

An Analysis of the Supreme Court's Holdings in Establishment Clause Cases:
Comparing Holdings to Measure Consistency across Variables

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ABSTRACT

Literature regarding the Supreme Court's holdings in Establishment Clause cases suggests the Court's jurisprudence has been inconsistent. Because the Court had both upheld and invalidated challenged governmental actions that relate to religious practices or institutions, a broad overview of the Court's holdings in Establishment Clause cases seems to support that notion. But where does the inconsistency lie: in the tests and criteria used by court members or in the holdings themselves? This thesis suggests that when comparing categories and subsets of the Court's holdings in Establishment Clause cases to one another, the jurisprudence is in fact consistent. This thesis demonstrates where the consistency can be identified and measured in the Court's jurisprudence by analyzing the holdings.

The thesis employs three models, Strict-Separationism, Non-Preferentialism, and Accommodationism, to create standardized categories of Supreme Court's holdings, as independent as possible of the reasoning, criteria, or tests applied to the case by the Court members. I grouped the cases included in this study into one or more categories based on which model(s) the Court's actual holding matched. Then I compared cases within each category of holdings to one another across variables (such as actual holding and case types) to measure consistency between the cases. I conclude with an examination of the measured consistency and explanation of identified patterns in the Supreme Court's Establishment Clause holdings. The data indicated that the Court's actual holdings matched the same projected holdings consistently when compared to cases with similar variables.

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*Congress shall make no law respecting an establishment of religion...
-First Amendment, United States Constitution*

Chapter 1: Introduction

The First Amendment's Establishment Clause has served as a battleground for constitutional interpretation. Though only ten words, the complexities of understanding the clause and how it applies to particular laws or actions cannot be explained in as few words. Deciphering and interpreting the Establishment Clause can be an exhausting task. Like many of the clauses written into the Constitution, the phrasing is vague, and could be interpreted in a multitude of ways using a multitude of sources.

Over time the Supreme Court, through its opinions and legal rulings, applied those ten words in a variety of cases to the laws and actions of federal, state, and local government institutions and officials. The Court used the meaning of the Clause to uphold and invalidate government actions such as federal and state laws, federal and state funding, and school board policies. As justices considered new cases on challenged actions that the involved parties claim violated the clause, they ruled on the constitutionality of the law, policy or other governmental action using a variety of methods and tests, including their interpretation of what the clause means, their ideology, judicial precedents, and historical writings. The circumstances of the case, the justices' political ideology and personal opinions created the basis of the holding and opinion, while references to Founding Fathers or scholarly writings provided the evidentiary support they sought to solidify their position. The rulings and interpretations changed as the Court changed, with different justices, different ideologies, and different interpretations of the clause.

Because different justices with differing methods of judicial decision-making and interpretations ruled differently than previous Courts on Establishment Clause cases, a general

overview of the clause indicates that the Court's jurisprudence may be unpredictable. In fact, one author phrased the scholarship surrounding it this way: "Establishment Clause doctrine 'is a mess'."¹ Upon broad examination of the cases, it seemed that the Supreme Court has not applied just one standard test or ruled one distinct way on Establishment Clause cases. Steven G. Gey identified ten different standards between the mid-1990s and mid-2000s, with individual justices responsible for multiple tests themselves.² Why has the Court's Establishment Clause jurisprudence appeared inconsistent? One could assume that that factors such as circumstances of the case, judicial ideology³, sources of the justices' understanding of the meaning, and personal beliefs are among the answers, and the combination of these factors resulted in the diverse rulings on the cases. However, these factors leave observers unsatisfied. What are observers of the Court or those interested in the Court's jurisprudence to do with the ever-changing nature of Establishment Clause jurisprudence? Is there some method to understanding the 'madness'?

Scholars created many studies to explain how the Court has used certain tests and show how they applied to a variety of cases. Scholarly works dissected the Founding Fathers and historical writings and debates to show how the Court should rule on these various cases. Papers sought to distinguish different positions that the Court has held to, and defined the features of the case that justified that position. However, because of differences in case facts and different justices hearing the case and ruling based on different legal standards, measuring consistency by

¹ Doshi 2010, p. 461, referencing Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 120 (1992).

² Gey 2006, p. 725: "At some point during the last ten years, one or more of the nine justices have articulated ten different Establishment Clause standards. Many of the Justices have endorsed several different-and often conflicting- constitutional standards. Justice O'Connor alone authored or signed opinions that relied on five different (and again, often contradictory) standards for enforcing the Establishment Clause."

³ By judicial ideology, I mean whether the justice is classified as liberal or conservative, and how their beliefs are reflected in their rulings. My study controls for judicial reasoning by focusing on the holdings of the cases rather than the stated reasoning given by the justices for why the Court ruled as it did.

comparing the standards or tests applied would be a difficult task. A standard of comparison that removed variables that are solely based on what a judge decided to apply to a particular case (such as the test applied to the facts of the case) and accounted for the rationale based on the facts would be a preferable way to measure consistency because the facts of an individual case remained fixed⁴ no matter what level of court heard the case.

Perhaps the focus should not be placed on the tests or justification, but instead should be placed elsewhere. After all, no matter what sources or legal theory the justices used to rule on the challenged action, the Court's holding ruled on the constitutionality of the challenged action brought before the Court. In each case, a justice wrote the majority or plurality opinion, with input from the other justices in the majority, to announce whether the challenged law or action was upheld or invalidated. The holding of the majority or plurality of the Court, no matter the reasoning, was its legal answer for the challenged action. This ruling determined whether the action was allowed to continue, whether it should be altered, or whether it should be discontinued because it violated the Establishment Clause.

Comparing and analyzing the holdings themselves provides the best method of comparison. The holdings of the Court determined whether the Court upheld or invalidated the challenged government action brought before the justices. The holding can be analyzed without relying on legal reasoning used by the justices to arrive at the decision of the Court. Two separate cases with similar facts could be heard by two different Courts, and the majority opinion could use different reasoning for arriving at or justifying their decision. But if the holdings of both cases have the same or a similar result with respect to their challenged government action, then the Court ruled consistently in the cases. This approach diminished the effect of judicial

⁴ By fixed, I mean that the challenged actions and the events surrounding the case remain constant and are not in question. The argument at the various levels of courts become one of interpretation and application of the actions and facts of the case.

reasoning and interpretation to offer standardized categories of comparison based on the holdings. This is the approach I offer with this study.

The question that I address in this thesis is: Are the Supreme Court's holdings consistent when compared with other similar cases, and if so, to what extent are they consistent? I have always believed that religious freedom was a bedrock principle of America's history, and that the federal government would recognize religion's role in government and society and would protect that role. But when the Court ruled that school prayer violated the Establishment Clause or that the Ten Commandments could not be posted in a courtroom, it seemed that the Court had not protected the freedom as vigorously as I imagined. To make matters worse, it appeared that the Court's rulings were inconsistent, allowing for government involvement in religion in some instances, but not in others. I expected that at the end of this thesis, the data would show that the Supreme Court's rulings were inconsistent, confirming the appearance of inconsistency in the effects of the holdings.

In this study, I created the framework for this new approach. It takes a step back from examining particular factors to offer a better understanding of the holdings of the cases. In this approach, the most important part of understanding the cases is not the rhetoric in the opinions or the characteristics of those involved. The most important factor first and foremost is the Court's holding. I decided to delve into the holdings themselves in order to judge whether the Supreme Court ruled consistently on Establishment Clause cases.⁵ I provide an understanding of the cases by classifying and grouping the holdings into categories based on distinct models of the Establishment Clause. Categorizing the holdings by models matched would provide a basis for

⁵ I did not address whether the litigants complied with the Supreme Court's ruling or whether other government institutions or officials, including other courts, followed the precedent set.

comparing and analyzing positions taken by the Supreme Court in its holdings. Through this categorization, I measure the consistency of Supreme Court rulings.

In order to compare cases and determine whether consistency existed in Supreme Court holdings, I created standardized categories to compare the Court's holdings in Establishment Clause cases and a measurement standard to determine whether the Court ruled in a consistent manner. I categorized 73 actual holdings of 70 Establishment Clause cases ruled on by the Supreme Court into one or more of three models established in the study (Strict-Separationism, Non-Preferentialism, and/or Accommodationism) based on projected holdings according to the models. I also compared cases within and among each category and across several variables and analyzed the results to determine to what extent there has been consistency in the Establishment Clause case holdings.

I established the three particular models on Establishment Clause jurisprudence, defined and demonstrated by the writings of historical figures (members of the Constitutional Convention of 1787 and the First Congress), scholars and justices that have advanced reasoning that matched each particular position, and by examples of holdings that illustrate that position. Using the three models, I projected the holdings for each case according to each model by comparing the facts of the case to the criteria established in each model. This gave each case three projected holdings, and I compared each to the Court's actual holding in the case. Once these steps were applied to each case included in the study, I grouped the cases into categories according to which model(s) the actual holdings matched. After creating the categories, I compared subsets of cases across variables such as challenged actions, case types, and the justices' vote in each case variables to measure consistency in the Court's holdings across cases.

The results of the thesis show that the data support consistency in the Supreme Court's jurisprudence among most variables when the holdings were compared to one another. Consistency was measured by the percentage of cases in a subset in which the actual holdings of each case matched one another when compared across variables. The greater the percentage of cases that matched, the more consistent the Court's jurisprudence. The thesis finds greater levels of consistency among cases in which the actual holding matched at least Strict-Separationism, as well as in subsets of cases compared according to the result of the Court's holding (whether the Court upheld or invalidated the challenged action) and the strength of the Court's votes on cases. Using a consistency measurement based on percentages showed a higher or lower degree of consistency in each category or subset.

This study is significant for political scientists because it contributes to the scholarly debate over the Supreme Court's Establishment Clause jurisprudence that I believe to be lacking. By standardizing the comparison of cases, the level of consistency can be formally measured and offer data to support a political scientist's claim. For observers of the Supreme Court, this study offers a plausible explanation for the Court's holdings. For those involved in policy such as legislators who may be writing new legislation that involves religion and the executives that implement and enforce the new policies, this study clarifies the nuances of previous Supreme Court holdings that allows for a better understanding of what the Court is likely to uphold or invalidate in terms of challenged government actions.

Chapter 2 of the thesis reviews relevant literature on Establishment Clause jurisprudence and describes what scholars call disorder and inconsistency in the Court's jurisprudence. It uses examples of cases to illustrate what scholars have called inconsistency, showing how the Court invalidated a challenged government action in one case and then upheld a similar challenged

government action in another. Chapter 3 describes the methodology used in this study. It starts by explaining what cases I chose to be included and why. It then examines the three models of Establishment Clause jurisprudence that I employed in the study. These three models define views that could be applied to a challenged government action and how the Court would rule on a case according to that model. The chapter also describes what criteria are often found in the facts of cases that I use to categorize the holdings of each case when applying the models to the facts. Each model is illustrated using summaries of Supreme Court Establishment Clause cases, as well as supported by scholarly evidence. Next, the chapter explains how the cases are summarized and what data were collected from each case. It then explains how holdings were projected for each case, and how the actual holdings of the case were compared to the projected holdings in deciding which model or models a case matched. This section includes a few case summaries to illustrate the process. Finally, the chapter describes the comparisons made between categories of models matched, and the subsets created within each category by comparing particular variables in cases to measure consistency.

Chapter 4 reports the results of the comparisons used to determine the extent of consistency in the Supreme Court's Establishment Clause jurisprudence. I compared the subsets of cases across several variables to determine whether the actual holding in the cases in each subset matched the projected holdings of the same or similar models. Chapter 5 analyzes the results of the various comparisons. The chapter examines whether the data support consistency measured in the Supreme Court's holdings when compared to the other cases in the subset. Chapter 6 summarizes my findings and the consistency found in the Supreme Court's jurisprudence when comparing the Court's holding in categories and subsets of cases to one another.

Chapter 2: Establishment Clause Jurisprudence

Many studies of the Establishment Clause begin with an acknowledgment of the Supreme Court's prior jurisprudence on the subject. These writings ranged from harsh criticism of the Supreme Court's vacillating stance with regard to the tests applied in various cases to a defense of the Court's attempt to defend religious liberty by allowing religion to have a protected place in some aspects of people's lives. The charges came not only from scholars, but many times from Supreme Court justices themselves. Stephen G. Gey began his article, "Why is Religion Special: Reconsidering the Accommodation of Religion under the Religion Clauses of the First Amendment," by relating the following allegations about the jurisprudence of the religious clauses: "Constitutional jurisprudence concerning religion has been described as 'a maze,' 'in significant disarray,' 'a conceptual disaster area,' 'inconsistent and unprincipled,' and resembling in several respects the more surreal portions of *Alice in Wonderland*."⁶ He also echoed Rupal M. Doshi in stating that Establishment Clause jurisdiction is "a mess".⁷ Others have pointed out the Establishment Clause "check has remained unsettled"⁸, and that the religious doctrines held by the Supreme Court "have been in a state of great controversy, perpetual transformation, and consequent uncertainty."⁹

Why have these authors and justices reached such conclusions? One answer might be that because religion is often seen as such a personal matter that any stance in support or in

⁶Gey 1990-1991, p. 75. The quotes came from the following sources: "a maze" from Justice Scalia's dissent in *Edwards v. Aguillard*; "in significant disarray" from Pepper, Stephen L. "The Conundrum of the Free Exercise Clause-Some Reflections on Recent Cases." *Northern Kentucky Law Review* 9 (1982), 303; "a conceptual disaster area" from Choper, Jesse H. "The Establishment Clause and Aid to Parochial Schools – An Update." *California Law Review* 75 (1987), 6; "inconsistent and unprincipled" from Cornelius, William J. "Church and State – The Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality." *St. Mary's Law Journal* 16 (1984), 8; "Alice in Wonderland" from Smith, Steven D. "Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test." *Michigan Law Review* 86 (1987), 269.

⁷Gey 2006, p. 725.

⁸Steffey 1991-1992, p. 903.

⁹Sisk, Heise, and Morriss 2004, p. 491.

opposition of religion, particularly by the government, is bound to spark a strong response.

William French Smith seemed to agree with that viewpoint, stating that the Establishment Clause is “one of the most controversial and widely debated provisions.”¹⁰ However, the Supreme Court contributed to this sentiment through its history of holdings in religious cases and the tests it has applied to answer the constitutionality of the challenged actions. It has not held the same position on the clause, instead ruling on cases with similar fact backgrounds in ways that seemingly opposed one another.

Take government aid to parochial schools as an example. In the case *Board of Education v. Allen* (1968), the Court held that a state policy that provided textbooks to students in religious schools was not a violation of the Establishment Clause as long as the content in the books was secular and they were distributed neutrally to all students regardless of school. Then the Court ruled in *Meek v. Pittenger* (1975) and again in *Wolman v. Walter* (1977) that materials such as maps, globes, science kits, etc. given to students at religious schools by the states violated the clause and were therefore unconstitutional aid. The court reversed the precedent set by *Meek* and *Wolman* in *Mitchell v. Helms* (2000), saying that religious schools could receive federal funds under Chapter 2 of Education Consolidation and Improvement Act to purchase supplies if they were used for secular purposes.¹¹ In simple analysis, each of these cases seemed to show a Court that wavered between whether government aid to religious schools violated the Establishment Clause or not.

Another example of inconsistency was illustrated in the case *County of Allegheny v. ACLU* (1989). The ACLU sued Allegheny County to have the county remove religious holiday

¹⁰ Smith 1983-1984, p. 457-472.

¹¹ McConnell 2000-2001, p. 685.

displays located in and around the county courthouse. A crèche¹² was placed at the top of a staircase inside the courthouse and a menorah was located outside of the courthouse at the base of a large Christmas tree; the ACLU challenged both displays. The Supreme Court ruling provided five separate opinions, none of which garnered a majority. Three justices held both displays to be violations of the Establishment Clause and four justices held that neither display was a violation. The remaining two justices found the crèche to be unconstitutional and the menorah to be constitutional. As a result, the Court ruled by a 5-4 vote that the crèche display was unconstitutional and by a 6-3 vote that the menorah display was constitutional.¹³ The Court even seemed to contradict itself on the same day when it found in *McCreary County v. ACLU of Kentucky* (2005) that a display of the Ten Commandments violated the clause, yet in *Van Orden v. Perry* (2005), it ruled another display of the same document to be in line with the Establishment Clause.

These almost schizophrenic stances illustrate what seemed to be the inconsistency of the Supreme Court in Establishment Clause cases. These cases provided “numerous interpretations (of the Establishment Clause) and at times may conflict with one another.”¹⁴ The Supreme Court seemed to struggle to determine what the Clause meant and to apply that meaning.¹⁵ Making matters worse for the Court, the justices created, changed, ignored, discarded and replaced a variety of tests in their rulings. Gey’s article “Reconciling the Supreme Court’s Four Establishment Clauses” discussed 10 standards and tests created by the Supreme Court in various

¹² A crèche is a nativity scene, depicting the Birth of the Baby Jesus.

¹³ Discussion of *Allegheny* from Paulson 1992-1993, p. 813.

¹⁴ Ignagni 1994, p. 301.

¹⁵ Larsen 2006, p. 155 (note 6): “For more than 200 years, the U.S. Supreme Court has struggled to apply that seemingly simple mandate” and Holland 1992, p. 1600 discussed the Court’s struggle to articulate the models and tests.

cases.¹⁶ When the Court articulated a test that evidently believed could help clarify the clause, like the *Lemon* test,¹⁷ there was inconsistency in the application.¹⁸ Even Supreme Court justices like Antonin Scalia held the tests in similar regard. Scalia wrote in *Lamb's Chapel v. Center Moriches Union Free School District* (1993): "For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced."¹⁹ Gey concluded that "the only conclusion...is that the Court's current Establishment Clause jurisprudence is inconsistent to the point of incoherency."²⁰

The Court's application of the Establishment Clause varied from case to case. The outcomes of each ruling differed in their legal reasoning and interpretation. Many individual cases also showed a division of the Court, as they contained one or more dissenting opinions.

How then are we to understand Establishment Clause jurisprudence? An overview of some of the empirical studies completed on the subject shows that a variety of factors influenced justices' votes. Among the considerations were the justices' religious orientation,²¹ their judicial ideology²² or party affiliation,²³ and the religious background of the claimants.²⁴ Other empirical

¹⁶ Gey 2006, p. 725-800: The tests he named were the three-pronged *Lemon* test, endorsement, broad coercion, narrow coercion, formal neutrality, substantive neutrality, non-preferentialism, non-incorporation, divisiveness, and ad hoc analysis.

¹⁷ *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *Lemon* test is a three-pronged test to determine whether an action is a violation of the Establishment Clause. The action must have a secular purpose, must not advance nor inhibit religion, and must not result in "excessive government entanglement."

¹⁸ See Horowitz 1988-1989, p. 617-638: Quoting *Lemon*, "blurred, indistinct barriers"; also Angus 1996, p. 123-154 and Paulson 1992-1993, p. 795-864. Angus discussed how the Court followed or disregarded the *Lemon* test in terms of the outcomes of cases from *Lemon* to *Rosenberger*; Paulson celebrated what he calls the death of the *Lemon* test.

¹⁹ *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), 399.

²⁰ Gey 2006, p. 783.

²¹ Feldman 2006-2007, p. 43-57.

²² Sisk and Heise 2012, p. 1201-1264. Sisk and Heise cited several other studies they have completed that considered various factors of ideology, demographic background and religious and political affiliation in their paper.

²³ Wasserman and Hardy Volume and Date TBD.

²⁴ Sisk, Heise, and Morriss 2004, p. 491-614.

studies sought answers by considering the expressive meanings of the government actions to reconcile the Establishment Clause stances,²⁵ by examining the Court's attempt to determine the meaning of various words,²⁶ or even asking whether judges are even constrained by the law at all.²⁷

Although these studies offered important information relating to the demographics, backgrounds, attitudes, and ideology of those involved in the case and the holdings, they still left something to be desired in terms of a broad understanding of the whole of Establishment Clause jurisprudence and the relative consistency or inconsistency of the holdings themselves. Gey pessimistically offered that in order to deliver a coherent articulation of the clause, the Court would have to determine whether the government should be secular or theocratic, which would solve the disputes between Establishment Clause doctrines; however, this choice would also contradict several of the basic tenets of a democracy.²⁸

²⁵ Geisinger and Bodensteiner 2007-2008, p. 77-136.

²⁶ Holland 1992, p. 1595-1694: Page 1600, "Since that time, the Court has struggled to articulate the range of government actions that are invalid under the *Lemon* test by trying to give content to essential words like "purpose," "effect," "advance," and "inhibit" and seeking to reconcile its more recent holdings with those prior to *Lemon*."

²⁷ Benesh and Spaeth 2007, p. 755-768.

²⁸ Gey 2006, p. 727-728: "A properly democratic government must therefore be defined by both political and religious agnosticism—a renunciation of the idea that any political majority is permitted to define and enforce any set of absolute political or religious truths. According to this theory, a system of theocratic majoritarianism is not only contrary to the basic themes set forth in the Establishment Clause and the Bill of Rights, but is also contrary to the basic theoretical requisites of any proper constitutional democracy."

Chapter 3: Methodology

The literature review shows the perception that the Court is inconsistent in its Establishment Clause holdings. I created this study to examine the Court's holdings in order to determine whether this perception is correct. In this chapter, I lay out the approach I used to select cases, establish the models, and collect data from the cases in order to categorize and compare the cases to one another to measure consistency.

A. Selection of Cases

I used Mark David Hall's Supreme Court case list²⁹ for the cases to include, which he adapted from Carl H. Esbeck's *U.S. Supreme Court Decisions Relating to Religious Liberty and Church-State Relations* (2005). Hall's methodology for choosing cases included taking several lists from different sources and then reviewing the cases to determine which cases were heard by the Court on the basis of one of the two religion clauses of the First Amendment.³⁰ He used a "rule of four" to determine what cases qualified for his study.³¹ This rule allowed cases to be selected in which at least a "substantial minority" of justices believed that one of the religious clauses was at issue.³² He then listed all of the cases in an appendix with a note beside of it indicating whether it was a Free Exercise clause case, an Establishment Clause case, or both.³³ His original list included 115 cases. Because I focused on the Establishment Clause, I eliminated all cases from Hall's list that involved only the Free Exercise clause. This left 71 cases that were either primarily Establishment Clause cases or both Establishment Clause and Free Exercise Clause. The decision was made to include all 71 cases. Though the focus of this thesis was the

²⁹ Hall 2006, p. 609-613.

³⁰ Hall 2006, p. 565-566: "This count does not include cases where religion played a significant role but that were decided upon other constitutional or statutory grounds. Nor does it include cases where a Religion Clause claim is dismissed without serious consideration".

³¹ Hall 2006, p. 565.

³² Hall 2006, footnote 6.

³³ Hall 2006, p. 565.

Establishment Clause, because it examined the holdings themselves, other claims (such as Free Exercise or judicial standing) did not change whether the justices ruled to uphold or invalidate the challenged action.

It should be noted that not all cases on the Establishment Clause heard in the state or federal courts were included in this study, only the ones argued before the U.S. Supreme Court. There were two main reasons for this decision. First, the sheer number of cases heard by the state courts and lower federal level courts would have made this study nearly impossible. A case law search of the term “Establishment Clause” on findlaw.com returned 4,713 results.³⁴ Researching over 4,000 cases for the Establishment Clause issue and challenged government action would have required years of dedicated study. Using U.S. Supreme Court cases made for a manageable list from which to study, particularly since Esbeck’s and Hall’s work provided a ready compilation. Second, including cases from 50 state courts, 94 federal district courts, and 13 courts of appeal would have required the study to account for more differences in variables. Cases heard by the U.S. Supreme Court set precedent for all federal courts, as well as the states if the Constitutional issue was incorporated via the Fourteenth Amendment, as is the Establishment Clause. Because of the reach of the Supreme Court’s holdings, it seemed that only cases at the highest level be included for this study. Moreover, as stated earlier, the case list from Esbeck included only those cases in which a substantial minority, or at least four justices, believed the case should be heard on Establishment Clause grounds. I did not include cases in which the Establishment Clause may have been at issue, but not the primary focus of the case (according to a substantial minority). The Court’s holding in cases that may have had a secondary Establishment Clause issue may not have adequately answered or ruled on the

³⁴ “Establishment Clause.” Findlaw.com.

challenge to the Establishment Clause. As a result, the data taken from the holding may not have been clear enough to analyze for the purposes of this study.

Esbeck's updated 2010 list³⁵ was referenced for any Establishment Clause cases since Hall's article was published that should be included. This updated list added three cases to the data set, *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007), *Pleasant Grove City, Utah v. Sumnum*, 555 U.S. 460 (2009), and *Salazar v. Buono*, 559 U.S. ____ (2010). A brief review of the Oyez Project at IIT Chicago-Kent School of Law (oyez.org) and the US Supreme Court Center (supreme.justia.com) showed no additional cases on the Establishment Clause to include as of July 2013. Appendix A lists the 74 cases that are included.

B. The Models and Their Understandings: Strict Separationism, Non-Preferentialism, and Accommodationism

In order to create a standardized method of comparison, the thesis established three models to compare to the Court's holdings in each case. The models are based on historical and legal interpretations of the Establishment Clause.

1. Description of the Models

Each model expresses a different framework that has been or could be applied to cases that challenge a government action on an Establishment Clause basis. The models are tools to organize cases in terms of criteria within each model. The models are not committed to tracking reasoning in terms of causation of the holding or justification given by the justices for the holding. The criteria do track patterns of reasoning found in the cases that may indicate the Court's ruling. These patterns of reasoning apply the criteria found in a particular model to the facts of a case in order to project how the Court would rule or indicate how the Court ruled if it

³⁵ Esbeck 2010.

followed that particular model. For example, if the Supreme Court heard a case that challenged a state law that created an official state religion, then applying the criteria of each model to the facts of the case allows for an indication of the Court's ruling according to each model. The patterns of reasoning found in the criteria of the Strict-Separationism model, for example, would support a decision invalidating the challenged government action. The criteria may depend on the facts or some other element of judicial rule; however, the criteria still signal the Court's stance according to each model.

The models have predictive, explanatory, and projective value. The criteria in each model could be applied to a future case, and, based on the facts of the case and the patterns of reasoning in the criteria, predict the Court's ruling according to that model (predictive value). This value would be limited, as it would be most useful if there were some indication that the Court would follow that particular model. The criteria in each model could be applied to a past case, and based on the facts and patterns, explain the Court's holding based on particular criteria that the justices seemed to have found to be important (explanatory value). Again, this value would be limited because it would only offer reasons to explain the Court's ruling on a prior case or offer reasoning to justify or rationalize a holding. The greatest value, and the most important to this study, is a model's projective value. The projective value combines elements of both the predictive and explanatory to determine how the Court would rule if it followed a particular model. This step can be applied to any case, past, present, or future. One could take a case or set of facts and compare the facts to the criteria established in each model. By applying the criteria of each model, one could determine how a Supreme Court justice would rule on that challenged action if he/she followed that particular model. The projective value of the models would give three possible holdings of the Court, based on the criteria and reasoning found in each model.

These projected holdings could then be compared to how the Court ruled (on previous cases or after the opinion of the Court is announced in a present case) in order to indicate what stance the Court took on that particular case. Using the models in a projective manner allows for comparison of cases based on models that the Court's actual holding matched.

The models link the facts of the case to the holdings of the Court, using criteria based on patterns of reasoning indicated in the Statement of Models (Appendix B). The criteria in each model encompass the various sets of facts found in the cases included in this study. The criteria in each model indicate the Court's stance on four particular facets of the cases: the purpose of the challenged government action,³⁶ the role of the government in the challenged action,³⁷ the level of government involvement,³⁸ and the neutrality (or lack thereof) shown by the government in the challenged action.³⁹ Each criterion in the models indicates more specifically the stance of that model when addressing the facts of the case that correspond to one or more of these four facets. Using the models to project holdings for each case allowed for me to compare cases based on the reasoning found in the criteria rather than on facts that varied greatly from case to case (and even within sets of cases that seem to share a particular issue, such as all cases that challenged a religious display or prayer).

Using the models for their projective purpose allows for the criteria to be applied to each case in order for the cases to be categorized according to the projected holdings of each model that the Court's actual holdings matched. I completed the classification by comparing the facts

³⁶ This could also be expressed as why the government actor passed a particular policy or acted in a particular way. This facet includes criteria such as whether there was a secular purpose, if the government's action was to provide a general service to someone or some group, or was providing some support to a religious institution.

³⁷ This facet includes criteria such as whether the government attempted to inhibit or promote a religion or religious belief, endorsed a particular religious message, or coerced someone into a particular religious belief or worship.

³⁸ This facet includes criteria such as whether the government acted directly to benefit a religious institution or whether the benefit was indirect through help given to another actor.

³⁹ This facet indicates whether the government remained neutral towards a religious institution, message, or practice in comparison to other religions or non-religions.

of the case to the criteria in each model to determine how the Court would have ruled if it had followed that particular model, then comparing the Court's actual holding to those projected models to determine which model(s) the Court's holding matched. This allowed the cases to be viewed in terms of categories of models matched, a data set that could be compared across many variables.

a. Strict-Separationism

The first model of the Establishment Clause is Strict-Separationism. This model states that government should not take an action that would advance or aid religion or a religious doctrine. A Strict-Separationist interprets the Establishment Clause to say that a government official or institution should not appear to give credence to or promote or favor a church, religious institution, or principle; doing so would in effect be an "establishment" of that religion by the government. For example, government should not provide funding to a school that can or will be used for religious purposes. Such an action may be understood as suggesting that the government agreed with or preferred that particular religious idea over others, which would violate the clause. Government should maintain neutrality by not involving itself in religion unless necessary (for example to prevent an illegal action among those who are worshipping), choosing instead not to take an action that advances or appears to advance or inhibit religious worship, beliefs, or practices. To place the model in terms of the issues and actions that Establishment Clause cases review, the Strict-Separationist model would not allow any interaction between the government and religion that would promote or inhibit a religion, religious institution, or religious doctrine. Examples of government involvement that would be invalidated according to a Strict-Separationist model include funding to parochial schools for religious purposes, allowing or promoting prayer in schools, legislating tax exemptions for

religious institutions, and permitting religious symbols to be displayed by the government or on government property. Such actions may promote religious purposes, coerce the observers into a religious experience, entangle the government with a religious institution by requiring surveillance or monitoring, or endorse a particular faith. The model would allow for investigation of a religious institution to prevent illegal acts (such as a crime committed by a church member or discrimination by religious authorities), but would otherwise expect government to remain separate from the church.

I found examples of this position in the Supreme Court's majority holdings in *McCreary County v. ACLU* (2005) and *Lee v. Weisman* (1992), and the dissenting opinions in *Everson v. Board of Education* (1947) and *Roemer v. Board of Public Works* (1976).⁴⁰ In *McCreary*, the Court held that the purpose of the Ten Commandments posted as a display in McCreary County courthouses was to advance religion and therefore violated the Establishment Clause. In *Lee*, the Court held that a school system's practice of holding an invocation at middle and high school graduations coerced those in attendance to participate in religious worship, which violated the Establishment Clause. In *Everson*, the dissenting opinion stated that the state program to reimburse parents for transportation to schools gave aid to parochial schools (in addition to public schools), but not other private schools, which showed preference to a religion and therefore was unconstitutional. In *Roemer*, the dissent declared that the state statute that gave funds to church-affiliated colleges aided religious schools, even if the funding was for a secular purpose. In each of these cases, the holding or opinion stated that government should have a hands-off approach to religion, and disallowed the action that connected government to a religious institution or doctrine. As Gregory Horowitz wrote, "[t]he establishment clause

⁴⁰ The case summaries included in this section and the subsequent sections on the three models were taken from Angus 1996, p. 123-154.

requires that the secular and religious spheres be distinguished in order to determine whether a governmental action is prohibited.”⁴¹

In summary, a holding is classified as Strict-Separationism if it:

- prohibits a religious doctrine or practice from being recognized by government;
- shows neutrality between government and religion through disallowing a government action that preferred one religion over another, one religious sect over another, or religion over non-religion;
- attempts to insulate the government from any “entanglement”⁴² that may favor one religion or another, one religious sect over another, or religion over non-religion; or
- prevents the appearance that government favors a particular religion or sect, or favors religion over non-religion.

Appendix B shows the full criteria included in the Strict-Separationist model.

b. Non-Preferentialism

The second model included in the study is titled Non-Preferentialism. Non-Preferentialism is the idea that government may aid religious institutions or allow religious practices, provided that the government institutions showed no preference for religion⁴³ over non-religion, one religion over another, or one religious sect⁴⁴ over another. This model allows for government to be involved in religious matters through its laws and actions, such as school funding or curriculum, as long as the action taken does not identify one religion or set of

⁴¹ Horowitz 1988-1989, p. 618.

⁴² *Lemon v. Kurtzman*, 403 U.S. 602 (1971): “the cumulative impact of the entire relationship arising under the statutes involves excessive entanglement between government and religion.”

⁴³ By religions I mean organized systems of beliefs such as Christianity, Judaism, Buddhism, etc. The Non-Preferentialism model states that government should not take an action that treats one religion differently from another.

⁴⁴ By religious sects, I mean subsets within a religion, such as Baptists or Methodists in Christianity or the Sunni and Shi’a in Islam. The Non-Preferentialism model states that government should not take an action that treats one subset differently from another.

religious beliefs as official or preferred. According to this understanding, some practices that violated the Establishment Clause under the Strict-Separationist model would be upheld. One distinguishing feature of Non-Preferentialism is that upheld actions or laws are not intended to declare that the religious institution or religious practices involved are the official religion of the state or the United States. The challenged actions must serve a secular purpose. In terms of the issues before the Court, Non-Preferentialism may permit a religious display if it was clear that the government was not endorsing that particular religion, or provide funding for religious schools if the same funding was available to public or non-religious private schools. Non-Preferentialism may not allow prayer in school if the prayer favored religion over non-religion.

I found examples of this position in the majority opinions in *Walz v. Tax Commission* (1970) and *Wallace v. Jaffree* (1985). In *Walz*, the Court upheld property tax exemptions for religious groups, finding that the exemptions neither advanced nor inhibited religion. In *Wallace*, the Court held that the prayer had no secular purpose and had the primary effect of advancing religion over non-religion, and invalidated the one-minute period of silence in schools as a violation of the Establishment Clause. In each of these cases, the Court considered whether the connection between government and religion advanced or inhibited religion. In *Walz*, the Court answered that there was no advancement of religion and the Court upheld the action, but in *Wallace*, the Court answered that there was advancement of religion and invalidated the action. McConnell argued that neutrality is desirable to protect religious liberty, but as long as the governmental action is neutral towards religion or non-religion or between religions, religious liberty is not threatened⁴⁵; therefore, if religious liberty was not threatened, the action was not a violation of the Establishment Clause, an idea supported by Non-Preferentialism.

In summary, a holding is classified as Non-Preferentialism if it:

⁴⁵ McConnell 1986-1987, p. 146-167.

- allows for neutral government aid to religious institutions;
- allows religious actions that were not endorsed by the government as official or favored;
- does not deny the same religious practice or action towards other religions; or
- recognizes the role of a religious organization in promoting general benefits to society and allows the government to assist in those general benefits.

Appendix B shows the full criteria included in the Non-Preferentialist model.

c. Accommodationism

The third model included in this study, titled Accommodationism, is similar to Non-Preferentialism in that each allows for government actions that are religious in nature. But this model takes the understanding a step further to allow government to acknowledge religion and the United States' tradition of religious worship, as long as the action did not violate any one else's religious liberty. Accommodationism carves out a place for religious expression in peoples' lives. Accommodationism also states that government actions do not violate the Establishment Clause unless the government overtly founds and establishes an official religion, coerces the citizens to believe a particular way, or determines one particular religious doctrine to be the one that should be followed.⁴⁶ Acknowledgement of the role of religion, or even the implication that favoring or aiding religion in general over non-religion, is acceptable under this position. Actions like non-coerced prayer in school or funding for religious purposes in parochial schools are allowed by Accommodationism, as is an action that favored religious worship or practice in general or acknowledged a Judeo-Christian tradition of government.

I found examples of Accommodationism in the majority holdings in *Marsh v. Chambers* (1983) and *Zorach v. Clauson* (1952), and the dissents in *Board of Education v. Grumet* (1994)

⁴⁶ Estes 2010.

and *Engle v. Vitale* (1962). In *Marsh*, the Court held that the United States has a history of acknowledgement of religion dating back to the First U.S. Congress opening with prayer and upheld the Nebraska state legislature's practice of opening legislative sessions with prayer from a chaplain paid for out of state money. In *Zorach*, the Court allowed students to be released from school to attend religious devotional classes. The Court acknowledged the historical tradition of recognizing the role of religion, and held that since no aid was given from the government and the students were not coerced to attend the classes, no violation was found. The dissenting opinion in *Grumet* stated that the creation of a school district for an exclusively religious community in order to provide needed, secular, handicapped services for those citizens who needed it was allowed by the Establishment Clause. In *Engel*, the dissenters argued that a school board policy that allowed the principal to lead a nondenominational prayer only provided an opportunity for prayer, and did not endorse that prayer, nor coerce the students into praying at this time; therefore the policy did not violate the Establishment Clause. In these cases, the religious connection between the government and the religious institution was allowed or some justices argued that it should be allowed.

In summary, a holding is categorized as Accommodationism if:

- the holding upholds a religious action or practice;
- the ruling allows a challenged law or action by acknowledging the role of religion in U.S. history or tradition;
- the action does not coerce anyone to believe or practice in the same way; or
- the action does not establish an official religion.

Appendix B shows the full criteria included in the Accommodationism model.

2. Historical and Scholarly Background of the Models

Scholarly and historical evidence from authors and justices substantiated the understandings in the models. It should be stated that the literature, rulings or references included in this summary were provided to illustrate the arguments. I did not seek to assess the validity of the works used or to question the author's or justice's use of those works. There could be variations of each of these models as well. This thesis does not claim to have an exhaustive list of opinions or stances.

a. Strict-Separationism

A Strict-Separationist model maintains that the Establishment Clause is designed to keep the government from interfering with the rights of the individual in matters of religion. This position treats religion as a private matter between an individual and their deity of choice, or their decision to not be religious at all. Carl Esbeck categorized religion as private and individual, and as such, the state should have little or no influence over religious matters. Likewise, religion should hold little influence over public affairs and matters of state. States should avoid any actions which would seem to favor a particular religion.

Strict-Separationism has been characterized by either government neutrality in religious matters, including between religious and non-religious beliefs⁴⁷ or at the very least the insulation of government⁴⁸ from direct involvement or the appearance of involvement in favoring a religion. The basis of this interpretation started largely on the "wall of separation" metaphor written by Thomas Jefferson. In Jefferson's "Letter to the Danbury Baptists," he stated that religion is "between Man & his God" and that the First Amendment clauses built "a wall of

⁴⁷ Tabash 2007, p. 1.

⁴⁸ Esbeck 1986, summary of points on pp. 379-388.

separation between Church & State.”⁴⁹ The Strict-Separationist model says that this metaphor illustrated that the wall should be built high and the relationship between the government and religion should be just that, separate. Many that hold this position recognized that at times complete separation or government neutrality was not possible; in these cases, the government should hold high standards that make it absolutely necessary for the state to involve itself in religion (i.e. to prevent crimes or protect civil rights).

Justice David Souter claimed in a concurring opinion in *Lee v. Weisman* (1992), and later in a dissenting opinion in *Rosenberger v. Rectors* (1995), that this principle did not allow government to involve itself in any fashion for fear of being viewed as favoring one religion or denomination over the others.⁵⁰ Later cases and interpretations have extended the Strict-Separationist model beyond favoring one religious denomination over another to favoring a believer in religion over another who is not a believer.⁵¹ Isaac Kramnick and Laurence R. Moore’s 1997 book *The Godless Constitution* took this a step farther and stated that the Constitution was designed to create a secular government.⁵²

All of the models rely on an interpretation of the text of the Establishment Clause, though each interprets the phrase to mean something different. Strict-Separationists often state that the prohibition on an “establishment of religion” should be interpreted to mean any position taken by

⁴⁹ Jefferson, 1802: “Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church & State.”

⁵⁰ Muñoz 2006, 586-587.

⁵¹ Tabash 2007, referenced three particular cases as evidence of this position. On page 21, he quoted *Torasco v. Watkins*: “We repeat and again reaffirm that neither a state nor the federal government can force a person to ‘possess a belief or disbelief in any religion.’ Neither can constitutionally pass laws or impose requirements which aid all religions against non-believers”. On page 22, he wrote that in *Santa Fe Independent School District v. Doe*, the message that “adherents” to religion are favored and “non-adherents” are outsiders. In *Board of Education v. Grumet*, he pulled from Sandra Day O’Connor’s opinion that the government can’t treat people differently based on how they worship.

⁵² Tabash 2007, p. 9.

the government to put forth one religion over another. Some supporters of this model reviewed the debate over the clause in the First Congress to find its meaning. In his *Lee* concurring opinion, Souter focused not only on the text that was proposed in the Congress, but also the text that was rejected. Language originally included in the clause⁵³ would have changed the clause to a wording more consistent with a Non-Preferentialist model, but that language was rejected in favor of the current wording.⁵⁴ This meant, according to Souter, that because the framers rejected language that would have clarified the clause to mean that government could not prefer one religion over another, they meant to separate the two institutions.

Those who argued in favor of a Strict-Separationist model often referenced Thomas Jefferson and James Madison to support the claim that the Establishment Clause was meant to separate church and state. For Jefferson, the most common reference quoted was Jefferson's "wall of separation" metaphor in his 1802 "Letter to the Danbury Baptists", such as in the majority opinion in *Everson*.⁵⁵ Another source from Jefferson included his 1787 *Notes on Virginia* in which Jefferson recognized that people may have different opinions on religion, yet the government should not injure that right by involving itself in the person's life.⁵⁶ A third Jeffersonian source was his Statute for Religious Freedom, which his autobiography in 1821

⁵³ *Lee v. Weisman*, 505 U.S. 577 (1992), p. 613, Souter concurring: "In September 1789, the Senate considered a number of provisions that would have permitted such aid, and ultimately it adopted one of them. First, it briefly entertained this language: 'Congress shall make no law establishing One Religious Sect or Society in preference to others, nor shall the rights of conscience be infringed.'"

⁵⁴ Muñoz 2006, p. 596: "The narrow prohibitions against only the establishment of "one religious sect" or specific "articles of faith" were dropped. According to Souter, "[t]he Framers repeatedly considered and deliberately rejected such narrow language and instead extended their prohibition to the state support for 'religion' in general. Implicit in their choice is the distinction between preferential and nonpreferential establishments, which the weight of evidence suggests the Framers appreciated."

⁵⁵ *Everson v. Board of Education*, 330 U.S. 1 (1947): "In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

⁵⁶ Tabash 2007, p. 7, quoting Jefferson: "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods or no god. It neither picks my pocket nor breaks my leg."

noted was “meant to secure protection for all points of view on matters of religion”.⁵⁷ Justice Souter also pointed out in his opinion in *Lee v. Weisman* (1992) that Jefferson refused to issue presidential proclamations of official days of prayer and thanksgiving “because of doubts regarding their constitutionality”.⁵⁸ According to Souter, Jefferson’s refusal to issue the proclamations evidenced the separation of church and state he wrote about in the Danbury Letter.

Those who advance Strict-Separationism used several works of James Madison as well. Madison was active in the Virginia legislature during the founding time period and worked on several referenced bills and laws. He collaborated with Jefferson through letters on some of the works while Jefferson was in France.⁵⁹ Some of Madison’s own works showed evidence of the Strict-Separationist model, including his “Memorial and Remonstrance on Religious Assessments”, the “Detached Memoranda”, and a 1774 Letter to William Bradford.

Madison’s “Memorial and Remonstrance on Religious Assessments” argued that the government could not favor one religion over another because would be a violation of the rights of the people, and a government that doesn’t protect people’s rights is a tyrannical government.⁶⁰ In his dissenting opinion in *Everson*, Justice Rutledge argued that the phrase “respecting an...” equated to “tending toward”, and that the government should not engage in any action that went that direction for sake of the appearance that government did not favor religion.⁶¹ He referenced Madison’s Memorial, among other sources, as support because Madison was opposed to an action, in this case the assessment of taxes for a church that showed favoritism towards an

⁵⁷ Tabash 2007, p. 19.

⁵⁸ Muñoz 2006, p. 596.

⁵⁹ Tabash 2007, p. 16, referencing Souter, *Lee v. Weisman*, concurring, who discussed Madison’s collaboration with Jefferson on the Virginia Statute for Religious Freedom.

⁶⁰ Madison 1785.

⁶¹ Muñoz 2006, p. 591: “As interpreted by Justice Rutledge, “respecting an” means “tending toward”-that is, the Founders not only intended to prohibit a traditional establishment like the Church of England, they also sought to prohibit anything tending toward such an arrangement.”

established church. Souter used this document to show that the use of taxes for church support could lead to government interference in religion, an entanglement that would violate rights of religion.⁶² In his “Detached Memoranda,” Madison said that proclamation for days of thanksgiving and prayer implied that government could function as ‘a religious agency’. He also argued against the use of chaplains in Congress, vetoed a church incorporation law, and argued against tax exemptions for churches.⁶³ In a letter written to William Bradford, Madison discussed the fear of what may have happened if the Church of England was established in the northern colonies, and how he believed that slavery would have spread. He stated that the “Union of religious sentiments begets a surprising confidence, and ecclesiastical establishments tend to great ignorance and corruption; all of which facilitate the execution of mischievous projects.”⁶⁴ Strict-Separationists used this statement to show a fear among leaders that religion could be used against the people for violation of rights, should religion and government mix.

b. Non-Preferentialism

Strict-Separationism does not address all of the issues surrounding Establishment Clause jurisprudence. Questions about particular words and meanings in the clause raised issues that future cases had to address. For one, did the Establishment Clause only apply to actions that endorsed an official religion, or did it simply prevent the government from treating religions differently? Andrew Koppelman claimed that the Establishment Clause did not prohibit government from endorsing religion generally, so long as it does not discriminate among religions.⁶⁵ Questions similar to this guided some Court members to consider another position: Non-Preferentialism. Non-Preferentialism can be defined as permitting the government to aid or

⁶² Muñoz 2006, p. 597.

⁶³ Tabash 2007, p. 19-20.

⁶⁴ Madison 1774.

⁶⁵ Koppelman 2009, p. 729.

favor religion or practices that may be rooted in religion, provided that the action does not show preference of one religion over another⁶⁶ or one denomination over others. Proponents of Non-Preferentialism contend that government should be able to be involved in matters of religion, as long as the involvement did not favor one religion or sect over the other.⁶⁷ For instance, the government could allow for a moment of silence or prayer in school provided the time for prayer was not mandatory for all students and did not favor one denomination or religion by advancing that denomination's beliefs over the others.

An example of the Non-Preferentialist model can be seen in Justice Rehnquist's dissenting opinion in *Wallace v. Jaffree* (1985). This case extended the debate to include questions of whether government could promote religion in general over non-religion. Rehnquist stated that the clause stopped government from asserting preference for one religious denomination or sect over others⁶⁸; however, he claimed, the First Amendment never intended to require neutrality between "religion and irreligion."⁶⁹ Justice Rehnquist's *Wallace* dissent offered his interpretation of what evidence should be used. He stated that the only evidence that would be relevant to understanding the meaning of the Establishment Clause were writings and arguments made by those involved in drafting, debating and ratifying the amendments. His method for interpretation in this case was that "one must look to the intentions of those who drafted it within the context of its actual adoption,"⁷⁰ making the debate in the First U.S. Congress the only relevant source. Therefore, works by Thomas Jefferson, who was Secretary of State at the time of the First Amendment's writing, had no bearing on the meaning of the clause. Justice Rehnquist, like Souter, discussed not only the phrasing of the amendment itself, but also

⁶⁶ Esbeck 1986, p. 379.

⁶⁷ Tabash 2007, p. 1.

⁶⁸ Koppelman 2009, p. 732.

⁶⁹ Tabash 2007, p. 3, citing *Wallace v. Jaffree*, Rehnquist dissenting.

⁷⁰ Muñoz 2006, p. 594.

the language that was rejected. He pointed out that Madison wanted the word “national” in the text before religion, which he argued changed the interpretation at the state level to a Non-Preferentialist interpretation.⁷¹ If Madison and the First Congress were concerned about prohibiting Congress from establishing a “national” religion, then states should still be free to legislate or aid religious organizations as they see fit. Prior to the early twentieth century, the Supreme Court understood the Bill of Rights to only apply to the federal government,⁷² which complemented Rehnquist’s statement that the Establishment Clause was not intended to apply to states.

Other justices also used Madison’s work to advance Non-Preferentialism. Justice Thomas wrote a concurring opinion in *Rosenberger*, citing Madison’s “Memorial and Remonstrance”. He claimed that Madison was only worried about the assessment bill because the program that would have been established would have allowed special subsidies for churches, which favored a Christian sect over non-religious organizations.⁷³ However, it did not eliminate the possibility that the church could receive money from other more widely available subsidies. So in effect, Thomas argued, Madison’s religious liberty “prohibits only preferential government policies that single out religious entities for special benefits.”⁷⁴ This was a far cry from the Strict-Separationist principles, because if this belief is true, a religious organization may receive benefits from the government, just not special treatment or extra benefits.

Justice Joseph Story’s work *Commentaries on the Constitution* agreed with a Non-Preferentialist model. Justice Story wrote on the Establishment Clause saying in §991: “The real object of the amendment ... to exclude all rivalry among Christian sects, and to prevent any

⁷¹ Tabash 2007, p. 13.

⁷² *Barron v. Mayor and City Council of Baltimore*, 32 U.S. 243 (1833) held this opinion.

⁷³ Muñoz 2006, pp. 598-599.

⁷⁴ Muñoz 2006, p. 599.

national ecclesiastical establishment which would give to a hierarchy the exclusive patronage of the national government.”⁷⁵ This would point to the idea that the purpose of the Establishment Clause was, as Rehnquist said, to prevent the federal government from establishing a national religion. He also stated in §988: “Probably at the time of adoption of the constitution...the general, if not universal, sentiment in America was, that Christianity ought to receive encouragement from the state.”⁷⁶

c. Accommodationism

Accommodationism appears similar to Non-Preferentialism though on the opposite side of the spectrum than Strict-Separationism. The two are related, as they both allow for government involvement in religion. But whereas Non-Preferentialism would stop government action where that action begins to prefer one doctrine over others, Accommodationism accepts a role for religion, particularly Judeo-Christian doctrine, because of its historical roots in U.S. history. Esbeck argued that government involvement in religion was allowable in order to ensure that “the public interest in a stable, democratic government is served”⁷⁷ because governments and religious institutions have similar goals. Since government should work to preserve rights of the people, including human rights, and religious institutions also work towards that goal, state aid will help reach those common goals and would not lead to government entanglement.⁷⁸ Marla DeGaetano agrees, saying that “Accommodationists argue that faithful interpretation of the Establishment Clause recognizes the legitimacy of a relationship

⁷⁵ Story 1833, p. 701.

⁷⁶ Story 1833, p. 700.

⁷⁷ Esbeck 1986, p. 394.

⁷⁸ Esbeck 1986, p. 394-396.

between religion and government. They contend that the Framers merely sought to prevent the establishment of an official church or religion.”⁷⁹

One criterion commonly present in Accommodationism rulings and opinions is that the United States has recognized religion over and over in their actions and statements. Justice Scalia recounted a story following the September 11 attacks in which President Bush ended his speech with the phrase “God Bless America” as many presidents have in their State of the Union addresses or inaugurations.⁸⁰ Other examples respecting religion by the government included Congressional sessions beginning with prayer, the phrase “In God We Trust” on U.S. currency, and even the prayers at the inauguration of Presidents Jefferson and Madison.

Justice Scalia’s dissent in *McCreary* vocalized the Accommodationist position, stating “the Court’s oft repeated assertion that the government cannot favor religious practices is false”⁸¹ and “The Court in the past prohibited government action that ‘proselytize or advance any one, or... disparage any other, faith or belief’, or that apply some level of coercion (though I and others have disagreed about the form that coercion must take). The passive display of the Ten Commandments, even standing alone, does not begin to do either.”⁸² Justice Potter Stewart’s dissents in two cases argued for the position as well. In *Engel v. Vitale* (1962), he questioned the Court’s characterization of a voluntary (i.e. not mandatory) prayer as promoting an official religion⁸³ and in *Abington School District v. Schempp* (1963), he stated that unless it was proven that the students were coerced into reading the Bible as a religious act, if students did not have to

⁷⁹ DeGaetano 1993, p. 943.

⁸⁰ Domke and Coe, 29 April 2008: “...from Reagan's inauguration through the six-year mark of the current Bush Administration, Presidents gave 129 major speeches, yet they said "God bless America" (or the United States) 49 times.”

⁸¹ *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), at 885, related from Gellman and Looper-Friedman pp. 676-677.

⁸² *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), at 908-909: from Gellman and Looper-Friedman, pp.676-677.

⁸³ Doshi 2010, p. 473.

participate, there was no Establishment Clause violation.⁸⁴ In each position, he argued the Court should allow room for religion and religious practices unless the people involved were being forced into the practice.

3. Summary

The three models show the criteria that I applied to a challenged government action to project the Supreme Court's holdings according to the model or to explain the rationale of someone who voted along a particular model. Some overlap exists in the models, particularly with Non-Preferentialism. In terms of case facts, there is overlap between Strict-Separationism and Non-Preferentialism in that both uphold laws or actions that provided a general government service to religious institutions or organizations, and both would invalidate any law or action that provided for a service that was not a general government service provided to all, a law or action with no secular purpose, a law or action applied on a non-neutral basis, or a law or action that excessively entangled government with a religious institution. There is also overlap between Non-Preferentialism and Accommodationism in that both would uphold laws or actions that provided aid to an individual directly rather than to a religious organization or institution. Some overlap exists among all three models as well, although it is unlikely that the Court would hear many cases in which all three models would project the same holding. All three models would invalidate any law or action establishing a national or state church or religion or any attempt to use religion to discriminate against a person or group. There appears to be little other overlap between Strict Separationism and Accommodationism; most of the time, the laws or actions upheld in the latter violate the endorsement or coercion criteria in the former.

⁸⁴ Doshi 2010, p. 474.

Strict Separationism applies a higher level of scrutiny to challenged government actions and only upholds those that are within the scope of government services or those that prevent the governing authority from favoring a religious institution or organization on the basis of religion. Due to the higher scrutiny, the list of facts under a Strict Separationism model that would invalidate a law is much longer than those in other models. On the opposite end of the spectrum, Accommodationism allows the most challenged government actions. This model allows laws or actions that benefit or advance religion, and exercises a higher level of scrutiny on invalidating the laws. Non-Preferentialism balances and overlaps with both, giving the Court a middle ground to uphold or invalidate challenged governmental actions. Appendix B shows a full statement of the criteria included in each model.

4. Categorization of the Cases

As discussed earlier, I analyzed the Court's holdings in Establishment Clause cases in order to compare the Court's jurisprudence across cases. I considered whether the Court's holdings upheld or invalidated the challenged government action. I only considered the majority or plurality opinions issued by the Court. After the Court votes on whether to uphold or invalidate the challenged action, one member is assigned to write the opinion. Majority opinions are the opinions that give the legal reasoning of the Court as to why the majority voted to uphold or strike down the challenged action. Although individual justices write these opinions, they are the collective opinion of the majority of the Court and are attributed to the majority rather than specific justices. At times, the justices may only agree on the holding, but not on the legal reasoning. In this case, the Court may issue a plurality opinion joined by a portion of the majority.

However, analyzing the holdings themselves can only go so far. Consider the very brief summaries and the holdings in the following five cases: *Stone v. Graham* (1980), *Marsh v. Chambers* (1983), *Lynch v. Donnelly* (1984), *Santa Fe Independent School District v. Doe* (2000), and *Van Orden v. Perry* (2005).⁸⁵

Stone v. Graham (1980): A Kentucky statute required the Ten Commandments purchased with private funds to be posted in school classrooms. The Court invalidated this statute.⁸⁶

Marsh v. Chambers (1983): A legislator challenged Nebraska's tradition of opening legislative sessions with a prayer. The Court upheld this practice.⁸⁷

Lynch v. Donnelly (1984): The city government of Pawtucket, Rhode Island included a crèche in its holiday display in a park. The Court upheld the crèche.⁸⁸

Santa Fe Independent School District v. Doe (2000): A student chaplain delivered a prayer before home football games in this public school district. The Court invalidated the prayer.⁸⁹

Van Orden v. Perry (2005): The grounds of the Texas state capitol included a monolith of the Ten Commandments. The Court upheld the display.⁹⁰

These five cases allowed for a very basic comparison of the Supreme Court's holdings. They illustrate basic challenged actions the Court upheld or invalidated. However, the groups are rudimentary at this point, because the summary did not describe the criteria for upholding or striking down the action or the extent of government involvement where the action was upheld

⁸⁵ Larsen 2006, p. 155-171: Larsen compares these five cases, as well as *County of Allegheny v. ACLU* and *McCreary v. ACLU* to discuss the Court's "stumble" in *Van Orden*.

⁸⁶ *Stone v. Graham*, 449 U.S. 39 (1980).

⁸⁷ *Marsh v. Chambers*, 463 U.S. 783 (1983).

⁸⁸ *Lynch v. Donnelly*, 465 U.S. 668 (1984).

⁸⁹ *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

⁹⁰ *Van Orden v. Perry*, 545 U.S. 677 (2005).

or invalidated. *Stone* and *Santa Fe* both disallowed government involvement in religion, which would seem to suggest that the holdings would be classified as Strict-Separationism according to the models. Although the challenged actions in *Marsh*, *Lynch*, and *Van Orden* were upheld, the criteria from the models that could apply to each case differed,⁹¹ which indicated that the holdings could be classified under either Non-Preferentialism or Accommodationism (or both). Invalidating the challenged government action in two cases and upholding the challenged government action in three others seems to indicate that the Court was inconsistent, but the reasons for the Court's holdings are unclear in this simple summary, which potentially would change the category under which the holding would be classified. Without further analysis, comparison of the cases is an exercise in futility. I expected that the Court upheld some challenged actions and invalidated others. In order to compare the cases more clearly, the holdings had to be categorized by a standard process that addressed the facts of the case further.

To classify the cases into one or more of the positions, I took the criteria in each model (in Appendix B) and compared those criteria to the facts of the case to project a holding for that case according to each model. Then I compared the Court's actual holding to each projected model. This process allowed for categorization of each case into one or more of the models. If the models projected that the challenged government action in a particular case would be invalidated according to Strict-Separationism, upheld according to Non-Preferentialism, and upheld according to Accommodationism, and the Court invalidated the challenged government action, then the case would be categorized as Strict-Separationism.

Due to the overlap found in the criteria, the possibility existed that the holdings in some cases may be categorized under multiple models. The facts of a particular case may be

⁹¹ In *Marsh*, the Court stated that the action was not in violation of the Establishment Clause due to a tradition of prayer before legislative sessions; in *Lynch*, the Court found that the city had a secular purpose for the display; in *Van Orden*, the Court said that because there is a history of acknowledgment of religion, the display could stand.

consistent with the criteria in both Non-Preferentialism and Accommodationism as in the previous example. Some cases may be complex, involving multiple issues. For example, the Court ruled differently on two separate issues in *County of Allegheny v. ACLU* (1989), and the actual holdings matched the projected holdings of multiple models. In order to effectively compare the cases, further categorization was needed.

C. Categorization and Comparison of the Supreme Court's Actual Holdings to the Projected Holdings Based on the Models

I read through the facts of each of the 74 cases⁹² and compared them to the criteria included in the statement of models. Data were collected for each case and entered into a spreadsheet in order to sort according to particular variables. The data collected included the case name and opinion designation, the year it was heard before the Supreme Court, a summary of the background, an assigned case type,⁹³ the challenged government action that created the Establishment Clause issue before the Court,⁹⁴ whether the challenged action was a U.S. law, a state law, or the state implementation of a U.S. law, the Court's actual holding, and the vote of the Court members. I then projected a holding for the case according to each model and entered the projected holdings into the spreadsheet. Next I compared the Court's actual holding to the three projected holdings to determine which model(s) the case matched. The last three columns in the spreadsheet indicated whether the actual holding matched each model's projected holding. If the actual holding matched the projected holding for that model, an "X" was placed in the column. Once I completed this step for each case, I sorted the cases by the model(s) the Court's actual holding matched. Using the comparison of actual holding to projected holdings according to the models to categorize allowed for a standard comparison among all cases.

⁹² 71 cases from Esbeck's 2005 list plus the 3 additional cases from his 2010 list.

⁹³ Assigned case types are discussed in further detail later in the chapter.

⁹⁴ Establishment Issue will also be referred to as the challenged government action.

1. Sample Case Analysis

In order to illustrate how I applied the three models to cases in order to project holdings and determine which model the actual holdings match, I chose five cases from five different case types to discuss in further detail. I summarized the cases below and discussed how the criteria of each model applied to the facts of the case, and how I projected the holding of each case according to each model. A brief discussion of the models and criteria follows the case summaries. Appendix C shows the spreadsheet of the data collected for the five sample cases.

a. Board of Education v. Mergens (1990)

A student group at Westside High School applied to create an ecumenical Christian club. This club was a non-curricular club which met after school, following the same procedures for all clubs as outlined by the school's policy. School policy allowed both curriculum-based and non-curriculum based clubs at the school. Curriculum-based clubs were defined as clubs created around curriculum that students had learned or would learn in the future, such as a Spanish club. Non-curriculum-based clubs were defined as clubs with no relation to any curriculum taught by the school, such as the Subsurfers, a scuba diving club. School officials denied the religious-based club, citing that allowing the formation of a religious club would violate the Establishment Clause of the First Amendment. The students argued that the federal Equal Access Act prevented the school from denying their request. Because the school maintained a limited open forum by allowing other types of clubs, the Act stated that a school cannot deny equal access on the basis of "religious, political, philosophical, or other content." The content of this particular club was religious based, and the Court of Appeals held that the club would fall under the Equal Access Act. The Supreme Court heard arguments to determine whether the Equal Access Act violated the Establishment Clause by requiring a school to allow an ecumenical club.

Strict-Separationism:

The Strict-Separationist model seeks to prevent a government entity from advancing or endorsing a religious message, display, or belief. In this case, the school was a government entity because it received government funding, both from local sources and federal sources.⁹⁵ If the government entity (the school) permitted a group of students to form a religious club, then permitting a religious club, was thought to be an action impermissible by the Establishment Clause, because the decision could be construed to mean that the school was advancing a religion. The school denied the request, and the District Court ruled that the school was correct in denying the request, actions that are consistent with the result a Strict-Separationist model would seek. A Strict-Separationist model projected that allowing the club under the Equal Access Act would violate the Establishment Clause.

Non-Preferentialism:

The Non-Preferentialist model seeks to ensure that the government authority's decision is neutral between religion and non-religion, and among religions or religious sects. This means that religious organizations received no preferential treatment because of their religious beliefs, nor are they inhibited on the basis of those beliefs. According to a Non-Preferentialist model, any action taken by a government entity should be secular in purpose or to provide a general government service. Even then, if a challenged governmental action affected a religious organization, or had connections to a religious organization, belief, message or practice, then a Non-Preferentialist model states that the religious organization, belief, message or practice should be treated neutrally between religion and non-religion, or in other words, the same way any other is treated, regardless of their religious beliefs. By granting the club's request, school

⁹⁵Though not stated explicitly in the opinion, federal funding was implied because the Equal Access Act applied to schools that received federal funding and maintained a limited open forum.

officials would remain neutral toward the religious club as with a non-religious club. The Non-Preferentialist model projected that allowing the club under the Equal Access Act would be upheld.

Accommodationism:

The Accommodationist model seeks to carve out a spot for religion in society, short of a government creating an official religion outright or passing a law that mandates a national religion. According to this model, the school could allow a religious club to exist without stating that they agreed with or promoted the message. Even though this club was clearly religious, granting the request would permit the students to create their club in a manner consistent with the school's policies and the limited open forum. The Equal Access Act allowed for religious-based organizations, provided they are treated in an equal manner. An Accommodationist model projected that allowing the club under the Equal Access Act would be upheld.

Actual Holding:

The U.S. Supreme Court upheld the U.S Equal Access Act as applied by the state under the circumstances of this case, which matched the projected holding under the Non-Preferentialist and Accommodationist models.

b. Epperson v. Arkansas (1968)

The Arkansas state legislature passed a statute that prohibited teaching "that man ascended or descended from a lower order of animals" (evolution) or using a textbook that taught evolution in state supported schools or universities. The purpose of the law stemmed from a religious group's belief that considered evolution to conflict with a biblical origin of man. A teacher brought action challenging the statute as a violation of free speech and the Establishment Clause. The Chancery Court agreed that the statute was a violation of the Establishment Clause,

but the State Supreme Court reversed the Chancery Court because the judges were unsure whether the statute meant that a school could not explain evolution at all, or could not teach it as “true”.

Strict-Separationism:

The law clearly endorsed a particular religious group’s belief, and banned teachers from teaching anything that contradicts it in school. A Strict-Separationist model would not allow for a statute that endorsed or coerced a religious belief; this law did both. The Strict-Separationist model projected the law would be invalidated.

Non-Preferentialism:

The challenged statute had no secular purpose; in fact, its purpose was to advance a religious belief by opposing the teaching of opposite positions. Because the state legislature allowed this belief to be a part of the law, the government gave preference to a religious belief. The law did not treat other religious beliefs or non-religious beliefs neutrally, because a particular religious teaching was allowed, and a conflicting non-religious teaching was not. A Non-Preferentialist model projected that this law would be invalidated.

Accommodationism:

As stated earlier, the Accommodationist model seeks to carve out a space for religious belief, and it would seem that the facts of this case may present an opportunity to put a religious belief in the education system, particularly since the United States has a history of recognizing the role of Judeo-Christian teachings, from the influence of a document like the Ten Commandments on the United States legal system to more modern Christian beliefs such as Creationism. However, the Accommodationism model allows for religious viewpoints, activities, or practices, provided that the viewpoints are treated in an equal manner. Because the

non-religious viewpoint in the law was not treated in an equal manner, an Accommodationist model projected that this law would be invalidated.

Actual Holding:

The U.S. Supreme Court invalidated the law, which matched the projected holding for all three models.

c. Lynch v. Donnelly (1984)

The city government of Pawtucket, Rhode Island erected a Christmas display in a park owned by a nonprofit organization. The city erected a crèche as a part of the display, which also included a Santa Claus house, a Christmas tree and a banner that read “Seasons Greetings.” The city paid the cost of purchase of the current crèche in 1973, and paid approximately \$20 per year to erect and dismantle the crèche. The nonprofit organization allowed the city government to use the park for the display, but was not involved in the erection or maintenance of the display. This display had been erected every year for the previous 40 years before it was challenged by citizens of Pawtucket.

Strict-Separationism:

Because the city owned and was responsible for erecting the display, and not the nonprofit organization who owned the park, this created a connection between the government entity and the religious symbol. The crèche was clearly a religious symbol; therefore the government entity endorsed a religious symbol. The Strict-Separationist model projected the use of the crèche in the display would be invalidated.

Non-Preferentialism:

According to the Non-Preferentialist model, if the city were to have other religious displays as part of a holiday season display, then the crèche may not be problematic. However,

this display contained one religious symbol among many secular symbols in the display. The display did not recognize other religious symbols, such as a menorah, meaning the display was not neutral among religions. If the display was meant to be neutral among religions (as the banner “Seasons Greetings” implied since it referred to the entire season rather than a particular holiday) then the display should not have included only one religious symbol. This display had the effect of advancing the Christian symbol over other religious symbols. The Non-Preferentialist model projected the inclusion of the crèche would be invalidated.

Accommodationism:

The Accommodationist model understands that religious symbols have a history and tradition of being recognized, particularly around the holiday season. The crèche is clearly a religious symbol, but one that is historically recognized and accepted as part of the Christmas season. In this case, the crèche had been a part of the display for 40 years, meaning that it had its own tradition of inclusion in the display. The purpose of the crèche was not to advance the message behind the religious symbol, but instead to recognize it as a traditional symbol of the holiday season. The Accommodationist model projects that the inclusion of the crèche would be upheld.

Actual Holding:

The U.S. Supreme Court upheld the inclusion of the crèche, which matched the projected holding for the Accommodationist model.

d. Mitchell v. Helms (2000)

Chapter 2 of the U.S. Education Consolidation and Improvement Act of 1981 funneled federal funds to local educational agencies through state educational agencies to lend educational materials and equipment to public and private elementary and secondary schools, to be used for

“secular, neutral, and non-ideological programs.” Approximately 30% of the Chapter 2 funds disbursed in Jefferson Parish, Louisiana went to private schools, which were mostly Roman Catholic or other religious-affiliated schools. Respondents challenged the law because the funding represented direct aid from the government to religious schools.

Strict-Separationism:

Although Chapter 2 funds were for secular, neutral, and non-ideological programs, the private religious schools still received aid in the form of equipment and materials directly from the government under the law. Without this direct aid, the schools that wanted the same materials would have to purchase the items with their own school funds. Since the school did not have to spend its own money for the materials, receiving the equipment from the government, even as a loan, was direct aid. The Strict-Separationist model projected the law would be invalidated.

Non-Preferentialism:

The law provided aid from the government that went to the private religious schools for secular programs, a purpose stated in the act itself. The equipment and materials were available for loan to the schools, an important point because the aid was not transferred to the school’s possession. The equipment and materials were not given to religious schools only, but available to all public and private schools. The aid was available in a neutral manner, regardless of religious affiliation. The Non-Preferentialist model projected that the law would be upheld.

Accommodationism:

The Accommodationist model overlapped with Non-Preferentialism in this case. Accommodationism also allows for actions or laws that were for a secular purpose and done in a neutral manner. However, because the aid made materials and equipment available that helped

to advance the education of students, which is a general government service, the neutrality was irrelevant. The Accommodationist model allows for actions that benefit religious organizations if they are providing a general government service. The Accommodationist model projected that the law and funding would be upheld.

Actual Holding:

The U.S. Supreme Court upheld the Chapter 2 funding, which matched the projected holdings of the Non-Preferentialism and Accommodationism models.

e. Santa Fe Independent School District v. Doe (2000)

A Santa Fe Independent School District policy allowed the high school's student-elected Student Council chaplain to deliver a non-sectarian, non-proselytizing prayer over the school's public address system prior to home varsity football games. The prayer was not led by school officials, and the officials had no knowledge of what the student would say. Roman Catholic and Mormon students and their families brought the suit against the school as a violation of the Establishment Clause. The school claimed that the prayer was private student speech that was protected by the First Amendment.

Strict-Separationism:

The prayer was given over the public address system for all of those in attendance to hear. Even though a student delivered the prayer, because he or she used the school's PA system at a school-sponsored event, was a student representing the student body, was under supervision of the school faculty, and was following a school policy, the speech in question was endorsed by the school. A second factor is that although the fans in the stands were not required to attend the game, there were players, band, cheerleaders, and coaches in attendance who were required to attend. Those required to be there were coerced into participating in an act of religious worship.

Under the Strict-Separationist model, the endorsement of a religious practice and the coercion of others to participate are not permissible, and the Strict-Separationist model projected an invalidation of the policy.

Non-Preferentialism:

In addition to the endorsement and coercion criteria, the given prayer was non-neutral between religions because the speaker did not deliver different types of prayers. A Non-Preferential model projected an invalidation of the policy due to the non-neutral manner in which it is implemented.

Accommodationism:

Prayer has a strong tradition of acceptance and use in the United States. Previous presidents have had prayers given at inaugurations or called for national days of prayer and thanksgiving. Congress still opens legislative sessions with prayer. Because prayer has been recognized as having a place in government, a prayer before a football game would simply follow the tradition. An Accommodationist model projected the policy would be upheld.

Actual Holding:

The U.S. Supreme Court invalidated the policy, which matched the projected holdings under Strict-Separationism and Non-Preferentialism.

f. Summary

The five cases outlined in this sample analysis illustrate important features about the case facts and challenged governmental actions in terms of what the models would uphold or invalidate. To start, the actual holdings in two of the cases matched at least the projected holding of Strict-Separationism. In these cases, *Epperson* (1968) and *Santa Fe* (2000), the challenged governmental action directly connected government to a religious belief or action. In one case,

the government passed a law that supported a religious belief and in the other the government entity allowed religious worship. In contrast, *Board of Education* (1990) and *Mitchell* (2000) the government funding to the private schools or access to the religious club was not granted specifically because of their religion; other standards existed that determined whether the religious organization would benefit, and therefore the action was not a direct action taken by the government to support a religious organization.

On the other end of the spectrum, in four of the cases the actual holdings matched the projected holdings for Accommodationism. Accommodationism allows more freedom for religious organizations, worship, and beliefs. However, in only one of the cases did the actual holding match the projected holding for Accommodationism only. In *Lynch* (1984), the Court upheld the inclusion of the crèche, a religious symbol, in the display. Accommodationism allowed symbols to be displayed because not everyone will interpret the symbol in a religious manner. Some would see the symbol as just that, a symbol, with no regard to the message the symbol stands for. Any perceived government endorsement would only be an interpretation made by the viewer. In *Board* (1990) and *Epperson* (1968), the holdings match with Accommodationism because the challenged government action did not treat religious viewpoints equally with others. As the projected holdings in *Epperson* show, an actual holding could match Accommodationism and Strict-Separationism (as well as Non-Preferentialism). Most overlap occurred if the action, law or issue established an official religion of the state or if a religious or non-religious viewpoint is treated differently when compared among religions or between religion and non-religion.

The projected holdings for Non-Preferentialism overlapped those of the other models in 53 of the 73 holdings, as expected by the discussion of the criteria. Non-Preferentialism ensures

that the action taken is not based on religion, but has another purpose or can be applied neutrally with respect to religion. If the challenged action had a secular purpose and was neutral, then the Non-Preferentialist model would allow benefits with respect to religion, and lean towards Accommodationism. If the purpose of the challenged government action was to promote or benefit a religious organization, symbol, belief, or practice, or if the action treated religion and non-religion or different religions/sects differently, then the Non-Preferential model would lean towards Strict-Separationism. Due to the criteria of Non-Preferentialism and its overlap with the other models, it was unlikely that the actual holding of the case will match with Non-Preferentialism only.

In this sample, the categories that the cases were classified into based on the models that the Court's actual holding matched were: All three models (one case), Strict-Separationism and Non-Preferentialism (one case), Non-Preferentialism and Accommodationism (two cases), and Accommodationism Only (one case). When applied to all of the cases, I had categories with multiple cases that could be compared to one another in order to measure consistency.

2. Full Categorization

I included 77 holdings for the 74 cases in this study. In three cases - *County of Allegheny v. ACLU* (1989), *Meek v. Pittenger* (1975) and *Wolman v. Walters* (1977), the justices voted to uphold part or parts of the challenged governmental action and invalidate another part or parts. Because the holding on the challenged actions were split in these three cases, I treated them as different entries in the analysis. There were two entries for each split case in the spreadsheet, accounting for the three additional entries. For cases in which the justices considered a challenged governmental action with multiple parts or provisions, but invalidated or upheld all provisions, I treated the case as a whole for the purposes of the analysis.

In four cases, *Bender v. Williamsport Area School District* (1986), *Flast v. Cohen* (1968), *Hein v. Freedom from Religion Foundation* (2007) and *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.* (1982), the Supreme Court held that the respondent had no standing to sue, and reversed or vacated the Court of Appeals decision without speaking to the Establishment Clause issue. In *Bender*, the Supreme Court vacated the Appeals Court’s ruling, stating that the school board member who filed an appeal on behalf of the entire board had no standing to file.⁹⁶ In *Flast*, the Supreme Court reversed the Court of Appeals, stating that the taxpayers had no standing to sue.⁹⁷ In *Hein* and *Valley Forge*, the Supreme Court reversed the Appeals Court’s ruling that neither the Freedom from Religion Foundation nor Americans United had standing to file a suit in the case.⁹⁸ Because the Supreme Court ruled on standing and not on the Establishment Clause issue, I removed all four cases from the analysis. Appendix D shows the full data collection for the remaining 73 holdings.

3. Comparisons Used in the Study

Once I completed the data collection, I sorted the cases by particular variables in order to measure consistency. I first sorted by the models matched when comparing the actual holding to the projected holding, then sorted again by particular variables. I compared cases by the challenged government action, the Court’s holding, and case types.

The challenged government action variable allowed for a comparison of cases with a challenged government action at the same level of government. I assigned one of three values of the variable to each case: U.S., State, or U.S. and State. “U.S.” referred to cases in which the challenged government action was a federal law or action taken by the federal government. In

⁹⁶ *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986).

⁹⁷ *Flast v. Cohen*, 392 U.S. 83 (1968).

⁹⁸ *Hein v. Freedom from Religion Foundation*, 551 U.S. 587 (2007) and *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

addition to laws passed by Congress, U.S. challenged actions included decisions made by the executive branch. “State” referred to cases in which the challenged government action was a law or action by a state government, or a government institution within a state. This descriptor included state statutes, as well as local ordinances or policies passed by a legislative body such as a city council, school board, or county commission. I included local challenged actions in the state descriptor because the challenged action likely originated in the state court before making its way to the U.S. Supreme Court and, in U.S. federalism, local governments constitutionally are created by state governments. “U.S. and State” referred to cases in which the challenged government action was a state’s implementation of a U.S. law. The challenged action in cases under this descriptor involved a state entity applying a federal law. The challenger believed that the state applied the law in a manner that violated the Establishment Clause. This sort allowed for a comparison of a subset of cases at the same level of government to determine whether the Court ruled consistently on those cases.

The “Actual Holding” data contained two values, whether the U.S. Supreme Court upheld the challenged government action and whether the U.S. Supreme Court invalidated the challenged government action. This allowed for an analysis of a subset of cases whose actual holdings matched the projected holdings of the same models according to whether the challenged actions were upheld or invalidated.

Finally, I assigned each case a case type in order to compare cases with similar facts. I created the case types by grouping cases with similar challenged actions. I gave each case type a title based on the Establishment Clause issue raised by the challenged action. Carl Esbeck’s case types influenced the titles, though I did not use all of the same titles. The 73 holdings were

sorted into 14 different case types. Each case type included at least two cases. See Table 1 for case types.

Table 1: Explanation of Each Case Type

Case Type	Explanation
Access for Religious Institutions	Cases in which a religious institution or organization wanted access to a service, funding or building according to a community use policy

Table 1 Continued

Case Type	Explanation
Accommodation of Religious Beliefs	Cases in which the challenged action either gave power to a religious institution to influence government decision-making or questioned whether the government should make accommodations for individuals based on their religious beliefs
Aid to Higher Education	Cases in which funding or aid was given to a university for construction or programs
Benefits	Cases in which challenged government benefits such as Medicaid or unemployment was used or collected for religious reasons
Employers/Employees	Cases in which hiring, wages, due process, and/or firing were based on religious reasons
Exemptions	Cases which challenged IRS deductions, sales tax exemptions, and property tax exemptions for religious organizations
Funding for Religious Organizations	Cases which challenged government funding given to religious organizations other than schools
Parochial School Funding/Aid	Cases in which funding was given to or available for private religious or parochial schools for a variety of purposes
Prayer	Cases in which a government agency included prayer in its operation or associated activities
Public School Curriculum	Cases in which religious teachings were mandated or blocked by law
Religious Displays	Cases which challenged the display of religious symbols by a government institution
Religious Oaths/Test	Cases in which an oath or test required someone to renounce or announce a religious belief
Services for the Disabled	Cases in which services for a disabled person were challenged because the disabled person attended or applied to a religious school
Sunday Laws	Cases which challenged laws that regulated business or commercial activities on Sundays

After projecting the holdings based on the models, I then sorted the cases by certain variables and compared the cases in each subset by the model(s) that their actual holding matched. This categorization allowed for comparing cases to one another to measure the consistency of the Court’s rulings. I measured consistency by comparing the percentage of cases in which the actual holding matched the projected holdings for the same model or models among all of the cases included in a category. If a category was created that contained 15 cases that

share a value on a particular variable (such as case type), then if the actual holding of most of the cases matched the same model(s), then it could be said that the data supported the claim that the Court ruled on that category of cases consistently.

Comparing cases in categories created according to the models matched gave a better basis for comparing cases to one another. It removed elements of comparison that have led other scholars to claim “inconsistency,” such as the standards and tests justices applied to determine or support their votes. No matter what the Court members claimed as the reason or standard for voting a particular way, this design only considered the Court’s actual holding, and categorized the cases according to the models matched by the holdings. Relying on the criteria developed in the models allowed me to project standardized holdings, meaning that two cases with different general fact summaries could be compared by whether the actual holdings matched projected holdings of the same models. Once I made the projected holdings and compared them to the actual holdings, the design allowed for comparisons of case holdings by sorting according to controlled variables.

In order to support a claim of consistency, I set a standard of a 60% match. I decided that 60% gives a stronger claim to consistency than a simple majority of 50%+1. If a category contained ten cases, and the holdings in five of the cases matched Strict-Separationism and the holdings of the other five cases matched Accommodationism, then the data supported a claim of inconsistency in the Court’s holdings of the cases within that category; if the models did not match, then it was likely that the Court ruled differently on each case. However, if six cases matched Strict-Separationism compared to four that matched Accommodationism, the data supported a claim that the Court’s holdings matched Strict-Separationism consistently. If the category had seven or more cases in which the Court’s actual holding matched Strict-

Separationism, then a stronger claim of consistency could be made. By using a percentage as a measurement, I could also claim that one category or subset with a higher percentage as being “more consistent” than another, allowing for relative comparisons as well

I also set a qualification standard for categories in order to evaluate consistency. If a category included six or more cases, I examined it for consistency. Most categories created when sorted by most variables included many more than six cases. The one variable in particular that created categories with fewer than six cases was “Case Types”: ten of the fourteen case types had fewer than six cases. I did not want to overstate the significance of case type categories by including those in which two of only three cases (66%), for example, had actual holdings that matched the projected holding for the same model(s). A change to the holding in one case meant that the particular case type would change from “consistent” to “inconsistent”. By setting a qualification standard of six cases, in order to reach the 60% standard to be judged as consistent, the category would have at least two more cases that matched a particular model or models than did not.

Chapter 4: Results of the Comparisons of Holdings by Variables

In this chapter, I describe the process I used to compare case holdings to one another using the models. The chapter explains how I sorted cases by the model(s) that the actual holdings matched and then compared those holdings to one another while controlling for four particular variables (Level of Challenged Action, Nature of the Holding, Court Vote, and Case Type).

Once I completed the spreadsheet for the 73 holdings (Appendix D), the cases were sorted according to which projected holding(s) of the model or models the actual holding matched (see Table 2). The actual holding in each case matched at least one of the models.

Table 2: Comparison of Actual to Projected Holdings by model

Actual Holding Matched Projected Holdings of:	Number of Cases
All three models	9
Strict-Separationism Only	0
Both Strict-Separationism and Non-Preferentialism	25
Non-Preferentialism Only	0
Both Non-Preferentialism and Accommodationism	28
Accommodationism Only	11

Most cases matched multiple models, with the exception of the 11 cases that matched only Accommodationism.

I next sorted cases by “U.S. and/or State Challenged Government Action”, “Actual Holding- Upheld/Invalidated”, and “Case Type”.

A. Level of Government Action Challenged

In 56 cases, the challenged government action was a state/local government law/action, 10 cases involving a U.S. law/action, and seven cases in which the challenged government action was a state implementation of a U.S. law. Table 3 examines the relationship between projected and actual holdings controlling for the level of government whose action was challenged.

Table 3: Comparison of Actual to Projected Holdings, by Level of Government of Challenged Action

Models Matched	State	U.S.	U.S./State
All three models (9)	7/56 (13%)	2/10 (20%)	0/7 (0%)
Strict-Separationism and Non-Preferentialism (24)	23/56 (41%)	1/10 (10%)	1/7 (14%)
Non-Preferentialism and Accommodationism (28)	18/56 (32%)	6/10 (60%)	4/7 (57%)
Accommodationism Only (11)	8/56 (14%)	1/10 (10%)	2/7 (29%)
Total	56	10	7

In the “State” and “U.S.” columns, the Court’s holding matched the projected holdings of four subsets, and in the “U.S./State” column, the Court’s holding matched in three separate subsets. Of the 56 cases involving “State” action, no subset of models matched met the 60% standard of consistency. Under “U.S.,” only those cases in which the actual holding matched the projected holdings of the Non-Preferentialism and Accommodationism models met the consistency standard. Under “U.S./State,” no subset reached the 60% standard.

Judging consistency solely on the challenged government actions created a problem. This type of comparison did not take into account two factors: 1) whether the Court upheld or invalidated the challenged government action and 2) whether the facts of the cases under each column were similar. For example, take the cases of *Engel v. Vitale* (1962) and *Pleasant Grove v. Summum* (2009).⁹⁹ Both cases had a state or local government authority action as its Establishment Clause issue and based on the criteria of the models, the actual holding of each case matched the projected holdings of both Strict-Separationism and Non-Preferentialism. But the Court invalidated the challenged government action in *Engel*, while it upheld the challenged

⁹⁹ In *Engel*, a Board of Education of Union Free School District No. 9, New Hyde Park, NY policy directed school principals to begin each day with a prayer, following a state statute that directed the use of prayer in schools. The challenged government action was state statute and the school policy. In *Pleasant Grove v. Summum*, a religious organization, asked permission from the mayor of Pleasant Grove City, Utah to place a permanent monument of the "Seven Aphorisms of SUMMUM" in one of the city parks. According to the organization, the aphorisms were collected by Moses before he received the Ten Commandments. The mayor denied the request because the monument did not relate to the history of Pleasant Grove City, even though the park already had a Ten Commandments monument. The challenged government action was the denial of an application from a religious organization to place a religious display in a city park.

government action in *Pleasant Grove*. Moreover, the challenged action in *Engel* was prayer led by a government representative, while the challenged action in *Pleasant Grove* was a religious display. Comparing these two cases (among others) to one another created a very broad subset of cases, which made judging consistency difficult because the types of facts and challenged actions varied so widely.

B. Nature of Holding

The next sort created subsets based on whether the Supreme Court’s actual holding upheld or invalidated the challenged government action. Again, cases were sorted by models matched and then by whether the Court upheld or invalidated the challenged government actions. To measure consistency, the higher of the two numbers (either cases in which the Court upheld the challenged government action or those in which the Court invalidated the challenged government action) were divided by the total number of cases in that subset. If the percentage was equal to or greater than the 60% standard, the category showed evidence of consistency.

Table 4: Comparison of Actual to Projected Holdings, by Court Ruling on Challenged Government Action

Models Matched	Upheld/Invalidated
All three models (9)	Upheld: 6 (67%) Invalidated: 3
Strict-Separationism and Non-Preferentialism (25)	Upheld: 2 Invalidated: 23 (92%)
Non-Preferentialism and Accommodationism (28)	Upheld: 26 (93%) Invalidated: 2
Accommodationism Only (11)	Upheld: 11 (100%) Invalidated: 0

Table 4 shows strong evidence of consistency. The Court’s actual holding in each category of models was almost exclusively one holding or the other, with the exception of the category “All three models.” Even that category had a greater majority of cases in which the Court upheld the challenged action.

The Strict-Separationism model tends to support invalidating challenged government actions, while the Accommodationism model supports upholding them. Of the cases in which the actual holding matched the projected holdings for Strict-Separationism and Non-Preferentialism, actions in 92% of the cases were invalidated. Of the cases in which the actual holding matched the projected holdings for Accommodationism Only and Non-Preferentialism and Accommodationism, the challenged actions in 100% and 93% of the cases were upheld, respectively.

These findings are further supported when the Court’s holdings are examined by the individual model matched. Table 5 shows this comparison.

Table 5: Result of Challenged Government Action, by Projected Holding

Model	# of Cases in which the Model Projected “Invalidate”	# of Cases in which the Model Projected “Uphold”
Strict-Separationism	63/73 (86%)	10/73 (14%)
Non-Preferentialism	39/73 (53%)	34/73 (47%)
Accommodationism	8/73 (11%)	65/73 (89%)

C. Court Vote

My next sort extended the “Upheld/Invalidated” analysis. I decided to measure how strongly the Court’s holding matched each category of projected holdings. I used the Court’s vote to measure the strength of the holding: if a high percentage of cases in which the actual holding matched the projected holdings of different models by votes of 8-1 or 9-0, then the Court’s holding was stronger than it would be if more of the decisions were decided 5-4. Table 6 shows the number of cases in each category of projected models with each vote.

Table 6: Comparison of Actual to Projected Holdings, by Numbers of Votes in the Holding

Models Matched	Court Vote
All three models (9)	9-0: 6
	8-1: 1
	7-2: 1
	5-2: 1

Table 6 Continued

Models Matched	Court Vote
Strict-Separationism and Non-Preferentialism (25)	9-0: 1 8-0: 1 8-1: 6 6-1: 1 5-2: 1 6-3: 8 5-4: 7
Non-Preferentialism and Accommodationism (27) <i>*The Court's vote in Quick Bear v. Leupp is unknown</i>	9-0: 5 8-1: 3 7-1: 1 7-2: 2 6-3: 6 5-4: 10
Accommodationism Only (11)	9-0: 1 8-1: 2 6-3: 3 5-3: 1 5-4: 4

Because there are between four and seven different vote ratios in each category, I created a standardized measure: “Vote Difference.” This is simply the difference between the number of justices who voted in the majority and the number in the minority. A vote of 5-4 would have a vote difference of one, while a 9-0 vote would have a vote difference of nine. Votes of 9-0 and 8-1 both indicated that the Court voted strongly to either uphold or invalidate the challenged action, while votes of 5-4 indicated that the Court’s holding did not have overwhelming support. Instead of comparing many vote ratios, I used Vote Difference to group votes into two subsets: “Greater than/Equal to 3 Vote Difference” and “Less than 3 Vote Difference.” I chose three votes as the dividing line, because such a vote difference of three votes would require multiple justices to switch their votes to change the holding. A 5-4 or 5-3 decision to uphold (if one justice did not vote in the case) could potentially be a 5-4 vote to invalidate or a tied 4-4 vote. With a standard of a three vote difference, at least two justices would have to change their votes in order to change the holding. A case with a vote difference of three or greater indicated a “stronger” position of the Court. This characterization does not speak to how firm the individual

justices’ positions were in the case; it is only a classification of the Court’s stance as a body on the case. A “strong” vote required a 5-1 vote if there were only a quorum of justices, a 5-2 or higher vote if one or two members did not participate, or a 6-3 vote or higher if all of the members participated. A vote difference of less than three means indicates a “weaker” position of the Court, due to the higher possibility that the Court could have invalidated a challenged action that it upheld, or vice versa. A “weak” vote most commonly indicated a vote of 5-4, though there were examples of 5-3 votes as well. Table 7 shows the subsets of cases according to vote difference.

Table 7: Comparison of Actual to Projected Holdings, by vote difference

Models Matched	> or = 3 Vote Difference	<3 Vote Difference	Total	Percent of Cases > or = 3 Vote Difference
All three models	9	0	9	100%
Strict-Separationism and Non-Preferentialism	18	7	25	72%
Non-Preferentialism and Accommodationism	17	10	27*	62.9%
Accommodationism only	6	5	11	54.5%
<i>Total number of cases</i>	<i>50</i>	<i>22</i>	<i>72</i>	<i>69.4%</i>

*The vote for *Quick Bear v. Leupp* was unknown.

Table 7 includes a striking pattern. In cases where the actual holding matched the projected holdings of all three models, the Court took the strongest position of any subset, with 100% of the cases having a vote difference of greater than or equal to three. All of the subsets except Accommodationism only met the consistency standard of 60%. But as the subset changed from Strict-Separationism to Accommodationism, the percentage of consistency dropped from 72% in cases that matched Strict Separationism and Non-Preferentialism to below the consistency standard for Accommodationism only.

D. “Case Types”

Sorting the data by “Case Types” gave a clearer picture of consistency, though only a few categories contained enough cases to measure consistency. The subsets created compared cases with similar facts, which previous comparisons did not take into account. Table 8 shows the Case Types identified and the number of cases in each type.

Table 8: Number of Cases by Case Type

Case Type	Number of Cases
<i>Access for Religious Institutions</i>	5
<i>Accommodation of Religious Beliefs</i>	3
<i>Aid to Higher Education</i>	3
<i>Benefits</i>	2
<i>Employers/Employees</i>	3
Exemptions	6
<i>Funding for Religious Organizations</i>	2
Parochial School Funding/Aid	21
Prayer	6
<i>Public School Curriculum</i>	5
Religious Displays	9
<i>Religious Oaths/Test</i>	2
<i>Services for the Disabled</i>	2
<i>Sunday Laws</i>	4

*Subsets that did not meet the qualification standard of six cases are italicized.

I sorted the cases into 14 different case types. 10 of these case types contained five or fewer cases, including seven with three or fewer cases. 42 of the total number of cases fit into one of four case types: Exemptions, Parochial School Funding/Aid, Prayer, and Religious Displays.

Table 9 shows the proportions of actual holdings in each Case Type that matched the projected holdings of each model.

Table 9: Case Type, by Comparison of Actual to Projected Holdings

Case Type	Models Matched (Number of Cases/Total)
<i>Access for Religious Institutions</i>	<i>Non-Preferentialism and Accommodationism (5/5)</i>
<i>Accommodation of Religious Beliefs</i>	<i>Strict-Separationism and Non-Preferentialism (2/3)</i> <i>Accommodationism Only (1/3)</i>
<i>Aid to Higher Education</i>	<i>Non-Preferentialism and Accommodationism (3/3)</i>
<i>Benefits</i>	<i>Non-Preferentialism and Accommodationism (2/2)</i>

Table 9 Continued

Case Type	Models Matched (Number of Cases/Total)
<i>Employers/Employees</i>	<i>All three models (1/3)</i> <i>Non-Preferentialism and Accommodationism (2/3)</i>
Exemptions	All three models (3/6) Strict-Separationism and Non-Preferentialism (2/6) Non-Preferentialism and Accommodationism (1/6)
<i>Funding for Religious Organizations</i>	<i>Non-Preferentialism and Accommodationism (2/2)</i>
Parochial School Funding/Aid	All three models (1/21) Strict-Separationism and Non-Preferentialism (9/21) Non-Preferentialism and Accommodationism (9/21) Accommodationism Only (2/21)
Prayer	Strict-Separationism and Non-Preferentialism (5/6) Accommodationism Only (1/6)
<i>Public School Curriculum</i>	<i>All three models (2/5)</i> <i>Strict-Separationism and Non-Preferentialism (2/5)</i> <i>Accommodationism Only (1/5)</i>
Religious Displays	Strict-Separationism and Non-Preferentialism (4/9) Non-Preferentialism and Accommodationism (1/9) Accommodationism Only (4/9)
<i>Religious Oaths/Test</i>	<i>All three models (2/2)</i>
<i>Services for the Disabled</i>	<i>Non-Preferentialism and Accommodationism (2/2)</i>
<i>Sunday Laws</i>	<i>Strict-Separationism and Non-Preferentialism (1/4)</i> <i>Non-Preferentialism and Accommodationism (2/4)</i> <i>Accommodationism Only (1/4)</i>

*Subsets that did not meet the qualification standard of six cases are italicized.

These data suggest that in some types of cases, the Court’s actual holding compared to projected holdings matched the same models for all or a majority of the cases. All of the actual holdings in cases categorized as Religious Oaths/Tests matched the projected holdings of all three models. The actual holding of all three of the Aid to Higher Education cases and all five of the Access for Religious Organizations holdings matched Non-Preferentialism and Accommodationism. Although none of these case types met the qualification standard for consistency, that the actual holdings matched the projected holdings in 100% of the selected cases shows that the measurement allowed for a valid comparison.

Sorting by case types also allowed examination of cases that did not match the same models to determine if the nuances of the case might explain the difference. For example, four of the five cases typed Public School Curriculum matched at least Strict-Separationism and Non-

Preferentialism. The challenged actions in these cases were changes to the curriculum by statute or policy to include teaching creationism¹⁰⁰ or to prohibit teaching evolution¹⁰¹ and to create programs for religious teaching that excused students from their regular classroom to attend the religious teaching.¹⁰² In each of these cases, the Court found that the teachings or programs violated the Establishment Clause.

However, the actual holding in one Public School Curriculum case, *Zorach v. Clauson*, matched the projected holding for Accommodationism only. Sorting the data by Case Type allowed a clearer comparison of cases with similar facts to address such an issue. In *McCollum* and *Ball*, the Court invalidated the religious curriculum programs, while in *Zorach* the Court upheld the religious curriculum program. A closer look at the three cases showed that in *McCollum* and *Ball*, the teachers involved in the religious teaching programs were hired by and paid for by the state, which created the violation of the Establishment Clause. In *McCollum*, the Champaign, Illinois Board of Education hired religious teachers to provide religious instruction in the public schools to students whose parents requested the instruction. The school released these students from their secular instruction, but the students who declined were not released from their secular instruction. In *Ball*, the Grand Rapids School District provided classes during the school day and after school to nonpublic school students at public expense in classrooms located in and leased from the nonpublic schools. Of the 41 schools involved in the programs, 40 were religious schools. The Court ruled that the challenged classes and programs in both cases violated the Establishment Clause. *Zorach* differed from *McCollum* and *Ball* because the religious instruction took place outside of school grounds and was taught by non-school

¹⁰⁰ *Edwards v. Aguillard*, 482 U.S. 578 (1987). This case matched all three models.

¹⁰¹ *Epperson v. Arkansas*, 393 U.S. 97 (1968). This case matched all three models as well.

¹⁰² *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948) and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

personnel, a fact that the Court ruled made this program permissible according to the Establishment Clause. Even when sorting by case type showed that not all cases fell in the same or similar categories, many times the specific facts of the case helped to explain the difference between the cases that may have led the Court members to vote differently.

Earlier sorts compared cases of different types to one another, and the specific criteria that projected a particular holding under each model were less relevant. When comparing cases with similar fact summaries (i.e., holding case type constant), the criteria that distinguished each model took on greater relevance. In order to account for the greater importance of the criteria of each model and measure consistency, I examined the number of cases in each case type by each individual model matched, regardless of overlap. For example, the Exemption case type had three cases in which the actual holding matched the projected holding of all three models, two cases that matched Strict-Separationism and Non-Preferentialism, and one case that matched Non-Preferentialism and Accommodationism. Counting the models individually, the Exemption cases matched the Strict-Separationism model in five cases, Non-Preferentialism in six cases and Accommodationism in four cases. (See Table 10.)

Table 10: Case Type, by Individual Models Matched

Case Type	Number of cases that match the projected holding for Strict-Separationism (Percentage)	Number of cases that match the projected holding for Non-Preferentialism (Percentage)	Number of cases that match the projected holding for Accommodationism (Percentage)
Access for Religious Institutions	0/5 (0%)	5/5 (100%)	5/5 (100%)
Accommodation of Religious Beliefs	2/3 (67%)	2/3 (67%)	1/3 (33%)
Aid to Higher Education	0/3 (0%)	3/3 (100%)	3/3 (100%)
Benefits	0/2 (0%)	2/2 (100%)	2/2 (100%)
Employers/Employees	1/3 (33%)	3/3 (100%)	3/3 (100%)
Exemptions	5/6 (83%)	6/6 (100%)	4/6 (67%)

Table 10 Continued

Case Type	Number of cases that match the projected holding for Strict-Separationism (Percentage)	Number of cases that match the projected holding for Non-Preferentialism (Percentage)	Number of cases that match the projected holding for Accommodationism (Percentage)
Funding for Religious Organizations	0/2 (0%)	2/2 (100%)	2/2 (100%)
Parochial School Funding/Aid	10/21 (48%)	19/21 (90%)	12/21 (57%)
Prayer	5/6 (83%)	5/6 (83%)	1/6 (17%)
Public School Curriculum	4/5 (80%)	4/5 (80%)	3/5 (60%)
Religious Displays	4/9 (44%)	8/9 (89%)	5/9 (56%)
Religious Oaths/Test	2/2 (100%)	2/2 (100%)	2/2 (100%)
Services for the Disabled	0/2 (0%)	2/2 (100%)	2/2 (100%)
Sunday Laws	1/4 (25%)	3/4 (75%)	3/4 (75%)
Total	34/73 (47%)	66/73 (90%)	48/73 (66%)

The actual holdings of all case types consistently matched the projected holdings for Non-Preferentialism. The actual holdings in all individual case types consistently matched the projected holdings for Accommodationism in 10 of the 14 case type categories, yielding an overall consistency measurement of 66%. Although the evidence in Table 10 showed that the actual holdings that matched the projected holdings for Strict-Separationism measured low consistency as a whole, the data were skewed by case types had no cases that matched the projected holding for Strict-Separationism. The data showed that the actual holdings of the cases in those five case types matched the projected holding for both Non-Preferentialism and Accommodationism with a consistency measure of 100%, indicating the Court’s holdings were highly consistent. If the remaining nine case types are examined, then the actual holdings of 34 of the remaining 54 cases matched the projected holdings of Strict-Separationism, 63% consistency.

Yet, only four case types contained enough cases to meet the qualification standard to evaluate consistency: Exemptions, Parochial School Funding/Aid, Prayer, and Religious Displays. Table 11 shows these four case types by models matched.

Table 11: Case Types with Six or more Cases, by Individual Models Matched

Case Type	Number of cases that match the projected holding for Strict-Separationism (Percentage)	Number of cases that match the projected holding for Non-Preferentialism (Percentage)	Number of cases that match the projected holding for Accommodationism (Percentage)
Exemptions	5/6 (83%)	6/6 (100%)	4/6 (67%)
Parochial School Funding/Aid	10/21 (48%)	19/21 (90%)	12/21 (57%)
Prayer	5/6 (83%)	5/6 (83%)	1/6 (17%)
Religious Displays	4/9 (44%)	8/9 (89%)	5/9 (56%)
Total	24/42 (57%)	38/42 (90%)	22/42 (52%)

In all four case types, the Supreme Court’s actual holding matched the projected holding under the Non-Preferentialism model with high consistency, a combined 90% of the 42 cases. The Court’s holdings also matched the projected holdings for Strict-Separationism with consistency for Exemption cases and Prayer cases, and matched the projected holding for Accommodationism with consistency in Exemption cases. The data in the subsets suggest that the Supreme Court’s holdings on Exemption cases as a whole were consistent with one another.

As stated earlier, when examining cases with similar fact summaries, the nuances of each case became important. The next question to address is why the Supreme Court’s holdings in two of the case types (Parochial School Funding/Aid and Religious Displays) were inconsistent in cases that matched the projected holdings for Strict-Separationism and Accommodationism, and how one case in the Prayer case type that matched Accommodationism differed from the other cases. I chose these three case types for further scrutiny because these types were the only ones other than Exemptions to contain enough cases to qualify for consistency measurement.

1. Parochial School Funding/Aid

I first looked at the Parochial School Funding/Aid cases. In *Norwood v. Harrison* (1973), the Supreme Court looked at race neutral policies in receiving government benefits and matched all three models, the only case in the subset with those criteria. As the only case in this subset in which the Supreme Court focused on race neutral policies as part of its holding, no other case in this subset serves as a close comparison. The two cases it most resembled are *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.* (1986)¹⁰³ and *Bob Jones University v. United States* (1983).¹⁰⁴ In all three cases, the Supreme Court's holding allowed challenges to religious-based discriminatory policies.¹⁰⁵ The Court's holdings in these three cases indicated that the Establishment Clause could not be used by a religious group to prevent an investigation or a challenge into a discriminatory policy.

Since *Norwood* had no other comparable cases in the subset, it was eliminated from the analysis. Removing this case does not skew the total number of cases that matched each individual model, in part because the actual holding matched the projected holding of all three models (each model had one fewer match), and the subset contained 20 other cases, which provided a large number for comparison.

¹⁰³ Dayton Christian Schools in Dayton, Ohio required teachers to hold to a particular set of religious beliefs, including a "Biblical Chain of Command" in order to be employed. According to the teacher's contract, if a teacher has a grievance, they must take it to their supervisor, and up the chain, but end at the authority of the board of directors rather than take the matter to court. When a teacher was not renewed due to pregnancy (the religious beliefs stated that mothers should stay home with their children), she hired an attorney and brought a suit of discrimination against the school. The school rescinded its nonrenewal, but terminated her on the basis of violating the chain of command policy. The Ohio Civil Rights Commission began an investigation, but Dayton Christian filed an action to stop the investigation, claiming the investigation violated the Establishment Clause because its policies were sincerely held religious beliefs.

¹⁰⁴ Bob Jones University and Goldsboro Christian Schools each had their federal tax-exempt status revoked for practicing discrimination (disallowing unmarried African-Americans and interracial couples, and admitting mostly Caucasian students, respectively). The two organizations claimed that the IRS violated their religious freedoms by penalizing each for practices consistent with their religious beliefs. The Supreme Court upheld the revocation of their tax-exempt status.

¹⁰⁵ In *Ohio Civil Rights Commission*, the Supreme Court upheld the Commission's investigation. In *Bob Jones*, the Supreme Court upheld the revocation of the schools' tax-exempt status.

Of these remaining cases, the biggest distinction in the facts was who received the benefit, the school and its representatives (i.e. teachers) or the families of the students attending the school. Table 12 shows the twenty cases and the distinctions in the fact summaries.

Table 12: Distinctions in Parochial School Funding/Aid Cases

Case Name	Who Received the Aid?	Models Matched
<i>Agostini v. Felton</i>	Families	Accommodationism Only
<i>Board of Education v. Allen</i>	Families	Non-Preferentialism and Accommodationism
<i>Everson v. Board of Education</i>	Families	Non-Preferentialism and Accommodationism
<i>Mueller v. Allen</i>	Families	Non-Preferentialism and Accommodationism
<i>Meek v. Pittenger (Split Case)</i>	Families	Non-Preferentialism and Accommodationism
<i>Quick Bear v. Leupp</i>	Families	Non-Preferentialism and Accommodationism
<i>Zelman v. Simmons-Harris</i>	Families	Non-Preferentialism and Accommodationism
<i>Board of Education v. Grumet</i>	Families	Strict-Separationism and Non-Preferentialism
<i>Sloan v. Lemon</i>	Families	Strict-Separationism and Non-Preferentialism
<i>Lemon v. Kurtzman (II)</i>	Schools	Accommodationism Only
<i>Committee for Public Education & Religious Liberty v. Regan</i>	Schools	Non-Preferentialism and Accommodationism
<i>Mitchell v. Helms</i>	Schools	Non-Preferentialism and Accommodationism
<i>Aguilar v. Felton</i>	Schools	Strict-Separationism and Non-Preferentialism
<i>Lemon v. Kurtzman (I)</i>	Schools	Strict-Separationism and Non-Preferentialism
<i>Levitt v. Committee for Public Education & Religious Liberty</i>	Schools	Strict-Separationism and Non-Preferentialism
<i>Meek v. Pittenger (Split Case)</i>	Schools	Strict-Separationism and Non-Preferentialism
<i>New York v. Cathedral Academy</i>	Schools	Strict-Separationism and Non-Preferentialism
<i>Wolman v. Walters (Split Case)</i>	Schools	Strict-Separationism and Non-Preferentialism
<i>Committee for Public Education & Religious Liberty v. Nyquist*</i>	<i>Schools and Families</i>	<i>Strict-Separationism and Non-Preferentialism</i>
<i>Wolman v. Walters (Split Case*)</i>	<i>Schools and Families</i>	<i>Non-Preferentialism and Accommodationism</i>

*These two cases did not meet the qualification standard to measure consistency.

Families received the aid or benefit in nine of the cases. In six of those nine cases, the actual holding matched the projected holdings of both Non-Preferentialism and Accommodationism, for a consistency measure of 67%.

Schools received the benefit in nine of the cases. In six of those, the actual holding of the cases matched the projected holdings of Strict-Separationism and Non-Preferentialism, at a consistency measure of 67%. Again, further scrutiny showed circumstances that allowed for exceptions in the remainder of the rulings. In *Lemon v. Kurtzman (II)* (1973), the Court upheld payment of costs for services rendered prior to the *Lemon v. Kurtzman (I)* (1971) ruling.

Mitchell v. Helms (2000) provided for educational materials to be used in the school rather than teacher salaries as in *Aguilar* and *Lemon (I)*. Although the testing services provided in *Committee for Public Education & Religious Liberty v. Regan* (1980) were similar to services provided in *New York v. Cathedral Academy* (1977), the challenged statute in Regan provided for a program to ensure that the money was being spent for secular services and not for any religious services.

2. Prayer

Next, I looked at the six Prayer cases. Further review showed that in five, the challenged action was prayer that took place in schools either as a daily practice or at a school event, while the sixth involved prayer in a state legislature. Table 13 shows the prayer cases.

Table 13: Distinctions in Prayer Cases

Case Name	Where was the Prayer Taking Place?	Models Matched
<i>Abington School District v. Schemp</i>	School	Strict-Separationism and Non-Preferentialism
<i>Engel v. Vitale</i>	School	Strict-Separationism and Non-Preferentialism
<i>Lee v. Weisman</i>	School	Strict-Separationism and Non-Preferentialism
<i>Santa Fe Independent School District v. Doe</i>	School	Strict-Separationism and Non-Preferentialism
<i>Wallace v. Jaffree</i>	School	Strict-Separationism and Non-Preferentialism
<i>Marsh v. Chambers*</i>	State Legislature	Accommodationism Only

*This case did not meet the qualification standard to measure consistency.

The holdings of all five of the school prayer cases matched the projected holdings for Strict-Separationism and Non-Preferentialism for a consistency measurement of 100%.

3. Religious Displays

The Religious Display case type was the puzzling subset. The actual holding in four cases matched the projected holdings of both Strict-Separationism and Non-Preferentialism, one

case matched Non-Preferentialism and Accommodationism, and four others matched Accommodationism only. Further review of the individual cases produced two distinctions: 1) the type of symbol on display and 2) the context in which the symbol was displayed. (See Table 14.)

Table 14: Distinctions in Religious Display Cases

Case Name	Symbol	Context	Models Matched
<i>County of Allegheny v. ACLU (Split Case)*</i>	<i>Crèche</i>	<i>The crèche sat by itself at the top of the grand staircase in the county courthouse.</i>	<i>Strict-Separationism and Non-Preferentialism</i>
<i>McCreary County v. ACLU of Kentucky*</i>	<i>Ten Commandments</i>	<i>The Ten Commandments were the main part of a display on foundations of law that was ruled to have had a religious purpose.</i>	<i>Strict-Separationism and Non-Preferentialism</i>
<i>Pleasant Grove City, Utah v. Summum*</i>	<i>Seven Aphorisms Monument</i>	<i>The religious organization requested to put a monument of the Seven Aphorisms in a city park that already contained the Ten Commandments.</i>	<i>Strict-Separationism and Non-Preferentialism</i>
<i>Stone v. Graham*</i>	<i>Ten Commandments</i>	<i>The Ten Commandments would be posted in every school classroom.</i>	<i>Strict-Separationism and Non-Preferentialism</i>
<i>Capitol Square Review & Advisory Board v. Pinette*</i>	<i>Cross</i>	<i>The KKK requested to place an unattended cross in Capitol Square, an area set aside as a public forum.</i>	<i>Non-Preferentialism and Accommodationism</i>
<i>County of Allegheny v. ACLU (Split Case)*</i>	<i>Menorah</i>	<i>The menorah was part of a “Salute to Liberty” display with other holiday symbols.</i>	<i>Accommodationism Only</i>
<i>Lynch v. Donnelly*</i>	<i>Crèche</i>	<i>The crèche was part of a display that included secular holiday displays</i>	<i>Accommodationism Only</i>
<i>Salazar v. Buono*</i>	<i>Cross</i>	<i>The cross was erected in a national park in 1934 to honor WWI soldiers. The land was transferred to a private individual to care for the cross.</i>	<i>Accommodationism Only</i>
<i>Van Orden v. Perry*</i>	<i>Ten Commandments</i>	<i>A monolith of the Ten Commandments, donated by the Fraternal Order of the Eagles (a civic organization), sat alone on the Texas capitol grounds.</i>	<i>Accommodationism Only</i>

*These cases did not meet the qualification standard to measure consistency.

No consistent type of symbol correlated with the Court’s holding. Both subsets of models matched contained cases in which the challenged displays contained a crèche or the Ten Commandments. Examining the context of the challenged displays provided some clarity. The challengers in cases in which the actual holding matched the projected holdings for Strict-Separationism and Non-Preferentialism challenged displays that were the sole or main part of the

display, while in the cases in which the actual holding matched the projected holding for Accommodationism only, the challenged display was a small part of the overall display. But because each of the subsets in table 12 had fewer than six cases, consistency could not be measured.

The data collected show that the Supreme Court's holdings are consistent in most subsets when compared to other cases. In Chapter 5, I analyze the data in order to explain what comparisons show consistency and why some comparisons show inconsistency.

Chapter 5: Analysis

The findings that Chapter 4 discussed showed that consistency could be measured in many ways in the Supreme Court’s Establishment Clause jurisprudence, particularly when I compared cases to one another, controlling for one or more variables. The holdings of cases in subsets based on the level of the challenged government action were inconsistent, as only one subset met the consistency standard. In contrast, when one controls for whether the Court upheld or invalidated the challenged government action and for case types, the Court’s holdings were more consistent, and at times, highly consistent.

A. Level of Government Challenged Action

Table 3 showed that the only measured consistency in the Court’s holdings appeared when the challenged governmental action was a U.S. law. In those cases, the Court’s holding matched the projected holdings of Non-Preferentialism and Accommodationism 60% of the time. However, no other subset met the consistency standard. Even comparisons that combined values in this variable, such as measuring consistency by combining challenged actions that involved a state law to actions that were implementation of a U.S. law into one subset and comparing them to a subset that combined U.S. laws and the implementation of U.S. laws yielded no subset that met the consistency standard. Table 15 shows this comparison.

Table 15: Comparison of Actual to Projected Holdings, by combined U.S. Laws/ Actions and combined State Laws/Actions

Models Matched	U.S. Law or Implementation of U.S. Law	State Law or State Implementation of U.S. Law
All 3 Models	2/17 (12%)	7/63 (11%)
Strict-Separationism and Non-Preferentialism	2/17 (12%)	24/63 (38%)
Non-Preferentialism and Accommodationism	10/17 (59%)	22/63 (35%)
Accommodationism Only	3/17 (18%)	10/63 (16%)

No discernible patterns appeared in these data either. The data do seem to show that if the challenged government law was a U.S. law or state implementation of a U.S. law, then the Court's actual holding matched Non-Preferentialism and Accommodationism more frequently than with other models, though not at a percentage that reached the consistency threshold. The lack of consistency might be explained by the fact that these large groups of challenged actions at each level of government include a wide range of case types and types of challenged actions. Therefore, the categories were not specific enough to adequately measure consistency.

B. Nature of Holding

When one controls for whether the Court upheld or invalidated a government action, Table 4 showed that the Court's holdings, when matched to particular models, were highly consistent. This suggests that when the Court heard a case with a fact pattern that matched a projected holding for a particular model or set of models, the Court consistently upheld or invalidated those challenged government actions, depending on which way that model or set of models projected. One question that the data in Table 4 raise deals with cases that matched all three models. Since cases that matched Strict-Separationism tended to invalidate the challenged government actions, and those that matched Accommodationism tended to uphold actions, then what explains the challenged actions in the 67% of cases that matched both models (in addition to Non-Preferentialism) to be upheld? Further examination of the nine cases showed that the results of the Court's holdings were similar. Three cases prevented an institution from using religious beliefs to discriminate against a group of people.¹⁰⁶ Two cases prevented a religious organization from using religion as a basis of a claim to not pay a portion of taxes for which the

¹⁰⁶ The three cases were: *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), *Norwood v. Harrison*, 413 U.S. 455 (1973), and *Bob Jones University v. United States*, 461 U.S. 574 (1983).

organization was responsible.¹⁰⁷ Two cases prevented states from passing laws that prohibited the teaching of evolution and stated that only Creationism could be taught in schools.¹⁰⁸ The final two cases prevented a state or territory from including a religious belief in an oath required of all people to vote or hold office.¹⁰⁹ Even though the Court upheld the challenged action in 67% of the cases (meeting the standard of consistency), the effect of the Court's actual holding in the cases limited the use of religion or religious beliefs in a variety of government roles.

These comparisons, while significant in showing high levels of consistency, only provided data based on the action taken by the Supreme Court when its ruling followed a particular model. These data suggest that if a justice or a majority of the Court members held an interpretation on the Establishment Clause that matched a particular model, one could expect them to uphold or invalidate the challenged government action accordingly. For example, if a justice stated that he or she ruled on Establishment Clause cases as Strict-Separationist, based on these data one could confidently expect that the justice would vote to invalidate the challenged government action. However, justices do not rely solely on a particular model; instead they likely combine the facts, judicial precedent, the precedent that would be set, and their judicial ideology, among other factors, rendering the evidence here useful only to predict a justice's or Court's vote on a limited portion of jurisprudential reasoning.

C. Court Vote

When I compared the Court's actual holding to the projected holdings according to each model, controlling for the actual holding, the vote difference of the Court measured a higher level of consistency when the actual holding matched Strict-Separationism, but a weaker Court

¹⁰⁷ The two cases were: *Swaggart Ministries v. California Board of Equalizaion*, 493 U.S. 378 (1990) and *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989).

¹⁰⁸ The two cases were: *Edwards v. Aguillard*, 482 U.S. 578 (1987) and *Epperson v. Arkansas*, 393 U.S. 97 (1968).

¹⁰⁹ The two cases were: *Davis v. Beason*, 133 U.S. 333 (1890) and *Torcaso v. Watkins*, 367 U.S. 488 (1961).

holding when the actual holding matched Accommodationism. The Court appeared to be more divided when its holding had the effect of accommodating a religious institution, practice, symbol or worship. One explanation could be that fewer members take a position on the Establishment Clause that would be similar to or match Accommodationism, and they were only in the majority when enough justices voted according to Non-Preferentialism on a case. This finding contributes to the observation that if the Court's holding matched the projected holdings for Strict-Separationism, the majority would have at least three more votes than the minority, and with a high consistency measurement, would be likely to hold in future cases; but when the actual holding matched the projected holding for Accommodationism, the majority's lead would be less than three a higher percentage of the time with a lower consistency measurement. Again, the data only show the behavior of the Court in terms of its vote if it ruled in such a way that matched a particular model. These data may be useful for future predictions with a high degree of confidence based on the consistency measurements.

D. "Case Types"

Type of case offered the clearest comparison on which to judge consistency. This sort had the advantage of comparing subsets of cases that were the most similar. These data allowed for consistency to be measured according to a particular set of facts presented to the Court. Consistency measured in these subsets were not as reliant on judicial reasoning or behavior as in previous comparisons. This comparison also allowed distinguishing the nuances of the fact patterns of a case according to the syllabus of the Court's holdings in order to explain how a case in a subset of case type differed from the other cases in the model(s) it matched.

When comparing the actual holdings of all cases in each case type to the individual models matched, the data indicated that the Court's actual holdings are consistent. However, 10

of the case types had five or fewer cases, a disadvantage since six of those ten matched the particular models with 100% consistency. When I removed those case types with insufficient numbers of cases for the consistency measurement, only four of the fourteen categories remained. If the qualification standard were removed and all of the cases subjected to the same comparison, the data seem to suggest consistency in those case types. However, because of the few number of cases in these case types, the holding of a single new case that does not match the projected holding of the others may lower its consistency measurement to below 60%.

For the four case types that met the qualification standard, the Court's actual holding was consistent with Non-Preferentialism in all four types. The consistency measurement for Strict-Separationism was high in the Exemptions and Prayer case types, but that for Accommodationism was only above 60% for Exemptions. These data indicate that in Exemptions cases, the Court's holdings were highly consistent with one another according to all three models. For the other three cases types, the Court's holdings were highly consistent with the projected holding for Non-Preferentialism, indicating that the model's criteria applied to a higher degree in these case types.

Comparing the cases in the three case types that did not meet the consistency standard under all three models allowed for a closer analysis of the individual circumstances that may have changed the Court's holding from previous case holdings.

1. Parochial School Aid/Funding

Further scrutiny of the facts of the three cases that did not match Non-Preferentialism and Accommodationism showed that in each case, the facts were distinctive enough to create exceptions. In *Agostini v. Felton* (1997), the Court reversed its position from an earlier ruling in *Aguilar v. Felton* (1985) in order to provide financial relief for a school district that attempted to

comply with the *Aguilar* ruling.¹¹⁰ In *Board of Education v. Grumet* (1994), the Supreme Court invalidated legislation that created a school district for one particular religion.

In *Sloan v. Lemon* (1973), families whose children attended non-public schools received tuition reimbursement from the state; however, no program existed to separate reimbursement for students who attended parochial non-public schools from non-sectarian non-public schools, creating an Establishment Clause issue. This case differed from the other tuition aid cases for two reasons: 1) it did not reimburse for a specific expense such as transportation (as in *Everson* and *Mueller*) or textbooks (as in *Mueller*), and 2) it was not a necessity to provide families with a guarantee of a quality education (as in *Zelman*¹¹¹).

2. Prayer

In all five school prayer cases, the Supreme Court invalidated the challenged action. In *Abington* and *Engel*, the Court invalidated daily prayers that were led by the teacher and principal, respectively. Even though parents could request that their student be excused from the practice, the Court held that prayer led by a government official in a school violated the Establishment Clause. In *Wallace*, the Court invalidated a moment of silence for meditation or voluntary prayer. Even though the moment of silence was not led by a teacher or principal, since the school devoted a moment that was used for prayer, again the Court held that this action violated the Establishment Clause. In *Lee*, the challenged action was a district's practice of inviting a clergy member to the high school graduation ceremony to deliver an invocation and prayer to the graduating class. The clergy member was given a pamphlet instructing that the

¹¹⁰ After the ruling in *Aguilar*, New York City attempted to create a plan to provide remedial services to disadvantaged students while following the Court's ruling. Due to the extreme financial cost of complying with *Aguilar* and the Court's rulings in *Board of Education v. Grumet* and *Grand Rapids School District v. Ball*, the respondents asked for relief from the ruling in *Aguilar*.

¹¹¹ The challenged program provided reimbursement for parents to send their students to another school if their assigned district school was deemed a failing school.

prayer should be nonsectarian. Those arguing in support of the practice tried to distinguish this action from previous prayer cases by relying on the facts that the prayer was not led by a school official and the ceremony was not mandatory. The Court invalidated the practice, rejecting both arguments. The school still controlled the graduation ceremony, and when it invited a clergy member to deliver an invocation and prayer, the state still created an impermissible violation of the Establishment Clause. The Court also held that the graduation ceremony was such a significant event that it could not be labeled as voluntary. In *Santa Fe*, a student led a prayer over the school's public address system before home football games. Those who argued in support of the student-led prayer claimed that a home football game was genuinely a voluntary activity, and that those who did not agree with the prayer could enter the stadium after the game started. Since the prayer was student-led, they also argued that the school was absolved of all responsibility. The Court found that although the spectators' attendance was voluntary, the attendance of the players, coaches, cheerleaders, band, etc. was not. The school knew that the student would say a prayer, and the prayer was delivered over the school's equipment; therefore the school still had responsibility for what was said, and the student-led prayer violated the Establishment Clause. The result of these five cases was that the Supreme Court held that prayer in a school event that was mandatory for anyone and was led by a school official or with the school's knowledge and permission would create a violation of the Establishment Clause.

In *Marsh v. Chambers* (1983), the Supreme Court held that the practice of paying for a chaplain who began each legislative session with a prayer was not a violation of the Establishment Clause, as history showed that even the First Congress that wrote the Bill of

Rights opened sessions with prayer, a practice that continued to that day.¹¹² This was the only case of its type.

3. *Religious Displays*

Examining the context of the challenged displays provided some clarity. The challengers in cases in which the actual holding matched the projected holdings for Strict-Separationism and Non-Preferentialism challenged features that were the sole or main part of the display. The crèche in *Allegheny*, the Aphorisms monument in *Pleasant Grove*, and the Ten Commandments in *Stone* were the sole display in each of those cases, and the Ten Commandments in the first display that was challenged in *McCreary* was the main focus of the challenged action. In each of the cases, the Court invalidated the challenged display as a violation of the Establishment Clause.

In the four cases in which the actual holding matched only the projected holdings of Accommodationism, two sets of context appeared. The first separated the cases that matched Strict-Separationism and Non-Preferentialism. In two of the cases, the challenged displays were not the sole symbols. The menorah in *Allegheny* and the crèche in *Lynch* were both in larger holiday displays that included secular symbols. In the *Salazar* and *Van Orden* cases, the Court accepted the historical significance of the symbols and upheld the displays. In *Salazar*, the challenged cross was erected in 1934 to honor fallen World War I soldiers. The cross sat on a rock in a national park, but private individuals largely maintained it. The land was transferred to an individual in a land-swap. The Court took into account that the cross had been up for so long,

¹¹² *Marsh v. Chambers*, 463 U.S. 783 (1983): “While historical patterns, standing alone, cannot justify contemporary violations of constitutional guarantees, historical evidence in the context of this case sheds light not only on what the drafters of the First Amendment intended the Establishment Clause to mean, but also on how they thought that Clause applied to the chaplaincy practice authorized by the First Congress. In applying the First Amendment to the states through the Fourteenth Amendment, it would be incongruous to interpret the Clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government.”

and allowed the land swap so that the cross could be maintained by non-government individuals. In *Van Orden*, the challenged monolith was donated to the state capitol grounds in 1961 by the Fraternal Order of the Eagles, a civic organization, and Van Orden challenged the display six years after he first started to see it with frequency. The Court held that the purpose for the donation was to recognize the historic work of the Fraternal Order of the Eagles and since the monument had been around for over forty years, the display could remain in place.

Taken together, it seemed that if the challenged symbol was the only symbol, unless it had historical significance, the Court invalidated the display, and the actual holding matched the projected holdings of Strict-Separationism and Non-Preferentialism. If the challenged symbol was part of a larger display or had historical significance, the Court upheld the display, and the actual holding matched the projected holding of Accommodationism.

Chapter 6: Summary and Conclusions

Although the Court may apply different tests or standards, or uphold some Establishment Clause cases and invalidate others, I found that when categorizing cases by the holdings each model projected, the Court's holdings were largely consistent. By categorizing the actual holdings in cases along with the holdings that the three models projected and by comparing them to each other, I found evidence of consistency in most of the subsets: I conclude that the Supreme Court's holdings were indeed consistent with one another when controlling for a number of variables. When the Court's actual holding matched the projections of all three models or of the Strict-Separationism and Non-Preferentialism models, the Court consistently invalidated the challenged government actions; when the actual holding matched Non-Preferentialism and Accommodationism or only Accommodationism, the Court consistently upheld the challenged actions. Looking at Vote Difference, when the actual holding matched the projected holding for all subsets except Accommodationism only, the Court's majority had at least three more votes than the minority, though the consistency measurement declined when the holding matched Accommodationism along with Non-Preferentialism. Among case types with at least six cases, the Court's actual holding was consistent in all Exemption cases and in Parochial School Funding/Aid and Prayer cases when case facts are analyzed.

The thesis illustrated types of fact summaries and holdings that matched the projected holdings according to the three models and whether the Supreme Court upheld or invalidated the challenged government action. The analysis also showed that if Establishment Clause cases were viewed in terms of case types with similar facts, the holdings of the Supreme Court were consistent with one another. When the challenged governmental action involved a religious teaching, message, or practice by a government institution; gave direct aid to a religious

institution; or promoted one religion's symbol or belief, the Supreme Court was likely to prohibit the challenged action. However, if the challenged action was funding given to religious organizations that non-religious organizations could also qualify for, or was a display, symbol or message that was a part of a bigger, neutral display, then the Supreme Court was likely to allow the challenged action.

Projected holdings based on the models allowed for a standardized comparison of cases. When comparisons were made among subsets of data that matched the same model or models or had similar values on a variable, the Supreme Court's holdings were consistent, though the level of consistency varied across the different comparisons. A comparison of the Court's actual holding in terms of whether the Court upheld or invalidated the challenged action showed a higher level of consistency than did a comparison of vote.

The models represent three particular views of the Establishment Clause jurisprudence. Each view of the Establishment Clause spoke to what kind of and how much involvement government could have in religious matters. A Strict-Separationist believes that the "wall of separation" between church and state should be high, allowing government only to be involved in religious matters to prevent an illegal activity, such as discrimination. An Accommodationist, on the other hand, would believe the wall to be low, only preventing government from establishing an official religion. An observer can project how a Court member would vote on a case based on the facts, if the justice followed one of the three models. The data showed that cases that matched Strict-Separationism consistently invalidated the challenged government actions, while the cases that matched Accommodationism consistently upheld the challenged government actions.

Some actual holdings match the projected holdings of all three models. In such cases, the challenged government action either legislated religious beliefs or applied a law to a religious organization or institution. These cases tended to involve one of three situations: 1) the challenged action or law mandated belief in a particular religious idea,¹¹³ 2) the challenged action was an action or law applied to a religious institution that sought to prevent the institution from violating existing law or discriminating against a particular group,¹¹⁴ or 3) a religious institution used religion for financial benefit.¹¹⁵ Supreme Court holdings that reviewed a challenged action in which the government had passed a law that mandated religious belief typically invalidated the law. On the other hand, the three models prevented religious institutions from using religion to block government inquiry into their practices. The Court ensured that the government could intervene in religious organizations to guarantee that the law was applied fairly, regardless of religious belief or denomination. Even Accommodationism held that religious beliefs were viewpoints that should be treated in an equal manner with non-religious viewpoints. The laws in the examples given clearly violated that criterion. On the other hand, the three models prevented religious institutions from using religion to block government inquiry into their practices. The Court ensured that the government could intervene into religious organizations to guarantee that the law would be applied fairly, regardless of

¹¹³ *Epperson v. Arkansas*, 393 U.S. 97 (1968) was an example of a government agency mandating a particular belief. The law required the teaching of a religious belief and had no exceptions for those who believed otherwise. The oath that required a public official to declare his belief in God according to Maryland's Declaration of Rights in *Torcaso v. Watkins*, 367 U.S. 488 (1961) provided an example of the government mandating religious belief in its constitutional text.

¹¹⁴ *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) and *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) were examples of cases in which the challenged action was applied in order to prevent the religious institution from violating an existing law (minimum wage under the FSLA in *Alamo*) or discriminating against someone (allowing the investigation of the non-renewal based on religious beliefs in *Ohio*).

¹¹⁵ *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989) provided an example of a religious institution that attempted to benefit financially from religion (the "auditing" sessions).

religious belief or denomination. When the actual holding matched the projected holding of Strict-Separationism, the margins of the Court's vote tended to be greater. This could be explained by studying whether more justices tended towards Strict-Separationism or whether the facts of the cases in which the actual holding matched Strict-Separationism were clearer violations of the Establishment Clause than the facts in cases that matched other models.

The actual holding of 66 of the 73 cases (90%) matched Non-Preferentialism. This was a very high proportion of the total cases, though no case matched Non-Preferentialism only. The criteria listed in the Statement of Models for the Non-Preferentialism model corresponded to similar criteria found in either the Strict-Separationism or Accommodationism models, making it likely that the projected holdings according to Non-Preferentialism would match the other models. Non-Preferentialism was still an important model, because it included more moderate criteria with which to categorize the cases. Strict-Separationism and Accommodationism took opposite stances on the type of government involvement with religion the Establishment Clause allowed; Non-Preferentialism mediated between the two stances. The large number of cases with actual holdings that matched the projected holding of Non-Preferentialism suggests that the Court tended to rule on cases according to the model's criteria. When cases that matched Non-Preferentialism to the actual holding and invalidated the government action the cases likely also matched the overlapping criteria with Strict-Separationism; when the action was upheld, they likely matched the overlapping criteria with Accommodationism.

Some actual holdings matched only the projected holding of Accommodationism. These cases tended to involve a religious organization receiving benefits or religious practices or displays, all of which the Court held to be within the limits of the Establishment Clause. These Accommodationism only cases tend to share one or more of three characteristics: 1) participation

in the challenged religious practice or activity was based on a personal choice,¹¹⁶ 2) the meaning of the challenged religious practice or activity was up to the individual viewer to interpret,¹¹⁷ and 3) the challenged practice or activity was based on a long-standing tradition.¹¹⁸ In such cases the challenged government action involved government recognition of religion's role in an individual's life or the traditions of the United States. These actions allowed for the individual to decide his or her own level of involvement or interpretation of the role of religion. However, the vote difference data showed that the Court members were less likely to rule strongly on the Accommodationism only cases. More Court members evidently held stances that were categorized as Strict-Separationist or Non-Preferentialist, because the Court's rulings tended to be stronger according to vote difference in the cases in which the holdings matched the projected holdings for Strict-Separationism and Non-Preferentialism.

This study left at least two issues unresolved or unaddressed. First, when comparing cases by case types, most case types had too few cases to adequately measure consistency, even though in some subsets 100% of the actual holdings in cases in a particular case type matched the same models. Perhaps I could have found a way to combine case types by some particular shared aspect of the case, creating a subset that would qualify. I did not take that step in order to maintain the goal of comparing the most similar cases to one another. I also was unable to address whether a justice's or a Court's vote followed a particular position on the Establishment Clause that matched a particular model, or if other factors that shape judicial decision-making

¹¹⁶ *Zorach v. Clauson*, 343 U.S. 306 (1952) did not require students to attend the religious instruction. No public funds were spent on the challenged program, which distinguished it from other "release time" programs in later cases.

¹¹⁷ The crèche in *Lynch v. Donnelly*, 465 U.S. 668 (1984) was a part of a greater display. The individual could have interpreted it as a religious symbol or as part of a holiday display. The government did not endorse a particular view of it.

¹¹⁸ The Court held that prayer in *Marsh v. Chambers*, 463 U.S. 783 (1983) was based on a long-standing tradition of prayer in the legislative branch.

had greater influence. I tried to limit the impact of the other factors, but could not completely separate them.

The findings of this study are significant in two ways. First, the claims that the Supreme Court has been inconsistent in its Establishment Clause jurisprudence do not hold up when the most similar cases were compared to one another. In fact, the Court's rulings appeared to be consistent a majority of the time. Second, the models and comparisons the study included provide a framework for future Establishment Clause studies to build upon. Future studies could build upon this thesis in the following ways:

- include the holdings in cases not heard before the Supreme Court, but perhaps in a particular court of appeals;
- include cases in which the Establishment Clause is not the primary focus of the case for at least a substantial minority;
- measure whether lower federal courts or state courts follow the precedent set by the Supreme Court with consistency;
- determine whether the Court's holdings measured more or less consistent over time;
- determine whether consistency could be measured within each natural court or in a particular chief's court;
- compare the justice's ideology with their votes on Establishment Clause cases to see if a connection could be found between the two;
- compare the positions of the individual justices according to the models and the votes they cast in the cases; and
- use the models to predict how the judiciary would rule on future cases that come before the Supreme Court or lower courts.

So how high is Jefferson's "wall of separation"? According to the data in this study, the wall is high enough to prevent direct government involvement in cases where the government mandates or requires a religious practice, but low enough to allow individuals the freedom to believe or worship the way they see fit, even with some government assistance. The Supreme Court's holdings were consistent when compared to other cases based on which models the holdings matched. While scholars may still debate the true meaning of the Establishment

Clause or the rightful standard to apply to cases involving the religion clauses of the First Amendment, I confidently conclude that the Court's current holdings are in fact consistent when compared to one another.

Appendix A: Supreme Court Case List

Full list of Supreme Court cases used in the study. They are organized in alphabetical order. Opinions and other data were collected from the US Supreme Court Center (supreme.justia.com) and the Oyez Project at IIT Chicago-Kent College of Law (oyez.org).
Note: Cases marked with an asterisk (*) were not included in the analysis.

Abington School District v. Schempp, 374 U.S. 203 (1963).
Agostini v. Felton, 521 U.S. 203 (1997).
Aguilar v. Felton, 473 U.S. 402 (1985).
**Bender v. Williamsport Area School District*, 475 U.S. 534 (1986).
Board of Education v. Allen, 392 U.S. 236 (1968).
Board of Education v. Grumet, 512 U.S. 687 (1994).
Board of Education v. Mergens, 496 U.S. 226 (1990).
Bob Jones University v. United States, 461 U.S. 574 (1983).
Bowen v. Kendrick, 487 U.S. 589 (1988).
Bradfield v. Roberts, 175 U.S. 291 (1899).
Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753 (1995).
Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).
Committee for Public Education & Religious Liberty v. Regan, 444 U.S. 646 (1980).
Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987).
County of Allegheny v. ACLU, 492 U.S. 573 (1989).
Cutter v. Wilkinson, 544 U.S. 709 (2005).
Davis v. Beason, 133 U.S. 333 (1890).
Edwards v. Aguillard, 482 U.S. 578 (1987).
Engel v. Vitale, 370 U.S. 421 (1962).
Epperson v. Arkansas, 393 U.S. 97 (1968).
Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).
Everson v. Board of Education, 330 U.S. 1 (1947).
**Flast v. Cohen*, 392 U.S. 83 (1968).
Gallagher v. Crown Kosher Super Market of Massachusetts, Inc., 366 U.S. 617 (1961).
Gillette v. United States, 401 U.S. 437 (1971).
Good News Club v. Milford Central School, 533 U.S. 98 (2001).
Harris v. McRae, 448 U.S. 297 (1980).
**Hein v. Freedom from Religion Foundation*, 551 US 587 (2007).
Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680 (1989).
Hunt v. McNair, 413 U.S. 734 (1973).
Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948).
Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993).
Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).
Larson v. Valente, 456 U.S. 228 (1982).
Lee v. Weisman, 505 U.S. 577 (1992).
Lemon v. Kurtzman (I), 403 U.S. 602 (1971).
Lemon v. Kurtzman (II), 411 U.S. 192 (1973).
Levitt v. Committee for Public Education & Religious Liberty, 413 U.S. 472 (1973).

Lynch v. Donnelly, 465 U.S. 668 (1984).
Marsh v. Chambers, 463 U.S. 783 (1983).
McGowan v. Maryland, 366 U.S. 420 (1961).
Meek v. Pittenger, 421 U.S. 349 (1975).
McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005).
Mitchell v. Helms, 530 U.S. 793 (2000).
Mueller v. Allen, 463 U.S. 388 (1983).
New York v. Cathedral Academy, 434 U.S. 125 (1977).
Norwood v. Harrison, 413 U.S. 455 (1973).
Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986).
Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009).
Quick Bear v. Leupp, 210 U.S. 50 (1908).
Roemer v. Board of Public Works, 426 U.S. 736 (1976).
Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995).
Salazar v. Buono, 559 U.S. ____ (2010).
Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).
School District of Grand Rapids v. Ball, 473 U.S. 373 (1985).
Sloan v. Lemon, 413 U.S. 825 (1973).
Stone v. Graham, 449 U.S. 39 (1980).
Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378 (1990).
Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).
Thomas v. Review Board, 450 U.S. 707 (1981).
Tilton v. Richardson, 403 U.S. 672 (1971).
Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985).
Torcaso v. Watkins, 367 U.S. 488 (1961).
Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961).
**Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,
454 U.S. 464 (1982).
Van Orden v. Perry, 545 U.S. 677 (2005).
Wallace v. Jaffree, 472 U.S. 38 (1985).
Walz v. Tax Commission of New York City, 397 U.S. 664 (1970).
Widmar v. Vincent, 454 U.S. 263 (1981).
Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986).
Wolman v. Walter, 433 U.S. 229 (1977).
Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993).
Zorach v. Clauson, 343 U.S. 306 (1952).

Appendix B: Statement of the Models

I. Strict Separationism Model

A. Facts of the case likely to support invalidation of a law or action:

1. The government action endorses a religion or religious practice
2. The government institution or authority coerces someone to a religious practice
3. Government action provides direct aid or assistance to a religious institution, even when the direct aid is provided to the institution in a neutral manner
4. The action or law appears to advance or inhibit religion
5. A government law/action establishes an official national/state church
6. The governing authority's law or action is applied in a non-neutral manner between religious institutions and non-religious institutions, or between different religions/sects
7. The governing authority's law or action has no secular purpose, even if the law or action is based on historical or traditional practices
8. The governing authority's law or action provides for a service for the religious institution or on the basis of religion that is not provided to the general public
9. The law or action will excessively entangle the government and a religious organization through the need for long-term monitoring or record-keeping
10. A government actor grants a request, application, or funding that would endorse a religion
11. A government actor grants a request, application, or funding that would coerce a religious action or practice
12. A government actor grants a request, application, or funding that would benefit a religious institution

B. Facts of the case likely to support a law or action to be upheld:

1. The governing authority's law or action has a secular purpose to allow incidental government involvement in prohibiting a religious institution or its members from engaging in an illegal activity
2. The government provides a necessary public service (such as public safety) to a religious institution

Strict Separationism tends to invalidate challenged government actions more than uphold them.

II. Non-Preferentialism Model

A. Facts of the case likely to support invalidation of a law or action:

1. The governing authority's law or action is applied in a non-neutral manner between religious institutions and non-religious institutions, or between different religions/sects
2. The governing authority's law or action has no secular purpose, even if the law or action is claimed to be based on historical or traditional practices
3. The governing authority's law or action provides for a service for the religious institution or on the basis of religion that is not provided to the general public
4. A government law/action that establishes an official national/state church
5. The law or action would excessively entangle the government and a religious organization through the need for long-term monitoring or record-keeping

B. Facts of the case likely support a law or action to be upheld:

1. The governing authority's law or action provided a general government service to a religious institution that was also provided to non-religious institutions
2. The governing authority's law or action was applied in a neutral manner, regardless of religion
3. The governing authority's law or action had a secular purpose
4. The primary effect of the governing authority's law or action neither advanced nor inhibited religion
5. The law or action gave aid to individuals rather than directly to a religious institution, provided the aid was given in a neutral manner
6. The governing authority's law or action has a secular purpose to allow incidental government involvement in prohibiting a religious institution or its members from engaging in an illegal activity
7. Granting a request or application that treats religion in a non-neutral manner

Non-Preferentialism tends to strike down more challenged governmental actions than it upholds, but not as many as Strict Separationism.

III. Accommodationism Model

A. Facts of the case likely to support invalidation of a law or action:

1. A government law/action that establishes an official national/state church
2. A government law/action treats religious viewpoints in an unequal manner

B. Facts of the case likely support a law or action to be upheld:

1. A government actor grants a request or application for equal access to government facilities for a religious worship or practice
2. The law or action is based on a history of recognition of a religious message or practice by the government
3. The law or action is based on a tradition of recognition of a religious symbol, message, or practice by the government
4. The law or action provides aid to a student or parent, and not directly to a religious institution
5. The governing authority's law or action provided a general government service to a religious institution, even if it was not neutrally provided to a non-religious institution
6. The governing authority's law or action was applied in a neutral manner, regardless of religion
7. The governing authority's law or action had a secular purpose
8. The primary effect of the governing authority's law or action advanced or inhibited religion
9. Participation in the challenged action is voluntary
10. The government allows a variety of religious viewpoints and activities, provided all viewpoints are given equal treatment

Accommodationism tends to uphold more challenged governmental actions than it invalidates.

Appendix C: Sample Supreme Court case analysis spreadsheet (five cases)

Case Name and Opinion Designation	Year	Summary of Background	Case Type	Establishment Clause Issue	U.S. and/or State Challenged Govt. Action	Projected Holding Based on Strict-Separationist Model	Projected Holding Based on Non-Preferentialist Model	Projected Holding Based on Accommodationist Model	Actual Holding - Upheld/Invalidated	Vote	Model(s) that The Actual Holding Matches		
											Strict-Sep.	Non-Pref.	Acc.
<i>Board of Education v. Mergens</i> , 496 U.S. 226	1990	A group of students requested to form a religion-based ecumenical club as an after-school, extra-curricular club, following the same school and district guidelines as of any other established club. The school and the district denied the request, arguing that if they granted this club, the district would violate the Establishment Clause. The students argued that the U.S. Equal Access Act prevented the school from denying their request; if the school allowed any non-curricular clubs, then they are required by law to allow all non-curricular clubs, including religion-based clubs. The Court heard arguments to determine whether granting the application under the Equal Access Act would violate the Establishment Clause.	Access for Religious Organizations	Whether the Equal Access Act (20 U.S.C. §§ 4071-4074), which required the school to allow a religion-based club under the circumstances of this case, would violate the Establishment Clause?	U.S. and State	Invalidate- Granting the club's application under the Equal Access Act would endorse a religious practice by a government agency.	Uphold- The Equal Access Act ensures that clubs be given access in a neutral manner, regardless of religion or religious beliefs.	Uphold- Granting the club's request in an equal manner as all other clubs would not violate the Establishment Clause.	The U.S. Supreme Court upheld the Equal Access Act as applicable to the circumstances of this case, holding that the state's providing access would not violate the EST clause.	8 to uphold, 1 to invalidate		X	X
<i>Epperson v. Arkansas</i> , 393 U.S. 97	1968	Arkansas law prohibited the teaching of evolution or of using a textbook that included the theory in public schools. A teacher brought action against the state challenging the law as a violation of her free speech and of the Establishment Clause.	Public School Curriculum	Whether the Arkansas statute (Ark.Stat.Ann. §§ 80-1627, 80-1628-1960 Repl. Vol.), as applied, violated the Establishment Clause?	State	Invalidate- The law has no secular purpose, and advances religion.	Invalidate- The program has no secular purpose, and advances religion.	Invalidate- The government is not treating religious viewpoints equally with other views.	The U.S. Supreme Court invalidated the state law.	9 for invalidation, 0 to uphold	X	X	X
<i>Lynch v. Donnelly</i> , 465 U.S. 668	1984	The city government of Pawtucket, RI purchased, erected, and maintained a Christmas display that included a creche, a Santa Claus house, a Christmas tree and a banner that reads "Seasons Greetings". Pawtucket residents and members of the Rhode Island ACLU challenged the inclusion of the creche, at a park owned by a non-profit organization, as a violation of the Establishment Clause.	Religious Displays	The inclusion of the creche in the city's holiday display is a violation of the Establishment Clause.	State	Invalidate- the creche is a religious symbol, and its inclusion can be understood as a government endorsement of that religion, particularly since no other religious symbol was included.	Invalidate- The government included one religious symbol, but not others. It was non-neutral on a religious basis in its selection of symbols, particularly with the banner "Seasons Greetings" not speaking to Christmas only.	Uphold- The creche is a symbol that has been recognized as a symbol of the Christmas season, and is not only used for a religious message.	The U.S. Supreme Court upheld the inclusion of the creche in the holiday display.	5 to uphold, 4 to invalidate			X

Case Name and Opinion Designation	Year	Summary of Background	Case Type	Establishment Clause Issue	U.S. and/or State Challenged Govt. Action	Projected Holding Based on Strict-Separationist Model	Projected Holding Based on Non-Preferentialist Model	Projected Holding Based on Accommodationist Model	Actual Holding - Upheld/Invalidated	Vote	Model(s) that The Actual Holding Matches		
											Strict-Sep.	Non-Pref.	Acc.
<i>Mitchell v. Helms</i> , 530 U.S. 793	2000	Chapter 2 of the U.S. Education Consolidation and Improvement Act of 1981 funneled money through state education agencies to local education agencies to purchase and lend instructional materials and equipment to public and private schools to implement "secular, neutral, and nonideological programs". In Jefferson Parish, LA, around 30% of the funds go to private schools, most of which are Catholic or other religious affiliation. Respondents challenged Chapter 2 as applied to Jefferson Parish as a violation of the Establishment Clause.	Parochial School Funding/Aid	Chapter 2 of the Education Consolidation and Improvement Act of 1981 as applied in Jefferson Parish is a violation of the Establishment Clause.	U.S. and State	Invalidate- Funding is given directly to religious organizations.	Uphold- The funding is given for a secular purpose, that does not have the effect of advancing religion.	Uphold- The funding is given neutrally	The U.S. Supreme Court upheld the law as applied by the state.	6 to uphold, 3 to invalidate		X	X
<i>Santa Fe Independent School District v. Doe</i> , 530 U.S. 290	2000	Santa Fe school district policy allowed Santa Fe High School's student-elected Student Council chaplain to deliver a prayer over the school's PA system prior to football games. Two families, one Catholic and one Mormon, filed suit, claiming the practice violated the Establishment Clause. While the law suit was pending, the district changed the policy to hold two votes: one to determine whether the students wanted the prayer, and a second to determine whether they want saying the prayer. The district court modified the policy to allow for only a nonsectarian, nonproselytizing prayer. The Circuit Court held that even with the modification, the practice violated the Establishment Clause.	Prayer	Santa Fe School District's policy of allowing student-led prayer before football games is a violation of the Establishment Clause.	State	Invalidate- The prayer coerces religious practice among those that are required to be there. The speech is not private speech because it is done on the school's property with school's equipment.	Invalidate- The prayers were non-neutral, did not have a secular purpose, and had the effect of advancing a religion.	Uphold- the speech is private speech. The school is not endorsing the message of the speaker.	The U.S. Supreme Court invalidated the school district's policy.	6 to invalidate, 3 to uphold	X	X	

Appendix D: Supreme Court case analysis spreadsheet (full)

Case Name and Opinion Designation	Year	Summary of Background	Case Type	Establishment Clause Issue	U.S. and/or State Challenged Govt. Action	Projected Holding Based on Strict-Separationist Model	Projected Holding Based on Non-Preferentialist Model	Projected Holding Based on Accommodationist Model	Actual Holding - Upheld/ Invalidated	Vote	Model(s) that The Actual Holding Matches		
											Strict-Sep.	Non-Pref.	Acc.
<i>Abington School District v. Schemp</i> , 374 U.S. 203	1963	Pennsylvania law required teachers to read scriptures from the Bible at the beginning of each school day. Abington Township then required students to recite the Lord's Prayer, led by the teacher. Students could be excused from the scripture readings and Lord's Prayer by a written request from their parents.	Prayer	Whether the scripture reading required by Pennsylvania Law (24 Pa.Stat. § 15-1516, as amended, Pub.Law 1928 Supp. 1960 Dec. 17, 1959) and Abington Township's required recitation of the Lord's Prayer violated the Establishment Clause?	State	Invalidate- The state law and school board practice advanced and endorsed a specific religion, a specific religious practice, and coerced the students to worship.	Invalidate- The state law and practice promoted a particular religion over the others in a non-neutral manner.	Uphold- The law and school practice allowed students that wanted to have an opportunity to practice religious teachings.	The U.S. Supreme Court invalidated the law and school board practice.	8 to invalidate, 1 to uphold	X	X	
<i>Agostini v. Felton</i> , 521 U.S. 203	1997	After the ruling in <i>Aguilar</i> , New York City attempted to create a plan to provide remedial services to disadvantaged students while following the Court's ruling. Due to the extreme cost of complying with <i>Aguilar</i> and the Court's rulings in <i>Board of Education v. Grumet</i> and <i>Grand Rapids School District v. Ball</i> , the respondents asked for relief from the ruling in <i>Aguilar</i> .	Parochial School Funding/Aid	Whether New York City's revised Title I program created under the U.S. Elementary and Secondary Education Act violated the Establishment Clause, as decided in <i>Aguilar v. Felton</i> ?	U.S. and State	Invalidate- The action provided direct aid to religious institutions, and required excessive monitoring.	Invalidate- The program excessively entangled the government with the religious institution.	Uphold- The program provided for a general government service to benefit the students.	The U.S. Supreme Court upheld the New York City program.	5 to uphold, 4 to invalidate			X
<i>Aguilar v. Felton</i> , 473 U.S. 402	1985	New York City received federal funding under Title I of the U.S. Elementary and Secondary Education Act and used the money to pay the salaries of public school teachers who taught in parochial schools to work with low-income families.	Parochial School Funding/Aid	Whether New York City's Title I program created under the U.S. Elementary and Secondary Education Act violated the Establishment Clause?	U.S. and State	Invalidate- The action provided direct aid to religious institutions, and required excessive monitoring.	Invalidate- The program excessively entangled the government with the religious institution.	Uphold- The program provided for a general government service to benefit the students.	The U.S. Supreme Court invalidated New York City's Title I program.	5 to invalidate, 4 to uphold	X	X	
<i>Board of Education v. Allen</i> , 392 U.S. 236	1968	A New York law required public school boards to lend textbooks free of charge to all 7-12 grade students, even those in private school. The law was challenged by some school boards as a violation of the Establishment Clause by providing instructional materials to parochial school students.	Parochial School Funding/Aid	Whether providing textbooks to students under §701 of the Education Law of the State of New York violated the Establishment Clause?	State	Invalidate- The law aided students who attended religious schools, and therefore aided the parochial schools.	Uphold- The law loaned textbooks to all students, regardless of religion. The service was a general, neutral program that was aimed at benefiting the students.	Uphold- The law lent textbooks to students. It was a secular law, even if it helped students at a parochial school.	The U.S. Supreme Court upheld the New York state law.	6 to uphold, 3 to invalidate		X	X

Case Name and Opinion Designation	Year	Summary of Background	Case Type	Establishment Clause Issue	U.S. and/or State Challenged Govt. Action	Projected Holding Based on Strict-Separationist Model	Projected Holding Based on Non-Preferentialist Model	Projected Holding Based on Accommodationist Model	Actual Holding - Upheld/Invalidated	Vote	Model(s) that The Actual Holding Matches		
											Strict-Sep.	Non-Pref.	Acc.
<i>Board of Education v. Grumet</i> , 512 U.S. 687	1994	A New York village was created entirely of one religious sect. School redistricting under Chapter 748 of the NY State Legal Code created one school district specifically for the village. Most students attended private sectarian schools. The students who needed special education services attended the public school that was created because the private schools did not offer them.	Parochial School Funding/Aid	Whether the creation of a school district for a particular religious sect under Chapter 748 of the New York State Legal Code violated the Establishment Clause?	State	Invalidate- The new school district gave direct aid of services to a religious sect.	Invalidate- The district was created to benefit the particular religious sect.	Upheld- The new district benefited students by providing services to them, not the religious sect.	The U.S. Supreme Court invalidated the New York law.	6 to invalidate, 3 to uphold	X	X	
<i>Board of Education v. Mergens</i> , 496 U.S. 226	1990	A group of students requested to form a religion-based ecumenical club as an after-school, extra-curricular club, following the same school and district guidelines as of any other established club. The school and the district denied the request, arguing that if they granted this club, the district would violate the Establishment Clause. The students argued that the U.S. Equal Access Act prevented the school from denying their request; if the school allowed any non-curricular clubs, then they are required by law to allow all non-curricular clubs, including religion-based clubs. The Court heard arguments to determine whether granting the application under the Equal Access Act would violate the Establishment Clause.	Access for Religious Organizations	Whether the U.S. Equal Access Act (20 U.S.C. §§ 4071-4074), which required the school to allow a religion-based club under the circumstances of this case, would violate the Establishment Clause?	U.S. and State	Invalidate- Granting the club's application under the Equal Access Act would endorse a religious practice by a government agency.	Uphold- The Equal Access Act ensured that clubs be given access in a neutral manner, regardless of religion or religious beliefs.	Uphold- Granting the club's request in an equal manner as all other clubs would not violate the Establishment Clause.	The U.S. Supreme Court upheld the Equal Access Act as applicable to the circumstances of this case, holding that the state's providing access would not violate the Establishment Clause.	8 to uphold, 1 to invalidate		X	X
<i>Bob Jones University v. United States</i> , 461 U.S. 574	1983	Bob Jones University and Goldsboro Christian Schools each had their federal tax-exempt status revoked for practicing discrimination (disallowing unmarried African-Americans and interracial couples, and admitting mostly caucasian students respectively). The two organizations claimed that the IRS violated their religious freedoms by penalizing each for practices consistent with their religious beliefs.	Exemptions	Whether the IRS's revocation of each institutions' tax exempt status under Section 501(c)(3) of the Internal Revenue Code of 1954 violated the Establishment Clause?	U.S.	Uphold- The Establishment Clause was not violated because the government intervention into the religious institutions prevented a violation of public rights, such as discrimination.	Uphold- The Establishment Clause was not violated because the government intervention into the religious institutions prevented a violation of public rights, such as discrimination.	Uphold- The Establishment Clause was not violated because the government intervention into the religious institutions prevented a violation of public rights, such as discrimination.	The U.S. Supreme Court upheld revocation of the schools' tax exempt status by the IRS.	8 to uphold, 1 to invalidate	X	X	X

Case Name and Opinion Designation	Year	Summary of Background	Case Type	Establishment Clause Issue	U.S. and/or State Challenged Govt. Action	Projected Holding Based on Strict-Separationist Model	Projected Holding Based on Non-Preferentialist Model	Projected Holding Based on Accommodationist Model	Actual Holding - Upheld/ Invalidated	Vote	Model(s) that The Actual Holding Matches		
											Strict-Sep.	Non-Pref.	Acc.
<i>Bowen v. Kendrick</i> , 487 U.S. 589	1988	The U.S. Adolescent Family Life Act provided grants for public and nonprofit private organizations for counseling and education services in family life and premarital sexual relations, as well as family planning and abortion. The appellees challenged the AFLA as a violation of the Establishment Clause because funding went to religious organizations.	Funding for Religious Organizations	Whether funding to nonprofit religious organizations under the U.S. Adolescent Family Life Act violated the Establishment Clause?	U.S.	Invalidate- Funding was given directly to religious organizations.	Uphold- The funding had a secular purpose and was given in a neutral manner to both religious and non-religious.	Uphold- The funding was given in a neutral manner.	The U.S. Supreme Court upheld the AFLA.	5 to uphold, 4 to invalidate		X	X
<i>Bradfield v. Roberts</i> , 175 U.S. 291	1899	Providence Hospital was incorporated in 1864 by an act of the U.S. Congress. The hospital was run by members of a monastic order of the Roman Catholic Church. Joseph Bradfield brought a suit in equity as a citizen and taxpayer to prevent the U.S. Treasurer from giving federal funds to the hospital.	Funding for Religious Organizations	Whether funding Providence Hospital under U.S. 13 Stat. at L. 43, chap. 50 violated the Establishment Clause?	U.S.	Invalidate- The law provided direct aid to an organization run by a religious organization.	Uphold- The funding had a secular purpose and did not have the effect of advancing religion.	Uphold- The funding was given for a general service.	The U.S. Supreme Court upheld the Hospital's incorporation act.	9 to uphold, 0 to invalidate		X	X
<i>Capitol Square Review & Advisory Board v. Pinette</i> , 515 U.S. 753	1995	Capitol Square was a forum for public discussion and activities in Columbus, OH. The Capitol Square Advisory Board regulated access to the Square. The regulations included filling out an application form and meeting speech-neutral criteria. The Ku Klux Klan applied for a permit to place an unattended cross in the Capitol Square. The Advisory Board denied the application, stating that allowing the cross would be a violation of the Establishment Clause. The District Court entered an injunction, requiring the issuance of the permit.	Religious Displays	Whether requiring the Capitol Square Advisory Board to issue a permit to a group to place an unattended cross on Capitol Square violated the Establishment Clause?	State	Invalidate- The government allowing a religious symbol to be displayed could be seen by an observer as an endorsement of religion.	Uphold- Denial of the application would be done in a non-neutral manner. If Capitol Square was truly a public forum, then this display should have been allowed.	Uphold- The cross was relating a symbol of religion that had been historically recognized in our country.	The U.S. Supreme Court upheld that the issuance of a permit by the Capitol Square Advisory Board would not have violated the Establishment Clause.	7 to uphold, 2 to invalidate		X	X
<i>Committee for Public Education & Religious Liberty v. Nyquist</i> , 413 U.S. 756	1973	Chapter 414 of New York's Education and Tax Laws created three financial aid programs from the government for nonpublic elementary and secondary schools. Section one of the law gave grants for facility maintenance and repair, section two gave tuition reimbursement to low-income parents, and sections three through five provided tax relief to parents who did not qualify for tuition reimbursement. Funding to religious nonpublic schools given under Chapter 414 was challenged.	Parochial School Funding/Aid	Whether funding provided under Sections 1-5 of New York's Education and Tax Laws to nonpublic religious schools and reimbursements and tax relief given to parents whose children attended religious schools violated the Establishment Clause?	State	Invalidate- The law gave direct aid to parochial schools, and gave benefits to parents who sent their student to religious schools.	Invalidate- The law gave benefits in a non-neutral manner to students that attended parochial schools, but not to students who attended public schools.	Uphold- The first section provided a general government service with a secular purpose. The remaining sections gave help to individuals, not to the religious schools.	The U.S. Supreme Court invalidated all sections of the New York law.	6 to invalidate, 3 to uphold	X	X	

Case Name and Opinion Designation	Year	Summary of Background	Case Type	Establishment Clause Issue	U.S. and/or State Challenged Govt. Action	Projected Holding Based on Strict-Separationist Model	Projected Holding Based on Non-Preferentialist Model	Projected Holding Based on Accommodationist Model	Actual Holding - Upheld/ Invalidated	Vote	Model(s) that The Actual Holding Matches		
											Strict-Sep.	Non-Pref.	Acc.
<i>Committee for Public Education & Religious Liberty v. Regan</i> , 444 U.S. 646	1980	A New York statute appropriated money to both church-sponsored and secular nonpublic schools for performing services mandated by the state including administering, grading and reporting results of tests. After the statute was challenged, the state passed a new law that directed payment to nonpublic schools for costs incurred for complying with state requirements. This version of the law also provided for a system to audit the state funds to ensure the money was covering costs for secular services.	Parochial School Funding/Aid	Whether the appropriation of money to sectarian nonpublic schools under the Ch. 138, § 2 of the 1970 N.Y. Laws violated the Establishment Clause?	State	Invalidate- Though the services were general government services and for a secular purpose. The creation of the auditing system excessively entangled the government and the religious schools.	Uphold- The law gave funding in a neutral manner for general government services. The auditing system did not create excessive entanglement because the law was ensuring the funding is spent for the mandated services.	Uphold- The funding provided was for a secular purpose to meet state education guidelines.	The U.S. Supreme Court upheld New York's new statute.	5 to uphold, 4 to invalidate		X	X
<i>Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos</i> , 483 U.S. 327	1987	The appellee was discharged from his job at a nonprofit facility run by the Church of Jesus Christ of Latter-day Saints because he failed to gain a certificate that said he was a member of the Church. The appellant filed suit claiming that he was discriminated against under Title VII of the U.S. Civil Rights Act and that the religious exemption in § 702 was unconstitutional because it allowed churches to discriminate on religious grounds for nonreligious jobs.	Employers/ Employees	Whether the religious exemption in Title VII, § 702 of the U.S. Civil Rights Act of 1964 violated the Establishment Clause?	U.S.	Invalidate- The exemption created by the law was non-neutral towards non-religions.	Uphold- The purpose of the law was not to advance or inhibit religion or religious belief.	Uphold- The law allows the church to determine what religious standards it wants to apply.	The U.S. Supreme Court upheld § 702 of the Civil Rights Act.	9 to uphold, 0 to invalidate		X	X
<i>County of Allegheny v. ACLU</i> , 492 U.S. 573 (Split Case)	1989	Allegheny County, PA erected a creche every year at the top of the Grand Staircase in the county courthouse. The creche sat by itself in this display. The ACLU challenged the display as an impermissible violation of the Establishment Clause.	Religious Displays	Whether the county's display of the creche in a government building violated the Establishment Clause?	State	Invalidate- The creche was a religious symbol, and its inclusion could be understood as a government endorsement of that religion, particularly since no other religious symbol was included.	Invalidate - The creche in this display had no secular purpose.	Uphold - The creche was a symbol that had a history of recognition as a holiday symbol.	The U.S. Supreme Court invalidated the county's display of the creche.	5 to invalidate, 4 to uphold	X	X	
<i>County of Allegheny v. ACLU</i> , 492 U.S. 573 (Split Case)	1989	The city of Pittsburgh, PA maintained a menorah outside of the city-county government building as part of a display with a Christmas tree and a sign that declared a "salute to liberty". The ACLU challenged this display as a violation of the Establishment Clause.	Religious Displays	Whether the city's display of the menorah violated the Establishment Clause?	State	Invalidate- The menorah was a religious symbol, not a secular one, and the inclusion of this symbol endorsed religion.	Invalidate- The inclusion of the menorah had no secular purpose.	Uphold- The menorah was part of a holiday display, with the message of promoting religious freedom.	The U.S. Supreme Court upheld the city's display of the menorah.	6 to uphold, 3 to invalidate			X

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<i>Cutter v. Wilkinson</i> , 544 U.S. 709	2005	The U.S. Religious Land Use and Institutionalized Persons Act states that the government cannot impose a burden on the religious exercise of persons in prison without "compelling government interests." Prisoners claimed that the Ohio prison system did not accommodate their beliefs in non-mainstream religions such as Satanism, Wicca, and Asatru religions, and the Church of Jesus Christ Christian. The prison officials claimed that the law advanced religion in violation of the Establishment Clause.	Accommodation of Religious Beliefs	Whether allowing inmates to practice any religion they choose under Section 3 of the U.S. Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 804, 42 U.S.C. § 2000cc-1(a)(1)-(2) violated the Establishment Clause?	U.S. and State	Invalidate- The law advanced religious beliefs of the prisoners.	Invalidate- The law's purpose of upholding the religious rights of prisoners was not a secular purpose.	Uphold- The law sought to protect a Constitutional right, which made it a secular purpose.	The U.S. Supreme Court upheld the U.S. law .	9 to uphold, 0 to invalidate			X
<i>Davis v. Beason</i> , 133 U.S. 333	1890	Idaho's territorial statutes stated that any person who practices, teaches, or counsels bigamy or polygamy may not vote in territorial elections or hold an elected or appointed office in the territory. The appellee falsely swore to the oath, and was arrested. He claimed that the arrest under the law violated his religious beliefs and violated the religious clauses.	Religious Oaths/Tests	Whether the religious oath required by §501 of the Rev.Stats.Idaho violated the Establishment Clause?	State	Uphold- The law prevented an illegal action for religious purpose.	Uphold- The law was applied neutrally, regardless of religion or non-religion.	Invalidate- The government was not treating religious view points equally with other view s.	The U.S. Supreme Court upheld Idaho's oath.	9 to uphold, 0 to invalidate	X	X	X
<i>Edwards v. Aguillard</i> , 482 U.S. 578	1987	Louisiana passes a Creationism Act which forbade the teaching of evolution unless the teaching included the theory of "creation science". The law was challenged by Louisiana parents, teachers, and religious leaders as a violation of the Establishment Clause.	Public School Curriculum	Whether Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction" Act (La.Rev.Stat.Ann. §§ 17:286.1-17:286.7) violated the Establishment Clause?	State	Invalidate- The law had the primary effect of advancing religion.	Invalidate- The law had the primary effect of advancing religion, and no secular purpose.	Invalidate- The government was not treating religious view points equally with other view s.	The U.S. Supreme Court invalidated the Louisiana law .	7 to invalidate, 2 to uphold	X	X	X
<i>Engel v. Vitale</i> , 370 U.S. 421	1962	A Board of Education of Union Free School District No. 9, New Hyde Park, NY policy directed school principals to begin each day with a prayer, following a state statute that directed the use of prayer in schools.	Prayer	Whether the New York statute and the resulting Board of Education of Union Free School District of New Hyde Park policy violated the Establishment Clause?	State	Invalidate- The statute and policy endorsed religion, coerced students into a religious practice, and advanced religion.	Invalidate- The law had no secular purpose, and had the effect of advancing religion.	Uphold- The act of prayer was a tradition that has been historically recognized in government.	The U.S. Supreme Court invalidated the state law and school policy.	6 to invalidate, 1 to uphold	X	X	

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<i>Epperson v. Arkansas</i> , 393 U.S. 97	1968	Arkansas law prohibited the teaching of evolution or of using a textbook that included the theory in public schools. A teacher brought action against the state challenging the law as a violation of her free speech and of the Establishment Clause.	Public School Curriculum	Whether the Arkansas statute (Ark.Stat.Ann. §§ 80-1627, 80-1628-1960 Repl. Vol.), as applied, violated the Establishment Clause?	State	Invalidate- The law had no secular purpose, and advances religion.	Invalidate- The program had no secular purpose, and advanced religion.	Invalidate- The government was not treating religious view points equally with other view s.	The U.S. Supreme Court invalidated the state law .	9 to invalidate, 0 to uphold	X	X	X
<i>Estate of Thornton v. Caldor, Inc.</i> , 472 U.S. 703	1985	A Connecticut man was demoted after informing the store's owner that he would no longer work on Sundays in line with a Connecticut statute that stated employees cannot be forced to work on their Sabbath. He filed a grievance with the State Board of Mediation and Arbitration to be reinstated. The Board sustained the grievance.	Sunday Laws	Whether giving employees an absolute right to not work on their Sabbath as outlined in Conn.Gen.Stat. §§ 53-300 to 53-303 (1958) violated the Establishment Clause?	State	Invalidate- The law advanced religion, and was applied in a non-neutral manner between religion and non-religion.	Invalidate- The law had no secular purpose, and had the effect of advancing religion.	Uphold- The law was applied neutrally among religion, and allowed recognition of religious worship.	The U.S. Supreme Court invalidated the Connecticut state law .	8 to invalidate, 1 to uphold	X	X	
<i>Everson v. Board of Education</i> , 330 U.S. 1	1947	A New Jersey state statute authorized school boards to create transportation rules and contracts for all students except for those attending a for-profit private school. The school board of the Township of Ewing created a program that reimbursed parents for costs associated with transportation to and from public and parochial schools. The program was challenged as a violation of the Establishment Clause for providing aid to religious schools.	Parochial School Funding/Aid	Whether the school board's program to reimburse parents for transportation costs to parochial schools violated the Establishment Clause?	State	Invalidate- The program gave taxpayer aid to the families of students who attended parochial schools, which indirectly aided the religious schools.	Uphold- The program provided a general government service with a secular purpose that did not advance religion.	Uphold- The program provided for a general government service.	The U.S. Supreme Court upheld the Ewing Township reimbursement program.	5 to uphold, 4 to invalidate		X	X
<i>Gallagher v. Crown Kasher Super Market of Massachusetts, Inc.</i> , 366 U.S. 617	1961	A group of rabbis in the Orthodox Jewish faith challenged Massachusetts's Sunday closing laws which required businesses to be closed on Sundays. The laws were designed to provide a day of rest for most businesses, with a few exceptions. The Appellees, who were not allowed under their religion to shop on the Sabbath (from sundown Friday to sundown Saturday) claimed that the laws inhibit their religious beliefs by not allowing them to operate their store on Sundays.	Sunday Laws	Whether the Massachusetts Sunday Closing Laws (Mass.Gen.Laws Ann. c. 136; c. 131, § 58; c. 138, §§ 12 and 33; c. 149, §§ 47 and 48; c. 266, §§ 113 and 117) violated the Establishment Clause?	State	Invalidate- The law endorsed religion by requiring a day of rest on Sundays.	Uphold- The law had a secular purpose of providing for a day of rest. The day of rest was not based on any particular religious belief.	Uphold- The law was based on longstanding laws that protected worship and recognition of the Sabbath.	The U.S. Supreme Court upheld the state laws.	6 to uphold, 3 to invalidate		X	X

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<i>Gillette v. United States</i> , 401 U.S. 437	1971	Two petitioners (both soldiers) stated that the Vietnam War was an unjust war according to their religious beliefs and asked for the same exemption from war due to religious beliefs given to those who conscientiously object to all wars under §6(j) of the U.S. Military Selective Service Act of 1967. One was convicted of failing to report for induction and one asked for a discharge. They challenged the application of the law to cover only objectors to all wars as unconstitutional violation of both religion clauses.	Accommodation of Religious Beliefs	Whether applying the conscientious objector exemption in §6(j) of the U.S. Military Selective Service Act of 1967 only to soldiers who objected to all wars due to religious beliefs violated the Establishment Clause?	U.S.	Uphold- Allowing the two soldiers an exemption to one specific war based on religious beliefs would be a government endorsement of religion and an advancement of that religion's beliefs, therefore the exemption should not be applied.	Uphold- Allowing the soldiers to object to a specific war on the basis of religion would create an entanglement of government by determining which religious beliefs are valid to object, therefore the exemption should not be applied.	Invalidate- The law currently inhibited religious beliefs by not treating the beliefs neutrally with all conscientious objectors.	The U.S. Supreme Court upheld §6(j) of the U.S. Military Selective Service Act of 1967.	8 to uphold, 1 to invalidate	X	X	
<i>Good News Club v. Milford Central School</i> , 533 U.S. 98	2001	New York law authorized school boards to create a policy governing use of their facilities for public use. Milford Central School in Milford, NY adopted a community use policy that adopted 7 of the purposes listed in the law, but did not include religious purposes. The Good News Club, a Christian organization, applied to use Milford Central School after school hours for a Christian program for boys 6 to 12. Milford denied the request on the basis that allowing the group to use the school for religious activities would promote religious worship prohibited by the policy. The GNC claimed that the decision violated their free speech, and Milford countered by arguing that approving the application would put the school in violation of the Establishment Clause.	Access for Religious Organizations	Whether allowing religious organizations to use facilities as a part of the Community Use policy adopted by Milford Central Schools in accordance with N.Y. Educ. Law §414 would violate the Establishment Clause?	State	Uphold- Allowing the Good News Club to use the facilities was seen as the school endorsing religion.	Invalidate- Access to the facilities was given in a neutral manner.	Invalidate- Granting the Good News Club's application to use the school in an equal manner as other organizations would not violate the Establishment Clause.	The U.S. Supreme Court invalidated the denial of the Good News Club's permit.	6 to invalidate, 3 to uphold		X	X
<i>Harris v. McRae</i> , 448 U.S. 297	1980	Versions of the Hyde Amendment restricted the use of Medicaid funds under the Title XIX of the 1965 U.S. Social Security Act to reimburse costs for abortions. The appellants filed suit, claiming the Hyde Amendment violated the Establishment Clause, among other clauses of the Constitution.	Benefits	Whether the U.S. Hyde Amendment's prevention of funding for abortions violated the Establishment Clause?	U.S. and State	Invalidate- The Hyde Amendment was applied in a non-neutral manner towards nonreligious beliefs.	Uphold- The law is applied neutrally, regardless of religion or non-religion.	Uphold- The law had a secular purpose, and even if it promoted a religious belief in the process.	The U.S. Supreme Court upheld the Hyde Amendment.	5 to uphold, 4 to invalidate		X	X

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<i>Hernandez v. Commissioner of Internal Revenue</i> , 490 U.S. 680	1989	The Church of Scientology offered "auditing" sessions to increase the members' understanding of their faith and awareness of the tenets of their religion. The Church sought to deduct payment for the sessions from their federal income taxes as charitable contributions or gifts. The IRS denied the deductions. The Church challenged the IRS decision on religion clause grounds in the Tax Court.	Exemptions	Whether the IRS's denial of the deductions under §170 of the Internal Revenue Code of 1954 to religious organizations violated the Establishment Clause?	U.S.	Uphold- The denial of the tax deductions prevented the IRS from providing financial aid to a religious organization.	Uphold- The denial of deductions prevented the IRS from giving aid to a religious organization in a non-neutral manner.	Uphold- The IRS denied the deductions because the money was given to the Church for services rendered, not for a religious purpose.	The U.S. Supreme Court upheld the Internal Revenue Services denial of the church's tax deductions.	5 to uphold, 2 to invalidate	X	X	X
<i>Hunt v. McNair</i> , 413 U.S. 734	1973	The South Carolina Educational Facilities Authority Act created the Educational Facilities Authority to assist higher education institutions with constructing new facilities through the issuance of bonds. The higher education institution is responsible for paying the principal and interest on the bonds. The Authority approved an application from Baptist College at Charleston, a Baptist controlled university. This approval was challenged by a taxpayer as a violation of the Establishment Clause.	Aid to Higher Education	Whether the issuance of bonds to assist with facility construction at a sectarian university under the South Carolina Educational Facilities Authority Act violated the Establishment Clause?	State	Invalidate- Issuing bonds to a sectarian university was direct aid to the university.	Uphold- The law provided a general government service neutrally towards religious and non-religious institutions for a secular purpose.	Uphold- The law provided a general government service, no matter if it was to a religious institution.	The U.S. Supreme Court upheld the South Carolina law.	6 to uphold, 3 to invalidate		X	X
<i>Illinois ex rel. McCollum v. Board of Education</i> , 333 U.S. 203	1948	The Board of Education of Champaign County, Illinois hired religious teachers to teach religious instruction in the public schools to students whose parents requested the instruction. The school released these students from their secular instruction, but the students who declined were not released from their secular instruction.	Public School Curriculum	Whether the school district's practice of using compulsory education to give religious teachings in public schools violated the Establishment Clause?	State	Invalidate- The practice of hiring religious teachers was a government endorsement of religion. The payment of teachers resulted in excessive entanglement.	Invalidate- The program had no secular purpose and had the primary effect of advancing religious teachings. Those that received the religious instruction were given benefits not extended to the	Uphold- Student involvement in the religious instruction was voluntary, and the benefits were given to students, not a religious institution.	The U.S. Supreme Court invalidated the Release Time program.	8 to invalidate, 1 to uphold	X	X	

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<i>Lemon v. Kurtzman (I)</i> , 403 U.S. 602	1971	Rhode Island's 1969 Salary Supplement Act gave an additional 15% salary supplement to teachers in nonpublic schools where the average per-pupil expenditure was below the average in public schools. Teachers from any nonpublic school were eligible to receive the supplement, but only if they taught courses that were offered in public schools. A court found that the only beneficiaries to date were Catholic school teachers. Pennsylvania's Nonpublic Elementary and Secondary Education Act authorized the Superintendent of Public Schools to purchase secular educational services from nonpublic schools, directly reimbursing those schools for teachers' salaries, textbooks and instructional materials for specific secular subjects.	Parochial School Funding/Aid	Whether funding for sectarian schools under Rhode Island's 1969 Salary Supplement Act and Pennsylvania's Nonpublic Elementary and Secondary Education Act violated the Establishment Clause?	State	Invalidate- The two laws provided direct aid to religious institutions, and it created excessive entanglement in monitoring between the government and the religious institution.	Invalidate- There was no secular purpose for the laws.	Uphold- The aid was applied neutrally to all nonpublic schools.	The U.S. Supreme Court invalidated Rhode Island and Pennsylvania laws.	8 to invalidate, 0 to uphold	X	X	
<i>Lemon v. Kurtzman (II)</i> , 411 U.S. 192	1973	Following <i>Lemon v. Kurtzman</i> (1971), the District Court on remand enjoined payment for services rendered after <i>Lemon I</i> , but permitted payment for services prior to <i>Lemon I</i> .	Parochial School Funding/Aid	Whether reimbursement for services provided to sectarian schools under Pennsylvania's Nonpublic Elementary and Secondary Education Act provided prior to <i>Lemon v. Kurtzman (I)</i> violated the Establishment Clause?	State	Invalidate- The law provided direct aid to religious institutions, and it created excessive entanglement in monitoring between the government and the religious institution.	Invalidate- There was no secular purpose for the law.	Uphold- The aid was applied neutrally to all nonpublic schools.	The U.S. Supreme Court upheld the remainder of the payments for services rendered before <i>Lemon I</i> .	5 to uphold, 3 to invalidate			X
<i>Levitt v. Committee for Public Education & Religious Liberty</i> , 413 U.S. 472	1973	New York Legislature appropriated \$28 million dollars to public and nonpublic schools for maintaining various administrative records such as health records and personnel qualifications and for expenses incurred with creating and administering tests, both state-mandated and teacher-created. According to the act, though the money was not to be used for religious instruction, nonpublic schools were eligible to receive funding.	Parochial School Funding/Aid	Whether funding from the New York Legislature's Appropriation that went to sectarian schools violated the Establishment Clause?	State	Invalidate- The money was direct aid to a religious institution.	Invalidate- The legislature had no way to know if the money was being used for a nonsecular purpose, therefore it was direct aid to a religious institution.	Uphold- The money was given for a secular purpose.	The U.S. Supreme Court invalidated the New York statute.	8 to invalidate, 1 to uphold	X	X	

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<i>Lynch v. Donnelly</i> , 465 U.S. 668	1984	The city government of Pawtucket, RI purchased, erected, and maintained a Christmas display that included a creche, a Santa Claus house, a Christmas tree and a banner that reads "Seasons Greetings". Pawtucket residents and members of the Rhode Island ACLU challenged the inclusion of the creche, at a park owned by a non-profit organization, as a violation of the Establishment Clause.	Religious Displays	Whether the inclusion of the creche in the city's holiday display violated the Establishment Clause?	State	Invalidate- the creche was a religious symbol, and its inclusion could be understood as a government endorsement of that religion, particularly since no other religious symbol was included.	Invalidate- The government included one religious symbol, but not others. It was non-neutral on a religious basis in its selection of symbols, particularly with the banner "Seasons Greetings" not speaking to Christmas only.	Uphold- The creche was a symbol that has been recognized as a symbol of the Christmas season, and was not only used for a religious message.	The U.S. Supreme Court upheld the inclusion of the creche in the holiday display.	5 to uphold, 4 to invalidate			X
<i>Marsh v. Chambers</i> , 463 U.S. 783	1983	Nebraska's state legislature sessions began with an ecumenical prayer from a chaplain who was paid for out of state taxpayer funds. Ernest Chambers, a Nebraska legislator brought suit, claiming the practice was a violation of the Establishment Clause.	Prayer	Whether Nebraska's employment of a legislative chaplain and holding prayer before the opening of a legislative session violated the Establishment Clause?	State	Invalidate- The practice was a government endorsement of religion. Allowing the chaplain and prayer at all were violations.	Invalidate- The government did not include other types of prayer, so the prayer was performed on a non-neutral basis, and had no secular purpose.	Uphold- There was a tradition of prayer before sessions of Congress, as well as government recognition of religion.	The U.S. Supreme Court upheld the Nebraska legislature's employment of a chaplain.	6 to uphold, 3 to invalidate			X
<i>McCreary County v. ACLU of Kentucky</i> , 545 U.S. 844	2005	Two Kentucky county courthouses (McCreary County and Pulaski County) displayed the Ten Commandments. When the display was challenged, the counties passed resolutions that created a new display showing the Ten Commandments and other documents with religious references as Kentucky's legal precedent. The district court entered a preliminary injunction barring the second display. A third display was created under the previous resolution, with nine documents of equal size and was titled "The Foundations of American Law and Government" display. The injunction applied to the third display because the intent was still religious.	Religious Displays	Whether the Kentucky counties' resolutions and the courthouse's display of the Ten Commandments violated the Establishment Clause?	State	Invalidate- The display was an endorsement of a religion.	Invalidate- The display had no secular purpose, and had the effect of advancing religion.	Uphold- The symbol had a tradition of recognition by the government.	The U.S. Supreme Court invalidated the Ten Commandments display.	5 to invalidate, 4 to uphold	X	X	

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<i>McGowan v. Maryland</i> , 366 U.S. 420	1961	Employees of a large department store in Anne Arundel County, Maryland were convicted and fined for selling various items on a Sunday in violation of a law that prohibited the sales with the exception of a few specific items. This law was one of several Maryland laws that prohibited specific activities or place limitation on them on Sundays.	Sunday Law s	Whether Maryland's law that prohibited the sale of certain items on Sunday (Md. Ann. Code, Art. 27, § 521) violated the Establishment Clause?	State	Invalidate- The law advanced religion by stating that Sunday, a traditional day of worship, was a day that stores would be closed, and was applied in a non-neutral manner between religion and non-religion.	Invalidate- The law had no secular purpose, and had the effect of advancing religion.	Uphold- The law was applied neutrally among religion, and allowed recognition of religious worship.	The U.S. Supreme Court upheld the Maryland law.	8 to uphold, 1 to invalidate			X
<i>Meek v. Pittenger</i> , 421 U.S. 349 (Split Case)	1975	Pennsylvania Acts 194 and 195 provided the same direct services and materials for nonpublic school students that were given to public school students. Services provided to nonpublic schools under Act 194 included testing, counseling, speech and hearing services, etc. Act 195 loaned to nonpublic schools instructional and equipment materials including periodicals, maps, projectors, etc.	Parochial School Funding/Aid	Whether services provided to nonpublic school students under Pennsylvania Act 194 and Part of Act 195 violated the Establishment Clause?	State	Invalidate- The aid given under the law benefitted a religious institution, and excessively entangled the government to the religious institution.	Invalidate- The instructional materials had the potential to advance religious teaching. The field trip transportation and services would require excessive entanglement through surveillance.	Uphold- The law provided for a general service, regardless of whether it benefitted a religious institution.	The U.S. Supreme Court invalidated Pennsylvania Act 194 and most of Act 195.	6 to invalidate, 3 to uphold	X	X	
<i>Meek v. Pittenger</i> , 421 U.S. 349 (Split Case)	1975	Pennsylvania Act 195 provided for loaning textbooks to nonpublic school students as well as public school students.	Parochial School Funding/Aid	Whether services provided under Pennsylvania Act 195 violated the Establishment Clause?	State	Invalidate- The aid given under the law benefitted a religious institution, and excessively entangled the government to the religious institution.	Uphold- The aid provided general services to the institution, and had a secular purpose.	Uphold- The law provided for a general service, regardless of whether it benefitted a religious institution.	The U.S. Supreme Court upheld the textbook provision of Pennsylvania Act 195.	6 to uphold, 3 to invalidate		X	X
<i>Mitchell v. Helms</i> , 530 U.S. 793	2000	Chapter 2 of the U.S. Education Consolidation and Improvement Act of 1981 funneled money through state education agencies to local education agencies to purchase and lend instructional materials and equipment to public and private schools to implement "secular, neutral, and nonideological programs". In Jefferson Parish, LA, around 30% of the funds went to private schools, most of which were Catholic or other religious affiliation. Respondents challenged Chapter 2 as applied to Jefferson Parish as a violation of the Establishment Clause.	Parochial School Funding/Aid	Whether Chapter 2 of the U.S. Education Consolidation and Improvement Act of 1981 as applied in Jefferson Parish violated the Establishment Clause?	U.S. and State	Invalidate- Funding was given directly to religious organizations.	Uphold- The funding was given for a secular purpose that did not have the effect of advancing religion.	Uphold- The funding was given neutrally between public and private schools.	The U.S. Supreme Court upheld Chapter 2 of the U.S. law as applied by the state.	6 to uphold, 3 to invalidate		X	X

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<i>Mueller v. Allen</i> , 463 U.S. 388	1983	A Minnesota statute allowed taxpayers to file tax deductions for expenses paid for providing transportation, tuition or textbooks for attending school. Taxpayers filed a challenge against those who filed deductions for expenses paid for religious schools, stating that the deductions provided financial assistance to sectarian institutions.	Parochial School Funding/Aid	Whether the tax deductions allowed under Minnesota Statute § 290.09, subd. 22 violated the Establishment Clause?	State	Invalidate- The law gave benefits to students on the basis of religion.	Uphold- The law was neutral and allowed all families with school children to apply.	Uphold- The law gave the tax break to the family, not to the schools.	The U.S. Supreme Court upheld the Minnesota statute.	5 to uphold, 4 to invalidate		X	X
<i>New York v. Cathedral Academy</i> , 434 U.S. 125	1977	After a District Court found a New York statute that authorized reimbursement for state-mandated record-keeping and testing services unconstitutional, New York passed a new statute (Ch. 996) to reimburse monies already incurred prior to the court enjoining payment. Cathedral Academy filed for reimbursement under Ch. 996 of the New York law, and the NY Court of Claims ruled the statute violated the 1st and 14th Amendments. The NY Court of Appeals reversed.	Parochial School Funding/Aid	Whether Chapter 996 of the 1972 N.Y. Laws violated the Establishment Clause?	State	Invalidate- The funding was direct aid to a religious institution.	Invalidate- There was no secular purpose for the law.	Uphold- The funding was for a general government service.	The U.S. Supreme Court invalidated the New York statute.	6 to invalidate, 3 to uphold	X	X	
<i>Norwood v. Harrison</i> , 413 U.S. 455	1973	A district court upheld a Mississippi statutory program under which textbooks were purchased by the states and lent out to students in public and private schools. This program did not require the state to look at whether the private school has racially discriminatory policies. The program was challenged on the basis that aid to private schools that discriminated based on race endorsed racial segregation.	Parochial School Funding/Aid	Whether a race neutral policy that resulted in a nondiscriminatory private sectarian school receiving a benefit from the government, but a discriminatory private secular school not receiving the same benefit would violate the Establishment Clause?	State	Uphold- The policy would prevent a religious institution from engaging in an illegal activity of discrimination.	Uphold- The policy would prevent a religious institution from engaging in an illegal activity of discrimination.	Uphold- The policy would provide for a general government service to schools, regardless of their religious affiliation	The U.S. Supreme Court upheld a race neutral policy as allowed by the Establishment Clause, even if it resulted in a private sectarian school receiving a benefit that a secular school did not.	9 to uphold, 0 to invalidate	X	X	X

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<i>Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.</i> , 477 U.S. 619	1986	Dayton Christian Schools in Dayton, OH required teachers to hold to a particular set of religious beliefs, including a "Biblical Chain of Command", in order to be employed. According to the teacher's contract, if a teacher has a grievance, they must take it to their supervisor, and up the chain, but end at the authority of the board of directors rather than take the matter to court. When a teacher was not renewed due to pregnancy (the religious beliefs stated that mothers should stay home with their children), she hired an attorney and brought a suit of discrimination against the school. The school rescinded their nonrenewal, but terminated her on the basis of violating the chain of command policy. The Ohio Civil Rights Commission began an investigation, but Dayton filed an action to stop the investigation, claiming the investigation violated the Establishment Clause because their policies were sincerely held religious beliefs.	Employers/ Employees	Whether the Ohio Civil Rights Commission's investigation into Dayton Christian School's Hiring Policies would violate the Establishment Clause?	State	Uphold- The purpose of the investigation was to prevent a religious institution from engaging in an illegal activity, which was allowed by the Establishment Clause.	Uphold- The investigation was for a secular purpose to prevent discrimination.	Uphold- The investigation was for a secular purpose to prevent discrimination.	The U.S. Supreme Court upheld the Commission's investigation.	9 to uphold, 0 to invalidate	X	X	X
<i>Pleasant Grove City, Utah v. Summum</i> , 555 U.S. 460	2009	Summum, a religious organization, asked permission from the mayor of Pleasant Grove City, Utah to place a permanent monument of the "Seven Aphorisms of SUMMUM" in one of the city's parks. According to the organization, the aphorisms were collected by Moses before he received the Ten Commandments. The mayor denied the request because the monument did not relate to the history of Pleasant Grove City, even though the park already had a Ten Commandments monument.	Religious Displays	Whether the mayor's denial of Summum's monument violated the Establishment Clause?	State	Uphold- The mayor's denial of the religious organization's request to place a monument in the park prevented an endorsement of the group's religious display and message.	Uphold- The mayor's denial of the monument prevented giving a benefit to a religious organization that was not given to other groups. Also, there was no secular purpose given for placing the monument.	Invalidate- There was a tradition of recognition of religious symbols, as evidenced by the city's Ten Commandments display. The mayor's denial of the request treated one religious organization in a non-neutral manner.	The U.S. Supreme Court upheld the mayor's denial of Summum's request.	9 to uphold, 0 to invalidate	X	X	

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<i>Quick Bear v. Leupp</i> , 210 U.S. 50	1908	The United States government provided funding for education in Native American territories. By the late 1800s, the government funded a number of sectarian schools from public money, money from treaty payments, and the trust fund from the sale of land. In 1899, the Congress made its last payment from public money. This left tribal money as the only source for funding the St. Francis Mission Boarding School on the Rosebud Sioux Indian Reservation in the South Dakota territory. The Bureau of Catholic Indian Missions applied to the Commissioner of Indian Affairs for a contract to provide education on the reservation. Reuben Quick Bear and others filed suit to prevent the use of tribal money for sectarian education.	Parochial School Funding/Aid	Whether the use of tribal money to support sectarian education would violate the Establishment Clause?	U.S.	Invalidate- The use of the tribal money provided direct aid to sectarian schools.	Uphold- The money was used for a secular purpose to provide for education.	Uphold- The funding was for a general government service.	The U.S. Supreme Court upheld the use of tribal money for the sectarian education.	_ to uphold, _ to invalidate		X	X
<i>Roemer v. Board of Public Works</i> , 426 U.S. 736	1976	A Maryland statute authorized the payment of state funds to any private institution of higher learning that meets minimum criteria for types of degrees awarded and refrains from awarding "only seminarian or theological degrees". The money was given to the institution based on the number of students, excluding those in seminarian or theological programs. The money may not be used for sectarian purposes. The statute authorized the Maryland Council for Higher Education to administer the program and insure compliance with the restrictions. Four citizens and taxpayers challenged the statute as a violation of the Establishment Clause. The district court upheld the statute.	Aid to Higher Education	Whether payments given by the government to the private institutions under Md. Ann. Code, Art. 77A, §§ 65-69 (1975) violated the Establishment Clause?	State	Invalidate- The grants provided funds to a religious institution, which in effect gave benefits for a religious institution.	Uphold- The statute was applied neutrally, was for a secular purpose, and created no excessive entanglement.	Uphold- The funding was a general government service.	The U.S. Supreme Court upheld the Maryland statute.	5 to uphold, 4 to invalidate		X	X

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<i>Rosenberger v. Rector & Visitors of the University of Virginia</i> , 515 U.S. 819	1995	The University of Virginia authorized payments from its Student Activities Fees to outside contractors for printing costs of publications by student groups. The student groups must include a disclaimer that the publications were independent of the University and the University was not responsible for them. The university withheld authorization for payment for a publication titled "Wide Awake: A Christian's Perspective at the University of Virginia" solely because the publication promoted a religious belief. The student group, Wide Awake Productions, filed suit that the refusal violated their free speech rights. The University claimed that the refusal was necessary to comply with the Establishment Clause.	Access for Religious Organizations	Whether a university authorization for payment for a religious publication would violate the Establishment Clause?	State	Invalidate- Authorizing the payment would be perceived as endorsing a religious belief and would be a violation of the Establishment Clause.	Uphold- Granting the authorization would be done in a neutral manner towards religious and nonreligious publications and would not be a violation of the Establishment Clause.	Uphold- Authorizing the payment for the religious publication would be consistent with the university policy for other clubs, and would not be a violation of the Establishment Clause.	The U.S. Supreme Court held that the university's authorization of payment for a religious publication would not violate the Establishment Clause.	5 to uphold, 4 to invalidate		X	X
<i>Salazar v. Buono</i> , 559 U.S. ____	2010	A cross was placed on a rock in California's Mojave Desert in 1934 to honor the fallen soldiers in WWI. The original cross deteriorated, but a new one was erected in its place. The federal government passed a law, U.S. Department of Defense Appropriations Act, 2004, Pub.L. 108-87, § 8121(a), 117 Stat. 1100 that would transfer ownership of the land and the cross to a private party.	Religious Displays	Whether transferring the land from the federal government to private ownership under the U.S. Department of Defense Appropriations Act, 2004, Pub.L. 108-87, § 8121(a), 117 Stat. 1100 violated the Establishment Clause?	U.S.	Invalidate- Transferring the land had the purpose of endorsing the upkeep of the cross, and therefore was an endorsement of a religious symbol.	Invalidate- There was no secular purpose for the law.	Uphold- The law had a secular purpose to transfer a piece of land.	The U.S. Supreme Court upheld the Department of Defense act.	5 to uphold, 4 to invalidate			X

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<i>Santa Fe Independent School District v. Doe</i> , 530 U.S. 290	2000	Santa Fe school district policy allowed Santa Fe High School's student-elected Student Council chaplain to deliver a prayer over the school's PA system prior to football games. Two families, one Catholic and one Mormon, filed suit, claiming the practice violated the Establishment Clause. While the law suit was pending, the district changed the policy to hold two votes: one to determine whether the students wanted the prayer, and a second to determine who they wanted saying the prayer. The district court modified the policy to allow for only a nonsectarian, nonproselytizing prayer. The Circuit Court held that even with the modification, the practice violated the Establishment Clause.	Prayer	Whether Santa Fe School District's policy of allowing student-led prayer before football games violated the Establishment Clause?	State	Invalidate- The prayer coerced religious practice among those that were required to be there. The speech was not private speech because it was done on the school's property with school's equipment.	Invalidate- The prayers were non-neutral and had the effect of advancing a religion.	Uphold- The speech was private speech. The school was not endorsing the message of the speaker.	The U.S. Supreme Court invalidated the Santa Fe School District's policy.	6 to invalidate, 3 to uphold	X	X	
<i>School District of Grand Rapids v. Ball</i> , 473 U.S. 373	1985	The Grand Rapids School District in Grand Rapids, MI adopted two programs, Shared Time and Community Education. Each program provided classes to nonpublic school students at public expense in classrooms located in and leased from the nonpublic schools. Shared Time offered classes during the regular school day to nonpublic school students to supplement the core curriculum required by the state. The teachers were full-time state employees. Community Education offered classes after school, some of which are offered at the nonpublic school and others that are not. Community Education teachers were part-time state employees and most were employed full time by the nonpublic school. Of the 41 schools involved in the programs, 40 were religious schools. The students who attended the classes under these programs attended the nonpublic school.	Public School Curriculum	Whether providing teachers to teach classes at nonpublic religious schools at public expense under Grand Rapids School District's Shared Time and Community Education Programs violated the Establishment Clause?	State	Invalidate- The programs provided aid to the religious schools in the form of full-time and part-time teachers who were paid by the state.	Invalidate- There was no secular purpose for the programs, particularly the classes that are already offered at the nonpublic schools. The programs also excessively entangled the government with religious schools by monitoring the pay.	Uphold- The programs offered classes that may not be offered or available at the nonpublic schools. There was a secular purpose to help bolster the educational opportunities for the students at the nonpublic school by offering more classes, or making teachers available for other opportunities.	The U.S. Supreme Court invalidated the two Grand Rapids programs.	5 to invalidate, 4 to uphold	X	X	

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<i>Sloan v. Lemon</i> , 413 U.S. 825	1973	Pennsylvania enacted the "Parent Reimbursement Act for Nonpublic Education" which reimbursed parents a portion of tuition expenses incurred in sending their children to nonpublic schools. Approximately 900 of the students entitled to reimbursement attended private schools controlled by religious organizations. The District Court ruled that the Act could not separate those who attended sectarian schools from those that attended nonsectarian, nonpublic schools.	Parochial School Funding/Aid	Whether reimbursing parents a portion of tuition expenses under Pennsylvania's Parent Reimbursement Act for Nonpublic Education violated the Establishment Clause?	State	Invalidate- The law gave government benefits to parents for sending their student to religious schools.	Invalidate- The law gave benefits in a non-neutral manner to students that attended parochial schools, but not to students who attended public schools.	Uphold- The law gave aid to individuals, not to the religious schools.	The U.S. Supreme Court invalidated the Pennsylvania law.	6 to invalidate, 3 to uphold	X	X	
<i>Stone v. Graham</i> , 449 U.S. 39	1980	A Kentucky statute required the posting of the Ten Commandments in every public school classroom. According to the statute, the displays would be paid for out of private funds.	Religious Displays	Whether displaying the Ten Commandments in every public school classroom as required by 1978 Ky. Acts, ch. 436, § 1 (effective June 17, 1978), Ky.Rev.Stat. § 158.178 (1980) would violate the Establishment Clause?	State	Invalidate- The law has no secular purpose and endorses a religious message.	Invalidate- The law has no secular purpose, and has the effect of advancing religion.	Uphold- The symbol has a tradition of recognition by the government.	The U.S. Supreme Court invalidated the Kentucky state law.	5 to invalidate, 2 to uphold	X	X	
<i>Swaggart Ministries v. California Board of Equalization</i> , 493 U.S. 378	1990	A California law stated that retailers were required to pay a 6% tax on in-state sales of tangible personal property. Swaggart Ministries sold such items at its evangelistic crusades in California and through mail-orders to California residents. After an audit, the State Board of Equalization advised the ministry to register as a seller and pay the tax. The ministry filed for refund and claimed that collection of taxes on religious items violated the Establishment Clause.	Exemptions	Whether California collecting taxes on religious materials under the California tax law violated the Establishment Clause?	State	Uphold- Collecting taxes from the sales of religious items prevented the state from providing financial aid in the form of tax breaks to a religious organization, aid that other non-religious organizations did not get.	Uphold- Collecting taxes would prevent the state from giving aid in the form of tax breaks to a religious organization in a non-neutral manner with respect to non-religious items.	Uphold- The collection of taxes were for items sold in order for the company to make a profit, not for a religious purpose.	The U.S. Supreme Court upheld California's collection of taxes.	9 to uphold, 0 to invalidate	X	X	X

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<i>Texas Monthly, Inc. v. Bullock</i> , 489 U.S. 1	1989	For a three year period, a Texas statute exempted religious periodicals from sales and use taxes. The appellant, a publisher of a periodical that was not entitled to the exemption, paid the taxes under protest and then sued to recover the payments. The district court ruled that the exemption promoted religion and therefore violated the Establishment Clause. The Appeals Court reversed the decision.	Exemptions	Whether giving tax exemptions to religious periodicals under Tex. Tax Code Ann. § 151.312 (1982) violated the Establishment Clause?	State	Invalidate- Exempting religious publications improperly benefitted and endorsed religion.	Invalidate- The law was not applied neutrally with respect to religion.	Uphold- The statute sought to avoid the entanglement between the government and religious institution that would have resulted in the government taxing the religious institution.	The U.S. Supreme Court invalidated Texas's tax exemptions.	6 to invalidate, 3 to uphold	X	X	
<i>Thomas v. Review Board</i> , 450 U.S. 707	1981	The petitioner was a Jehovah's Witness who was hired to work in the employer's roll foundry which fabricated sheet steel for industrial uses. When the foundry closed, he was transferred to a department that fabricated parts for military tanks. The remaining departments engaged in production of weapons. The petitioner asked to be laid off as working in any of the departments violated his religious beliefs. His request was denied, and he quit. He filed for unemployment benefits, but the hearing judge ruled that though he terminated his employment because of religious beliefs, the petitioner was not entitled to benefits because his voluntary termination was not based on "good cause". The petitioner filed suit claiming that his free exercise rights were violated, and the Review Board claimed that payment would violate the Establishment Clause.	Benefits	Whether payment of unemployment benefits when claimant quit for religious beliefs under the Indiana Employment Security Act would violate the Establishment Clause?	State	Invalidate- Paying benefits for voluntary termination would result in excessive entanglement and an endorsement of religion.	Uphold- The law was not applied neutrally with respect to religion.	Uphold- The law inhibited religious beliefs by not treating the beliefs neutrally.	The U.S. Supreme Court ruled that upholding the payment of unemployment benefits would not violate the Establishment Clause.	8 to uphold, 1 to invalidate		X	X

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<i>Tilton v. Richardson, 403 U.S. 672</i>	1971	The U.S. Higher Education Act of 1963 provided federal construction grants for college and universities, excluding "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . primarily in connection with any part of the program of a school or department of divinity." The U.S. retained a 20-year interest in any facility built with these funds, and if the institution violated the conditions, the U.S. government could recover the funds. Four church-related colleges in Connecticut received funds. The appellants attempted to show that based on the colleges' curriculum and relations with church authorities, they were sectarian colleges and in violation of the terms of the grant.	Aid to Higher Education	Whether awarding construction grants to sectarian colleges and universities under the U.S. Higher Education Act of 1963 violated the Establishment Clause?	U.S.	Invalidate- The grants provided funds to religious institutions, which in effect gave benefits for a religious institution.	Uphold- The law provided a general government service that was applied neutrally.	Uphold- The law had a secular purpose.	The U.S. Supreme Court upheld all parts of the U.S. law except the 20-year interest requirement.	5 to uphold, 4 to invalidate		X	X
<i>Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290</i>	1985	The Tony and Susan Alamo Foundation was a nonprofit religious organization in California that brought in income from operation of commercial businesses staffed by the Foundation's "associates", most of whom were drug addicts, derelicts or criminals before rehabilitation. The workers were not paid a salary, but were provided with basic necessities such as food and clothing. The Secretary of Labor filed suit against the Foundation, charging that the Foundation violated provisions of the U.S. Fair Labor Standards Act by not following minimum wage guidelines and other standards. The district court held that the Foundation was a business enterprise, and must follow the FLSA. The Foundation argued that applying the FLSA would violate the Establishment Clause.	Employers/ Employees	Whether applying the U.S. Fair Labor Standards Act to religious institutions would violate the Establishment Clause?	U.S.	Invalidate- Applying the FLSA to a religious institution would excessively entangle the government to religious institutions by requiring government to determine whether a religious institution was a business enterprise.	Uphold- The FLSA was applied in a neutral manner that neither advanced nor inhibited religion.	Uphold- The FLSA had a secular purpose when applied to this case and was applied in a neutral manner.	The U.S. Supreme Court upheld the application of the FLSA to the Foundation.	9 to uphold, 0 to invalidate		X	X

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<i>Torcaso v. Watkins</i> , 367 U.S. 488	1961	Torcaso was appointed to the office of Notary Public, but was denied his commission because he would not declare his belief in God in accordance with Article 37 of the Declaration of Rights of the Maryland Constitution.	Religious Oaths/Tests	Whether the religious oath found in Article 37 of the Declaration of Rights of the Maryland Constitution violated the Establishment Clause?	State	Invalidate- The article had the effect of supporting an official religion. The oath coerced a public official to declare a religious belief.	Invalidate- The article had no secular purpose, and had the effect of establishing an official religion.	Invalidate- The article treated religious viewpoints in an unequal manner.	The U.S. Supreme Court invalidated Article 37 of Maryland's Declaration of Rights.	9 to invalidate, 0 to uphold	X	X	X
<i>Two Guys from Harrison-Allentown, Inc. v. McGinley</i> , 366 U.S. 582	1961	The Corporation Two Guys from Harrison-Allentown, Inc., filed a law suit challenging Pennsylvania's Sunday Closing Laws. One challenged law was a 1939 statute which prohibited all worldly employment or business on Sunday, with narrowly drawn exceptions. The other was a 1959 statute that prohibited the retail sale of 20 specific items. Both laws carried a penalty of a fine or jail time.	Sunday Laws	Whether Pennsylvania's 1939 and 1959 Sunday Closing Laws violated the Establishment Clause?	State	Invalidate- The laws advanced religion by stating that Sunday, a traditional day of worship, was a day that items could not be sold, and was applied in a non-neutral manner between religion and non-religion.	Invalidate- The law had no secular purpose, and had the effect of advancing religion.	Uphold- The law was applied neutrally among religion, and allowed recognition of religious worship.	The U.S. Supreme Court upheld the Pennsylvania Sunday Closing Laws.	8 to uphold, 1 to invalidate			X
<i>Van Orden v. Perry</i> , 545 U.S. 677	2005	The state capitol grounds in Texas displayed a monolith inscribed with the Ten Commandments. The statue was donated by the Fraternal Order of the Eagles, a civic organization. Mr. Van Orden brought suit that the monolith, which sat alone as a display, violated the Establishment Clause.	Religious Displays	Whether the state's display of the Ten Commandments violated the Establishment Clause?	State	Invalidate- The statue was a religious symbol and could be seen as an endorsement of religion.	Uphold- The purpose of the statue was secular, having been donated by a civic organization.	Uphold- The symbol had a tradition of recognition by the government.	The U.S. Supreme Court upheld the Ten Commandments display.	5 to uphold, 4 to invalidate			X
<i>Wallace v. Jaffree</i> , 472 U.S. 38	1985	An Alabama statute provided that all public schools authorize a one minute period of silence for "meditation or voluntary prayer". The statute was one of three challenged as violating the Establishment Clause. The district and appellate court found two to be unconstitutional, but allowed the moment of silence.	Prayer	Whether the moment of silence for "meditation or voluntary prayer" required by Alabama Statute § 16-1-20.1 violated the Establishment Clause?	State	Invalidate- The statute and policy endorsed religion, coerced students into a religious practice, and advanced religion.	Invalidate- The statute had no secular purpose, and had the primary effect of advancing religion.	Uphold- Because prayer was just one option, there was no coercion. Prayer had been historically recognized by government.	The U.S. Supreme Court invalidated the Alabama statute.	6 to invalidate, 3 to uphold	X	X	

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<i>Walz v. Tax Commission of New York City</i> , 397 U.S. 664	1970	A property owner sought an injunction to prevent the New York Tax Commission from granting property tax exemptions to religious organizations for properties used solely for religious worship. The owner claimed that the state constitution and implementing statute violated the religion clauses because it compelled him to make a contribution to religious organizations.	Exemptions	Whether tax exemptions for religious organizations under the New York State Constitution and implementing statute violated the Establishment Clause?	State	Invalidate- Tax exemptions to religious organizations were benefits not given to the general public.	Uphold- The exemptions were for all nonprofits organizations, and were given neutrally regardless of religion.	Uphold- The law had a secular purpose, and was applied in a neutral manner.	The U.S. Supreme Court upheld the New York tax exemptions.	7 to uphold, 1 to invalidate		X	X
<i>Widmar v. Vincent</i> , 454 U.S. 263	1981	The University of Missouri at Kansas City made its facilities available to registered student groups. One such group, Cornerstone, was informed that it could no longer use the facilities due to a university regulation prohibiting the use of the grounds for religious worship or teachings. The group filed suit saying that their free speech and free exercise rights had been violated, to which the university replied that the Establishment Clause forbade the use of the facilities by a religious oriented group.	Access for Religious Organizations	The UM-KC Regulations 4.0314.0107 and 4.0314.0108 allowed the university to close its facilities to registered student groups that use the facilities for religious worship or teachings in order to comply with the Establishment Clause?	State	Uphold- Allowing the student group access for religious worship or teachings would be a government endorsement of religion.	Invalidate- Denying access to Cornerstone or other religious clubs treated religious groups in a non-neutral manner.	Invalidate- Granting Cornerstone access in an equal manner would not violate the Establishment Clause.	The U.S. Supreme Court invalidated the university's exclusion policy.	8 to invalidate, 1 to uphold		X	X
<i>Witters v. Washington Department of Services for the Blind</i> , 474 U.S. 481	1986	The petitioner suffered from a progressive eye condition and applied to the Washington Commission for the Blind for vocational rehabilitation assistance, pursuant to Washington law. The assistance provided special education and training in business or trade to help overcome handicaps. At the time he was attending a private Christian college to become a minister. The Commission denied his request. The petitioner appealed up to the state Supreme Court, who ruled that the Establishment Clause forbid the service.	Services for the Disabled	Whether providing assistance under the Washington law (Wash.Rev.Code § 74.16.181 (1981)) to a student attending a religious school would be a violation of the Establishment Clause?	State	Invalidate- The aid would be funneled through the student to a religious institution, creating aid given to a religious school.	Uphold- The request was for a secular purpose, and the aid would be given neutrally.	Uphold- The request was for a general government service. The aid would be given to a student, and not to the religious institution directly.	The U.S. Supreme Court upheld the application of the Washington law.	9 to uphold, 0 to invalidate		X	X

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											Strict-Sep.	Non-Pref.	Acc.
<i>Wolman v. Walters</i> , 433 U.S. 433 (Split Case)	1977	Citizens and taxpayers of Ohio challenged all but one provision of Ohio Rev.Code Ann. § 3317.06 (Supp. 1976) which provided various forms of aid to nonpublic schools. The law provided funding to nonpublic school children in the district where the nonpublic school was located. Two of the provisions provided funding for: 1- purchasing and loaning to pupils (upon request) instructional materials and equipment that was "incapable of diversion to religious use" and 2- providing field trip transportation and services.	Parochial School Funding/Aid	Whether funding provided to nonpublic schools under provisions of Ohio Rev.Code Ann. § 3317.06 (Supp. 1976) - Parts § 3317.06 (B, C, L) violated the Establishment Clause?	State	Invalidate- All provisions of the law were aid to religious schools.	Invalidate- The instructional materials had the potential to advance religious teaching. The field trip transportation and services would require excessive entanglement through surveillance.	Uphold- The services provided were general government services.	The U.S. Supreme Court invalidated these provisions of the Ohio law.	5 to invalidate, 4 to uphold	X	X	
<i>Wolman v. Walters</i> , 433 U.S. 229 (Split Case)	1977	Citizens and taxpayers of Ohio challenged all but one provision of Ohio Rev.Code Ann. § 3317.06 (Supp. 1976) which provided various forms of aid to nonpublic schools. The law provided funding to nonpublic school children in the district where the nonpublic school was located. Four of the provisions provided funding for: 1- purchasing secular textbooks and loaning them by request to the nonpublic children, 2- supplying standardized tests and scoring, 3- speech, hearing, and psychological services, and 4- supplying to students specialized attention therapeutic, guidance and remedial services.	Parochial School Funding/Aid	Whether funding provided to nonpublic schools under provisions of Ohio Rev.Code Ann. § 3317.06 (Supp. 1976), Parts § 3317.06 (A, D, F, G, H, I, K) violated the Establishment Clause?	State	Invalidate- All provisions of the law were aid to religious schools.	Uphold- The services were provided neutrally without regard to religion for a secular purpose.	Uphold- The services provided were general government services.	The U.S. Supreme Court upheld these provisions of the Ohio law.	7 to uphold, 2 to invalidate		X	X
<i>Zelman v. Simmons-Harris</i> , 536 U.S. 639	2002	Ohio's Pilot Project Scholarship Program was designed to give school choice to families in any Ohio school district that was controlled by the state due to failing schools. The program gave tuition aid to certain students in the Cleveland City School District to attend any participating public or nonpublic school. Religious and nonreligious schools in the district could participate, as well as public schools in adjacent districts. Tuition aid was given directly to parents according to financial need, and the parents determined where they wanted their child to go. 82% of the participating nonpublic schools were religious, and 96% of the students who participated enrolled in religious schools.	Parochial School Funding/Aid	Whether the tuition aid given to families under Ohio's Pilot Project Scholarship Program violated the Establishment Clause?	State	Invalidate- The money was funneled through parents to religious schools, resulting in direct aid from the state to religious schools.	Uphold- The program had a secular purpose to give educational opportunities to poor students who are in failing schools. The money was distributed to a wide variety of people, and was given neutrally.	Uphold- The aid was given to parents, not directly to religious institutions.	The U.S. Supreme Court upheld the Ohio program.	5 to uphold, 4 to invalidate		X	X

Case Name and Opinion Designation	Year	Summary of Background	Case Type	Establishment Clause Issue	U.S. and/or State Challenged Govt. Action	Projected Holding Based on Strict-Separationist Model	Projected Holding Based on Non-Preferentialist Model	Projected Holding Based on Accommodationist Model	Actual Holding - Upheld/Invalidated	Vote	Model(s) that The Actual Holding Matches		
											Strict-Sep.	Non-Pref.	Acc.
<i>Zobrest v. Catalina Foothills School District</i> , 509 U.S. 1	1993	The parents of a deaf student requested a sign-language interpreter from the local school district to accompany the student to a Roman Catholic school. The Catalina Foothills School District in Tucson, AZ refused the request. The parents claimed that the U.S. Individuals with Disabilities Education Act required the school district to provide the needed service. The district court ruled that the interpreter would be a conduit for religious teachings, which would be a violation of the Establishment Clause.	Services for the Disabled	Whether a school district providing a sign-language interpreter under the U.S. Individual with Disabilities Education Act for a student to attend a private religious school would violate of the Establishment Clause?	U.S. and State	Invalidate- The school district's employee would be forced to provide religious teachings to a student.	Uphold- The school district providing a sign-language interpreter would be for the student for a secular purpose to aid the student, not to benefit the religious school.	Uphold- The school district providing the sign-language interpreter would be a general government service.	The U.S. Supreme Court upheld the application of IDEA for the school district to provide an interpreter.	5 to uphold, 4 to invalidate		X	X
<i>Zorach v. Clauson</i> , 343 U.S. 306	1952	New York law permitted students who wish to be released during the instructional day to attend off-campus religious centers for religious instruction. Their attendance was required and reported to the school. There was no expenditure of public funds for the program.	Public School Curriculum	Whether the "Released Time" program established by § 3210 of the New York Education Law and the regulations thereunder violated the Establishment Clause?	State	Invalidate- There was no secular purpose for this law.	Invalidate- The law had no secular purpose, and had the effect of advancing religion.	Uphold- The program allowed students who choose to supplement their studies with religious studies do so at no cost to the government.	The U.S. Supreme Court upheld this program.	6 to uphold, 3 to invalidate			X

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