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Conversion of the Court: Ideological Reversal on Religious Liberty Cases

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Abstract: Over time, the United States Supreme Court has vacillated between an accommodationist and separationist approach to religious liberty cases. Under the Burger Court, liberal justices largely supported religious exemptions and strict scrutiny analysis of government actions limiting religious exercise. The ideological division was further heightened by the 1990 *Employment Division v. Smith* case, in which the conservative wing of the Court rejected a religious exemption to neutral laws of general applicability. Since then, however, the ideological lines have flipped, such that conservative movements and justices generally favor religious exemptions in cases involving contraception healthcare coverage, school choice, and public accommodation for LGBTQIA+ individuals, while liberal justices are more likely to uphold government actions. The literature has yet to explain this ideological reversal, which occurred over just a few decades. We introduce a new quantitative dataset of justices' Free Exercise decisions and then use a qualitative historical approach to examine this reversal. We find that the two ideological camps shifted asymmetrically: conservatives in the mid-1990s and liberals thereafter. Our analysis suggests that this is due primarily to the effect of intensive lobbying by new legal organizations, shifting partisan coalitions, and the policy response of the elected branches of government.
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Introduction

The United States Supreme Court's 1990 decision in *Employment Division v. Smith* (hereafter *Smith*) presented a marked shift in how the courts interpreted religious liberty cases (*Employment Division v. Smith*, 494 U.S. 872). The Court departed from its earlier decision in *Sherbert v. Verner* (hereafter *Sherbert*), which required the highest standard of review, strict scrutiny, when considering religious accommodations from generally applicable laws (*Sherbert v. Verner*, 374 U.S. 398). Instead, the Court stated that religious beliefs do not excuse one from adhering to an otherwise valid, neutral law of general applicability, in this case, a law prohibiting the use of the drug peyote. Conservative Justice Scalia, writing for the majority, stated that "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition" (*Employment Division v. Smith*, 878-879). Yet contrary to Scalia's claims, in the span of just under 30 years, the Court went from bipartisan support of the accommodationist decision in *Sherbert* (authored by liberal Justice Brennan) to a more divided, separationist decision by the conservative majority.

Examining this historical progression through the lens of contemporary ideological lines and rhetoric on religious liberty issues, one would perhaps be surprised to learn that in the mid-twentieth century it was predominantly the liberal wing of the Court that secured vigorous protections for religious exercise, while the conservative justices occasionally opposed the heightened protections granted to religious litigants. On the Court and in American politics today, it is largely the political and judicial right that push for religious accommodation in the face of liberal opposition (Hensley and McCartney 2023; Lewis 2021). Indeed, scholars have long noted the link between conservatives and movements like the Christian Right, leading to a considerable "God gap," where religious individuals are more likely to support conservative politics and the less religious are more likely to support liberal politics (Audette et al. 2018; Claassen 2015; Putnam and Campbell 2010). Why, then, was it conservatives on the Court who issued a ruling that so dramatically affected religious liberty that it has variably been called a "failure of conservative jurisprudence," "an embarrassment," and "a dubious and insidious interpretation of the Free Exercise Clause" (Paulsen 2015)? Or as an article in the *Washington Post* questioned in light of recent changes: "is religious freedom a liberal or conservative value?" (Baine 2020).

One may view the *Smith* case as a mere aberration, although as we show later, Justice Scalia and other conservative justices at the time were far from the justices most protective of religious liberty. Instead, *Smith*'s progeny marked yet another pivot for ideological stances on religious liberty issues. Shortly after *Smith*, the U.S. Congress responded to the decision with the landmark Religious Freedom Restoration Act of 1993 (hereafter RFRA), which sought to restore the strict scrutiny analysis of *Sherbert*

(Religious Freedom Restoration Act of 1993, Pub L. 103-141. 16 Nov. 1993. 107 Stat. 1488.). Numerous states followed suit in passing their own RFRA laws, often with vast bipartisan support until more recent instances. Several cases involving religious accommodations have since come before the Court, and after *Smith* the Court's justices have moved in opposite directions: conservative justices now routinely rule in favor of religious accommodations while liberal justices have adopted a stricter policy of separation of church and state. Three conservative justices (Alito, Gorsuch, and Thomas) have even outright called for *Smith* to be overturned, while two other conservative justices (Barrett and Kavanaugh) have criticized *Smith* but hesitated to overturn it without another standard in place (*Fulton v. City of Philadelphia*, 593 U.S. __; see also Girgis 2025).

As of yet, the literature has not fully explained why the justices have so dramatically shifted in their philosophical and ideological approach to religious accommodation issues. This article responds to the puzzle: why did conservatives become accommodationists while liberals became separationists in interpreting the Free Exercise Clause? To explain this shift, we present a quantitative dataset of individual justices' decisions in Free Exercise cases, combined with a qualitative historical analysis of judicial decision-making factors that contributed to this shift. Among possible theories, we assess changes due to the litigants and types of cases, court composition and judicial replacement, and the influence of public opinion and the other political branches. We examine changes both within and between justices. While each plays a role, we point especially to changing partisan opinion on religious liberty issues and the development of a judicial strategy in the Republican Party to appeal to Evangelical Christians and push for religious accommodationism. We find that the two ideological camps shifted asymmetrically, with conservatives moving towards an accommodationist approach in the mid-1990s and liberals to a separationist approach thereafter. These results suggest a need to consider the broader legal environment under which justices are making decisions involving religious liberty issues (e.g. Bennett 2017; Castle 2019; Hensley and McCartney 2023; Hollis-Brusky and Wilson 2020; Lewis 2017). Moreover, we anticipate that this divide will continue to widen, as issues such as school choice and LGBTQIA+ rights have featured prominently in American political life. Addressing those issues via the current conservative supermajority on the Court will likely heighten the culture wars in American politics.

Models of Judicial Decision Making

Scholars of judicial politics have pointed to many critical factors in determining how judges make legal decisions. Some scholars of judicial politics advance the legal model, an intellectual framework that assumes justices decide cases by applying established precedent and the original intentions of the Framers of the U.S. Constitution (for a review, see Gillman 2001). This model ostensibly prevails among legal practitioners, including Supreme Court justices, who claim to "discover" what the law is, rather than to "make law" themselves (Gillman 2001). Other scholars who study human behavior and decision making, however, have suggested that it is impossible for justices to divorce their legal decisions from their personal and ideological preferences. Segal and Spaeth (2012) infamously posited the attitudinal model of judicial decision making, which holds that justices, like other policymakers, will decide cases in manners that will support their ideological policy preferences. Still another model is something of a compromise between these two extremes; the strategic model of judicial decision making suggests that justices will decide cases in a way that supports their ideological preferences, but that they must balance their decisions with other considerations, like precedent, the Court's legitimacy, and the preferences of other political actors in order to best advance their ideological and institutional goals (Baum 1997; Epstein and Knight 1998). Even further research has complexified this debate, suggesting that justices have heterogeneous goal preferences and pursue them in correspondence with their psychological personality profiles, among a wealth of other research on judicial decision making (Cross and Nelson 2001; Hall 2018).

Our primary goal is not necessarily to wade into these well-trod and ongoing debates about judicial decision-making models. However, each model points to critical theories about what we should examine when considering why ideological camps and individual justices have changed their approach to religious liberty issues. For example, the legal model critically asks us to examine the litigants, the briefs, and types of religious disputes presented in the cases. According to the attitudinal model, we must examine the ideological contributions of individual justices. When thinking about longitudinal changes, this comes mainly in the form of judicial turnover and replacement (Epstein and Posner 2021; Norpoth et al. 1994). For example, we might examine whether the replacement of liberal stalwart Justice Ginsberg with equally-as-committed conservative Justice Barrett would change the ideological composition of the Court as it pertains to religious liberty issues. Additionally, some justices have gone through an ideological progression from when they were first appointed to the Court. For example, Justice O'Connor became increasingly liberal throughout her tenure, while nearly all justices underwent some ideological drift over time (Epstein et al. 2007). Assessing both the direction of the shift and the rationale for ideological change is another component of our analysis.

In addition to legal and ideological concerns, the strategic model raises other factors

that justices must consider when rendering their decision. For example, justices may be concerned about the legitimacy of the Court; because the Court controls neither "the purse" (the budget) nor "the sword" (the military), as Alexander Hamilton stated in Federalist 78, they must consider whether the public is willing to accept controversial decisions. Defined elsewhere as a "reservoir of goodwill," the concept of legitimacy has previously been linked to religiosity and judges' decisions (Audette and Weaver 2015). To maintain legitimacy, justices must consider the prevailing legal and political environment and act strategically to ensure that their decisions will be implemented and adhered to by other political actors and by the public (Dahl 1957). Some literature has (controversially) suggested that public opinion does have an impact on judicial decision making as a tool to maintain the Court's legitimacy (Bailey and Maltzman, 2011; Clark 2009; Giles et al. 2008; Mishler and Sheehan 1993; but see Norpoth et al. 1994). We further examine how the public's opinion (especially that of intense policy demanders like partisan activists) reaches the Court.

In sum, to determine why justices changed the way that they rule on religious liberty issues, we must examine the determinants of judicial decision making to identify major factors that would lead to ideological shifts. We remain agnostic as to the model that ultimately best explains decision making and, in our analysis, consider factors most important to each model. Among these are the litigants and subject matter of the cases themselves, the ideological composition of the Court, and strategic factors like concerns for legitimacy, the attitudes of other political actors, and other external factors that might lead to a strategic shift by Supreme Court justices.

Pivots in Religious Accommodations

In examining religious liberty issues as a whole, many scholars have sought to outline how the Supreme Court should decide matters of religious exemption and accommodation (e.g. Garvey 1986; Gillman and Chemerinsky 2020; Underkuffler, 1995). In doing so, those scholars have combed the historical record to consider what the Framers of the Constitution envisioned (Dreisbach 2017; Green 2022; Hamburger 2002; Muñoz 2009, 2022; Sehat 2011), weighed changing religious demographics in the U.S. (Ragosta 2021), and considered the efficacy of faith-based public-private initiatives (Formicola et al. 2003). While the prescriptive debate rages in American public life, Supreme Court justices no doubt have been exposed to different academic and political attempts to redefine religious jurisprudence.

One of the major debates in the literature is the extent to which religious people and organizations should be granted individual exemptions from generally applicable laws, the very subject of *Smith*'s precedent (Laycock 2009; Muñoz 2016). Some have suggested that religion does not differ from other ideological viewpoints and does not warrant exemption from generally applicable laws (Lupu 2015; Schwartzman 2012).

Others have argued that religious organizations deserve special exemptions from laws that might infringe upon their religious values and that the practice of exemptions is historically rooted in American legal precedent (Barclay 2020; Lund 2017).

In examining these legal questions about the jurisprudential development of the exemptions debate, most scholars point to three major pivot points: the aforementioned *Sherbert* decision, the *Smith* decision, and the subsequent *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (hereafter *Lukumi*) decision, in which the Court unanimously backtracked from *Smith* by introducing the question of legal targeting (*Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520). Ira Lupu (1993) argues that the judicial conservatives in *Smith* were merely attempting to rectify the excesses of liberal orthodoxy in the 1960s and 1970s, but soon after the *Smith* decision recognized the adverse effects *Smith* would have on future Free Exercise claims. *Smith* was widely unpopular among religious conservatives and civil rights liberals and triggered enactment of RFRA laws, which claimed to restore *Sherbert* as the governing precedent in all Free Exercises cases. The principles articulated in *Lukumi* have given judicial conservatives an alternative lens to analyze Free Exercise claims and have given rise to an increase in religious exemptions granted by the conservative voting bloc, notwithstanding the conservatives' decision in *Smith* (Lund 2022). Meanwhile, liberals on and off the Court have been fighting an uphill battle against *Lukumi*'s targeting and the RFRA standard, even attempting to amend the original bipartisan RFRA law, supported by liberals including President Bill Clinton (Zauzmer 2018). Particularly following the 2010 case *Christian Legal Society v. Martinez* (hereafter *Martinez*), liberals on the Court have more consistently ruled against religious interests than in previous decades (*Christian Legal Society v. Martinez*, 561 U.S. 661; see also Epstein and Posner 2021). This suggests that conservatives moved in favor of religious interests first – around the early 1990s – while liberals moved away from their previous position in more recent years, resulting in an asymmetric polarization in religious liberty cases (for a review of asymmetric polarization in American religion, see Burge 2019; on the courts, see Tushnet 2020).

We follow the previous literature in recognizing at least four distinct eras of the Court's Free Exercise jurisprudence: (1) the *Sherbert* era, defined by strict scrutiny analysis and liberal accommodationism, (2) the *Smith* era, defined by rational basis analysis and conservative opposition to religious accommodation, (3) the *Lukumi* era, where conservative justices began to move towards religious accommodation and a standard of religious targeting, and (4) the *Martinez* era, where conservatives fully transitioned into religious accommodationists while liberals shifted towards a policy of non-accommodationism. Even as scholars have attempted to make prescriptive arguments about how the justices should decide on religious matters during each of these eras, the literature has not yet explained why the justices have decided in this manner and why we see transition across these four eras.

Data & Methods

To examine factors that contribute to the justices' ideological reversal on religious liberty issues, we first assess judicial ideology by turning to the cases themselves. Although the Supreme Court addressed various religious issues prior to the Sherbert case, we use Sherbert as a starting point of our analysis as it was the first case in which a majority of the Court laid out a test using scrutiny analysis.[3] Moreover, the 1993 federal RFRA specifically cites the Sherbert test as the standard that Congress sought to revert to following the Smith decision. We then examine all landmark Free Exercise cases through the 2024-2025 Supreme Court term to determine how individual justices voted on the cases. We define landmark cases as those listed on the "Free exercise of religion" page of the popular online multimedia archive Oyez, which, in our assessment, represents a reasonable and common list of landmark cases in this area (Oyez 2025). We include all cases that were decided on the merits and as a religious issue. As with many legal studies, we limit the analysis to landmark cases to examine those cases that set significant precedent and demonstrate a shift in ideological patterns (see, however, Segal and Spaeth 1996). This yields a total of 40 Free Exercise cases.[4]

Beginning with the nine justices who were on the Court at the time of the *Sherbert* decision, we then analyzed each case to determine whether the justice decided the case in a manner that accommodated religious liberty or not. Per case, those supporting religious accommodations were coded as a one for an accommodationist decision and a zero for a non-accommodationist decision.[5] The scores were then divided by the total number of cases heard over the justice's tenure for a final score between zero and one. Since Free Exercise Clause cases do not appear before the Court consistently, some justices heard relatively few religious liberty cases (e.g. Justice Fortas heard only one) while some long-tenured justices like Justice Stevens heard more (20). The religious liberty score was then merged with other justice-level data, such as the ideological Martin-Quinn scores (Martin and Quinn 2002). As discussed below, the influence of the RFRA legislation at both the federal and state levels may also be influential in a justice's decision (Parsell 1993). Therefore, we also coded an additive variable of the number of state-level RFRA laws enacted by the time the justice's tenure ended.

This new dataset presents several opportunities to analyze the ideological shift of the Supreme Court justices, including trends by the appointing president's party and the Martin-Quinn ideology score of the justices. However, we are also interested in the scores of individual justices and why those justices might have changed individually or

[3] A previous Free Exercise case, *Braunfeld v. Brown*, "left unclear" the question of scrutiny analysis, particularly as it was decided through a plurality opinion (McCrossin 1980).

[4] The list of cases and data will be made available at the second author's website.

[5] Justices concurring in judgement were counted with the (non-)accommodationism of the majority, even though they may have decided for different reasons.

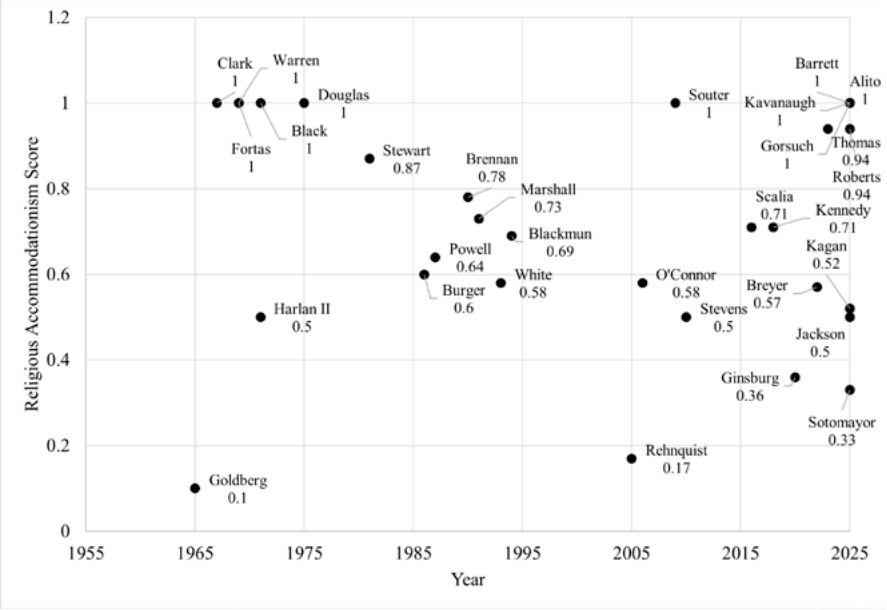
collectively over time. For this, we turn to a qualitative historical analysis to determine what external stimuli might impact the justices' decision making. Our qualitative analysis examines the 40 cases and the societal context surrounding the Court as each case was decided.

The Court is a prime candidate to utilize this method of analysis due to the Court's decision-making nature, involving only nine ostensibly rational actors who tend to serve in the institution for upwards of a decade. Consequently, the Court is a decision-making body with a high degree of continuity, though we can attempt to identify causal patterns by examining pivot points over time. Importantly, every decision in our case sample includes a written opinion outlining the public reasoning of the justice. To determine why those opinions changed over time, we therefore assess the context in which opinions are authored, allowing us to make inferences about the aforementioned factors that may have contributed to the outcome.

Results: Quantitative Analyses

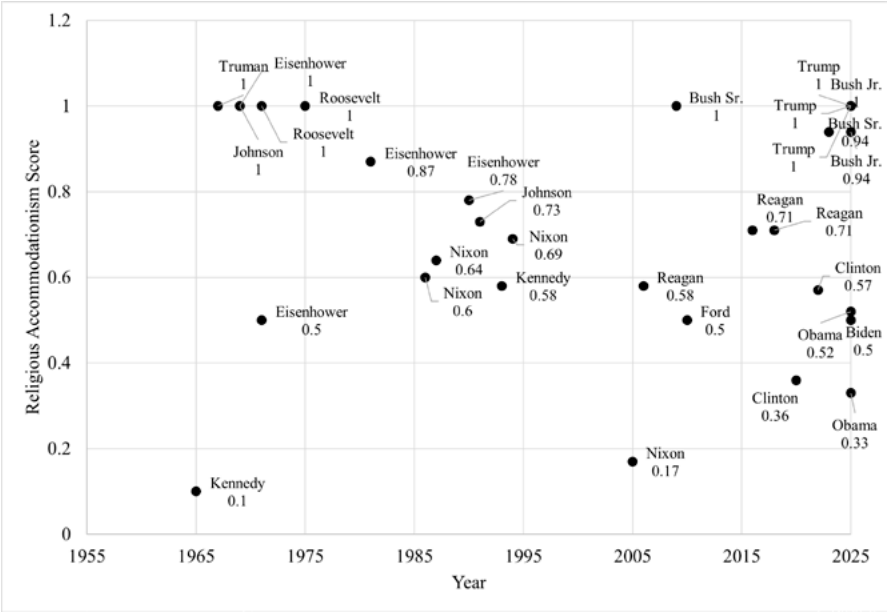
To establish that the justices did indeed undergo an ideological shift on religious liberty issues between *Sherbert* and *Smith*, we first present a series of figures using our quantitative data. Figure 1 shows a scatterplot of all justices in the dataset, grouped on the x axis by the year their tenure ended on the Court (with those presently serving on the right).

Figure 1. Religious Accommodationism by Justice



For a broad assessment of the impact of partisan politics, Figure 2 presents the same data by listing the president who nominated the justice.

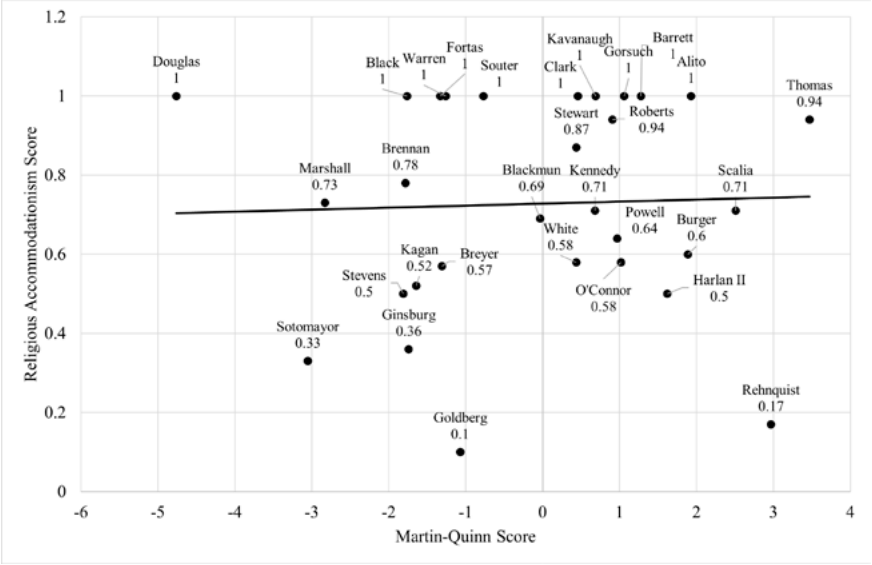
Figure 2. Religious Accommodationism by Nominating President



We can roughly group the justices based on the time period that they left the Court, with those in the *Sherbert* era centered largely on the left and those in the post-*Smith* era on the right. Of note, Democratic appointees Justices Black, Clark, and Douglas all received perfect accommodationist scores (appointed by Roosevelt, Truman, and Roosevelt, respectively). Appointees by Republican presidents Eisenhower, Nixon, Ford, and Reagan all received middling accommodationist scores, with conservative Justice Rehnquist (a Nixon appointee) scoring a 0.17. However, as we move into the present, we see Clinton, Obama, and Biden appointees receiving low to middling accommodationist scores, while Bush and Trump appointees consistently receive high accommodationist scores. This suggests an upward progression for Republican appointed justices and a downward progression for Democratic appointed justices, confirming our hypothesis that the ideological groups seem to have switched sides pre- and post-*Smith* on Free Exercise issues.

This trend is further exemplified in Figure 3, which presents religious accommodationism scores by Martin-Quinn scores, an ideology measure that scores liberal justices with negative numbers and conservative justices with positive numbers, centered at zero.

Figure 3. Religious Accommodationism by Martin-Quinn Score



The trend line is slightly positive, indicating that conservative justices are slightly more likely to side in favor of religious accommodation on Free Exercise cases, although the trend is remarkably flat. This appears to be due to over-time inconsistencies in the ideological groupings of justices. On the left, we can see the most liberal Justice Douglas receiving a perfect accommodationist score, while more recent liberal stalwarts Justice Sotomayor and Justice Ginsburg both receive a 0.36. On the conservative side, we see Justices Rehnquist, O'Connor, and Burger below the trend line, while more recent conservative appointees Justices Thomas, Alito, and Barrett all receive high accommodationist scores. Notably, Justice Scalia, the author of the *Smith* opinion, falls slightly below the trend line, indicating that his support of religious liberty does not match the expected rate given his conservative ideology, which is also the case for his fellow Reagan appointee Justice Kennedy.

In sum, the quantitative data do support an ideological shift by the justices. *Sherbert*-era liberal justices over-perform on their expected religious accommodationism and trend downwards. Recent conservative justices over-perform on their expected religious accommodationism, an upward trend from previous conservative justices. Therefore, we next engage in a qualitative historical analysis to discuss what caused these ideological changes.

Results: Qualitative Analyses

In our qualitative analyses, we identify major pivot points on the Court and connect them to factors recognized as significant by scholars of judicial decision making, including the litigants, Court composition, and external factors that might cause the justices to act strategically on religious liberty issues. We briefly examine each of these factors in turn.

Litigants

Some scholars have suggested that the ideological reversal on religious liberty issues results in part from the litigants in the case: that liberals prior to *Smith* were mostly concerned with preventing discrimination against minority religious groups, consistent with their civil rights jurisprudence, while conservatives post-*Smith* have been preoccupied with protecting the rights of dominant Christian (and largely Evangelical) religious groups, who face fewer barriers overall in society (Lund 2022). While it is true that the religious landmark cases prior to *Smith* do involve minoritized religious groups (Seventh-Day Adventists, the Amish, and Jehovah's Witnesses, among others), it is not necessarily the case that only dominant religious groups sought protection post-*Smith*. Indeed, one of the first attempts to rearticulate the values of *Smith* came in *Lukumi*, where the conservative justices joined the liberal justices in protecting the rights of practitioners of the Santería religion to engage in animal sacrifice. Since *Smith*, conservative justices have also protected the rights of Muslims, Jehovah's Witnesses, and Indigenous religions, among others. This suggests that the religious affiliation of the litigant is neither a persuasive nor empirically supported explanation for the observed ideological shift.

A second consideration when analyzing the Court's decisions is the nature of the cases themselves. Earlier cases, such as *Sherbert*, involved discrimination against religious individuals because of their beliefs or practices. In subsequent religious developments before the Court, both on the issue of Free Exercise and otherwise, cases now involve at least some discussion of whether religious individuals or organizations may themselves discriminate against others on the basis of their own religious beliefs (e.g. *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014), *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. __ (2018), or *Fulton v. City of Philadelphia*). In these cases, the conservative majority relied heavily on the *Lukumi* test of religious targeting in favor of granting religious exemptions from neutral laws. Essentially, the cases pitted advancing the legal rights of LGBTQIA+ individuals against the rights of religious groups; the liberal justices have favored the rights of gender and sexual orientation minorities while the conservative justices have sided with religious groups (Oleske Jr. 2015). Thus, liberals on the Court may have shifted

in favor of *Smith* because they see it as a safeguard against discrimination on faith-based grounds (Chavez 2021).

In addition to the subjects of the case themselves, however, an important trend relates to the growth of a legal industry devoted to defending religious liberty cases before the Court. The growth of organizations like the American Center for Law & Justice, Becket Fund for Religious Liberty, Alliance Defending Freedom, and the First Liberty Institute (all founded in the early- to mid-1990s), and other conservative Christian legal organizations has significantly expanded the legal infrastructure for religious interests. Importantly, the organizations all have significant ties to conservative Christian organizations and actors, a significant base within the Republican Party (Hensley and McCartney 2023; Hollis-Brusky and Wilson 2020). They also have a record of consistent and successful litigation before the Supreme Court. Furthermore, the organizations have close ties to conservative justices, suggesting that they are an effective means to communicate elite policy preferences to the justices (Canellos and Gerstein 2022). As a means to bring cases to the Court, communicate strategic messages, and frame the language of potential decisions in their briefs and oral arguments, the importance of these organizations should not be understated.

These lobbying groups represent part of a broader strategy by Republican partisans to utilize the Supreme Court and religious liberty as a campaign issue, an issue that Democrats did not take as seriously until seeing the effects of a right-leaning judiciary (Chemerinsky 2021). The network was supported by a variety of new law schools that trained "mission-oriented" lawyers and supported organizations and legal clinics in favor of religious accommodationism (Hollis-Brusky and Wilson 2020). Justice Barrett's alma mater and employer previous to her elevation as a Supreme Court justice is cited by scholars as one of the institutions supporting a push for religious liberty in the federal judiciary (Hollis-Brusky and Wilson 2020). Moreover, the formation of these groups corresponds directly with the timing of the *Smith* decision, providing evidence for the hypothesis that these organizations significantly impacted how justices ruled on cases in this area. Scholars have also previously noted the importance of these lobbying campaigns in shaping the nominations of federal justices (e.g. Caldeira and Wright 1998), and our analysis likewise suggests that these groups are one of the key contributors to the ideological shift on the Court.

Court Composition

Sherbert was decided during the Warren Court, viewed as one of the most liberal in American history due to its expansion of civil rights and liberties as well as an increasing use of elevated judicial scrutiny (Ely 1981). Although the earlier days of the Warren Court included justices who were more conservative, as the Court moved

towards the *Sherbert* decision, many of the justices could be quantitatively classified as moderate or liberal by their Martin-Quinn scores.[6] Importantly, during the *Sherbert* era, the schism between liberal and conservative justices on the issue had not become completely apparent. We do not see a well-defined position of the conservative bloc until the 1970s when Chief Justice Burger and Justices Rehnquist and Powell were added to the Court, reflecting the dissenting views in *Sherbert* of Justices White and Harlan II.

Conservative opposition to religious accommodations ironically reached its height after President Reagan appointed new conservative justices to the Court, even as the public was moving to a place of religious prominence in society (as noted in the subsequent section). Justice O'Connor and Scalia, in particular, slowed the rate at which the Court ruled in favor of religious litigants, casting key votes in cases throughout the 1980s and leading into the *Smith* decision. Foreshadowing the *Smith* decision, Justice O'Connor, writing for the majority in *Lyng v. Northwest Indian Cemetery Protective Association*, stated: "however much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires" (*Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 452). Although O'Connor wrote a sharp concurring opinion in *Smith*, the logic for Scalia was nonetheless similar between the two cases.

Following the *Smith* decision, President Clinton had the opportunity to nominate two liberal justices and George W. Bush two conservative justices, including Chief Justice Roberts. Obama's confirmed nominees, Justice Sotomayor and Justice Kagan, in many ways mirrored the Clinton nominees in terms of religious accommodationism. For example, in our dataset, Justice Ginsburg and Justice Sotomayor receive similar scores, while Justice Breyer and Justice Kagan also receive higher, yet still middling religious accommodationist scores. Though early, Biden appointee Justice Jackson seems to follow this trend. All modern liberal justices, though, are reminiscent of conservative justice voting patterns on religious issues in the 1970s and 1980s. In terms of judicial philosophy, liberal justices have even suggested that *Smith* should prevail over RFRA in resolving religious disputes.[7]

After the initial ideological shift, the trend was solidified when President Trump announced that the conservative Federalist Society would be influential in deciding his judicial nominees (Fredrickson and Segall 2020). The selection of Justices Gorsuch, Kavanaugh, and Barrett all followed the mold of new conservatives who were dedicated to issues of religious liberty. Barrett, for example, had become well-known in conservative religious liberty circles after Democratic Senator Feinstein

[6] Per our data, of the nine justices who decided *Sherbert*, a majority were coded as liberal, and the average score was a -0.85.

[7] E.g. see Justice Ginsburg's dissent in *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014) at p. 4. Note that only a few decades earlier, Ginsburg's employer, the American Civil Liberties Union, decried the *Smith* decision (Inazu 2012).

claimed during her Court of Appeals nomination that "the dogma lives loudly within you" (Chaput 2020). Justice Gorsuch, too, was cited by President Trump as a nominee that "evangelicals, Christians will love" and perhaps the Court's "most religiously motivated justice" (Joshi 2017). In short, judicial replacement seemed to solidify the ideological lines that were being drawn in the parties.

In addition to change through replacement, we also see evidence of ideological drift among the justices on religious liberty issues in the aftermath of the *Smith* decision. Justices Scalia and Kennedy both began to decide more frequently in favor of religion, while Justices Breyer and Ginsburg moved into the anti-accommodationist camp (Colombo 2017; Inazu 2012). Although the justices on the Court at the time of *Smith* retained their stances on *Smith* in name, in practice, conservatives adopted the religious targeting standard in *Lukumi* while liberals began balancing religion against other protected classes, especially the rights of LGBTQIA+ individuals. This ideological drift seems to offer support for justices acting strategically, particularly considering changing political norms on the issue.

Public Opinion and the Political Branches

The *Sherbert* era began in the midst of the civil rights movement, when public opinion shifted marginally towards greater acceptance of minority groups in society. Other federal political actors had likewise begun favoring enforcement of civil rights legislation, such as President Eisenhower sending federal troops to facilitate the integration of a high school in Little Rock, Arkansas in 1957. Although religiosity was low in the 1960s, public religion was still held in high regard as a counter to the "godless atheism" of the Soviet Union (Putnam and Campbell 2010). It makes sense, then, that the controlling liberal majority on the Court would want to protect the civil rights of religious groups in society.

After *Sherbert* and the low religiosity of the 1960s, however, we see another significant trend in the "aftershock" of religious revitalization in the U.S., including a rise in church attendance and the growth of the Christian Right (Putnam and Campbell 2010). This led to a substantial misalignment on Free Exercise issues especially between the broader conservative coalition and the conservatives on the Court. The public reaction to the *Smith* decision was swift. On the left, groups like the American Civil Liberties Union came out in protest of *Smith* (Bradley 1991). Coalitions of churches across the theological spectrum likewise opposed *Smith* and sought relief from the U.S. Congress (Laycock 1993). Immediate academic criticism of the case abounded (Gordon III 1991; Kaplan 2000; Laycock 1990; McConnell 1990; but see Marshall 1991). The result was a bipartisan RFRA, passed by Congress in 1993, a clear signal to conservatives that the public and other political branches of government were unpersuaded by the Court's new Free Exercise standard. After

RFRA was ruled unconstitutional by the Court in 1997, Congress again responded by passing the Religious Land Use and Institutionalized Persons Act in 2000, a second rebuke to the Court's conservative wing (Protection of Religious Exercise in Land Use and by Institutionalized Persons, Pub. L. 106-274. 27 July 2000. 42 U.S. Code Chapter 21C.). States, too, passed their own RFRA laws, both before and after the federal RFRA was struck down.[8] The response, as expected (Glendon and Yanes 1991), seems to have been effectively communicated to the Justices, as they unanimously ruled in favor of religious liberty in *Lukumi* in 1993. Even though *Lukumi* did not publicly overrule *Smith*, it did so tacitly, giving conservatives a new route to respond to the public's demand (and, more specifically, their political coalition's demand) for more protection for religious liberty. The result was general ideological agreement on religious liberty cases for nearly two decades.

With the *Martinez* case in 2010, liberal justices began to shift away from upholding accommodations for religious groups. The case was decided during a time of rising polarization and heightened culture wars as President Obama ushered in an era of progressive change on issues like LGBTQIA+ rights, reproductive healthcare, and anti-discrimination and public accommodation laws that became even more central to the liberal agenda (Reyes 2011). Even as religious freedom was traditionally regarded as a civil liberties issue, in many aspects it became an antiquated liberal cause of the past standing in the way of a new form of progressivism. Among conservatives, religious freedom became an intensified cause to combat what they saw as a fundamentally changing America.

This was due in part to shifting party coalitions, leading to changes in both the public and their elected officials. The Republican Party solidified support among Evangelical Christians, and white Roman Catholics moved further to the right on the basis of culture wars issues like abortion, same-sex marriage, and transgender rights (Castle 2019). On the other hand, seculars became the largest religious group in the Democratic Party (Brockway 2018). Playing to these new party coalitions, especially in the way of judicial politics, became a norm for the elected branches in judicial nominees, hearings, and the evolution of litmus tests on issues related to sexuality and religion (Cameron and Kastellec 2023).

Moreover, this was coupled with a significantly changing religious landscape in the U.S. The nonreligious share of the population has grown significantly, perhaps due in part to politics in religious organizations (Brockway 2018; Campbell et al. 2020; Hafner and Audette 2023; Putnam and Campbell 2010). Naturally, strategic Democratic actors attempt to cater to the issue demands of their new, more secular political elites, while Republicans, who must capture an increasingly isolated

[8] Using our dataset, conservative justices (defined as having a Martin-Quinn score above 0) who have served under the existence of at least one state RFRA have a strongly correlated religious accommodationism score with the number of state RFRAs passed by the end of their term (r=0.71). This suggests that state RFRAs did indeed serve as a cue to conservative justices.

religious base, attempt to win them over with appeals to religious bias and liberty issues. Although perhaps not reflective of public opinion as a whole, the justices and the elected officials who nominate and confirm them seem to be responding to the opinions of their partisan bases, as represented by the lobbying efforts of their associated legal organizations.

Conclusion

This analysis ultimately reveals several important features of the Supreme Court and its Free Exercise jurisprudence. First, we present quantitative evidence that, indeed, the ideological coalitions around religious accommodations shifted from *Sherbert* to the aftermath of the *Smith* decision. Conservative Justices Alito, Barrett, Gorsuch, Kavanaugh mirror Justices Douglas and Warren from decades earlier. Liberal Justices Kagan and Ginsburg mirror Justices Burger and White, while no liberal justice comes near Justice Rehnquist in opposition to religious accommodations. For an institution that exhibits little change in the ideological groupings of justices on most issues, let alone over the span of just a few decades, this presents a fascinating puzzle.

Second, our historical qualitative analysis has a latent driving force: changes in the opinions of partisan and legal activists. Religious accommodationism is not an issue where the Court led public opinion (e.g. Rosenberg 2008), but one where new social group alignments and partisan politics led the Court. It did so in various ways. Public opinion was communicated to strategic elites by new conservative Christian legal lobbying organizations, through the elected branches of government, and directly through RFRA legislation at the federal and state level. Partisan opinion also facilitated both ideological drift of important coalitional justices, as well as changes in Court composition through judicial replacement. To maintain legitimacy on the issue with the public and with the elected branches, justices developed new ways to interpret *Smith*, like the *Lukumi* religious targeting standard and a balancing test with the rights of other cultural minorities. Amidst the many different factors that may impact strategic actors, at the end of the day, our analysis suggests that judicial lobbying is fundamental to changes on this issue. Although our primary goal is not to weigh in on debates over models of judicial decision making, the results seem to provide additional support for those who would propose a realist model of decision making for this area of jurisprudence.

Third, it is notable that changes in the justices' decisions track external developments in partisan coalitions and issue agendas, namely, that justices polarized on this issue in an asymmetric fashion (Burge 2019). We find evidence that conservative justices moved quicker and more radically in their approach to religious liberty issues, due in part to the immediate backlash in their partisan coalition against *Smith*. Meanwhile, as LGBTQIA+ issues became more commonly accepted in the Democratic Party,

liberal justices began to respond more directly to those policy concerns instead of religious liberty issues, which have begun to decline as the non-religious make up a larger share of the Democratic coalition. Given this widening religious gap, we can expect the Court's polarization on this issue to continue for the foreseeable future.

The development of the Court's Free Exercise jurisprudence also suggests that it is ripe for change, especially as several conservative justices have outright called for abandonment of the *Smith* standard, while no justice defended *Smith* in its most recent rigorous test in *Fulton* (Lingo and Schietzelt 2022). As the Court has done recently in its Establishment Clause jurisprudence (e.g. *American Legion v. American Humanist Association*, 588 U.S. __), it is not a stretch of the imagination to believe that the Court will revisit *Smith*, particularly if conservatives must uphold religious liberty absent evidence of religious targeting.[9] This leaves room for a new group of conservative justices to chart the path forward – or backward, if *Sherbert* is reinstated – on this issue. In consort with changes on abortion regulation, other potential substantive due process rulings, and other issue areas, the newly emboldened conservative majority on the Court may fundamentally reshape American law, leading to greater polarization and potential (deleterious) effects for the legitimacy of the Court (Porat 2023). Although there is historic overlap between the ideological coalitions on the issue of religious liberty, that overlap is largely gone, and we should not expect any historic agreement to lessen contemporary polarization on religious accommodations or within the Court as a whole.

References

American Legion v. American Humanist Association, 588 U.S. __ (2019)

Audette, P. Andre; Kwawa, Maryann, and Christopher L. Weaver. 2018. "Reconciling the God and Gender Gaps: The Influence of Women in Church Politics." *Politics, Groups, and Identities* 6, no. 4: 682-701. https://doi.org/10.1080/21565503.2016.1273121

Audette, P. Andre, and Christopher L. Weaver. 2015. "Faith in the Court: Religious Out-Groups and the Perceived Legitimacy of Judicial Decisions." *Law & Society Review* 49, no. 4: 999-1022. https://doi.org/10.1111/lasr.12167

Bailey, A. Michael, and Forrest Maltzman. 2011. *The Constrained Court: Law, Politics, and the Decisions Justices Make*. Princeton: Princeton University Press.

Baine, Kevin. 2020. "Is Religious Freedom a Liberal or Conservative Value?" *Washington Post*, https://www.washingtonpost.com/opinions/2020/11/29/religious-freedom-supreme-court-ny-restrictions/

[9] Justice Alito, in *Fulton v. City of Philadelphia*, 593 U.S. __ (2021) at 8, says that the decision "might as well be written on the dissolving paper sold in magic shops" if the City of Philadelphia decided to simply abandon its exemption power that led to the targeting claim. See also Lund (2022).

Barclay, H. Stephanie. 2020. "The Historical Origins of Judicial Religious Exemptions." *Notre Dame Law Review* 96, no. 1: 55-124.

Baum, Lawrence. 1997. *The Puzzle of Judicial Behavior*. Ann Arbor: University of Michigan Press.

Bennett, Daniel. 2017. *Defending Faith: The Politics of the Christian Conservative Legal Movement*. Lawrence: University of Kansas Press.

Bradley, V. Gerard. 1991. "Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism." *Hofstra Law Review* 20, no. 2: 245-319.

Brockway, Mark. 2018. "Home on Sunday, Home on Tuesday? Secular Political Participation in the United States." *Politics and Religion* 11, no. 2: 334-363. https://doi.org/10.1017/S175504831700061X

Burge, P. Ryan. 2019. "Asymmetric Polarization is Occurring in American Religion." *Religion in Public*, https://religioninpublic.blog/2019/04/09/asymmetric-polarization-is-occurring-in-american-religion/

Burwell v. Hobby Lobby Stores, 573 U.S. 682 (2014)

Caldeira, A. Gregory, and John R. Wright. 1998. "Lobbying for Justice: Organized Interests, Supreme Court Nominations, and the United States Senate." *American Journal of Political Science* 42, no. 2: 499-523. https://doi.org/10.2307/2991768

Cameron, M. Charles, and Jonathan P. Kastellec. 2023. *Making the Supreme Court: The Politics of Appointments, 1930-2020*. New York: Oxford University Press.

Campbell, E. David; Layman, C. Geoffrey, and John C. Green. 2020. *Secular Surge: A New Fault Line in American Politics*. New York: Cambridge University Press.

Canellos, S. Peter, and Josh Gerstein. 2022. "'Operation Higher Court': Inside the Religious Right's Efforts to Wine and Dine Supreme Court Justices." *Politico*. https://www.politico.com/news/2022/07/08/religious-right-supreme-court-00044739

Castle, Jeremiah. 2018. "New Fronts in the Culture Wars? Religion, Partisanship, and Polarization on Religious Liberty and Transgender Rights in the United States." *American Politics Research* 47, no. 3: 650-679. https://doi.org/10.1177/1532673X18818169

Chaput, J. Charles. 2020. "When the Dogma Lives Loudly." *First Things*. https://www.firstthings.com/web-exclusives/2020/09/when-the-dogma-lives-loudly

Chavez, Margaret Smiley. 2021. "Employing *Smith* to Prevent a Constitutional Right to Discriminate Based on Faith: Why the Supreme Court Should Affirm the Third Circuit in *Fulton v. City of Philadelphia*." *American University Law Review* 70, no. 3: 1165-1216.

Chemerinsky, Erwin. 2021. "What Mitch McConnell Got Right." *New York Times*. https://www.nytimes.com/2021/02/11/opinion/biden-senate-judges-courts.html

Claassen, L. Ryan. 2015. *Godless Democrats and Pious Republicans? Party Activists, Party Capture, and the "God Gap."* New York: Cambridge University Press.

Clark, S. Tom. 2009. "The Separation of Powers, Court Curbing, and Judicial Legitimacy." *American Journal of Political Science* 53, no. 4: 971-989. https://doi.org/10.1111/j.1540-5907.2009.00411.x

Colombo, J. Ronald. 2017. "The Religious Liberty Jurisprudence of Justice Antonin Scalia." *Hofstra Law Review* 46, no. 2: 433-443.

Cross, B. Frank, and Blake J. Nelson. 2001. "Strategic Institutional Effects on Supreme Court Decisionmaking." *Northwestern University Law Review* 95, no. 4: 1437-1494.

Dahl, A. Robert. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6: 279-295.

Dreisbach, L. Daniel. 2017. *Reading the Bible with the Founding Fathers*. New York: Oxford University Press.

Ely, John Hart. 1981. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge: Harvard University Press.

Employment Division v. Smith, 494 U.S. 872 (1990)

Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*, Washington D.C.: CQ Press.

Epstein, Lee, and Eric A. Posner. 2021. "The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait." *Supreme Court Review*: 315-347. https://doi.org/10.1086/719348

Epstein, Lee; Martin, D. Andrew; Quinn, M. Kevin, and Jeffrey A. Segal. 2007. "Ideological Drift Among Supreme Court Justices: Who, When, and How Important?" *Northwestern University Law Review Colloquy* 101, no. 4: 1483-1541.

Formicola, Jo Renee; Segers, C. Mary, and Paul Weber. 2003. *Faith Based Initiatives and the Bush Administration: The Good, the Bad, and the Ugly*. Lanham: Rowman & Littlefield.

Fredrickson, Caroline, and Eric J. Segall. 2020. "Trump Judges or Federalist Society Judges? Try Both." *The New York Times*. https://www.nytimes.com/2020/05/20/opinion/trump-judges-federalist-society.html

Fulton v. City of Philadelphia, 593 U.S. __ (2021)

Giles, W. Michael; Blackstone, Bethany, and Richard L. Vining Jr. 2008. "The Supreme Court in American Democracy: Unraveling the Linkages between Public Opinion and Judicial Decision Making." *Journal of Politics* 70, no. 2: 293-306. https://doi.org/10.1017/S0022381608080316

Gillman, Howard. 2001. "Review: What's Law Got to Do with It? Judicial Behavioralists Test the 'Legal Model' of Judicial Decision Making." *Law & Social Inquiry* 26, no. 2: 465-504. https://doi.org/10.1111/j.1747-4469.2001.tb00185.x

Gillman, Howard, and Erwin Chemerinsky. 2020. *The Religion Clauses: The Case for Separating Church and State*. New York: Oxford University Press.

Girgis, M. Gabrielle. 2025. "Taming Strict Scrutiny." *Florida Law Review* 77, no. 3:

849-908.
Glendon, Mary Ann, and Raul F. Yanes. 1991. "Structural Free Exercise." *Michigan Law Review* 90, no. 3: 477-550.
Gordon III, D. James. 1991. "Free Exercise on the Mountaintop." *California Law Review* 79, no. 1: 91-118.
Green, K. Steven. 2022. *Separating Church and State: A History*. Ithaca: Cornell University Press.
Hafner, R. Shay, and Andre P. Audette. 2023. "The Politics of Church Shopping." *Politics and Religion* 16, no. 1: 73-89. https://doi.org/10.1017/S1755048322000384
Hall, E.K. Matthew. 2018. *What Justices Want: Goals and Personality on the U.S. Supreme Court*. New York: Cambridge University Press.
Hamburger, Philip. 2002. *Separation of Church and State*. Cambridge: Harvard University Press.
Hensley, B. Jonathan, and Paul T. McCartney. 2023. "Amicus Curiae briefs and the Competing Legal Agendas of White Protestants in the United States, 1969-2020." *Politics and Religion* 16, no. 2: 219-247. https://doi.org/10.1017/S1755048322000244
Hollis-Brusky, Amanda, and Joshua C. Wilson. 2020. *Separate But Faithful: The Christian Right's Radical Struggle to Transform Law and Legal Culture*. New York: Oxford University Press.
Inazu, D. John. 2012. "Justice Ginsburg and Religious Liberty." *Hastings Law Journal* 63, no. 5: 1213-1242.
Joshi, Yuvraj. 2017. "Gorsuch May Be Supreme Court's Most Religiously Motivated Justice." *NBC News*. https://www.nbcnews.com/feature/nbc-out/opinion-gorsuch-may-be-supreme-court-s-most-religiously-motivated-n732726
Kaplan, M. Carol. 2000. "The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith." *New York University Law Review* 75, no. 4: 1045-1084.
Laycock, Douglas. 2009. "The Religious Exemption Debate." *Rutgers Journal of Law & Religion* 11: 139-176.
Laycock, Douglas. 1993. "The Religious Freedom Restoration Act." *BYU Law Review*, Vol. 1993, No. 1: 221-258..
Laycock, Douglas. 1990. "The Remnants of Free Exercise." *The Supreme Court Review*, 1990: 1-68.
Lewis, R. Andrew. 2017. *The Rights Turn in Conservative Christian Politics: How Abortion Transformed the Culture Wars*, New York: Cambridge University Press.
Lingo, J. Bradley, and Michael G. Schietzelt. 2022. "A Second-Class First Amendment Right? Text, Structure, History, and Free Exercise After *Fulton*." *Wake Forest Law Review* 57, no. 3: 711-775.
Lund, C. Christopher. 2017. "Religion is Special Enough." *Virginia Law Review* 103, no. 3: 481-524.

Lund, C. Christopher. 2022. "Second-Best Free Exercise." *Fordham Law Review* 91, no. 3: 843-876.

Lupu, C. Ira. 1993. "*Employment Division v. Smith* and the Decline of Supreme Court-Centrism." *Brigham Young University Law Review* 1: 259-274.

Lupu, C. Ira. 2015. "*Hobby Lobby* and the Dubious Enterprise of Religious Exemptions." *Harvard Journal of Law and Gender* 38: 35-101.

Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988)

Marshall, P. William. 1991. "In Defense of *Smith* and Free Exercise Revisionism." *University of Chicago Law Review* 58, no. 1: 308-328.

Martin, D. Andrew, and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis* 10: 134-153. https://doi.org/10.1093/pan/10.2.134

Masterpiece Cakeshop v. Colorado Civil Rights Commission, 584 U.S. __ (2018)

McConnell, W. Michael. 1990. "Free Exercise Revisionism and the *Smith* Decision." *University of Chicago Law Review* 57, no. 4: 1109-1153.

McCrossin, G. Michael. 1980. "General Laws, Neutral Principles, and the Free Exercise Clause." *Vanderbilt Law Review* 33, no. 1: 149-174.

Mishler, William, and Reginald S. Sheehan. 1993. "The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions." *American Political Science Review* 87, no. 1: 87-101. https://doi.org/10.2307/2938958

Muñoz, Vincent Phillip. 2009. *God and the Founders: Madison, Washington, and Jefferson*. New York: Cambridge University Press.

Muñoz, Vincent Phillip. 2016. "If Religious Liberty Does Not Mean Exemptions, What Might It Mean? The Founders' Constitutionalism of the Inalienable Rights of Religious Liberty." *Notre Dame Law Review* 91, no. 4: 1387-1417.

Muñoz, Vincent Phillip. 2022. *Religious Liberty and the American Founding: Natural Rights and the Original Meanings of the First Amendment Clauses*. Chicago: University of Chicago Press.

Norpoth, Helmut, Segal, A. Jeffrey, Mishler, William, and Reginald S. Sheehan. 1994. "Popular Influence on Supreme Court Decisions." *American Political Science Review* 88, no. 3: 711-724. https://doi.org/10.2307/2944805

Oleske Jr., M. James. 2015. "The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages." *Harvard Civil Rights-Civil Liberties Law Review* 50: 99-152.

Oyez, Cases. 2025. "Free Exercise of Religion". https://www.oyez.org/issues/339

Parsell, G. Stuart. 1993. "Revitalization of the Free Exercise of Religion under State Constitutions: A Response to Employment Division v. Smith." *Notre Dame Law Review* 68, no. 4: 747-773.

Paulsen, Michael Stokes. 2015. "Justice Scalia's Worst Opinion." *Public Discourse*. https://www.thepublicdiscourse.com/2015/04/14844/

Porat, Iddo. 2023. "Court Polarization: A Comparative Perspective." *Hastings International and Comparative Law Review* 46, no. 1: 3-37.

Protection of Religious Exercise in Land Use and by Institutionalized Persons, Pub. L. 106-274. 27 July 2000. 42 U.S. Code Chapter 21C.

Putnam, D. Robert, and David E. Campbell. 2010. *American Grace: How Religion Divides and Unites Us*. New York: Simon & Schuster.

Religious Freedom Restoration Act of 1993, Pub L. 103-141. 16 Nov. 1993. 107 Stat. 1488.

Reyes, Rene. 2011. "The Fading Free Exercise Clause." *William & Mary Bill of Rights Journal* 19, no. 3: 725-804.

Rosenberg, N. Gerald. 2008. *The Hollow Hope: Can Courts Bring About Social Change?* (2nd Ed.). Chicago: University of Chicago Press.

Schwartzman, Micah. 2012. "What if Religion Is Not Special?" *University of Chicago Law Review* 79, no. 4: 1351-1427.

Segal, A. Jeffrey, and Harold J. Spaeth. 1996. "The Influence of Stare Decisis on the Votes of United States Supreme Court Justices." *American Journal of Political Science* 40, no. 4: 971-1003. https://doi.org/10.2307/2111738

Segal, A. Jeffrey, and Harold J. Spaeth. 2012 *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press.

Sehat, David. 2011. *The Myth of American Religious Freedom*. New York: Oxford University Press.

Sherbert v. Verner, 374 U.S. 398 (1963)

Tushnet, Mark. 2020. *Taking Back the Constitution: Activist Judges and the Next Age of American Law*. New Haven: Yale University Press.

Underkuffler, Laura. 1995. "The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory." *William & Mary Law Review* 36, no. 3: 837-988.

Zauzmer, Julie. 2018. "Top Senate Democrats Introduce Bill to Amend Religious Freedom Restoration Act." *Washington Post*. https://www.washingtonpost.com/news/acts-of-faith/wp/2018/05/22/top-senate-democrats-introduce-bill-to-amend-religious-freedom-restoration-act/

Метју Р. Датлоф и Андре П. Одет

Конверзија суда: идеолошки преокрет у случајевима верских слобода

Сажетак: Током времена, Врховни суд Сједињених Америчких Држава се колебао између акомодационистичког и сепарационистичког приступа у случајевима који се тичу верских слобода. Под Бергеровим судом, либералне судије су углавном подржавале верске изузетке и примену строгог надзора над државним мерама које ограничавају верско испољавање. Идеолошка подела се додатно продубила случајем Employment Division v. Smith из 1990. године, у коме је конзервативно крило суда одбацило верски изузетак од неутралних закона опште примене. Од тада, међутим, идеолошке линије су се преокренуле, тако да конзервативни покрети и судије углавном подржавају верске изузетке у случајевима који се односе на покриће контрацепције у здравственом осигурању, избор школе и јавно пружање услуга припадницима LGBTQIA+ заједнице, док либералне судије чешће подржавају поступке државе. Литература још увек није објаснила овај идеолошки преокрет, који се догодио током свега неколико деценија. Ми уводимо нови квантитативни скуп података о одлукама судија у случајевима који се тичу Слободе верског испољавања и затим користимо квалитативни историјски приступ да бисмо испитали овај преокрет. Наше истраживање показује да су се два идеолошка блока померала несиметрично: конзервативци средином деведесетих година, а либерали након тога. Наша анализа сугерише да је то првенствено последица интензивног лобирања нових правних организација, промене партијских коалиција и политичког одговора изабраних грана власти.

Кључне речи: верске слободе, Први амандман, Врховни суд, судска политика