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Theorizing the Submerged State: The Politics of Private Schools in the United States

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In this paper, I apply Mettler's concept of the "submerged state" to aid for children at private schools in the United States, including education vouchers, in-kind aid, and property tax exemptions. All aid policies are "submerged" in that they help private organizations take on state functions but some are more submerged than others. Theoretically, this paper distinguishes between subcategories of submergence. Using policy data from 50 states and an original database of court challenges between 1912 and 2015, I employ probit regression with sample selection to evaluate the effect of submergence on successful court challenge. I find that more submerged policies are less likely to be successfully challenged than less submerged policies. Submerged policy design enables supporters to avoid legal as well as political challenge.

KEY WORDS: submerged state, education policy, private schools, judicial politics

在本文中, 我将梅特勒（Mettler）的"隐匿的国家"这一概念应用于美国小学的儿童救助, 包括教育券, 实物救助, 物业税豁免。所有这些救助政策都是"隐匿的", 因为它们都在帮助私营组织来承担国家职能。但是它们中，一些救助政策比其它的更隐匿。这篇文章在理论上区分了这一隐匿的子种类。通过使用带样本选择的概率回归对1912年到2015年间的50个州的政策数据和一手的法庭质疑数据库进行分析，我估计了隐匿对于成功的法庭质疑的影响。我发现，相比于较少隐匿的政策，越隐匿的政策越难质疑成功。隐匿的政策设计使得支持者不仅能够逃避政治挑战而且逃避法律质疑。

The "submerged state" is a set of indirect government subsidies and benefits such as tax expenditures: policies that channel public money through private delivery mechanisms and through tax subsidies, rebates, and credits rather than direct governmental spending (Greve, Flinders, & Van Thiel, 1999; Mettler, 2009; Surrey, 1970; Thuronyi, 1988; Zelinsky, 1993). It is "a conglomeration of federal policies that function by providing incentives, subsidies or payments to private organizations and households or reimburse them for conducting activities deemed to serve a public purpose" (Mettler, 2009, p. 4). Unlike direct spending policies, submerged policies subsidize private providers, individuals, or organizations in the delivery of social policy.

Governmental aid for children at private religious schools is part of the submerged state because it helps private organizations to take on the state's education

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function. In this paper, I use qualitative education policy data from 50 U.S. states and a comprehensive original database of court challenges between 1912 and 2015 to refine the concept of the submerged state. I suggest that distinctions within the submerged state, such the differences between tax expenditures and outsourcing to private companies, have important consequences for these policies in the legal realm because the former type of policy is more submerged than the latter type. I employ probit sample selection modelling to evaluate the effect of an aid program's submergence upon the likelihood of an aid program being challenged in court and of that challenge being successful. I find that, controlling for a range of other factors, more submerged policies are less likely to be challenged—and less likely to be struck down as unconstitutional—than less submerged policies.

This paper makes two main claims: First, the submerged state should not be thought of as merely a dichotomous concept: there are greater and lesser degrees of submergence. Operationalizing submergence as a monolithic concept is crude: it fails to capture the nuances of policy design and the differential effects of different types of submergence. Second, the use of submerged policy design not only makes policies more difficult to challenge politically, as Mettler and others suggest, but also makes policies legally stronger through the process of "*attenuation*." Using a submerged policy design that attenuates the connection between government and schools, supporters can more easily defend them in court.

1. The Submerged State

Literature on "hidden" or "submerged" government expenditure examines the vast—and growing—governmental role in subsidizing private-sector social benefits,[1] and addresses some of the most important questions in political science: What is the shape and scope of the state? Why do policymakers divest themselves of policy responsibility? What accounts for growing voter apathy? How do citizens' preferences over social policy shape their vote choice? (Baskin, 1970; Ellis & Faricy, 2011; Gingrich, 2014; Weaver, 1986). We know that markets—often politically created—are integral to welfare state regimes and that recent expansion of private and semi-private organizational involvement in the provision of social benefits affects policymaker decision making, voter behavior, the economy, and the quality of democracy in the United States and elsewhere in the world (Esping-Andersen, 1990; Fleming, 2014; Greve et al., 1999). The effect of this growth in submerged policies upon judicial decision making and America's legal architecture, by contrast, has received little attention. This paper utilizes legal perspectives and an original database of judicial decisions to provide fresh insight into the growth of the submerged state.

The submerged state consists in policies that utilize private mechanisms for the delivery of social policy, *attenuating* the connection between government and ultimate beneficiary compared to directly funded public provision: for example, subsidies to private lenders for student loans (as opposed to direct federal loans or grants), housing vouchers that provide a sum of public money to be spent in the private rental market (as opposed to public housing), tax expenditures for childcare, medical expenses, savings plans, home mortgage interest, or earned-income tax

credits (as opposed to in-kind benefits funded by direct governmental spending, or lower headline tax rates). Scholars working on the submerged state acknowledge the fuzziness of the concept's boundaries. For example Mettler (2010) argues that: "It is appropriate . . . to think of all social programs as existing on a *continuum* from those that are most visible to those that are most submerged" (pp. 819–20). Similarly, other scholars refer to "more" or "less" visible social policies (Hacker, 2002, pp. 8–9; Howard, 2007, pp. 89–90). Despite this, scholars have tended to treat the submerged state dichotomously in empirical work. In doing so they may have missed important distinctions *within* the submerged state that reveal how different types of submerged policy design raise or lower the risk of successful court challenge.

Scholars identify the submerged state's associated attributes: it is hidden from view and the general public tends to know little about it (Haselswerdt & Bartels, 2015), it enables politicians to claim credit for "shrinking government" and avoid blame for policy failures, and it is regressive but its lack of visibility tends to dampen political mobilization on the part of the general public while increasing the informational advantages enjoyed by organized interests (Starr & Esping-Andersen, 1979). All of these characteristics are associated with the submerged state, but they should not be taken to define it, because what the public *feels* and *thinks it knows* about the *effects* of submerged policies is not the same thing as objective institutional characteristics of policy design. The salience of such policies among different portions of the population rises and falls much more rapidly than any amendments to the design of the policy itself. Examining policy design provides insight into the elite politics of the submerged state: why policymakers pass such legislation and why judges strike it down or uphold it as constitutional. In this paper, I define the submerged state in terms of policy design, noting the consequences of that design among policymakers, the general public, interest groups, and the status of legal challenges.

To expand Mettler's "submerged" policies in higher education student loans, tax policy, and healthcare I add aid for children at private religious schools. Because the "wall of separation" metaphor has currency in American political discourse, it is in the interests of many politicians to emphasize the indirectness of the aid programs so as to maintain an official separation between Church and State, whatever that is taken to mean (Hamburger, 2009, pp. 2–4; Jefferson, 1802; Roger Williams, 2001). For many of these programs religious school aid is not only indirect, by which is meant offering benefits to students at religious schools and their parents rather than the school itself, but is deeply submerged because it is administered through tax rebates rather than direct payments (Wall, 2012). All eight policies examined in this paper—education vouchers, tax credits, textbook loans, transportation, equipment, health services, food services, and tax exemptions for private religious school property—are submerged in the sense that they encourage private actors to undertake actions deemed to have an important public purpose.[2]

2. Typology of Submergence

By "aid for children at private religious schools" this paper refers only to the financial relationship between the state and private religious schools, that is, the use

Table 1. Aid for Children at Private Religious Schools—States and Programs

Aid Type	Number of Programs	States Currently Offering Aid (July 2015)
Vouchers	21	AR, DC, FL, GA, IN, LA, MS, NC, OH, OK, UT, WI
Textbook loans	17	CT, IN, IA, LA, ME, MI, MN, MS, NE, NH, NJ, NM, NY, OH, PA, RI, WV
Transportation	28	AK, CA, CT, DE, DC, IL, IN, IA, KS, LA, ME, MA, MI, MN, MT, NE, NV, NH, NJ, NY, ND, OH, OR, PA, RI, WA, WV, WI
Equipment	12	CA, CO, IL, IA, MI, NV, NH, NJ, NY, OH, PA, WA
Food services	18	AZ, CA, CT, ID, IL, IA, KS, ME, MN, NE, NV, NH, NJ, NC, OH, RI, TX, VT
Auxiliary (health) services[a]	19	CT, FL, IA, KS, ME, MD, MA, MI, MN, MO, NE, NH, NJ, NY, OH, PA, TX, WA, WV
Tax credit scholarships	26	AL, AZ, FL, GA, IL, IN, IA, KS, LA, MN, MS, MT, NH, NV, NC, OK, PA, RI, SC, TN, VA, WI
Tax exemptions for private religious school property	25	AL, AK, AZ, AR, CA, CO, FL, IL, KS, KY, LA, MD, MA, MI, MT, NV, NJ, NM, NY, NC, OK, SC, SD, VA, WA

[a]"Auxiliary services" encompasses many different types of health service, including hearing, vision and dental check-ups, vaccinations, screening for physical defects, and speech and language therapy.

of taxpayer money to fund services for children at such schools, whether they are delivered via the parent, indirectly via the school, or directly to the child.[3] I examine all 258 aid programs that have ever existed, including the 148 aid programs currently in existence and in the next section, the universe of legal cases—123 decisions—concerning such aid. Table 1 shows the eight kinds of aid for children at private religious schools examined in this paper and in which states they exist as of July 2015. The number of programs in some cases exceeds the number of states offering aid because some states have more than one program: Ohio, for example, offers five different educational voucher scholarship programs at the time of writing; Arizona, five educational tax credit programs.

To examine the submergence of aid programs I conduct a systematic examination of all 50 state constitutions and relevant legislative bill jackets and pieces of legislation, in conjunction with the federal Department of Education's private school regulatory information (Department of Education, Office of Innovation and Improvement, Office of Non-Public Education, 2009). I develop a twofold typology that places the eight types of program into two subcategories of submergence: weakly submerged (Level I) and deeply submerged (Level II), corresponding to the distinction between spending and tax expenditures. Both categories are part of the submerged state because they utilize private mechanisms for the delivery of social policy, but the latter is more submerged than the former because it utilizes the tax system and additional

Table 2. Categorization of Submergence with Eight Aid Types

Level of Submergence	Level I Weakly Submerged	Level II Deeply Submerged
	Definition	
Submerged policy design	*Quasi-direct transfer of public money to private providers* Subsidize private providers to deliver services through contracts and leases	*Tax exemption or reimbursement delivered through several intermediaries* Delivered entirely through private channels or tax exemption or subsidy
	Consequences	
Effect on public knowledge of program	Greater degree of public knowledge, but lower than direct spending. Political challenges more often	Hidden. Low levels of public knowledge. Infrequent citizen involvement and political challenge
Effect on interest group strategy	Organized interests have smaller informational advantage over public	Groups have large informational advantage over public. Organized interests are energized
Effect on policymaker strategy	More opportunities for credit claiming but harder to avoid blame for policy failures	Many blame-avoidance opportunities. Some credit-claiming ("reducing government involvement")
Effect on legal challenges	More likely to be challenged in court. More likely to be struck down if challenged	Less likely to be challenged in court. More likely to be upheld if challenged
	Examples	
Aid types	• Textbook loans • Publicly funded vouchers • Transportation • Equipment	• Food services • Auxiliary services • Tax credits • Property tax exemptions

private organizations to deliver funds. Two features of aid programs make in-depth qualitative readings of these policies necessary for categorization: (i) the complexity of the statutes and of the concept of submergence requires human readers to evaluate the relevant legislation and precludes automated computer coding. No numerical proxies have yet adequately captured the concept of submergence. (ii) The policies' very submergence—particularly long-standing programs buried in tax codes—requires detailed archival searching and qualitative understanding of history and context. Below I detail the criteria for determining membership of each category based on policy design and summarize the information in Table 2. There is great diversity among types of aid programs including goods, services, and tuition payments. Each of these aid program types have more and less submerged variations as the following section shows, such as regular and tax credit vouchers or transportation and auxiliary services programs. Aid program types are not classified according to whether they are goods, services, or tuition payments, but rather according to the mode of delivery of the program: the level of submergence.

In the submergence schema presented in Table 2, vouchers, textbook, transport, and equipment programs are weakly submerged ("Level I"), and tax credits,

auxiliary and food services, and property tax exemptions are deeply submerged ("Level II").[4] Table 2 formally places the aid programs into the subcategories of submergence.

Level I: Weakly Submerged

Quasi-direct transfer of public money to private providers. Weakly submerged Level I policies are the least submerged part of the submerged state but can be meaningfully distinguished from policies that are *not* part of the submerged state at all. Unlike ordinary tax-and-spend policies, weakly submerged policies subsidize private providers to deliver services and contrast the services available to the private sector with that of the directly funded public sector. But unlike their more submerged counterparts, weakly submerged policies are not provided through tax exemptions, rebates, or credits that attenuate the connection between government expenditure and policy delivery but typically consist in contractual arrangements with private providers, hedged about by caveats that place limits on the assistance private school students can receive. Voucher schemes, for example, are the most visibly designed and administered policy of the eight aid types. Unlike policies that utilize the tax system or additional third-party organizations for the delivery of policies, vouchers are relatively straightforward in design: they set aside a sum of public money for parents to spend on private education. While vouchers are part of the submerged state in virtue of the fact that they fund private mechanisms for the delivery of public education, their relative lack of complexity and their use of appropriated funding make them relatively less submerged than many other types of aid.[5]

Textbooks also join the weakly submerged category (I) because, although some textbook loans are provided only "upon request from parents," textbook programs tend to be provided using state appropriations with only minimal legislative language masking the role of the state in the provision of the service to private religious school students. In New York, New Jersey, and Minnesota, for example, statutes state that school boards "must" "provide or loan" books to nonpublic[6] schools (Laws of Minnesota, 1975; New Jersey Statutes, 1967; New York Sess. Laws, 1965, sec. 1). New Mexico statutes state that nonpublic schools are "entitled to free use of instructional material," and in Louisiana nonpublic schools are entitled to direct reimbursement from the state for textbook costs (Louisiana Statutes, 1928; New Mexico Statutes, 1996, vol. Article 15: Instructional Material, 22-15-1 through 22-15-31, sec. Section 22-15-5: Instructional material fund).

Like textbook loans, transportation programs are quite visible insofar as several state programs involve the use of iconic yellow public school buses to transport students, although many programs utilize private taxi companies. Transportation aid is classified as weakly submerged (Level I) here. Collecting information about the scope and cost of many transportation programs is challenging because of the complex ways such programs are designed. Transportation aid can be offered in the form of separate buses for children at private religious schools, regular public school buses looping back to collect private school students after dropping off public school students, regular public school buses filling spare seats with private school students,

or simply reduced-fare passes for children at private religious schools (Connecticut Public Acts, 1957; North Dakota Laws, 1943; Washington Laws, 1941). It is immensely difficult to find information on and systematically to calculate the scale of public financial commitment to such schemes.

Equipment programs for private religious school students are also classified in the weakly submerged category (I) because the apparatus of sports, IT, and science is provided through direct spending on private third-party organizations, although it is typically hedged about with qualifications. In New York, Ohio, and Pennsylvania, for example, nonpublic school students may be "loaned" equipment (New York Education Law, n.d.; Ohio Revised Code, 1976; Pennsylvania Statutes, 1998, vol. 14, sec. 923-A). In Michigan "educational media centers operated by intermediate school districts to provide teaching materials and services" "may" serve nonpublic school children (Michigan Compiled Laws, 1976). New Jersey's statutes provide that the County Educational Audiovisual Commissions "may contract" with nonpublic schools within the county to provide educational audiovisual aids to nonpublic school students (New Jersey Statutes, 1967).

Level II: Deeply Submerged

Tax exemption, credit, or reimbursement delivered through several intermediaries. The more submerged category consists in policies that deliver funds through a series of complex channels and the tax system. All tax exemptions, deductions, and credits fit this category, as do policies that provide funds through reimbursement for expenditure via several intermediate organizations. Tax credits fit this most submerged category (II) because they tend to be delivered through public subsidy of donations to private organization that award tax credit scholarships, rather than direct provision. In states such as Florida, for example, corporations are entitled to redirect up to 100 percent of their corporate income or insurance premium tax liability annually by contributing to a "Scholarship Funding Organization" or "SFO," which awards private school scholarships to low-income children (Florida Statutes, 2001). Private providers tend to play a much larger role with tax credits than with voucher scholarships. In the language of this paper, the links between government and private school are more *attenuated* (American Federation for Children, 2012; Berner & Miksic, 2014; Suitts & Dunn, 2011).

Food and auxiliary (nursing) services are also Level II programs because they are typically delivered through sales tax exemptions or contracts with private meal or health service providers as part of regular state screening programs. At the time of writing, school lunches at private schools are exempt from state sales taxes in Nebraska, California, Idaho, Maine, Texas, North Carolina, and Nevada. Children at nonpublic schools in Pennsylvania are entitled to nursing services "through the intermediate unit" (Pennsylvania Statutes, 1976). In Nebraska, Washington, and Texas, respectively, nonpublic schools "may request assistance" in establishing immunization clinics, participate in services provided under state substance abuse awareness programs, or be provided with "technological assistance and educational materials" to "assist" in the "coordination" of spinal screening programs (Texas

Statutes, Health and Safety Code, 1989; Washington Code, 1989). Like textbooks or transportation programs, food programs and auxiliary services involve the provision of goods and services to private school students but their mode of delivery is more submerged, *attenuating* the connection between government and beneficiary by the use of the tax system and complex contractual arrangements.

Tax exemptions for private religious school property are Level II programs because they are concealed in the tax code (Drakeman, 2010; Hennesey, 1981). At the time of writing private school infrastructure is constitutionally exempt from property taxes in 25 states. Many of these tax exemptions originated during the Civil War period, some even earlier. For example, the Illinois tax exemption dates to the state's 1848 constitution, Kansas's to the "Wyandotte" constitution of 1861, Nevada's to 1864, Alabama's to 1875, and California's to 1880. Submergence was an integral feature of American governments' fiscal strategy in education long before the "big government" spending of the twentieth century.

3. Litigation and Submergence

I argue that the eight aid programs vary in their vulnerability to legal challenge because if a policy is delivered by private organizations then it is less vulnerable (though by no means invulnerable; Boyer, 2009) to successful separationist challenge in the courts:

> *Challenge Hypothesis (Hc): More-submerged policies are less likely to be challenged in court than less-submerged policies.*
> *Successful Challenge Hypothesis (Hs): If challenged in court, more-submerged policies are less likely to be struck down than less-submerged policies.*

These hypotheses stand in tension with the claim that tax expenditures are *more* vulnerable to elimination than traditional spending programs (Haselswerdt, 2014; Howard, 2007). Haselswerdt finds that tax expenditures are more vulnerable to legislative elimination because they include more weakly justified programs, frustrate legislators, and lack a base of support from federal bureaucrats. I propose that the opposite logic applies in the legal realm: more submerged policies such as tax expenditures are attractive to policymakers seeking to insulate them from legal attack, and are protected by complex legal justifications based on the attenuation of the connection between government and religious institutions.

The next two sections investigate *Hc* and *Hs* in more detail using original data for all 50 states. Between 1835 and 1959, 43 U.S. states added provisions known as "Blaine Amendments" or "No-Aid Provisions" to their state constitutions which ban public aid to denominational schools. Twenty-nine states enacted "Compelled Support Clauses" according to which no person can be compelled to support a religious institution without his or her consent. Scholars are divided as to whether these provisions are real obstacles to the creation of aid programs for children at private religious schools (Cauthen, 2012; Fusarelli, 2003; Green, 2004; Viteritti, 1997).

Since the 1930 Supreme Court *Cochran* case, judges at both state and federal level have used, *inter alia*, "child benefit" theory (CBT) to uphold aid to children at private religious schools, No-Aid Provisions and Compelled Support Clauses notwithstanding.[7] According to CBT, funding that is provided for the child and not directly to the school does not constitute a violation of the separation of church and state because the religious institution benefits only indirectly. On this view direct taxpayer funding of religious school tuition is unconstitutional but providing vouchers, tax credits, transportation, equipment, or food services to children at those schools is not. Since the 1971 *Lemon v. Kurtzman* case judges also utilize "the Lemon Test," a three-pronged standard aid programs must meet: programs must have a secular purpose, neither advancing nor inhibiting religious practice, and must not result in "excessive governmental entanglement" with religious affairs (O'Connor, 1997). This latter standard—the so-called "Entanglement Prong"—may also be met through the avoidance of direct transfers between government and religious organizations (Rehnquist, 2002).

Recently policymakers may have designed certain tax credit and voucher programs to avoid judicial challenge; for instance, by deducting tax from donations to school tuition organizations (STOs) that grant scholarships, rather than awarding scholarships directly. The delivery of aid programs by "submerged" rather than direct methods makes them politically stronger and more difficult to abolish, as Mettler describes in the case of health and tax policy, but this delivery mode may also make them *legally* stronger. They are legally stronger because their design makes them easier to defend on the basis of CBT and the Entanglement Prong. The money does not go to the school directly but through an STO, which provides scholarships for the children or through tax deductions for parents who spend the money on their child's education. For example, even in Illinois, which has a very strong No-Aid Provision (Hackett, 2014, p. 511), six Illinoisan state courts found the Illinois Education Expenses Tax Credit constitutional in two lawsuits (Griffith v. Bower, 2001; Toney v. Bower, 2001).[8] The grounds for the decision were that the credit allows parents to keep more of their own money to spend on the education of their children as they see fit, through "true private choice," and does not involve the [direct] expenditure of government money (Berg, 2003; Underkuffler, 2004).

Examination of the five state voucher and tax credit programs passed in 2011–2012 and litigated in 2013–2015—in Arizona, Colorado, Indiana, Louisiana, and New Hampshire—reveals that No-Aid Provisions are strikingly poor barriers to the creation of vouchers. The chief reason No-Aid Provisions fail is that policymakers adopt indirect delivery channels *intentionally*, in order to insulate them from legal challenge. For example, Arizona's Empowerment Scholarship Account was passed by the state legislature in response to the 2009 *Cain* decision that a state voucher program was unconstitutional (Grado, 2011). Similar efforts to submerge voucher programs were debated publicly by legislatures in Indiana, Louisiana and New Hampshire, and in Douglas County school board meetings in Colorado (Barrow, 2011; Evans-Brown, 2013; Illescas, 2011; Landrigan, 2014; Timmins, 2012). When the programs were litigated, judges ubiquitously relied upon the distinction between direct and indirect expenditures, a line taken by *amicus curiae* briefs from

conservative supporters but opposed by liberal and union opponents (Dalianis, 2014; Dickson, 2013; Rice, 2015; Thompson, 2013).

Program design can also insulate other aid programs from legal challenge. For example, textbook loans in Louisiana, transportation in California, and nursing services in New York for nonpublic school students, were held constitutional despite the presence of a strong No-Aid Provision in all three states' constitutions (Fisher, 2006; Hughes, 1930; Marks, 1946). Since aid—particularly programs of Level II—is delivered through private mechanisms and tax expenditures or indirectly via the parent, such barriers are surmountable by CBT. For the general public, scholars have shown that the low "traceability" of tax expenditures—the fact that not all citizens accept that tax breaks are functionally equivalent to spending—makes the public more supportive of such expenditures than if they had full information about costs (Haselswerdt & Bartels, 2015). But what is the mechanism by which the submerged policy design affects judges' decisions? After all, judges do *not* lack information about the costs and benefits of such programs so they are unlikely to be confused about their nature and scope. The general public's relative lack of information about submerged policies affects citizens' voting decisions and political engagement (Mettler, 2009), but should not affect judicial decisions as to the constitutionality of such programs because these decisions take place in the informationally rich environment of the courts. The answer lies in the *attenuation* of the connection between government and beneficiary via the intervention of private organizations or the tax system.

By attenuating the government–beneficiary connection through policy design, submergence affects judicial decision making in three overlapping ways: providing an argument for the constitutionality of aid programs that is utilized by interest groups, embodied in precedent, and consistent with at least some reasonable interpretations of constitutional truth and intent. Elucidating an attenuation mechanism does not require scholars to adjudicate among attitudinal, legal, and strategic models of judicial decision making but merely to assume that some combination of policy preferences, institutional constraints, and concern for the law as written influences judges' decisions.

Many supportive amicus briefings in aid cases argue that the connection between government and religious institution is weakened by the intervention of private organizations and individual choice. The Alliance Defending Freedom, Cornerstone Institute and Liberty Institute's joint amici brief in the 2014 *Duncan v. New Hampshire* tax credit scholarship case is typical:

> It is illogical to conclude that [the No-Aid Provision] provides any bar to the state enacting a neutral program like this one to tax credits to private businesses for voluntarily donating to scholarship organizations, which in turn select families to receive scholarships, which in turn select the private school for which they will use the scholarship money to attend. (Compitello, Baylor, & Hacker, 2013)

The brief stresses the attenuated chain of private decision makers intervening between the state and private schools—private businesses, scholarship organizations,

and families—such that the program does not benefit any religious institution directly. Child benefit theory holds that parental choice attenuates the state–school connection to render aid programs constitutional. Interest groups argue that the additional attenuation of this connection by means of scholarship-granting organizations, private businesses, contracts with private providers, and the tax system further shields aid programs from challenge. CBT is widely cited in amici briefs by voucher and tax credit scholarship supporters (Keller, 2013; Mellor, 2013). Interest groups such as the Institute for Justice, Alliance Defending Freedom, Goldwater Institute, Cato Institute, and others mobilize in support of submerged programs because they favor private parental choice and seek to weaken or attenuate the connection between government and education (Bedrick, Butcher, & Bolick, 2016; Institute for Justice, 2016; Lips & Butcher, 2015). Judges supportive of aid can utilize such arguments (Dalianis, 2014; Dickson, 2013; Thompson, 2013); wavering judges may be persuaded by them, and judges opposed to aid often need to counter such arguments if they are to strike a program down (Ronayne, 2014; Smith, 2014).

Moreover, regardless of judges' political views and interest group mobilization, courts confront precedent. Submerged policies have been defended successfully over a long period by means of an attenuated policy design. The idea that "public" action should be treated differently from "private" action is a long-standing, albeit fiercely contested, legal principle applied across many policy areas and in constitutional and international law (Kay, 1993; Maier, 1982). Child benefit theory is the argument that private choice renders certain programs constitutional that would be unconstitutional if actioned directly by public authority. This principle has been in use in the United States for more than 80 years. More than two-thirds of the legal cases examined in the following section confront CBT: either relying upon it for support, or else denying that it is applicable or correct. Judges and justices are sensible of the fact that attenuation has rendered submerged policies constitutional in the past.

Judges and advocates have recognized the variable visibility of different aid programs for children at private religious schools and, although the variation has never been formalized as such, court decisions often turn upon the level of submergence of the program.[9] In the 2011 U.S. Supreme Court case *Arizona Christian School Tuition Organization v. Winn*, for example, the Court's 5-4 decision that the plaintiffs did not have standing to sue rested in part upon the distinction between "tax credits" and "government expenditure" (Kennedy, 2011).[10] The majority argued:

> Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs. Any injury the objectors may suffer are not fairly traceable to the government.

In dissent, Justice Kagan argued that "cash grants and targeted tax breaks are means of accomplishing the same government objective—to provide financial support to select individuals or organizations." The *Winn* decision broke with a previous Supreme Court decision, *Flast v. Cohen* (1968), in which taxpayers *were* found to have standing in their complaint against the use of federal funds "to finance instruction and the purchase of educational materials for use in religious and sectarian schools,

in violation of the Establishment and Free Exercise Clauses of the First Amendment" (Warren, 1968). The *Winn* justices argued that taxpayers had standing in *Flast* but not in *Winn* because the former involved unconstitutional government taxing and spending, whereas the latter did not. Aid that is provided by means of a more attenuated policy design, whether in the form of goods, services, or tuition payments, is more easily defended in court.

In claiming that attenuation makes more-submerged policies legally stronger than less-submerged policies, this article rules out three alternative arguments: *existing conflict*, *program age*, and *distributional effects*.

Existing Conflict

One argument is that the relationship between submergence and susceptibility to legal challenge is wholly endogenous: settled areas of law, such as tax exemptions and food services, are more submerged precisely because they lack existing legal conflict. Contentious policies like vouchers are less submerged simply in virtue of their greater degree of legal contentiousness, rather than because of the design of the policy itself. This argument would redefine the submerged state in terms of the degree of existing conflict, decoupling it from policy design and raising methodological problems: how to establish the boundaries of the concept amidst fluctuations in policy salience and legal contention between regions and governments and over time. Policies could be sufficiently contentious to qualify as part of "the submerged state" at one time but not at another, or in one state but not another. Such an argument does not explain *why* more submerged policies are legally stronger because it lacks a causal mechanism by which legal conflict and submergence interact.

The direction of causality in *Hc* and *Hs* is that submergence influences the likelihood of successful legal challenge, but policymakers may also take into account the likelihood of legal challenge when designing submerged policies. For example, Arizona's submerged Empowerment Scholarship Account was passed by the state legislature in response to the 2009 *Cain v. Horne* decision that a voucher program was unconstitutional (Grado, 2011). Attenuating the links between government and religious schools by incorporating a greater degree of parental choice, more-submerged policies are attractive to policymakers seeking to insulate their programs from legal dispute. The process of insulating programs from legal dispute may *itself* be less contentious than creating less-submerged policies, but not necessarily: for example, a new tax credit scholarship program in a state that had not previously offered one is likely to generate more debate than another state's fourth or fifth additional voucher program. *Hc* and *Hs* assert that legal outcomes are affected more by policy design than by the political contentiousness of the policymaking process.

Program Age

Another argument is that older policies are more settled legally than newer ones, so that legal contentiousness is a function of the age of the program rather than

its attenuated policy design. Settled legal issues attract fewer legal challenges. However, as the Supporting Information shows, the age of an aid program is not correlated with successful court challenge. Voucher programs have been subject to legal challenge for more than 60 years, and long-standing transportation policies in West Virginia and Kentucky have been struck down as unconstitutional more than 50 years after they were created. Newer tax credit scholarships have been subjected to legal challenges but these have been generally unsuccessful. If program age rather than an attenuated policy design was the causally relevant factor for legal challenges, then newer programs would be more likely to be challenged, and challenged successfully, than older programs. There is no evidence that this is the case.[11]

Distributional Effects

A third argument is that legal challenge is a function of the characteristics of the beneficiary population rather than attenuated program design. If tax breaks tend to target wealthier Whites while vouchers target poorer non-White populations, one might expect the latter to be successfully challenged more often. We know that race and class affect access to courts and that race-conscious policies directly remedying material racial inequalities are less popular than "color-blind" policies (King & Smith, 2011; Sandefur, 2008). But the argument that a program's distributional effects, rather than its attenuated policy design, is responsible for legal challenges fails to account for the fact that school vouchers and tax credit scholarships target demographically similar populations: color-blind in design, most vouchers and tax credit scholarships are aimed at low- and medium-income families with incomes up to 150–200 percent of the Federal Poverty line (Friedman Foundation for Educational Choice, 2016). There is no evidence that vouchers and tax credits differ systematically in enrollment of students by ethnicity or social class, and some evidence that Black, Hispanic, and low-income parents prefer the *more* submerged policy to the less-submerged one (Cato Institute, 2016). Although voucher and tax credit scholarships enroll similar low- and medium-income groups, legally they are very different: the latter attenuating the connection between government and religious school by means of the tax system and scholarship-granting organizations.

4. Data and Methodology

To examine the legal vulnerability of aid for children at private religious schools I create two original databases: The first is the set of all religious school aid programs of these eight types that have ever existed at state or federal level. The second is the set of court challenges to the eight aid program types across the 50 states. Aid programs are identified by means of modern and historical state constitutions, legislative bill jackets, and education law for each of the 50 states, yielding a total of 258 programs for analysis. These datasets contain the universe of aid programs through July 2015, including programs that once existed but were struck down or repealed.[12] These programs were created over a period of more than 150 years, from state

constitutional provisions passed during the Civil War period to modern voucher programs passed in the early months of 2015. Using state and federal court decisions and lists of relevant case law from the Institute for Justice (IJ), Americans United for Separation of Church and State (AU), and the American Civil Liberties Union (ACLU)[13] I also draw upon the universe of legal cases related to aid programs. The dataset contains a total of 123 challenges to aid programs of the eight programs examined here, beginning in 1912 and completed by the end of July 2015. Of these, 60 programs were struck down and 63 upheld.[14]

The most litigated aid program type is transportation, with 33 challenges, but more of these programs have been upheld than struck down. By contrast voucher scholarships and textbook loans, the second- and fourth-most-litigated aid programs with 25 and 19 challenges, respectively, have been struck down more frequently than upheld. The aid programs with the best ratio of being upheld to being struck down are property tax exemptions, auxiliary services (including services provided to children under IDEA), and educational tax credits. Of the 22 challenges to auxiliary services to date, only 6 resulted in the program being struck down. More than 80 percent of challenges to property tax exemptions, and two thirds of challenges to tax credit scholarships, were also unsuccessful. Table 3 displays the number of challenges for each aid program with the ratio of success to defeat.

Table 3 shows that deeply submerged programs are generally less likely to be challenged at all than weakly submerged programs. The likelihood of challenge is much higher for the least submerged programs (vouchers and textbooks) than for the more submerged policies (tax credit programs, food services, and property tax exemptions). Figure 1 distinguishes the aid categories according to their vulnerability to legal challenge.

The effect of submergence, as laid out in Table 2, implies not only that more submerged policies will be more likely to be upheld as constitutional when challenged but also that such policies will be less likely to be challenged at all. Using a probit model with sample selection I test the proposition that, compared to less submerged policies, more submerged policies are less likely to be challenged and also less likely to be struck down when challenged. I evaluate the effect of policy submergence at two stages: (i) whether or not a legal challenge is brought against a program, *and* given a legal challenge (ii) the success or failure of that challenge (whether the program is upheld as constitutional or struck down). Given that successful court challenge depends upon the program being first litigated, the two-stage approach deals with potential sample selection bias.

I control for whether the court challenge occurred before or after certain seminal Supreme Court establishment law decisions: *Cochran v. Louisiana State Board of Education* (1930), *Lemon v. Kurtzman* (1971), and *Mueller v. Allen* (1983). These three cases are the first federal application of CBT (*Cochran*), the first elucidation of the famous three-pronged test (*Lemon*), and a case involving several different types of aid (*Mueller*) which has been described as a "new dawn" in Establishment law (Choper, 1987; Huerta & d'Entremont, 2007; Monaghan & Ariens, 1984). Scholars argue that after the *Mueller* decision, aid cases tended to be treated more favorably, at least by federal courts.[15] These three cases can been described as "jurisprudential regimes":

Table 3. Court Challenges to Aid Programs Across 50 States, Through July 2015

	Program Never Challenged	Challenge Outcome			Challenge Rate	Challenge Success Rate	Number of Current Programs
		Upheld[a]	Struck Down[a]	Total[a]			
		Weakly submerged (Level I)					
Vouchers	16	9	16	25	61%	64%	21
Textbooks	10	6	13	19	66%	68%	17
Equipment	11	2	4	6	35%	67%	12
Transport	16	17	16	33	67%	48%	28
Level I average					57%	63%	
		Deeply submerged (Level II)					
Tax credit scholarships	27	8	4	12	31%	33%	26
Auxiliary services	13	16	6	22	63%	27%	19
Property tax exemptions	24	5	1	6	20%	17%	25
Food services	18	0	0	0	0%	0%	18
Level II average					29%	19%	
Total	136	62	60	122	Overall mean: 43%	Overall mean: 41%	148

[a]Total number of challenges. Includes double challenges to the same program in 9 of the 136 cases.

key precedents that structure the way in which justices evaluate key elements of cases in arriving at decisions in church-state law (Kritzer & Richards, 2003).

I control for judicial partisanship because of the partisan divide with respect to private school choice. Republicans are more supportive of educational voucher scholarships and tax credits than Democrats (Moe, 2001, p. 37). They also tend to support tax expenditures and the use of market-based delivery mechanisms for social programs (Haselswerdt & Bartels, 2015). For each decision I identify the opinion writer (or Chief Justice for *per curiam* decisions) and code this justice according to either (i) the partisan affiliation of the governor or president who appointed them or approved their selection (in Missouri plan and appointment-based systems); (ii) the party affiliations of the state legislature that selected the judge;[16] or (iii) the political affiliation of the justice or the party in whose name she or he ran for office, as stated in obituaries, news reports, and official court websites (in election-based systems).[17] My coding decisions rest upon the well-established principle that appointed judges' decisions usually align with the partisan affiliation of their elected monitors (Barber,

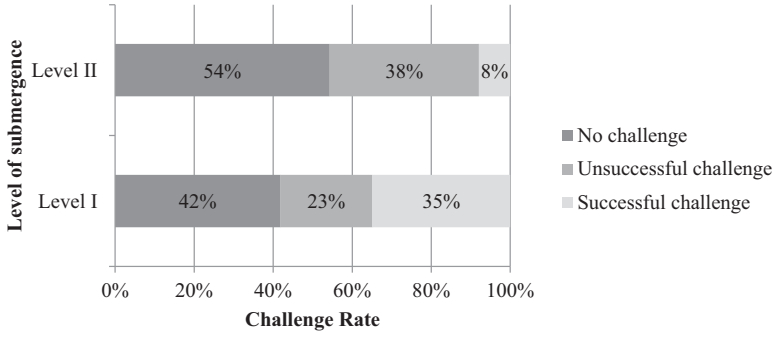

Figure 1. Legal Challenges to Aid Programs by Submergence Category.

1971; Canes-Wrone, Clark, & Kelly, 2014; Deno & Mehay, 1987; Wolf, Komer, & McShane, 2013).

I control for regional fixed effects in order to minimize the risk of omitted variable bias stemming from region-specific factors: for example, the South's relationship with religious schooling, vouchers, race and segregation, and the West's history of public schooling, lack of establishment, and recent entrance to the Union under stringent federal Enabling Acts (Forman, 2007; Jeffries & Ryan, 2001; Meyer, Tyack, Nagel, & Gordon, 1979). The error terms are likely to be heteroskedastic because court cases are not evenly distributed across U.S. states: 9 states account for more than half of all court cases; there have been 18 cases in New York and Pennsylvania alone; 11 states have never had a court challenge to an aid program. Also, the data break the assumption of independence of observations, both because several states are observed at different time points and because judges routinely utilize judicial precedent to support their reasoning from both state and federal courts, in their own and other states. The use of robust standard errors clustered by state relaxes the assumptions of homoskedasticity and observational independence (Rogers, 1993; R. L. Williams, 2000). The Wald test of independent equations suggests that ϱ is not statistically different from zero, indicating that the challenge model is not biased due to sample selection. To ensure that the results are not an artifact of the sample selection model I run both the selection and challenge models as separate probit models, which replicates the results of both models. Table 4 shows the regression results.

The results show that Level I policies are statistically significantly more likely to be challenged than Level II policies and are *also* more likely to be struck down if challenged. These results support *Hc* and *Hs*. The selection model demonstrates that more submerged policies are statistically significantly less likely to be challenged than less-submerged policies *and* when challenged such policies are statistically significantly less likely to be struck down as unconstitutional than less-submerged policies. Submergence is doubly efficacious, exerting influence at both stages of litigation. The effect of submergence is robust to the inclusion of justice partisanship, region, and critical junctures in church-state law such as *Cochran, Lemon*, and *Mueller*.[18]

Although there are no statistically significant regional differences in the likelihood of an aid program being challenged in court, Table 4 shows that once programs are challenged there are significant regional variations. Legal challenges in the South are statistically significantly less likely to succeed than those in the West, as are challenges since the *Mueller* decision in 1983. These results suggest that legal scholars are correct to argue that *Mueller* represented a turning point in Establishment law towards a more sympathetic approach to aid programs for children at private religious schools (Huerta & d'Entremont, 2007). During the 1970s judges tended to strike down programs as unconstitutional at a higher rate than in previous decades as Table 4 shows, but since *Mueller* they have in general become more favorably disposed to aid programs.[19]

The timing of the *Mueller* case also coincides with the advent of what court politics scholars call "new style judicial campaigning": increasingly expensive, high-profile, and with active interest group involvement (Brace & Boyea, 2008; Gibson, 2008). Aside from the influence of federal Supreme Court precedent, the increasing politicization of the judicial arena may help explain why justices post-*Mueller* are less

Table 4. Probit Models with Sample Selection Estimating the Effect of Policy Submergence on the Likelihood of an Aid Program Being Challenged and the Success of That Challenge

Challenge	Probit with Sample Selection	Challenge Probit	Success Probit
Level II policy	−.709*** (.153)	−.724*** (.161)	
Region (North-East)	.291 (.295)	.286 (.245)	
Region (Mid-West)	.108 (.293)	.117 (.234)	
Region (South)	−.004 (.259)	−.025 (.245)	
Constant	.167 (.217)	.177 (.201)	
Successful challenge			
Level II policy	−.756** (.335)		−.884*** (.274)
Region (North-East)	−.929*** (.357)		−.904** (.369)
Region (Mid-West)	−1.217*** (.392)		−1.224*** (.397)
Region (South)	−1.405*** (.358)		−1.438*** (.330)
Justice partisanship (democratic)	.715*** (.244)		.728*** (.235)
Post-*Cochran* (1930)	.265 (.869)		.267 (.888)
Post-*Lemon* (1971)	.825** (.373)		.842** (.368)
Post-*Mueller* (1983)	−1.112*** (.308)		−1.132*** (.306)
Constant	.517 (.899)		.357 (.869)
ϱ	−.241 (.345)		
	$N = 256$	$N = 258$	$N = 121$

<.05, *<.01.

likely to strike down aid programs than their predecessors, because, like many submerged policies, aid programs are supported by powerful lobbying groups (Pilkington & Goldenberg, 2013; Torres & Illescas, 2013). *Mueller* may be both a symptom and cause of increasing judicial sympathy for aid.

Table 4 shows that the partisan affiliation of the court is also statistically significantly related to the success or failure of judicial challenges to aid legislation. Democratic justices are more likely to strike down aid programs for children at private religious schools than Republican justices, a fact explicable in terms of conservative support for private school choice and general preference for submerged policies (Haselswerdt & Bartels, 2015). The effects of submergence, region, judicial partisanship, and critical junctures in church–state law are robust to the exclusion of any particular aid type as the probit robustness checks in Table 5 demonstrate.

Table 5 shows that the effects of submergence upon aid program challenge, and upon the success of that legal challenge, are statistically robust. Across the universe of aid programs, the probability of a program being challenged in court at some point is 61 percent for weakly submerged policies of Level I and 33 percent for deeply submerged Level II policies. Once challenged the categories also diverge, with a 57 percent chance of challenge success for the least submerged policies dropping to 30 percent for deeply submerged Level II policies. Taking the two stages of litigation together the chances of any particular aid program being challenged successfully is 35 percent for weakly submerged policies and 10 percent for deeply submerged policies.

5. Conclusion

This analysis suggests that the null hypotheses can be rejected. The level of submergence of an aid policy is negatively related to the success of court challenges

Table 5. Robustness Checks for Probit Model by Aid Category

Challenge	Auxiliary Services	Equipment	Food Services	Property Tax Exemption	Tax Credit Scholarships	Textbooks	Transport	Vouchers
Obscurely submerged	−1.084***	−.835***	−.563***	−.619***	−.709***	−.709***	−.624***	−.718***
(Level II)	(−0.199)	(−0.166)	(−0.167)	(−0.166)	(−0.165)	(−0.166)	(−0.177)	(−0.173)
North-East	.234	.246	.327	.171	.283	.478	.246	.252
	(−.278)	(−.309)	(−.287)	(−.331)	(−.303)	(−.295)	(−.298)	(−.307)
Midwest	.0871	.00765	.128	−.00467	.0912	.212	.0941	.279
	(−.298)	(−.302)	(−.303)	(−.304)	(−.293)	(−.296)	(−.283)	(−.339)
South	−.0116	−.208	−.0706	−.0259	.142	.0452	−.182	.0913
	(−.284)	(−.259)	(−.265)	(−.295)	(−.262)	(−.279)	(−.28)	(−.278)
Constant	.196	.375	.175	.246	.146	.0657	.133	.103
	(−.238)	(−.23)	(−.222)	(.231)	(−.197)	(−.233)	(−.235)	(−.239)
N	223	241	240	228	219	229	209	217
Successful challenge								
Obscurely submerged	−1.182***	−.846***	−.884***	−.757***	−.904***	−.790***	−1.265***	−.753**
(Level II)	(−.436)	(−.28)	(−.274)	(−.285)	(−.283)	(−.267)	(−.339)	(−.293)
North-East	−1.199***	−.929**	−.904**	−.772**	−1.148***	−.894**	−.574	−.940**
	(−.366)	(−.383)	(−.369)	(−.387)	(−.347)	(−0.377)	(−.554)	(−.455)
Midwest	−1.585***	−1.195***	−1.224***	−1.052**	−1.469***	−1.250***	−1.290**	−.980**
	(−.38)	(−.402)	(−.397)	(−.416)	(−.418)	(−.444)	(−.563)	(−.442)
South	−1.680***	−1.380***	−1.438***	−1.360***	−1.648***	−1.198***	−2.092***	−1.199***
	(−.397)	(−.335)	(−.33)	(−.363)	(−.318)	(−.351)	(−.531)	(−.401)
Justice partisanship	.615**	.704***	.728***	.798***	.682**	.598**	1.137***	.689**
(Democratic)	(−.28)	(−.242)	(−.235)	(−.248)	(−.282)	(−.247)	(−.182)	(−.282)
Post-*Cochran*	.105	.241	.267	.296	.241	0	.352	.169
	(−.843)	(−.896)	(−.888)	(−.89)	(−.888)		(−1.13)	(−.928)
Post-*Lemon*	1.207***	.804**	.842**	.812**	.724**	.781*	.512	.786**
	(−.328)	(−.366)	(−.368)	(−.363)	(−.363)	(−.463)	(−.621)	(−.399)
Post-*Mueller*	−1.323***	−1.042***	−1.132***	−1.204***	−.857***	−1.200***	−1.429***	−1.035***
	(−.381)	(−.293)	(−.306)	(−.297)	(−.314)	(−.382)	(−.411)	(−.373)
Constant	.688	.347	.357	.216	.609	.664	.764	.251
	(−.873)	(−.881)	(−.869)	(−.894)	(−.898)	(−.429)	(−.859)	(−.944)
N	99	116	121	115	109	102	88	96

<0.05, *<0.01.

brought against it. Deeply submerged Level II policies are more likely to be upheld than weakly submerged Level I policies. These results demonstrate that disaggregating the submerged state rather than treating it dichotomously provides additional analytic leverage with respect to several puzzles: What is the submerged state and how do judges interact with it? How vulnerable are aid programs to legal challenge? Why are vouchers challenged in court more often than tax credit scholarships? This article argues that the submerged state is not a monolithic concept but contains several important internal distinctions, one of which is the difference between spending and tax expenditures. The attenuation of the connection between government and religious organization through the use of the tax system, additional private third-party organizations, and household choice helps insulate aid programs from legal challenge. This paper demonstrates that, while all aid programs involve the private sector to some degree, those which veil the role of the government to the greatest extent are less vulnerable to successful legal challenge than those which veil the role of the government least.

Despite the best efforts of tax expenditure analysts, decisions of judges at both state and federal level frequently turn upon questions of submergence using, *inter alia*, CBT and the Entanglement Prong. Hence the submerged state is of great import not only for citizen attitudes, as Mettler, Surrey, and others have demonstrated (Hacker, 2002; Mettler, 2009; Surrey, 1970), but also for elite attitudes. Indeed, as the opinions in *Winn*, *Flast*, and other cases show, the level of submergence of a policy affects whether judges strike down the policy as unconstitutional, or not. Revealing the submerged state would not only affect citizen attitudes toward the government but also the very constitutionality of these vast programs, some more than a hundred years old, directly affecting 10 percent of the school-age population and costing many state governments tens of millions of dollars each year.

Aid for children at private religious schools is an instructive example of the submerged state, the "policies that [lie] beneath the surface of U.S. market institutions and within the federal tax system" (Mettler, 2009, p. 4). Their submerged features suggest that, like submerged health-care or tax policies, aid for children at private religious schools will remain difficult to challenge, in court, in the future. Legal challenges to the appropriation of public funds for religiously affiliated hospitals, colleges, orphanages, and social support services display the same characteristics as those examined here: programs in which the relationship between government and beneficiary is more *attenuated*—through submerged program design and legislative language—are less likely to be legally challenged than more visible programs (cf. Blackmun, 1976; Peckham, 1899; Rehnquist, 1988).

This paper's findings do not apply only to questions of church–state separation either. For example, the parts of the Affordable Care Act that were challenged in courts—the individual mandate, and to a lesser extent the employer mandate, Medicaid expansion, and the new Independent Payment Advisory Board—were those in which government involvement in the provision of health-care benefits was most direct. More submerged elements, such as federal subsidies and changes to bundled Medicare payments, insurance standards, and exchanges, were not. Contrary to the findings of Howard, Haselswerdt, and some other tax expenditure scholars, this

paper shows that submerged policies are less, rather than more, likely to be eliminated than direct governmental outlays (Haselswerdt, 2014; Howard, 2007).

Given the recent surge in the passage of educational voucher and tax credit scholarships—between 2011 and July 2015 alone, 30 new programs were created by U.S. states—the inevitable increase in court challenges is likely to bring questions of submergence to the fore. The new categorization of submergence powerfully indicates which aid policies are likely to be harder to repeal or reform. Level II policies—such as hidden tax exemptions buried within longer school codes—are less vulnerable to being overturned by judicial action than Level I policies involving spending programs that utilize the private sector. By disaggregating the submerged state in terms of degrees of submergence, this paper reveals the fuzziness of the distinction between "public" and "private" that characterizes American education, statecraft, and government.

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Notes

1. In 2009 alone such subsidies accounted for around $600 billion in federal spending (Ellis & Faricy, 2011, p. 1095).
2. By deploying the first comprehensive statistical analysis of the relationship between submerged aid policies and successful court challenges, this paper also extends the religion and politics literature and our scholarly understanding of tax expenditure analysis and the Establishment Clause, an area of scholarship hitherto conducted almost exclusively by lawyers (Adler, 1993; Davies, 1996; Drakeman, 2010; Harris, 1997; King, 1998; Livingston, 1998; Simon, 1981).
3. The boundaries of these school aid programs are contestable and fuzzy. Several aspects of the relationship between schools and the state have been purposely excluded here, for example, the regulation of private schools, homeschooling, charter laws, and the accreditation procedures for the opening and operation of nonpublic schools. This paper does not focus on charter schools because such schools are technically *public* and not private (although the distinction itself is fuzzy). I also exclude state regulation of private religious schools. Regulation is not aid, although it can affect the distribution and take-up of aid within a state.
3. One might argue that this definition of aid is too fuzzy. The provision of nursing (auxiliary) services for religious school students, for example, seems no more "aid" for children at private religious schools than the provision of fire services to douse fires, pest control to remove vermin, or road repairs to allow access. These are services to which every organization, whether religious or not, are entitled at public expense. That it is difficult to make judgements about what constitutes "aid" is evinced by the vast, complicated, and often contradictory body of case law on church–state issues in education in the United States. I acknowledge the fuzziness of the boundary between "aid" and mere "universal services." Calling the variable "aid for children at private religious schools" rather than "aid for private religious schools," signals that the careful distinctions made by church–state scholars and lawyers are taken seriously. It is reasonable to use this eightfold aid categorization because variations of this schema have been utilized by scholars, think-tanks, advocates, and the federal Department of Education (Connell, 2000; Department of Education, Office of Innovation and Improvement, Office of Non-Public Education, 2009; The Institute for Justice and The American Legislative Exchange Council, 2007).

4. Although there is within-category variation in policy design—differing eligibility requirements, for example—each aid program has more in common with other aid programs of its type than it does with other types of aid program along the dimensions elucidated in Table 2.
5. Consequently these lump-sum payments for tuition are subject to many divisive political confrontations, particularly over race: either as a means for southern whites to escape desegregation efforts or for urban minorities to obtain a better education (Forman, 2007; King & Smith, 2011; O'Brien, 1996).
6. Here, "private" and "nonpublic" are used interchangeably to refer to schools that are privately managed and funded, voucher, in-kind and tax credit payments notwithstanding. Charters, magnets, and traditional public schools are not included within the scope of this definition.
7. CBT, of course, is not the only grounds on which judges have decided aid cases. The most common legal justifications invoked in such cases include Free Exercise and Establishment (and religious "exclusion," "accommodation," or "advancement"), and state requirements to provide "thorough," "adequate," and "efficient" education for all state citizens (and local control rules, "equal protection," competition, and community benefits). Table A1 in the Supporting Information appendix lists all state and federal courts that have ruled on aid program cases since 1912.
8. Hackett (2014) creates a quantitative scale of No-Aid Provision strength that codifies the stridency of amendment language and the extent of the prohibitions of public aid to denominational schools. The index runs from 0 to 10, with 10 representing the strongest No-Aid Provisions. The Illinoisan No-Aid Provision scored 8.
9. C.f. (Kotterman v. Killian, 1999; Seegers v. Parker, 1970; Snyder v. Newtown, 1960; Thomas, 2000).
10. The 5-4 decision divided predictably along partisan lines, with the four liberal justices in the minority.
11. Table A2 in the Supporting Information appendix displays descriptive statistics on the relationship between program age and legal challenges.
12. Changes to the eligibility rules for existing programs (such as raising or lowering income requirements, or expanding an existing program state-wide as occurred for Louisiana's New Orleans voucher program in 2012) are *not* coded as additional programs but simply as alterations to existing ones. Programs that are created for an entirely new jurisdiction separate from existing programs, such as the Racine voucher enacted by the Wisconsin legislature in 2011 in addition to the 1990 Milwaukee program, are coded as new programs.
13. The IJ is a libertarian advocate of private school vouchers and tax credits, whereas the AU, an educational association committed to church-state separation, and the ACLU, which advocates for individual rights and liberties, tend to argue against private school choice and aid for children at private religious schools.
14. By "struck down/held unconstitutional" I mean that the judges held the program itself unconstitutional. Decisions in favor of aid or modifications to existing programs are coded as "upheld/held constitutional."
15. There are many other decisions that could have been included in this list: *Everson v. Board of Education of the Township of Ewing* (1947), for example, in which federal establishment law was applied to the states for the first time, or *Zelman v. Simmons-Harris* (2002), which upheld the Cleveland voucher program. The decision to exclude such cases as independent variables—potential turning points with respect to court challenge success—hinged partly upon the need to focus upon a limited set of variables, and partly upon the distribution of cases by decade: just eight cases were decided between *Cochran* and *Everson*, and a similar number have been decided since *Zelman*. Hence we would not expect substantially different results if such time-points were included. In earlier iterations of my regression analysis I added dummies for the level of court (state or federal), No-Aid Provisions, and judicial selection (elected or appointed), but none of these variables were statistically significant so they were excluded from the regression analysis presented below.
16. Where judges are elected by the legislature, unified Democratic control of the two houses is coded "1"; if Republicans formed a majority in one or both houses the case is coded "0" (Dubin, 2007).
17. Judges bearing the Democratic label, belonging to the Democratic Party, or appointed by Democratic executives are coded "1," Republicans "0."
18. Coefficients for a regular probit model, estimating the effect of submergence upon successful court challenge, are the same as for the Heckman Probit selection model.

19. Figure A1 in the Supporting Information appendix tracks court rulings on aid programs over the past century and confirms this trend: judges have become more likely to rule aid programs constitutional since the mid-1980s.

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Supporting Information

Additional Supporting Information may be found online in the supporting information tab for this article.

Figure A1. Cumulative Court Decisions, 1912–2015
Table A1. Courts Hearing Aid Cases, 1912–2015
Table A2. Program Age at Time of Legal Challenge by Decision