by the author, which was published on the website of the Pulitzer Center on Crisis Reporting. See Ani-Rae Lovell, February 25, 2012, “Full Court Press: Pursuing Rights Protection in State Court,” Pulitzer Center on Crisis Reporting, http://pulitzercenter.org/reporting/constitution-supreme-court-state-rights-school-vouchers.
state courts’ ability to find a higher wall of separation between church and state through their own state constitutional protections than the United States Supreme Court recognizes through the federal Constitution.

In this paper, I examine how often state courts take advantage of the opportunity, as Colorado did in *LaRue*, to fill the void created by the Supreme Court’s Establishment Clause jurisprudence. In particular, I analyze state high court decisions in the area of state aid to religious schools in the form of transportation to religious schools, textbooks loaned to religious school students, state funded assistance to disabled students at religious schools, and tuition vouchers spent at religious schools. Because the history of religious establishment in many states has been framed by debates on constitutional clauses known as “Blaine Amendments,” I pay particular attention to the use of state Blaine Amendments in providing a higher wall of separation between church and state.

This paper proceeds as follows: In the first section of this paper, I describe the way in which state courts can provide greater protection of rights than the United States Supreme Court. Second, I provide an overview of the research conducted on state court protection of civil liberties. Third, I summarize the United States Supreme Court’s Establishment Clause jurisprudence from the point of incorporation to present day. In a fourth section, I summarize the United States Supreme Court’s holding and reasoning in four pertinent high court decisions that correspond to types of state aid to religious schools considered here (transportation, textbooks, aid to disabled students, and tuition vouchers). Fifth, I describe the history and content of the federal Blaine Amendment and the so-called “Baby Blaines”—constitutional clauses that exist in many states and specifically prohibit state funds from flowing to religious schools or institutions. Sixth, I discuss the theoretical grounding for the analysis and the hypotheses generated from that
theory, as well as the methodology used to locate and code state high court cases in the area of state aid to religious schools. I conclude with a discussion of my analysis, where I demonstrate support for the notion that when the United States Supreme Court lowers the wall separating church and state, state courts will provide greater protection of non-establishment principles through their own state constitutions.

**HOW DOES IT WORK?**

In the American judicial system, the decisions rendered by the Supreme Court establish the federal floor of rights protection (Green 2006, 121). State courts, using their own state constitutions, can provide greater protection of individual liberties than the federal courts. When the Supreme Court does not find legislation to be in violation of the federal Constitution, it presents an opportunity for state courts to provide greater protection. As Williams (2009, 115) writes, “Decisions ruling against asserted federal constitutional rights…do not end the matter but rather leave the question…to the 50 states for their own decisions based on…their respective state constitutions.” State court protection of civil liberties above the federal floor is known as the New Judicial Federalism (Williams 2009, 113, 114). United States Supreme Court Justice William Brennan implored state courts to engage in such civil liberties protection in the absence of Supreme Court action. He wrote, “Rediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions…is probably the most important development in constitutional jurisprudence in our times” (Williams 2009, 113).

When it addresses Establishment Clause claims, the Supreme Court determines the level of separation between church and state required by the federal Constitution. When the Court holds that a program violates the Establishment Clause, it typically strengthens the wall of

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2 While this state court action is often referred to as the New Judicial Federalism in the literature, the protection of civil liberties beyond the level established by the United States Supreme Court will, at times, be referred to as simply “judicial federalism” in this paper.
separation between church and state. Alternatively, a Supreme Court decision that does not find a federal constitutional violation is often understood as lowering the wall of separation, leaving open the opportunity for state courts to provide for greater separation between church and state through their own state constitutions. The latter describes the Supreme Court’s decisions in *Everson v. Board of Education* 330 U.S. 1 (1947), *Board of Education v. Allen* 392 U.S. 236 (1968), *Zobrest v. Catalina Foothills School District* 509 U.S. 1 (1993), and *Zelman v. Simmons-Harris* 536 U.S. 639 (2002).

Religious liberties, which include limits on government action establishing religion as well as prohibiting the free exercise thereof, provide a unique dilemma for the courts. In protecting non-establishment principles the government might run afoul of the federal Constitution’s Free Exercise requirement. The Court’s opinion in *Everson* (1947) describes the tension between the two Religion Clauses stating:

“New Jersey cannot consistently with the ‘establishment of religion’ clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude…members of any…faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation” (*Everson v. Board of Education* 1947, 512).

Harwood (2006, 321) also emphasizes the “competing value[s]” of the Establishment Clause and the Free Exercise Clause. Complete non-establishment infringes on religious exercise, and complete free exercise impedes the separation between church and state.

Navigating the ground between the two religion clauses is a delicate balance for courts, particularly for state courts that consider providing greater protection of non-establishment principles. Indeed, in cases concerning state aid to religious schools, some may understand
greater separation between church and state to provide less protection of religious liberties because that separation can result in fewer opportunities through which individuals can exercise their religious beliefs. When courts strike down a tuition voucher program, for instance, parents cannot spend vouchers at religious schools, and some individuals consider receiving an education at a religious institution to be a protected aspect of exercising their religious beliefs.³

Here, I analyze how states pursue this delicate balance and whether they have accepted Justice Brennan’s challenge to protect individual liberties. In the pages that follow, I examine the extent to which state courts use their state constitutions to uphold or strike down transportation programs following the Supreme Court’s accommodationist rulings in *Everson* (1947), *Allen* (1968), *Zobrest* (1993), and *Zelman* (2002). In doing so, this paper considers whether state courts use their unique religious liberties clauses to provide greater protection of religious liberties in the shadow of federal precedent (Williams 2005, 1500).

**Literature Review**

In a seminal 1977 *Harvard Law Review* article, Justice Brennan implored state courts to act independently of the United States Supreme Court and recognize that their “state constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law” (Brennan 1977, 491). Brennan’s plea came as the Supreme Court’s protection of individual rights began to wane and left him in a minority on the Court (Shaman 2008, XIV-XVII). Brennan is among other Supreme Court Justices and state court judges who have encouraged independent interpretation

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³ Given this tension between non-establishment and free exercise principles, I recognize the imprecision in describing greater separation of church and state as “greater protection of religious liberties.” As discussed above, I understand that the protection of non-establishment principles can approach interference with free exercise principles. Nonetheless, I, at times, use the phrase “greater protection” in this paper because it is the language used in the literature, and while inexact in capturing the complexities of religious liberties protection, it describes the action taken by a court.
of state constitutions (Abrahamson 1985, 1142, 1148; Williams 2009, 120). Research investigating the extent to which state courts have acted upon that encouragement is limited. The extant research mainly examines the application of judicial federalism in criminal law, lacks a systematic and empirical focus, or is largely time-bound.

Research suggests that for a number of reasons state courts’ use of state constitutions to resolve civil rights claims is modest. Analyses of state court criminal law decisions indicate that state constitutions are less often grounds for civil liberties rulings than the federal analog. In attempts to address the question of state court use of their constitutions for civil liberties decisions, research has predominantly focused on criminal law, largely due to its prevalence in the state court system. Additionally, the studies gather data from restricted periods of time in the 1980s and 1990s (Emmert and Traut 1992, Esler 1994, Fino 1987). However, this focus on the rights of the criminally accused sheds little light on how state courts react in protecting other individual liberties.

Tarr (1988, 1989) provides some anecdotal evidence on state court protection of religious liberties using their state constitutions. Tarr describes several examples of state court action addressing transportation to, and textbooks for, religious schools and religious practices in public schools and public places. However, he concludes that he is uncertain “whether state courts will seize the opportunity available to them to pursue an independent course” (Tarr 1988). Although Tarr’s research provides some initial observations on state court religious liberties decisions, he does not systematically analyze all relevant state high court decisions, nor does he consider the specific constitutional grounds for state courts’ religious liberties decisions.

Friedelbaum (2000) examines the use of judicial federalism by analyzing a sample of state court free exercise cases. He finds modest and inconsistent use of state constitutions as
independent state grounds for free exercise decisions. Friedelbaum concludes that state free exercise claims are most successful in providing rights protection when coupled with other state constitutional claims (Friedelbaum 2000, 1097). This research presents a clarifying but ultimately inconclusive analysis of the prevalence of judicial federalism in state courts’ free exercise jurisprudence.

Some of the extant research compares state courts’ protection of civil liberties using their own state constitutions rather than the federal Constitution (Cauthen 2000, Davis and Banks 1987, Latzer 1991). Latzer (1991, 190) finds that adoption of federal doctrine often “outpaces [its]…rejection.” Cauthen (2000) considers First Amendment issues, including religious liberties, in analyzing state court protection of civil liberties beyond the federal floor. However, he does not consider which constitutional provisions, state or federal, are used when state courts arrive at a more protective outcome. Alternatively, David and Banks (1987) examine cases involving the use of private property for an expressive purpose and the exclusion of evidence obtained through illegal searches and seizures in ten state high courts. They find meager evidence of state courts’ action to protect individual rights beyond the federal level. Collins and Galie (1986) identify close to 300 state court decisions that go beyond the federally protected floor in 1985, but they do not put this number in context nor do they explain why they chose the cases they included in their analysis (Collins and Galie 1986).

A Virginia Law Review note discusses judicial federalism in the religious liberties context. The author finds that nine state courts have struck down transportation programs and seven have struck down textbook loan programs relying on their own state constitutions (Note 1985, 636). The author also considers different types of state-level religion clauses and finds that the “categories of state religion clauses tend to produce different degrees of state activism”
The author concludes that “the more precise the clause, the more likely a state court is to adopt a stricter church-state standard than the Supreme Court” (Note 1985, 638). In particular, the author finds that 12 state courts interpreted their Blaine Amendments to support a more protective outcome than required by the federal Constitution. Finally, the author finds that state courts use federal constitutional Establishment Clause precedent to different degrees when interpreting their own religion clauses (Note 1985, 643).

Although the *Virginia Law Review* note provides some important insight, it was published in 1985. Since then, state high courts have continued to issue decisions concerning transportation and textbook programs. Additionally, the United States Supreme Court has since issued two landmark Establishment Clause decisions concerning state aid to religious schools—*Zobrest* (1993), allowing state aid to disabled students in religious schools, and *Zelman* (2002), allowing state-funded tuition vouchers to be spent at parochial schools. Therefore, analysis of state court treatment of all four programs is justified. Furthermore, the methodology used by the note’s author to locate and analyze the state court decisions is unclear and thus any conclusions should be interpreted with caution.

My research improves on the current literature in several ways. For one, it clarifies Tarr’s (1988, 1989) uncertainty in the area of school transportation by providing a comprehensive, quantitative analysis of all state transportation, textbook, disabled student aid, and voucher cases since relevant Supreme Court decisions in these areas. Scholars have expressed concern that “the empirical research available on the subject of church-state

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4 It is important to note that the number of cases has now changed. Additionally, the methodology behind finding and evaluating these cases is not clear. The author does not describe how the cases were found and if they attempted to find the number of cases in any particular issue area. Instead, the author seems to talk generally about establishment clause cases in the states, focusing on transportation and textbooks at certain points and not others. The two issue areas do not appear to direct his/her hypotheses or conclusions but rather serve as examples of a general trend. As far as I know, this is the first analysis of all of these Establishment Clause cases, but is not clear it was conducted systematically. Therefore, it is difficult to draw firm conclusions from the work.
jurisprudence in state courts is not plentiful” (Viteritti 1998, 681). In short, previous research has lacked a systematic approach in analyzing state court protection of religious liberties decisions. Here, I conduct comprehensive, systematic empirical analysis of judicial federalism and the protection of religious liberties, specifically state court protection from state aid to religious schools.

THE LAY OF THE LAND: THE UNITED STATES SUPREME COURT’S ESTABLISHMENT CLAUSE JURISPRUDENCE

In discussing state court treatment of religious liberties, it is helpful to first have a general understanding of the United States Supreme Court’s Establishment Clause decisions. Well known for “its lack of consistency,” the Supreme Court’s Establishment Clause jurisprudence has evolved “from accommodation of church-state relationships, to stricter separation, and back to accommodation” (Bell 2001, 1274; Note 1985, 626).

In Everson (1947), the Supreme Court turned, for the first time, to interpreting the Establishment Clause (Bell 2001, 1273). In this case, the Court accommodated interaction between church and state by allowing New Jersey school districts to reimburse students’ bus fares to religious schools. The Court espoused two main justifications for its decision. First, the Court determined that the Establishment Clause compelled the federal government to act with neutrality toward religion rather than favorability or hostility (Bell 2001, 1285). Second, the Court emphasized the fact that any benefits from the transportation program were directed to students, not the religious school they attended (Note 1985, 626). Following Everson, the Supreme Court slowly moved toward a more separationist phase of its jurisprudence. In Abington School District v. Schempp (1963), the Court declared Bible reading in public schools unconstitutional. In rendering its decision, the Court articulated a two-prong test for deciding whether the program violated the Establishment Clause. Schempp, then, “foreshadowed the
more formulaic approach to the Establishment Clause jurisprudence adopted less than a decade later” (Bell 2001, 1287).

With its decision in Lemon v. Kurtzman (1971), the Supreme Court moved into the most separationist phase of its Establishment Clause jurisprudence to date (Note 1985, 627, 628; Viteritti 1998, 706). In Lemon, the Court articulated a three-prong standard for deciding Establishment Clause cases. In order to withstand constitutional scrutiny, the Lemon test requires that a challenged program (1) have a secular purpose, (2) have the primary effect of neither advancing religion nor inhibiting it, or (3) does not create excessive entanglement between church and state (Viteritti 1998, 706). Thus, Lemon effectively erected a high wall of separation between church and state. In Meek v. Pittenger (1974), for instance, the Court used the Lemon test to strike down a program offering auxiliary services, such as counselors, to religious schools at the state’s expense (Note 1985, 627). Even after espousing the Lemon test, though, the Court’s decisions throughout the following decade “did not appear to flow from a consistent formulation of philosophical principles” (Viteritti 1998, 708).

The Court’s philosophical inconsistency intensified, and “by 1980, the Court began to dismantle the wall of separation” (Note 1985, 628; see also Viteritti 1998). The move back toward accommodation began with Committee for Public Education and Religious Liberty v. Regan (1979) in which the Court allowed a state to reimburse parochial schools for testing, record keeping, and reporting services (Note 1985, 628). Then, in Mueller v. Allen (1982), the Court began to “relax the ‘primary effect’ prong of the Lemon test” (Note 1985, 628). It ruled that parents were allowed to receive tax deductions for textbooks, transportation, and tuition for their children, even if they attended religious schools.
Movement away from a strict application of *Lemon* continued a year later when Justice
Sandra Day O’Connor explicitly described her dissatisfaction with using the *Lemon* test for
Establishment Clause decisions. In her concurring opinion in *Lynch v. Donnelly* (1983),
O’Connor suggested changes to the secular purpose prong, arguing that “whether the
government *intends* to convey a message of endorsement or disapproval of religion [emphasis
added]” was an important consideration (Bell 2001, 1290). And in 1992 Justice Anthony
Kennedy abandoned the *Lemon* calculus in the majority opinion in *Lee v. Weisman* and instead
used a coercion test to determine whether prayers offered at public school ceremonies violate the
Establishment Clause (Bell 2011, 1290, 1291). In later cases, the Court has emphasized
accommodation and neutrality in its Establishment Clause decisions. In doing so, the Court’s
decisions “have left ample room for the states to apply their own criteria for determining the
proper relationship between church and state” (Note 1985, 629).

Therefore, in accommodating some interaction between church and state, the United
States Supreme Court’s more recent Establishment Clause decisions have lowered the wall of
separation. As mentioned previously, this accommodationist position provides state courts with
the opportunity to use their own state constitutions to provide greater religious liberties
protection—to build a higher wall of separation between church and state. In the next section, I
discuss the four landmark United States Supreme Court cases concerned with the types of state
aid to religious schools considered in this analysis (transportation, textbooks, aid to disabled
students, and tuition vouchers).

**Everson v. Board of Education**

In *Everson v. Board of Education* 330 U.S. 1 (1947), the Supreme Court considered the
constitutionality of a school transportation program in New Jersey. The state of New Jersey
allowed school boards to reimburse parents who paid for their children’s public transportation to and from school. The program reimbursed parents whose children attended private parochial schools as well as those who attended public schools. After the Board of Education in Ewing Township authorized reimbursements to parents, a district taxpayer, Arch Everson, brought suit against the board (*Everson v. Board of Education* 1947, 505). The question in front of the Court was whether the state-funded program violated the federal Constitution’s Establishment Clause. In a 5-4 decision, the Court decided that the program did not breach the federal Constitution’s prohibition on state support of religion.

The majority in *Everson* determined that the use of public buses or public dollars for transportation to religious schools “approach[d] the verge” of constitutional power but did not exceed it (*Everson v. Board of Education* 1947, 512). Writing for the Court, Justice Hugo Black contextualized the decision by discussing the history and purpose of religious liberties in the United States (*Everson v. Board of Education* 1947, 513). The majority conceded that reimbursement of transportation fares may encourage some students to attend religious schools, but the benefit would be no different than the other services provided equally and indirectly to religious and public schools, such as fire and police protection. The Court determined that the transportation program did not infringe upon the Establishment Clause because the “legislation, as applied, d[id] no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools” (*Everson v. Board of Education* 1947, 513). Because the First “Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers…not…their adversary,” the New Jersey program was found constitutional in that it provided equal compensation to students of public and parochial schools (*Everson v. Board of Education* 1947, 513).
Like the majority opinion, the dissents in *Everson* were framed using the principles of separation; the difference between the conclusion reached by the majority and that of the dissenters concerned the height of the wall between church and state should be built. At odds with the Court’s decision, Justice Rutledge wrote, “Neither so high nor so impregnable today as yesterday is the wall raised between church and state…New Jersey’s statute sustained is the first…breach to be made by this Court’s action. That…still others will be attempted, we may be sure” (*Everson v. Board of Education* 1947, Rutledge dissenting, 518).

**BOARD OF EDUCATION v. ALLEN**

The Court decided the constitutionality of a New York textbook program in *Board of Education v. Allen* 392 U.S. 236 (1968). The New York statute at issue in *Allen* “require[d] public school authorities to lend textbooks free of charge to…students” in public and private schools (*Board of Education v. Allen* 1968, 1924). The statute stipulated that textbooks would be loaned to students at public and parochial schools, and the textbooks were purchased with state funds. The board of education serving the New York counties of Rensselaer and Columbia complied with the statute, but they believed the program violated the state and federal Constitutions. Consequently, the board filed a lawsuit against James Allen, the Commissioner of Education in New York (*Board of Education v. Allen* 1968, 1925). The question in front of the Court was whether the New York law violated the federal Constitution’s Establishment Clause by using state funds to support religion. In a 6-3 decision, the Supreme Court ruled that the New York statute did not violate the federal Establishment Clause.

In deciding *Allen*, the Supreme Court applied a test articulated in *Abington School District v. Schempp*. That test said, “To withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits
religion” (*Board of Education v. Allen* 1968, 1926). In answering the first prong of the test, the Court found the New York statute had a secular legislative purpose. The New York Legislature passed the law to expand the educational opportunities available to all students (*Board of Education v. Allen* 1968, 1926).

In assessing the second prong, the Court decided that the primary effects of the program were neutral, neither advancing nor inhibiting religion. In the New York textbook program, the Court believed any benefits flowed directly to students and not to religious schools. The appellants tried to distinguish the textbook program in *Allen* from the transportation program in *Everson* to convince the Court of a more protective outcome. To do so, they argued that the use of books was distinct from the use of buses because books “are critical to the teaching process, and…that process is employed to teach religion” (*Board of Education v. Allen* 1968, 1927). The Court held, however, that the books lent to students were secular books and similar to those being lent to students in public schools. Second, the Court found that books were used to advance the secular education and not the religious instruction of parochial school students (*Board of Education v. Allen* 1968, 1927, 1928). In writing the majority opinion, Justice White stated that “Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by parochial schools to teach religion” (*Board of Education v. Allen* 1968, 1929). Finding the statute neutral in purpose and practice, the Court held that the New York textbook program did not violate the Establishment Clause of the federal Constitution.

**Zobrest v. Catalina Foothills School District**

*Zobrest v. Catalina Foothills School District* 509 U.S. 1 (1993) concerns the Individuals with Disabilities Education Act (IDEA)—legislation requiring school districts to provide
disabled students with adequate accommodations and assistance at public and private schools.

James Zobrest, who was born deaf, chose to attend a Catholic high school and asked the school district to provide him with a sign-language interpreter. The school district consulted the County Attorney and later the Attorney General about whether providing a publicly employed interpreter to a student attending a religious school was legally permissible. Both attorneys believed that providing Zobrest with an interpreter would violate the federal Constitution, and the school district declined his request. Consequently, Zobrest and his parents filed suit against the Catalina Foothills School District (Zobrest v. Catalina Foothills School District 1993, 2464). In this case, the question before Supreme Court was whether an interpreter, or similar public employee, could be provided by the state to assist a disabled student at a religious school. In a 5-4 decision, the Court decided that it was constitutionally permissible for the school district to provide aid, in the form of an interpreter, to a disabled student attending a religious school.

In rendering its decision, the Court first described its precedent allowing religious institutions and schools to benefit from general social welfare programs. The majority opinion pointed out, “We have never said that ‘religious institutions are disabled by the First Amendment from participating in publically sponsored social welfare programs’” (Zobrest v. Catalina Foothills School District 1993, 2466). Like in Everson, the Court described the ridiculous result of assuming that religious institutions were exempted from programs benefitting a broad class of citizens—policemen or firemen would not protect churches simply because they share a religious rather than secular message (Zobrest v. Catalina Foothills School District 1993, 2466).

Then, the Court compared the IDEA requirements to programs in Mueller and Witters, using similar reasoning to determine the constitutionality of the IDEA. The Court explained that

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5 In Mueller v. Allen (1983), the Court upheld a Minnesota law permitting parents to deduct education expenses when calculating their state income states, despite the program’s deductions went primarily to parents of students.
the protections in the IDEA apply equally to students at public or parochial schools.
Additionally, it pointed out that the benefit clearly flows to the student. Because the state is providing a service directly to a student, no funds make their way to religious schools’ coffers (Zobrest v. Catalina Foothills School District 1993, 2468). “The IDEA creates a neutral government program dispensing aid not to schools but to individual, handicapped children,” the Court emphasized (Zobrest v. Catalina Foothills School District 1993, 2469). Last in its reasoning, the Supreme Court concluded that an interpreter directly conveys the spoken information to the student and does not “add to nor subtract from” the religious message or education received by the student. In that way, the role of a publicly employed interpreter is distinct from that of a teacher or counselor, which impermissibly involve the state in providing a religious education (Zobrest v. Catalina Foothills School District 1993, 2468). Largely through comparison to Mueller and Witters, the Court found the assistance guaranteed by the IDEA can constitutionally extent to students attending religious schools.

Zelman v. Simmons-Harris

In Zelman v. Simmons-Harris 536 U.S. 639 (2002), the Court determined the constitutionality of an Ohio school voucher program. The program gave parents tuition vouchers to spend at public or private schools of their choice. Parents were allowed to spend their vouchers at religious private schools. A group of Ohio taxpayers challenged tuition voucher program on federal constitutional grounds and brought suit against Susan Zelman, the Superintendent of Public Instruction of Ohio. The question in front of the Court, then, was whether the state-subsidized program violated the federal Establishment Clause by giving money attending parochial schools (Zobrest v. Catalina Foothills School District 1993, 2466, 2467). In Witters v. Washington Department of Services for the Blind (1985), the Court upheld a program in the state of Washington that extended state support to a blind student studying at a Christian college (Zobrest v. Catalina Foothills School District 1993, 2467).
to private religious schools. In a 5-4 decision, the Supreme Court held that the program did not violate the Establishment Clause.

In *Zelman*, like in *Allen*, the Court assessed the primary purpose and effect of the program to determine whether it violated the federal Establishment Clause (*Zelman v. Simmons-Harris* 2002, 2465). The majority opinion begins with a description of the failing school system in Cleveland, Ohio. “For more than a generation,” the Court wrote, “Cleveland’s public schools have been among the worst performing public schools in the Nation” (*Zelman v. Simmons-Harris* 2002, 2463). Understanding the condition of Cleveland schools, the Court answered the primary purpose question, holding that “there is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system” (*Zelman v. Simmons-Harris* 2002, 2465).

Having quickly answered the purpose prong, the Court determined whether the voucher program had the effect of advancing or inhibiting religion. The Supreme Court first described a distinction in its precedent between programs that provide money directly to religious schools and those of “true private choice” that provide parents with money to be spent at secular or religious schools (*Zelman v. Simmons-Harris* 2002, 2465). The Court likened *Zelman* to three other cases—*Mueller*, *Witters*, and *Zobrest*—in which any benefit to religious schools was allocated through pure parental choice. In doing so, it concluded, “*Mueller*, *Witters*, and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause” (*Zelman v. Simmons-Harris* 2002, 2467). Assessing the Ohio voucher program’s characteristics and
implementation, the Court decided that it was a program of true choice and was therefore constitutional.

The Court also rebutted several objections raised by the respondents. The first issue dispelled by the Court was that the voucher program created a perception of state sponsorship of religion. Again, the Court focused on the “true private choice” offered by the program and that any benefits to religious institutions were received because of parents’ decisions not because of the government’s support (Zelman v. Simmons-Harris 2002, 2468). Then, respondents argued that the program provides too few options for vouchers to be spent at—82% of the participating schools were religious. However, the Court stated that students were able to spend their vouchers at many different types of schools, including public schools, magnet schools, secular private schools, and religious schools. The high level of participation by religious schools, the Court reasoned, was simply a consequence of the large number of religious schools in the Cleveland area. “To attribute constitutional significance to this figure,” wrote Chief Justice Rehnquist, “would lead to…[an] absurd result” (Zelman v. Simmons-Harris 2002, 2470). The Court also dismissed the fact that a high percentage of vouchers were spent at religious schools as not “constitutionally significan[t]” (Zelman v. Simmons-Harris 2002, 2470). Finding the Ohio voucher program consistent with the Court’s purpose and effect analysis and unconvinced by the practical outcomes raised by the respondents, the Court found the program consistent with the Establishment Clause.

In each of the cases discussed above, the United States Supreme Court reached an accommodationist decision and recognized a relatively low wall of separation. Below I describe the Blaine Amendments, which many state court decisions have relied on to recognize a higher wall of separation.
**Blaine Amendments: History and Content**

Plain language prohibitions on state funding of religious schools or institutions are widely known as Blaine Amendments. Green characterizes Blaine Amendments as “provisions that are more explicit and more prohibitory of public funds being spent on religious activities or given to religious institutions, schools or seminaries” than the federal Establishment Clause (Green 2004, 109). Thus, where Blaine Amendments exist, state court judges could engage in judicial federalism by interpreting the Amendments to provide a higher wall of separation between church and state than required by the federal Constitution, should they choose to do so. Thirty-seven states have these Blaine Amendments.6

State level Blaine Amendments are named for their failed federal analog. In 1875, Representative James Blaine introduced an amendment that would have applied the federal Constitution’s First Amendment to the states and restricted public funds from going to private, religious institutions. Specifically, the federal Blaine Amendment said,

“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

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6 Researchers disagree on the exact number of state Blaine Amendments. For instance, DeForrest (2003, 576) places the number “roughly” around 30 and Goldenziel (2005, 69) counts 38 state Blaine Amendments. The difference is largely due to different definitions of what constitutes a Blaine Amendment. While some scholars count those that mimic the language in the federal Blaine Amendment, others count all the state-level amendments that have a similar function—to prevent state aid from flowing to religious institutions and schools. For my research, I followed the second standard and included amendments that had the spirit of the federal amendment. In other words, I considered amendments with language prohibiting stated funds from going to (directly or indirectly) parochial institutions, particularly schools, to be Blaine Amendments. To compile this data, I first looked at a publication called “School Choice and State Constitutions” published by the Institute for Justice and the American Legislative Exchange Council. This publication lists the Blaine Amendments, Compelled Support Clauses, education amendments, and general religion clauses in each state. I read through each entry and made sure that the Blaine Amendments fit my understanding and characterization of those no-aide provisions for this project. In large part, my data on the provisions mirrors that compiled by Goldenziel (2005). There are a few exceptions. In four states, Goldenziel and I agreed that the state has a Blaine Amendment, but I count two articles as the Blaine Amendment, and she counts one; in those instances, I include Alabama’s Art. IV §73, Michigan’s Art. VIII §2, New Mexico’s Art. XXI §4, and Washington’s Art. IX §4. Goldenziel considers Mississippi’s Art. IV §66 to be a part of Mississippi’s Blaine Amendment, and I do not. Finally, Goldenziel considers Ohio’s Art. VI §2 and Oklahoma’s Art. I §5 and Art. XI §5 to be Blaine Amendments, while I do not; instead, I categorize these provisions as education clauses.
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” (DeForrest 2003, 556).

Personal and societal currents motivated the federal Blaine Amendment. The issue of common schools and sectarian influence was a popular political question at the time the federal Blaine Amendment was introduced. Indeed, Representative Blaine’s amendment followed President Grant’s insistence that education and religion remain separate (DeForrest 2003, 558, 565). Seeking political capital and popular support by alleviating a prevalent issue, Representative Blaine introduced the Blaine Amendment.

Scholars disagree on whether anti-Catholic prejudice instigated the Blaine Amendment. Many argue that the federal Blaine Amendment reflects and codifies Catholic hatred in the 19th century. In fact, “few events in American constitutional history have been as maligned as the [federal] Blaine Amendment” (Green 2008, 295). Justice Thomas condemned the amendment as having “a shameful pedigree that we [should] not hesitate to disavow…it is [a] doctrine, born of bigotry, [that] should be buried now” (Green 2008, 296).

When the federal Blaine Amendment was introduced, the public schools were considered Protestant and “sectarian was code for Catholic” (DeForrest 2003, 559). As an amendment prohibiting aid to sectarian schools, the Blaine Amendment has been described as an attack on Catholicism, not preservation of non-establishment principles. Some scholars suggest that strong anti-Catholic sentiments were used to support the passage of the Blaine amendment (Green 2008, 295). However, Green argues, “those who characterize the Blaine Amendment as a singular exercise in Catholic bigotry thus give short shrift to the historical record and the dynamics of the times” (Green 2004, 114). While recognizing the presence of some anti-Catholic animus, Goldenziel emphasizes that Blaine disavowed the perception that he was anti-Catholic and “no
evidence suggests that he had any personal animosity toward Catholics” (Goldenziel 2006, 64). DeForrest notes the political climate in which the Amendment was introduced. He also describes the Senate’s debate about the Blaine Amendment, which involved unabashedly anti-Catholic remarks (DeForrest 2003, 570). While scholars emphasize different elements of the historical account, there is agreement that anti-Catholic bigotry was part of the story behind the introduction of the federal Blaine Amendment. The amendment was passed in the House, but it was defeated in the Senate. Despite the Blaine Amendment’s failure to become a part of the federal Constitution, its principles are enshrined in many state constitutions.

The motivations behind these state-level Blaine Amendments, also known as Baby Blaines, are distinct (Green 2008, 297; Goldenziel 2006, 57). State Blaine Amendments were passed throughout the 19th and 20th centuries and were consequently motivated by disparate factors. Even before the federal Blaine Amendment was proposed, 23 states had clauses in their state constitutions that prohibited providing direct or indirect state aid to religious institutions (Goldenziel 2006, 69). Of those 22, eight states passed Blaine Amendments as part of the enabling act territories were required to ratify in order to become states (Goldenziel 2006, 69). At that time, some states did not have parochial schools within their borders and the height of Catholic immigration had not begun (Goldenziel 2006, 75, 89). Additionally, many states simply copied the constitution of a neighboring state in hopes of “expediting its own admission” to the Union after the Civil War (Goldenziel 2006, 67; Viteritti 1998, 673). For example, Wisconsin’s state constitution shares many similarities with the constitutions of Massachusetts and Pennsylvania.

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7 The eight states are North Dakota, South Dakota, Montana, Washington, Arizona, New Mexico, Utah, Idaho, and Oklahoma.
Modern approval of Blaine Amendments also removes them from 19th Century religious bigotry. Eleven states with Blaine Amendments have re-ratified their constitutions since 1960 (Goldenziel 2006, 69). In 1970, an effort to repeal Missouri’s Blaine Amendment was unsuccessful, evincing modern approval of the amendment (Goldenziel 2006, 66). Each of these historical facts demonstrates the difficulty of ascribing the same anti-Catholic animus to all of the state Blaine Amendments. While Catholic prejudice cannot be attached to all state Blaine Amendments, neither can we conclude that it was absent in all cases. Indeed, in Colorado evidence suggests there was controversy surrounding the passage of its Blaine Amendment and some anti-Catholic animus emerged in debates over the amendment (Goldenziel 2006, 87).

In addition to the various motivations discussed above, the lack of a clear historical record makes the link between anti-Catholic sentiment and state Blaine Amendments even more tenuous. Most state constitutional convention debates were poorly recorded and participants failed to document the discussion about each constitutional provision. Consequently, Goldenziel concludes, “One cannot know definitely whether the no-funding provisions [Blaine Amendments] were passed for anti-Catholic reasons, out of a desire to separate religion and state, or some combination of these or other motives” (Goldenziel 2006, 68).

Theory and Hypotheses

Legal, and to some extent political science, research has considered how often state courts provide greater protection of civil liberties than required by the United States Supreme Court. Several theories suggest reasons that state courts would provide a higher level of liberties protection. In this section, I describe the theories that compel my hypotheses. The first group of theories suggests reasons for state courts to create a higher wall of separation between church
and state. The second category provides explanations as to why state courts would use Blaine Amendments to protect non-establishment principles.

In some ways, federal courts serve as a model for state courts and their jurisprudence (Shaman 2008, Tarr 1994, Viteritti 1998, Williams 2009). Judges learn from and emulate the actions of other judges. As Tarr (1994, 72) explains, “They learn how to approach and interpret their state constitutions by watching how other courts (both federal and state) interpret their own charters.” The Warren Court (1953-1969) changed perceptions of the judicial branch—portraying the courts, instead of just the legislature, as a protector of individual rights and liberties. Having watched the Warren Court interpret the federal Constitution to provide expansive civil liberties protection, it follows that state courts might render decisions that protect their citizens’ civil liberties as well. Shaman argues, “The Warren Court revolutionized constitutional law by opening new vistas of civil rights and liberties that mesmerized a generation of lawyers and judges” (Shaman 2008, XVI). Inspired by the Warren Court, judges who work at the state level will be interested in a high degree of liberties protection, such as creating greater separation between church and state (Shaman 2008, XVII). In essence, the Warren Court was “a model of how state judges could develop a civil liberties jurisprudence” (Tarr 1994, 72; see also Williams 2009, 115). This literature suggests that state courts judges developed the tools and inspiration necessary to craft decisions that build a high wall of separation between church and state.

A second factor affecting state court judges’ rulings in favor of greater separation between church and state concerns the waning civil rights protection at the federal level. Warren Burger’s appointment as Chief Justice concluded the reign of the Warren Court and marked an “anticipated—and to some extent actual—retreat from Warren Court activism and encouraged
civil liberties litigants to look elsewhere for redress” (Tarr 1994, 73). Beginning with the Burger Court, the Supreme Court became increasingly conservative, offering less protection of individual rights (Shaman 2008, XIV; Schapiro 1998, 392).

The Court’s decreasing protection of rights is particularly pronounced in the area of religious liberties. As discussed above, several cases in the 1980s signaled a juncture in the Court’s Establishment Clause jurisprudence from supporting separation to allowing more interaction between church and state (Viteritti 1998, 710). In its move toward more accommodationist jurisprudence, the Supreme Court encouraged state courts to “step into the breach to revitalize those rights” (Shaman 2008, XVII). As a law review note describes, “Even though states are always free to impose stricter standards on the church-state relationship than the federal Constitution, the impact of state activism is more significant when the federal standards are accommodating” (Note 1985, 630). Combined with an understanding of the state courts as a possible site of civil liberties protection, this literature suggests that the federal court’s departure from protection of individual liberties makes it more likely that state courts will fill that role.

Based on the two previous factors—judges acquiring the tools to protect civil liberties and the declining protection of rights at the federal level—scholars identify the beginning of the 1970s as the dawn of the New Judicial Federalism (Shaman 2008, XVII; Williams 2009, 115). Since the Warren Court affected both of the previous factors, the year 1969—when the Warren Court era concluded—is considered the point after which state court judges had the best opportunity to engage in judicial federalism and protect civil liberties beyond the level established by the United States Supreme Court. This suggests that state high courts will be more likely to provide greater protection of religious liberties after 1969.
The ambiguity of the Supreme Court’s Establishment Clause jurisprudence is a third reason that we might expect state courts to protect religious liberties beyond the federal minimum level. Over time, the Supreme Court has expounded numerous, contradictory tests for deciding Establishment Clause cases. Indeed, Justice Clarence Thomas described the Court’s Establishment Clause jurisprudence as a “hopeless disarray” (Viteritti 1998, 712). Its Establishment Clause decisions have cycled through phases—from emphasizing separation to accommodating interaction between church and state—rather than charting a consistent course.

Given the United States Supreme Court’s inconsistent interpretations of the Establishment Clause, it is “a precarious endeavor for even the best-intentioned judges” to follow “the guidelines set by the Supreme Court” (Viteritti 1998, 680). Research on judicial compliance suggests that judges faced with inconsistent precedent are less likely to abide by the Supreme Court’s decision-making calculus. In studying the compliance of federal appellate courts to Supreme Court precedent, Luse et al. (2008, 77) found, “The indeterminacy of precedent…can make it difficult for even the most faithful and attentive lower court to determine what is required based on existing precedent.” Tests and precedent can only be “newly-minted blueprint[s]” when they are indeed clear and straightforward (Luse et al. 2008, 80). Unclear federal Establishment Clause jurisprudence presents a reason, then, that state courts would rule differently than the Supreme Court and perhaps rely on their own state provisions to create greater separation of church and state.

Given these theoretical bases, I expect that state court judges are more likely to engage in judicial federalism when the United States Supreme Court lowers the wall of separation between church and state. Considering the Warren Court’s effect on state court judges’ ability to provide
greater protection of non-establishment principles, I also expect that state courts’ likelihood to engage in judicial federalism will be stronger after 1969. This leads to the following hypothesis:

H1) I predict that state courts are likely to engage in judicial federalism and provide for a higher wall of separation between church and state when the United States Supreme Court provides lower protection.

Underlying these theories of new judicial federalism outlined above is the assumption that judges are interested in protecting civil liberties. Simply having the tools and the opportunity to reach more protective decisions does not in itself explain why state court judges would build a high wall of separation between church and state. To understand if judges would protect civil liberties at the state level, it is important to consider whether these state court judges have some preference for increasing the level of protection. After all, if the individual judges agree with the Supreme Court’s more accommodating decisions (i.e. creating a lower wall of separation), it is not clear that we should expect the state court judges to seize the opportunity to increase the wall of separation between church and state. One consideration that might affect the judges’ propensity to provide greater protection might be the people affected by the decision—the judicial audience. The judicial audience model accounts for legal, attitudinal, and strategic factors in decision-making, arguing that “judging can be understood as self-presentation to a set of audiences” (Baum 2006, 158).

One possible judicial audience is the public. The public is a particularly important audience for state judges, most of whom are elected or must be retained by the electorate. Unlike federal court judges, who are appointed for life tenure, 87% of all state court judges face the voting public to either gain or retain their seat on the bench. To a limited extent, therefore, the interests and opinions of the public play a role in state court judicial decision-making. The
connection between public perception of judges and their decisions is generally modest and most strong with politically charged issues like the death penalty (Baum 2006, 61, 62). In this way, state court decisions in cases concerning non-establishment principles are expected, to some degree, to mirror the public’s position on state aid to religious schools. Consequently, if a judge’s audience prefers a higher wall of separation between church and state, then I expect state court judges to rule in a way that creates greater separation.

**H2) State courts are likely to strike down transportation, textbook loan, disabled student aid, and tuition voucher programs, creating a higher wall of separation between church and state when their audience prefers greater separation between church and state.**

Another implication of the judicial compliance literature is the likelihood that state court judges will use state Blaine Amendments to create greater separation between church and state. First, the specific and detailed language of state Blaine Amendments encourages interpretation that protects non-establishment principles. Unlike the federal clause that vaguely prohibits an “establishment of religion,” state Blaine Amendments explicitly prevent state aid from flowing to sectarian schools and institutions. Tarr (1992) contends that when applied to cases concerning state support of religious schools, the Blaine Amendments more clearly forbid state aid than the federal Establishment Clause. He asserts that “[when] the text is clear and specific, there is no need for interpretation. Even where interpretation is required, the greater detail of state provisions orients interpreters to close textual analysis” (Tarr 1992, 1186). In that way, a Blaine Amendment’s prohibition of state aid is more likely to lead to a higher wall of separation between church and state than a general ban on an establishment of religion. Indeed, one author found, “The more precise the clause, the more likely a state court is to adopt a stricter church-
state standard than the Supreme Court” (Note 1985, 638). Since state Blaine Amendments specifically prohibit financial aid to religious institutions or schools, I expect their use to result in a higher wall of separation created by state courts.8

Second, state court interpretation of a state Blaine Amendment will not be hindered by criticism about legitimacy of independent interpretation. While state courts are allowed to interpret their state constitutions independently of Supreme Court precedent and tests, they have been, nonetheless, criticized for straying from the Court’s analysis when interpreting clauses that are similar or identical to federal constitutional provisions. Independent interpretation of state constitutional clauses is viewed with less uncertainty when the clauses have textual differences from provisions in the federal Constitution (VanCleave 1998, 217; Schapiro 1998, 391). State courts themselves have anticipated the criticism about legitimacy when interpreting their state constitutions, and to prevent it, they “typically…attempt to overcome or preempt this criticism by pointing to something ‘unique’ or ‘peculiar’ about their state constitution” (VanCleave 1998, 219). Because the Senate did not pass the federal Blaine Amendment, there is no federal analog to state level Blaine Amendments. State Blaine Amendments are also distinct from the federal Constitution’s Establishment Clause. Consequently, interpretation of Blaine Amendments is less likely to be hampered by concerns of legitimacy, which would decrease state courts’ likelihood to provide greater protection of non-establishment principles using a state constitution. Without concerns over the legitimacy of a decision, the state courts will be likely to protect non-establishment principles using a state Blaine Amendment. This leads to the following expectation:

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8 It could be argued that legislators, in writing a state Blaine Amendment, completed the most significant work and state courts are only applying the clear language of the amendment. However, a state court can choose to not apply a state Blaine Amendment in a case, and it can use other constitutional provisions to reach its decision concerning state aid to religious schools. I briefly discuss the legislative history of state Blaine Amendments above, but further analysis of legislative activity involving state Blaine Amendments is beyond the scope of this paper.
**H3) States that rely on their Blaine Amendments in their decisions will more often strike down programs offering state support to religious schools.**

**METHODODOLOGY**

To test these hypotheses, I studied state court cases concerning transportation to religious schools, textbooks loaned to students at religious schools, assistance for disabled students at religious schools, and tuition vouchers spent at religious schools. These areas are useful to study for several reasons. First, the Supreme Court upheld these four types of programs as constitutional, lowering the wall of separation of church and state and in turn leaving room for state courts to build a higher wall of separation. If the United States Supreme Court provides substantial protection of religious liberties, there is no reason for state courts to engage in judicial federalism; a state court has no need to provide any greater protection than that which is mandated under the federal Constitution. Second, addressing state support of religious schools is the best way to test state court interpretation of the Blaine Amendment since it concerns aid to religious schools and institutions. This is the most direct possible application of a state Blaine Amendment for state courts because it addresses a religious school or institution. Finally, the programs include distinct types of support and cover over 60 years of jurisprudence. A substantial time span provides an opportunity for analysis of state court decision-making over time.

I used a multiple-method strategy in examining state courts’ use of their own state constitutions, and state Blaine Amendments, in dealing with challenges to transportation, textbook, disabled student accommodation, and tuition voucher programs. My first task was to determine a universe of cases. Using LexisNexis, I identified state cases concerning transportation to, textbooks for, disability assistance in, and tuition vouchers for religious schools
that came after their respective Supreme Court cases. For instance, I located state high court transportation decisions that came after the *Everson* decision on February 10, 1947. I used a LexisNexis search to locate cases in each state that cited relevant provisions of the state’s constitution—Blaine Amendments, Compelled Support Clauses, education clauses, and other religion clauses—and the First Amendment to the federal Constitution. The searches also required cases to contain a relevant keyword. For example, the state court cases concerning transportation programs had to include the word “transportation.” I restricted the cases to those decided by a state’s highest court after the Supreme Court decided the relevant case. Within the retrieved results, I read the case summaries and excluded cases that were not relevant.

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9 Because a search for only a keyword would retrieve too many cases, the search needed to be restricted. The religion and education clauses of the state constitution were justified because they are the most likely options for bringing a challenge to a program. If in cases where a different provision was relied upon in the reasoning, at least one of these provisions was claimed by a party to the case or referenced in the opinion, causing it to appear in the LexisNexis search.

10 The keyword for transportation programs was “transportation.” The keyword for textbook programs was “textbook.” The keywords for disabled student were “school,” “disab!,” “handicap!,” or “IDEA.” The keyword for tuition voucher programs was “voucher.”

11 For transportation cases, the restriction was after February 10, 1947. For textbook cases, the restriction was after June 10, 1968. For disabled student assistance cases, the restriction was after June 18, 1993. For voucher decisions, the restriction was after June 27, 2002.

12 The LexisNexis searches often retrieved results with the keyword but did not involve a school program of the sort of interest. An example would be that a case would involve a dispute over transportation but not a transportation program for school students. Cauthen (2000) uses a similar search and review method to locate cases in his study. I did find one case that was cited by several of the cases I had located, but it did not show up in my LexisNexis search (*Spears v. Honda* 51 Haw. 1 (1968)). Because the case was on-topic and came after *Everson*, I included it in my analysis.

The search resulted in 20 transportation cases in 16 states. The next search located 10 cases in 8 states. The third search found 2 cases about disabled student aid in 2 states. The final search located 3 cases in 3 states. Some states had two cases in the same issue area (i.e. two transportation cases). These cases were not continuations of the same case and were often several years apart. In some instances, then, the composition of the state highest court is different when the two cases are heard. Consequently, both cases were contained within the analysis. The smaller number of cases in the disabled student aid and voucher categories might be an effect of the time span since the Supreme Court case being much closer to present day. While 65 years have passed since *Everson*, only 10 years have passed since *Zelman*. Since the most recent transportation decision was decided in 1999, it shows that cases can continue to reach the high state court for decades after the Supreme Court decision. Furthermore, several cases concerning tuition voucher are currently percolating in lower state courts and have not yet reached the highest state courts, which are studied here.

Two of the cases included in my analysis are advisory opinions by a state’s highest court. Both advisory opinions concerned textbook loan programs. The first was in Michigan (Advisory Opinion 394 Mich. 41 (1975)), and the second was in New Hampshire (Opinion of Justices 109 N.H. 578 (1969)). The use of advisory opinions is justified because the whole court is involved in the decision, and the court provides thorough reasoning like they would in a regular court opinion.
After determining the universe of cases meeting these parameters, I read each court opinion and coded each case for the outcome of the decision, the basis for the decision, and any unique elements of program. As for the outcome of the decision, a 1 indicated that the state court struck down a program, creating a higher wall of separation between church and state than the Supreme Court did in *Everson*, *Allen*, *Zobrest*, or *Zelman*. A zero indicated that the court upheld the program in question and therefore provided for no higher wall than was required by the United States Supreme Court.

I also coded each case for its citation of and reliance on different constitutional clauses—Blaine Amendments, Compelled Support clauses, education clauses, religion clauses, and federal constitutional clauses. Again, I used a series of dummy variables to code the bases of the court’s decision.

If a court used the clause in its decision-making, it was coded 1; otherwise it was coded zero. To further clarify state court use of any constitutional clause or amendment, I coded each case for either (1) its reliance on or (2) its mere citation of a clause. For instance, if the Blaine Amendment was cited but the constitutionality of the transportation program was not decided in light of it, the case would receive a 1 for the citation variable. Often, the Court cited a clause but did not rely on it. However, I coded the case as a 1 in reliance if the decision more extensively used interpretation of the Blaine Amendment to make its decision.13

To test the explanatory power of a public audience on judicial decision-making in school cases, I used a couple of different sources of data. Ideally, I would have used public opinion of

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13 Determining reliance was ultimately subjective, but consideration was given to: (1) explicit mention of upholding or striking a program *because of* a certain clause or amendment or (2) discussion, not mere citation, of a program in light of a clause or amendment.

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In *Doolittle v. Meridian Joint School District* 128 Idaho 805 (1996) the court ruled that the program violates the state Blaine Amendment, finding the program unconstitutional under its state constitution. Nonetheless, it holds that because the IDEA is a federal program federal law pre-empts a state constitutional issue. Consequently, this case was coded 1 for decision and 1 for relying on its Blaine Amendment.
the actual programs at issue in the various states at the point of the state court decisions; however, this data was not available. Thus, to test the role of public opinion on the courts’ decisions, I compiled public opinion data from existing datasets. While the data is not a perfect indicator of public sentiment towards these programs, it is at least a rough proxy of public opinion. I used data from the American National Election Survey (ANES) and a survey conducted by the Pew Research Center. In 1964, 1966, 1968, 1980, 1984, 1986, 1988, 1990, 1992, 1994, 1996, and 1998, the ANES asked respondents to describe their stance on prayer in public schools. Because this question dealt with establishment of religion and schools, I used it as a proxy for public opinion in each state at the time of a case about state aid to religious schools. I used the data from the survey conducted closest to the date the case was decided in the state in which the case transpired. I created a dummy variable and coded 1 for a separationist response, zero for an accommodationist response, 9 for some other response, and “.” for missing data. I ran a crosstab of the dummy variable and the state, and then calculated the percent of aggregate-level support for greater separation between church and state.

In 2005, the Pew Research Center asked respondents whether “lifers ha[d] gone too far in trying to keep religion out of the schools” (Religion and Public Life 2005). This question

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14 In the 1964, 1966, 1968, 1980, and 1984 surveys, the question asked, “Some people think it is all right for the public schools to start each day with a prayer. Others feel that religion does not belong in the public schools but should be taken care of by the family and the church. Have you been interested enough in this to favor one side over the other? If yes, which do you think: Schools be allowed to start each day with a prayer or religion does not belong in the schools.” If the respondent answered, “Schools should be allowed to start each day with a prayer,” the response was coded zero. If the respondent answered, “Religion does not belong in schools,” the response was coded “1.”

In the later surveys, the question asked, “Which of the following views comes closest to your opinion on the issue of school prayer?” If a respondent answered, “By law, prayers should not be allowed in public schools,” the response was coded “1.” If the respondent answered, “The law should allow public schools to schedule time when children can pray silently if they want to,” or “The law should allow public schools to schedule time when children, as a group, can say a general prayer not tied to a particular religious faith,” or “By law, public schools should schedule a time when children would say a chosen Christian prayer,” then the response was coded zero.

15 In its entirety the Pew question asked, “Do you think that liberals have gone too far in trying to keep religion out of the schools and the government, or don’t you think liberals have gone too far?” The possible responses were “Yes, think that liberals have gone too far,” “No, don’t think liberals have gone to too,” and a refusal to answer. If
gauges an individual’s stance on Establishment Clause issues and consequently, was also used as a proxy for public opinion about state aid to religious schools. Similar to the ANES data, I created a dummy variable and coded the answers. I created a crosstab of the dummy variable and the state and determined the percent of aggregate-level support for greater separation between church and state.

Using the data set created by coding the cases and the recoding the external datasets, I completed quantitative analysis to determine whether state courts’ transportation decisions relied on state Blaine Amendments to independently interpret their state constitutions and strike down programs similar to those upheld by the Supreme Court. I created cross tabulations of several dummy variables to test my hypotheses, using a chi-square to test for statistical significance. I also used a basic logistical regression to determine the explanatory power of relying on state Blaine Amendments and relying on federal constitutional amendments.

RESULTS AND DISCUSSION

In the years following Everson (1947), Allen (1968), Zobrest (1993), and Zelman (2002), state high courts more often struck down rather than upheld programs of state aid to religious schools, creating a higher wall of separation between church and state than the United States Supreme Court. In 60% of decisions, state courts found the programs unconstitutional and provided greater separation between church and state (See Table 1). For a majority of cases, then, state high courts provided outcomes that were more protection of religious liberties than required by the federal Constitution.

If the respondent answered, “Yes,” it was coded “1.” If a respondent answered, “No,” it was coded “2.” If a respondent refused to answer, it was coded “9,” and missing data was coded zero.
Looking specifically at cases decided after 1969—the year the Warren Court ended—state high courts rejected state aid to religious schools more often than they upheld such programs.\textsuperscript{16} Of the cases decided after 1969, 55.56\% decisions found programs of state aid to religious schools unconstitutional and created a higher wall of separation between church and state (See Table 2).\textsuperscript{17} The state high court decisions, both before and after 1969, show modest support for the hypothesis that after the Supreme Court lowers the wall of separation, state courts will act to increase religious liberties protection within their borders.

<table>
<thead>
<tr>
<th>Table 2: State High Court Decisions After 1969</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uphold Program</td>
</tr>
<tr>
<td>44.44% (12/27)</td>
</tr>
<tr>
<td>Strike Down Program</td>
</tr>
<tr>
<td>55.56% (15/27)</td>
</tr>
</tbody>
</table>

Although state courts more frequently struck down rather than upheld state laws providing for transportation, textbook, disabled student aid, and voucher programs for religious schools, there are a variety of legal bases on which they could make these decisions. I found that in decisions striking down statutes providing aid to religious schools (during both the pre- and

\textsuperscript{16} As discussed above, the year 1969 is commonly used cut point to analyze a subset of cases because the aforementioned theory suggests the Warren Court inspired state court judges to protect rights. Since the Warren Court ended in 1969, this is considered a year in which the New Judicial Federalism—or higher protection of civil liberties at the state level—would begin. For instance, Shaman (2008, XVII) and Williams (2009, 115) indicate that the New Judicial Federalism began in the early 1970s, making 1969 an appropriate cut point.

\textsuperscript{17} In analysis of decisions rendered after 1969, 27 cases are considered.
post-1969 period), courts more often than not relied on their state Blaine Amendments to reach their decisions. In 76.19% of cases in which a state court struck down programs providing state aid to religious schools, that state’s high court relied on the state Blaine Amendment (See Table 3). The results fall just outside of the level of statistical significance, but shows modest support for my hypothesis that state courts will use their state Blaine Amendments to create a higher wall of separation between church and state.

Table 3: Reliance on State Blaine Amendment in Decision

<table>
<thead>
<tr>
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<th>Don’t Rely on Blaine</th>
<th>Rely on Blaine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uphold Program</td>
<td>50.00% (7)</td>
<td>50.00% (7)</td>
</tr>
<tr>
<td>Strike Down Program</td>
<td>23.81% (5)</td>
<td>76.19% (16)</td>
</tr>
<tr>
<td></td>
<td>Pr = 0.110</td>
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</tbody>
</table>

When I narrow the analysis to consider cases decided after 1969, state courts are much more likely to rely on state Blaine Amendment to strike down programs providing aid to religious schools, and do so at a statistically significant level (See Table 4).

Table 4: Reliance on Blaine Amendment in Decision After 1969

<table>
<thead>
<tr>
<th></th>
<th>Don’t Rely on Blaine</th>
<th>Rely on Blaine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uphold Program</td>
<td>58.33% (7)</td>
<td>41.67% (5)</td>
</tr>
<tr>
<td>Strike Down Program</td>
<td>30.00% (3)</td>
<td>70.00% (7)</td>
</tr>
<tr>
<td></td>
<td>Pr = 0.040</td>
<td></td>
</tr>
</tbody>
</table>

Conversely, state courts that uphold aid to religious schools more often rely on a federal constitutional clause in their reasoning. In 64.29% of cases where state high courts upheld programs, the court relied on a federal constitutional clause (See Table 5). This result is statistically significant at less than the .5% level. The courts’ reliance on the federal
Constitution, then, demonstrates a lower likelihood of protecting civil liberties beyond the federal minimum.

Table 5: Reliance on Federal Clause in Decision

<table>
<thead>
<tr>
<th></th>
<th>Don’t Rely on Federal Clause</th>
<th>Rely on Federal Clause</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uphold Program</td>
<td>35.71% (5)</td>
<td>64.29% (9)</td>
</tr>
<tr>
<td>Strike Down Program</td>
<td>85.71% (18)</td>
<td>14.29% (3)</td>
</tr>
</tbody>
</table>

Pr = .002

When the analysis is restricted to cases decided after 1969, the effect of relying on a federal clause in upholding an aid program remains strong. In 66.67% of such cases, a state high court relies on a federal constitutional clause, and the results are again statistically significant below the .5% level (See Table 6).

Table 6: Reliance on Federal Clause in Decision After 1969

<table>
<thead>
<tr>
<th></th>
<th>Don’t Rely on Federal Clause</th>
<th>Rely on Federal Clause</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uphold Program</td>
<td>33.33% (4)</td>
<td>66.67% (8)</td>
</tr>
<tr>
<td>Strike Down Program</td>
<td>86.67% (13)</td>
<td>13.33% (2)</td>
</tr>
</tbody>
</table>

Pr = .004

Although the cross tabulations above provide support for the hypothesis that state courts are more likely to strike down programs when they rely on state Blaine Amendments, by conducting a multivariate analysis, I can examine the independent effects of relying on state Blaine Amendments or the federal Constitution. I use a basic logistical regression to examine the effect of reliance on a state Blaine Amendment or a federal constitutional clause in the
outcome of a case concerning state aid to religious schools (See Table 7). The results of this simple model illustrate that when state courts rely on the federal constitution, they are more likely to uphold the challenged state action. The variable is statistically significant and in the expected direction. Although the Blaine Amendment variable does not rise to statistical significance, it is in the expected direction, demonstrating the connection between reliance on a state clause and arriving at more protective religious liberties outcomes.

Table 7: The Decision to Uphold State Aid to Religious Schools

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Coefficient</th>
<th>Standard Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rely on Blaine Amendment</td>
<td>1.25</td>
<td>0.87</td>
</tr>
<tr>
<td>Rely on federal clause</td>
<td>-2.43*</td>
<td>0.88</td>
</tr>
</tbody>
</table>

* Statistically significant at p<.01
N=35

When I restricted the analysis to cases decided after 1969, both the Blaine Amendment and the federal clause variables have statistically significant effects on the state court’s decision to strike down or uphold the state program (See Table 8). They also remain in the direction expected by my hypotheses—specifically reliance on a state Blaine Amendment increases the likelihood of creating a higher wall of separation between church and state than required by the United States Supreme Court.

\[18\] A logistical regression is the appropriate tool to analyze a dichotomous dependent variable—in this case whether a court upheld or struck down a statute providing aid to religious institutions.
Although I find support for the effects of the legal bases of support on the courts’
decisions, the public’s opinion on support for aid to religious schools does not appear to have a
significant effect on the courts’ decisions. When considered in tandem with reliance on a state
Blaine Amendment and reliance on a federal constitutional clause, the affect of the Pew public
opinion variable is wrong direction and is not statistically significant. The logistical regression
shows that the more strongly public opinion favors separation between church and the less likely
the court is to strike down legislation providing aid to religious schools (See Table 9). This
result is contrary to my expectation.

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Coefficient</th>
<th>Standard Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rely on Blaine Amendment</td>
<td>2.55*</td>
<td>1.25</td>
</tr>
<tr>
<td>Rely on federal clause</td>
<td>-3.25*</td>
<td>1.28</td>
</tr>
</tbody>
</table>

* Statistically significant at p<.05
N=27

19 While I coded both the ANES and the Pew Center data, I did not end up using the ANES data. The first logistic
regression run with the ANES data had 21 observations because of missing data. The inclusion of the public
opinion did not change the affect of the reliance on a federal clause, as that variable remained statistically
significant. When the logistical regression was limited to cases after 1969, so few observations were counted that
the reliance on a federal clause variable was omitted from the analysis. Consequently, a model with the ANES data
was not considered in this analysis.
When I restrict analysis to the cases decided after 1969, the public opinion variable is statistically significant, but it remains in the unexpected direction (See Table 10). There are several reasons to doubt the results produced by this variable and data. Consequently, I cannot reject the null hypothesis that there is no relationship between public opinion on separation of church and state and state courts’ decisions in cases concerning aid to religious schools.

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Coefficient</th>
<th>Standard Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rely on Blaine Amendment</td>
<td>0.87</td>
<td>0.91</td>
</tr>
<tr>
<td>Rely on federal clause</td>
<td>-2.52*</td>
<td>0.90</td>
</tr>
<tr>
<td>Pew public opinion</td>
<td>-0.02</td>
<td>0.03</td>
</tr>
</tbody>
</table>

* Statistically significant at p<.01
N=32

---

20 First, the Pew Research Center data only accounted for 26 observations (it does not gather data for Hawaii and Alaska, for instance, which both had state aid cases). Second, the data was only collected in 2005, which does not correspond to the time period in which many of the cases were decided (which range from 1949 to 2009). Third, the wording of the Pew survey question could have biased respondents towards choosing a certain answer. Nonetheless, the measure for public opinion does not appear to affect the other variables in the model. Both reliance on a Blaine Amendment and reliance on a federal clause are stable and in the expected direction, even when public opinion variables are added to the model. This supports my hypothesis about the affect of Blaine Amendments on decision-making and shows then to be a modest predictor of a case outcome.
Because of the inadequacies of the Pew Research Center and ANES data for this project, future analysis should seek different data that records audience opinions about religious liberties and the separation between church and state. In addition, data measuring elite opinion should be used. Baum (2006) argues that the legislative and executive branches are another judicial audience. For several reasons, including their heightened attention to case outcomes and their role in selecting judges, members of the other branches have potential to affect judicial decision-making (Baum 2006, 72). Consequently, data on the opinions of state elites—such as legislators—would provide useful insight into affects on state court decision-making concerning state aid to religious schools. Furthermore, since public opinion polls measure latent opinion, measures of interest group activism concerning the intersection of religion and schools might be a more telling indicator of opinion taken into consideration when state court judges render their decisions.

Based on the analysis above, two of my three hypotheses are supported. Specifically, I find support for the expectation that state high courts will protect non-establishment principles

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Coefficient</th>
<th>Standard Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rely on Blaine Amendment</td>
<td>3.27*</td>
<td>1.58</td>
</tr>
<tr>
<td>Rely on federal clause</td>
<td>-5.62*</td>
<td>2.39</td>
</tr>
<tr>
<td>Pew public opinion</td>
<td>-0.12**</td>
<td>0.07</td>
</tr>
</tbody>
</table>

* Statistically significant at p<.05
** Statistically significant at p<.10
N=26

Table 10: Public Audience and the Decision to Uphold State Aid to Religious Schools After 1969
above the federal minimum. State high courts more often struck down state programs providing aid to religious schools than upheld them, building a higher wall of separation between church and state than the United States Supreme Court.

Second, the results support my hypothesis that state courts that rely on a state Blaine Amendment in their decision will be more likely to strike down transportation, textbook, disabled student aid, and tuition voucher programs. When providing greater separation between church and state, state high courts were more likely to rely on a state Blaine Amendment. This finding was supported by the Washington Supreme Court in its opinion in *Visser v. Nooksack* 33 Wn.2d 699 (1949). The Washington court emphasized the importance of its Blaine Amendment in arriving at a more protective outcome:

"Although the decisions of the United States supreme court are entitled to the highest consideration as they bear on related questions before this court, we must, in light of the clear provisions of our state constitution [a state Blaine Amendment] and our decisions thereunder, respectfully disagree with those portions of the Everson majority opinion which might be construed, in the abstract, as stating that transportation, furnished at public expense, to children attending religious schools, is not in support of such schools" (*Visser v. Nooksack* 1949, 204, 205).

A similar assertion was made by the California Supreme Court in *California Teachers Association v. Riles* 29 Cal. 3d 794 (1981). In building a higher wall of separation, the court asserted, “It is not the meaning of the First Amendment which is critical to our determination but…the California constitution [in reference to the state Blaine Amendment]" (*California Teachers Association v. Riles* 1981, 964).

When analysis was restricted to cases decided after 1969, this relationship between the Blaine Amendment and the state court’s decision is stronger and statistically significant, supporting both the initial hypothesis and the expectation that the effect will be stronger after the
Warren Court. State court reliance on a federal clause in upholding aid programs is also supported by the data and statistically significant; when upholding programs of state aid to religious schools, state high courts were more likely to rely on a federal constitutional clause.

However, my hypothesis that state high court decisions will mimic public opinion concerning religious liberties was not supported by the results. Rather than mirroring each other, public support and a state court’s decision are inversely related—as support for separation increases, the less likely state high courts are to render decisions that build a higher wall of separation between church and state. When analysis focused on cases decided after 1969, the results remained in the unexpected direction and became statistically significant. As discussed above, this finding is likely affected by the inadequacies of the public opinion data for this project.

**Conclusion**

This analysis of state high court protection of religious liberties beyond the federal minimum fills a gap in research concerning state court treatment of religious liberties, particularly the separation between church and state (Tarr 1988). In finding significant state court protection of non-establishment principles using state constitutions, these results contradict other research concerning state protection of other rights and liberties (Davis and Banks 1987, Latzer 1991) and provide insight into the conditions under which state courts are more likely to rely on their state constitutions and to engage in judicial federalism.

In *Everson* (1947), *Allen* (1968), *Zobrest* (1993), and *Zelman* (2002), the United States Supreme Court built a relatively low wall of separation by accommodating interaction between the state and religious schools. Consequently, the state high courts have the opportunity to use their own state constitutions to provide greater protection of non-establishment clause principles.
and construct a higher wall of separation within their state. Using a comprehensive, systematic, and empirical approach, this paper finds evidence that state courts are engaging in greater liberties protection than is required by the United States Constitution in cases involving state aid to religious schools through transportation, textbook loans, disabled student aid, or tuition vouchers. Particularly in those decisions rendered after 1969, state high courts show strong protection of religious liberties. Also, state high courts’ reliance on state Blaine Amendments is more often associated with state courts striking down state aid to religious schools and creating a higher wall of separation.

In the United States’ dual-court system, state high courts have the ability to significantly affect the level of civil liberties protection afforded to citizens. As state aid to religious schools remains an important and topical issue, state courts continue to hear challenges to programs and the level protection of religious liberties continues to change. Cases concerning tuition voucher programs, in particular, are percolating in states’ trial and lower appeals courts (for example see Meredith v. Daniels (Illinois, 2012) and Louisiana Federation of Teachers v. State of Louisiana (Louisiana, 2012)). These programs raise concerns over the wall of separation between church and state. The findings in this paper, then, provide relevant insight on the religious liberties jurisprudence of state high courts and their protection of religious liberties beyond the federal minimum level established by the United States Supreme Court.
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Miller, Warren E.; Kinder, Donald R.; Rosenstone, Steven J.; and the National Election Studies. 

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