LEE EPSTEIN
ERIC A. POSNER

THE ROBERTS COURT AND THE TRANSFORMATION OF CONSTITUTIONAL PROTECTIONS FOR RELIGION: A STATISTICAL PORTRAIT

The Roberts Court has handed down a number of decisions that suggest a new approach to the Court's religion jurisprudence. The religion clauses of the First Amendment were once understood to provide modest but meaningful protection for non-mainstream religions from discrimination by governments that favored mainstream Christian organizations, practices, or values. On the other hand, the religion clauses provided little protection for mainstream religions—indeed, under the Establishment Clause, mainstream religion's influence over government policy was restricted. Under the Roberts Court, however, the religion clauses have increasingly been used to protect mainstream

Lee Epstein is the Ethan A.H. Shepley Distinguished University Professor at Washington University in St. Louis; Eric Posner is the Kirkland & Ellis Distinguished Service Professor of Law and the Arthur and Esther Kane Research Chair at the University of Chicago.

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Christian values or organizations that are restricted by secular laws or liberal constitutional protections. Or so it has been argued. Some legal scholars have denounced this apparent turn to the right, while others see only small changes that incrementally move the jurisprudence in a direction more faithful to constitutional values.[1]

It is always hazardous to claim a "transformation" in the law, especially *in medias res*. Ideological or jurisprudential disagreements can be lost in the complexities of the facts. The Justices responsible for the change in the law characteristically claim to be following precedent. Tiny doctrinal innovations can lay the groundwork for a major revision in the law, while the announcement of a new direction may later be undercut by retrenchment. To help move the debate forward, we offer a quantitative assessment of the Roberts Court's religion decisions, based on the assumption that a consistent pattern of case outcomes or votes helps show that doctrinal disagreements are meaningful rather than mere rhetoric. And, as we will show, that has indeed been the case here.

The conventional historical account of the Supreme Court's religion jurisprudence recognizes two major shifts—leftward in the 1960s and 1970s, and then rightward beginning in the 1990s. For the Free Exercise Clause, we may date the leftward turn to 1963. Before then, the Court expressed little sympathy for religious dissenters who violated statutory law.[2] In that year, in *Sherbert v. Verner*, the Supreme Court held that a state could not constitutionally deny unemployment compensation to a Seventh-Day Adventist who refused to work on Saturdays because of her religious beliefs.[3] The Court applied strict scrutiny and held that the law placed an undue burden on the plaintiff. For the next few decades, the Free Exercise Clause was largely used to protect religious minorities—Christian or otherwise—who were burdened by general laws that advanced secular or mainstream Christian

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[1] *See* Erwin Chemerinsky & Howard Gillman, *Symposium: The Unfolding Revolution In the Jurisprudence of the Religion Clauses*, SCOTUSBLOG (Aug. 6, 2020), https://perma.cc/43BS-KQAS; Richard Garnett, *Symposium: Religious Freedom and the Roberts Court's Doctrinal Clean-Up*, SCOTUSBLOG (Aug. 7, 2020), https://perma.cc/7P5E-HP4Z; Kim Colby, *Symposium: Free Exercise, RFRA and the Need for a Constitutional Safety Net*, SCOTUSBLOG (Aug. 10, 2020), https://perma.cc/ZB6P-S9FV; Mark Rienzi, *Symposium: Amid Polarization and Chaos, the Court Charts a Path Toward Peaceful Pluralism*, SCOTUSBLOG (Aug. 5, 2020), https://perma.cc/A3N2-ALP2; Leslie Griffin, *Symposium: Religions' Wins are Losses*, SCOTUSBLOG (Aug. 4, 2020), https://perma.cc/Q2V7-DX2S.

[2] *See, e.g.*, Minersville School District v. Gobitis, 310 U.S. 586 (1940).

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

values (or both).[4] While "religion" prevailed in these cases, the cases reflected a liberal sensibility—the notion that the Court's job is to protect vulnerable minorities from indifferent or hostile majorities.

Meanwhile, the Court's interpretation of the Establishment Clause also drifted leftward. In a series of cases in the 1970s and 1980s, the Court struck down statutes that provided aid to religious schools even when that aid was given to comparable private secular schools as well. The turning point was the 1971 case of *Lemon v. Kurtzman*, in which the Court struck down a statute that funded the salaries of teachers who taught secular subjects in religious schools even though the statute also applied to teachers in secular private schools.[5] The Court worried that these types of subsidies would entangle the government in religious organizations. The Court also took a hard line against state-mandated or encouraged prayer in public schools.[6] And the Court developed skepticism toward public religious displays, and blocked them when they suggested government endorsement of religious values.[7]

The rightward shift begins in the 1990s but has flowered only in the last decade or so. For Free Exercise, the turning point was *Employment Division v. Smith*.[8] In that case, the Court upheld a state government's refusal to award unemployment benefits to individuals who had been fired for using peyote, even when they did so for purely religious purposes. The decision, by Justice Scalia, produced an ideologically jumbled split between the Justices, and has sometimes been regarded as liberal. By holding that facially neutral laws are valid even if they incidentally burden religions, the decision seemed to take a strong line against constitutionally compelled religious accommodation. Moreover, the decision provoked outrage on the right, and led to the enactment of the Religious Freedom Restoration Act (RFRA), which revived the *Sherbert* test.[9] In the context of the time, the decision pushed Free Exercise jurisprudence to the right. In most jurisdictions,

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[4] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[5] Lemon v. Kurtzman, 403 U.S. 602 (1971); *see also* Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

[6] Engel v. Vitale, 370 U.S. 421 (1962); Wallace v. Jaffree, 472 U.S. 38 (1985); School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 (1963).

[7] County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989).

[8] 494 U.S. 872 (1990).

[9] 374 U.S. 398; Whitney K. Novak, *The Religious Freedom Restoration Act: A Primer*, Cong. Rsch. Serv. (Apr. 30, 2020), https://perma.cc/7M5F-PT94.

the majority is Christian and will be inclined to pass laws that respect Christian values, dogma, and practices, like Sunday closing laws. *Sherbert*, a characteristic Warren Court decision, used the Free Exercise Clause to protect religious minorities. But under the actual facts of the case in *Smith*, it was a minority religion that was burdened. In her concurrence in *Smith*, Justice O'Connor called the majority opinion a repudiation of the principle that the Free Exercise Clause protects the rights of religious minorities "whose religious practices are not shared by the majority and may be viewed with hostility."[10] And, indeed, opposition to *Smith*, and support for RFRA, came from the left as well as from the right for just this reason.

The next step was to push doctrine beyond formal neutrality and into the realm of accommodation. In two RFRA cases decided roughly two decades after *Smith*, *Burwell v. Hobby Lobby*[11] and *Zubick v. Burwell*,[12] the Court held that the contraception mandate in the Affordable Care Act violated the rights of a corporation owned by a religious family and some religious nonprofits. These were not constitutional cases, but they anticipated *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.[13] That case involved a baker who refused, on religious grounds, to sell a wedding cake to a same-sex couple. The Court held narrowly that the baker's Free Exercise rights were violated by the state commission that enforced its anti-discrimination law, on the grounds that its ruling exhibited animus and showed inconsistency with other rulings.

The Court has also backpedaled on its Establishment Clause jurisprudence. In a series of cases beginning in the late 1990s, it allowed the government to offer subsidies to religious schools as long as the subsidies were offered on a nondiscriminatory basis to secular schools as well.[14] In a major turnabout, the Roberts Court struck down a Montana statute that made tax subsidies available to people who donated money to secular schools but not religious schools.[15] While the majority opinion was based on the Free Exercise Clause rather than the

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[10] *Smith*, 494 U.S. at 902 (O'Connor, J., concurring).

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

[12] Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016).

[13] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018).

[14] Agostini v. Felton, 521 U.S. 203 (1997); Mitchell v. Helms, 530 U.S. 793 (2000); Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[15] Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020).

Establishment Clause (Justices Thomas and Gorsuch would have relied on the Establishment Clause), the effect was to reverse the earlier Establishment Clause jurisprudence that effectively forced states to deny religious schools funds that they gave to secular schools. Less dramatically, the Court has also backed away from earlier prohibitions on sectarian (as opposed to "neutral") prayer in government settings where prayer is permitted,[16] and became more tolerant of public religious displays as well.[17]

In 2020, the Court's emerging view on religion was put to the test. In the midst of the Covid-19 pandemic, religious organizations around the country challenged state lockdown orders that blocked or limited congregation in religious buildings as well as in movie theaters, lecture halls, and other secular venues. The plaintiffs argued that these lockdowns violated the Free Exercise Clause because, in virtually every case, the lockdown order put fewer restrictions on other types of secular congregation—for example, in grocery stores, and even liquor stores and casinos. The lower courts exhibited a remarkable partisan divide. Eighty-two percent of Trump-appointed judges ruled in favor of religious organizations who challenged lockdown orders, while 100% of Democrat-appointed judges ruled for the government.[18] (Other Republican-appointed judges split.) Meanwhile, other constitutional challenges—based on freedom of speech, the right to association, due process, and the right to property—enjoyed significantly less success in the federal courts.[19]

Four of the Free Exercise challenges reached the Supreme Court in 2020 and 2021. In the first two cases, the Supreme Court ruled against the religious organizations. The majority, consisting of Roberts and the four liberals, held that lockdown orders during a public health emergency did not violate the free exercise rights of religious believers. The four remaining conservatives disagreed.[20] With the death of Ruth Bader Ginsburg, and her replacement with Amy Coney Barrett,

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[16] Town of Greece v. Galloway, 572 U.S. 565 (2014).

[17] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

[18] Zalman Rothschild, *Free Exercise Partisanship*, 107 Cornell L. Rev. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3707248.

[19] Jacob Gershman, *Challenges to Covid-19 Lockdowns Have Been Mostly Losing in Court*, Wall St. J. (Feb. 13, 2021), https://perma.cc/Q3JN-W3S2.

[20] South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020).

the majority flipped. In *Roman Catholic Diocese of Brooklyn v. Cuomo*,[21] the Court ruled that New York's lockdown order violated the Free Exercise Clause. The Court divided along ideological and partisan lines that almost exactly mirrored those of the lower courts—with the three Trump appointees voting for the church, the three Democratic appointees voting for the state, and the non-Trump Republican appointees splitting. In *South Bay United Pentecostal Church v. Newsom*,[22] the Republican justices partially struck down restrictions on church services in California. Justices Alito, Gorsuch, and Thomas would have struck them down completely, while the three liberal Justices would have upheld them.[23]

In light of these decisions, many observers expected that the Supreme Court would strike a blow for religious rights and finally overturn *Smith* in the case of *Fulton v. City of Philadelphia*.[24] A Catholic foster care agency sued the city for refusing to contract with it unless it agreed to place children with same-sex parents, arguing that the City's nondiscrimination policy violated the agency's Free Exercise rights. While it did not overturn *Smith*, the Court held in favor of the agency on narrow grounds—essentially that because the City offered an exemption to the nondiscrimination rule, the law was not generally applicable and *Smith* did not apply. The Court held that, in these circumstances, the City's refusal to extend the exemption to the agency placed an excessive burden on its religious exercise since the agency sought only to act consistently with its religious beliefs, and not to impose them on others. Justices Alito, Gorsuch, and Thomas made clear in concurrences that they believed that *Smith* should be overruled. Justice Barrett wrote a concurrence in which she said that "the textual and structural arguments against *Smith* are more compelling [than the historical record, which was mostly ambiguous],"[25] but that it was premature to overturn *Smith*. Justices Kavanaugh and Breyer joined this opinion, except that Breyer did not concur with the first paragraph from which that quotation was taken. Thus, it is clear, consistent with the earlier cases, that the Court is likely to further expand

[21] Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).

[22] South Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021).

[23] *See also* Tandon v. Newsom, 141 S. Ct. 1294 (2021).

[24] Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

[25] *Id.* at 1882.

religious rights by overturning *Smith*—with three Justices strongly in favor, and two Justices leaning in that direction.

Our goal in this article is to supplement the doctrinal scholarship with an empirical accounting. First, we paint a statistical picture of the doctrinal development. We show that from a statistical standpoint, the Roberts Court represents a sharp break from earlier Supreme Court religion jurisprudence. Second, we ask why this doctrinal change has taken place. As we show, a large part of the answer is the appointment by Republican presidents of Supreme Court Justices who favor religious rights and liberties.

While our empirical study of the Roberts Court and religion is novel, we do not write on a blank slate. The judicial behavior literature has established that judges—including Supreme Court Justices and lower-court judges—frequently decide cases in a way that reflects factors that lie outside legal doctrine. The most common type of study uses the judge's "ideology" as the independent variable of interest, and her decision or vote in a case as the dependent variable. Ideology typically means liberal or conservative, based on the party of the appointing president, the configuration of relevant ideological positions of the president and relevant senators, the judge's own party, the ideological valence of the judge's decisions in earlier cases, the judge's political giving before she ascended the bench, and so on.

But as numerous researchers have pointed out, judges' ideological or policy dispositions are more complex than merely conservative or liberal. Numerous studies have found that a judge's religious affiliation is correlated with voting outcomes, usually in predicted directions—with religious judges usually being more pro-religion than nonreligious judges, and judges of various religions taking positions that are consistent with the theological or institutional claims of their faith. Closest to our work are Blake and Wasserman-Hardy.[26] Controlling for ideology, Blake finds that Catholic Justices in cases from 1953 to 2007 form a distinctive voting bloc. For example, they vote more conservatively on abortion cases and more liberally on death penalty cases than other Justices—more consistent with Catholic theological commitments than with either of the two main ideological perspectives in

[26] William Blake, *God Save This Honorable Court: Religion as a Source of Judicial Policy Preferences*, 65 Pol. Rsch. Q. 814 (2012); Lewis Wasserman & James Hardy, *U.S. Supreme Court Justices' Religious and Party Affiliation, Case-Level Factors, Decisional Era and Voting in Establishment Clause Disputes Involving Public Education: 1947–2012*, 2 Brit. J. Am. Legal Stud. 111 (2013).

the United States. With respect to the religion clauses, Catholic Justices vote more conservatively in Establishment Clause cases (meaning for the government) and more liberally in Free Exercise Clause cases (meaning against the government). Blake argues that the Catholic Justices are hostile to the Establishment Clause because of their support for parochial schools, while they support the Free Exercise Clause in order to protect Catholics from the non-Catholic majority.[27]

Wasserman and Hardy examined 53 Supreme Court decisions involving disputes about public education under the Establishment Clause from 1947 to 2012. Like other researchers, Wasserman and Hardy found that conservative Justices favored religious organizations more than liberal Justices. With respect to religious affiliation, they found that, controlling for ideology, Catholic and Protestant Justices voted similarly until the Reagan era, but since 1981 the Justices have diverged, with Catholic Justices favoring religious organizations more than Protestant Justices—by a factor of twelve.[28] With another eight years of data, we are able to further develop these results into a story of transformation during the Roberts Court.

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[27] Blake, *supra* note 27; *see also* Kevin Walsh, *Addressing Three Problems in Commentary on Catholics at the Supreme Court by Reference to Three Decades of Catholic Bishops' Amicus Briefs*, 26 Stan. L. & Pol'y Rev. 411 (2015) (finding that in the Roberts Court, Catholic Justices voted for outcomes supported by amicus briefs filed by the United States Conference of Catholic Bishops more frequently than non-Catholic Justices did).

[28] Wasserman & Hardy, *supra* note 27. For earlier studies of the U.S. Supreme Court, *see* Stuart S. Nagel, *The Relationship Between the Political and Ethnic Affiliation of Judges, and their Decision-Making*, in Glendon A. Schubert, ed., *Judicial behavior: a reader in theory and research*, (Rand McNally, 1964); S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947–1956 Terms*, 17 Am. J. Pol. Sci. 622 (1973); and Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 Am. Pol. Sci. Rev. 491 (1975). Herbert Kritzer & Mark Richards, *Jurisprudential Regimes and Supreme Court Decisionmaking: The* Lemon *Regime and Establishment Clause Cases*, 37 Law & Soc'y Rev. 827 (2003) found that *Lemon v. Kurtzman* changed the likelihood that the Court subsequently found in favor of challengers under the Establishment Clause. Various other studies have looked at state courts and federal lower courts, and found similar results. *See* James Brent, *An Agent and Two Principals: U.S. Court of Appeals Responses to* Employment Division, Department of Human Resources v. Smith *and the Religious Freedom Restoration Act*, 27 Am. Pol. Q. 2 (1999); Donald R. Songer & Susan J. Tabrizi, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. Pol. 507, 518–22 (1999); Barbara M. Yarnold, *Did Circuit Court of Appeals Judges Overcome Their Own Religion in Cases Involving Religious Liberties? 1970–1990*, 42 Rev. Religious Rsch. 79 (2000); Gregory C. Sisk, Michael Heise, & Andrew P. Morriss, *Searching for the Soul of Judicial Decision-Making: An Empirical Study of Religious Freedom Decisions*, 65 Ohio St. L. J. 3 (2004); Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. Colo. L. Rev. 1021 (2005); Gregory C. Sisk & Michael Heise, *Ideology 'All the Way Down'? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 Mich. L. Rev. 1201 (2012); Michael Heise & Gregory C. Sisk, *Free Exercise of Religion before the Bench: Empirical Evidence from the Federal Courts*, 88 Notre Dame L. Rev. 1371 (2012).

I. Data

Our dataset includes every Supreme Court case that produced a judicial opinion relating to the Free Exercise or Establishment Clause from the 1953 to the 2020 term, excluding cases that were decided without oral argument.[29] The number of cases is 95, or about 1.4 per term. Figure 1 shows the percentage by Chief Justice era; the number of cases is in parentheses. The religion cases make up 1.3% (95/7,155) of the docket during this period. Religious organizations won almost 60% of the cases. By comparison, during the same period criminal defendants prevailed 42% of the time, and from the 1953 term to the 2020 term, businesses won 44% of the time.[30] Other summary statistics are reported in the Appendix.

To explain case outcomes, we look at the votes of individual Justices. The dataset consists of 841 votes cast by 32 Justices, or 1.3% of votes in all orally argued cases from the 1953 to the 2020 terms. We categorize votes as "pro-religion" if they favor a religious organization or religious outcome—typically (but not always) the plaintiff in a Free Exercise Clause case and the defendant (the state) in an Establishment Clause case.

The religion cases are important. A high percentage of the religion decisions were reported on the front page of the *New York Times* on the day after the Court issued them: 54%.[31] This compares to an average, overall, of 15%. All eleven of the Warren Court's religion cases made the front page. The percentages for the other eras are lower but still much higher than the norm. As for the Roberts Court, nine of its eighteen decisions made the front page.

II. Case Outcomes Over Time

The popular notion that the Roberts Court represents a break in the development of the jurisprudence of the religion clauses is

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[29] The initial data come from the U.S. Supreme Court Database (http://supremecourtdatabase.org).

[30] Lee Epstein, William M. Landes & Richard A. Posner, *When It Comes to Business, the Right and Left Sides of the Court Agree*, 54 Wash. U. J.L. & Pol'y 33 (2017). Data updated by the authors.

[31] This percentage excludes orally argued per curiams, for which we lack a complete set of *New York Times* data. Only one religion-related per curiam was issued between the 1953 and 2020 terms. Coverage on the front page of the *Times* is a common measure of the importance or salience of the Court's decisions. *See* Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience* 44 Am. J. Pol. Sci. 66 (2000).

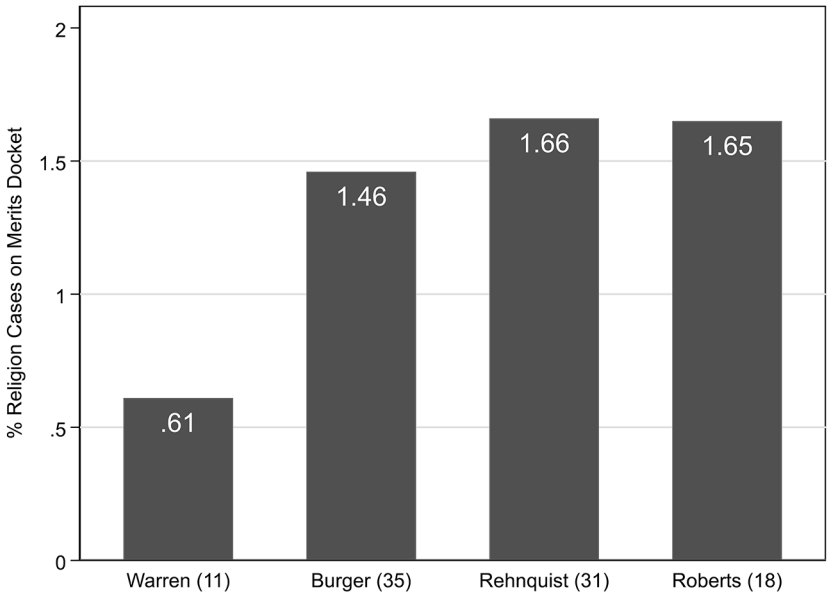

Figure 1. Religion cases as a percentage of all orally argued cases by Chief Justice era, 1953–2020 terms.

amply supported by the data. Figure 2 shows the percentage of pro-religion and anti-religion case outcomes by Chief Justice era.

Over the entire period, the Court ruled in favor of religion 59% of the time. Win rates do not differ significantly for Free Exercise Clause cases (59%) and Establishment Clause cases (57%). Across the Warren, Burger, and Rehnquist Courts the religious side prevailed about half the time, with gradually increasing success. In the Roberts Court, the win rate jumps to 83%. Relatedly, the participation of the Solicitor General in religion cases has increased over time from 9% during the Warren Court to 89% in the Roberts Court. Trump's Solicitors General supported religion in all the cases in which they participated except *Trump v. Hawaii*[32] and *Tanzin v. Tanvir*[33]—cases in which the q1

[32] In Trump v. Hawaii, 138 S. Ct. 2392 (2018), the Court held that President Trump's travel ban did not violate the Establishment Clause. The Court observed that the order did not ban Muslims on its face and disregarded evidence that the ban was motivated by animus or political expediency rather than national security considerations.

[33] In Tanzin v. Tanvir, 141 S. Ct. 486 (2020), the Court held that Muslim plaintiffs who had allegedly been put on the No Fly List after they refused to inform against their religious community had a claim for damages under RFRA.

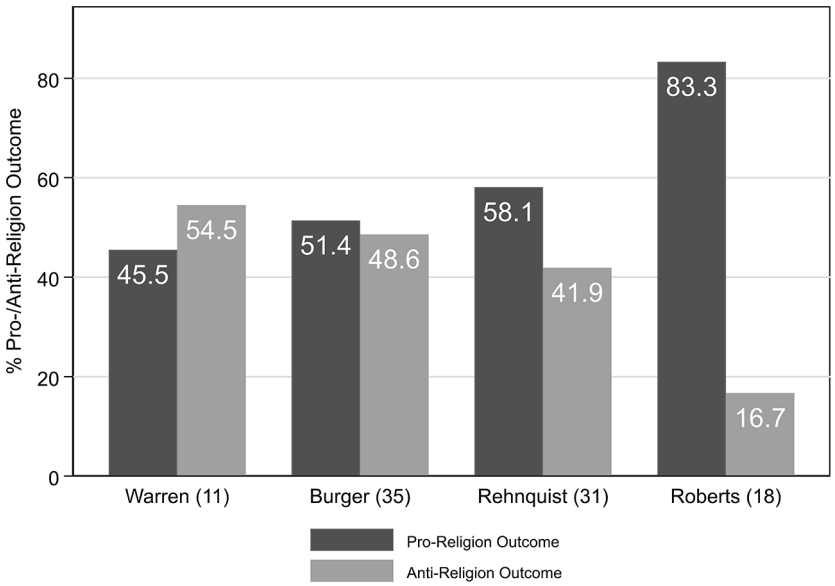

Figure 2. Outcomes in religion cases, by Chief Jusice era, 1953–2020 terms.

plaintiffs were Muslims or challenged a policy that harmed Muslims, and possibly not pro-religion but also not anti-Christian, a point which we must now address.[34]

What does "pro-religion" mean? The Warren Court religion cases were notable for protecting minority or non-mainstream religions, especially dissenting Christian denominations—the Seventh-Day Adventists in *Sherbert*, the Amish in *Wisconsin v. Yoder*.[35] Some observers argue that the Roberts Court has turned this tradition on its head by extending protections to mainstream Christian groups and values.[36] To address this argument, we try two strategies. First, we classify cases based on whether the plaintiff (not the petitioner) is affiliated with a mainstream Christian religion, or not. We find that in the Warren Court, *no* plaintiff was affiliated with a mainstream Christian religion; q2

[34] The Supreme Court usually rules in favor of the petitioner, presumably because the Justices search out lower court cases that they disagree with. And, indeed, the percentage of pro-religion petitioners has increased in parallel with their success in court—from 36% in the Warren Court to 78% in the Roberts Court.

[35] Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

[36] *E.g.*, Chemerinsky & Gillman, *supra* note 2.

thus, all of the pro-religion outcomes benefited minority or dissenting religious groups. This changes as the Court moves right. By the time we reach the Roberts Court, nine mainstream Christian plaintiffs win seven of their cases. Non-mainstream plaintiffs also did well, winning three out of four cases. The loss occurred in *Trump v. Hawaii*.[37] The Supreme Court upheld Trump's travel ban which Hawaii had challenged under the Establishment Clause as well as other constitutional and statutory provisions. Hawaii claimed that the ban discriminated against Muslims. (While Hawaii is obviously not a religious plaintiff, it acted on behalf of religious freedom.)

Second, we redefine the outcome variable as a ruling that is pro-mainstream Christian or not. The pro-mainstream Christian side won 44% of the cases in the Warren Court, 52% in the Burger Court, 57% in the Rehnquist Court, and 80% in the Roberts Court—mirroring the results for the pro-religion variable. Using this outcome variable, *Trump v. Hawaii* is no longer an anomaly but fits the pattern: the outcome is not pro-religion (it harms Muslims) but it advances, or at least is consistent with, a pro-Christian agenda. Still, while the Roberts Court favors mainstream Christian groups and values more than the earlier Courts did, the overall pattern mirrors the result for the merely pro-religion variable. One way to think about this pattern is that the **q3** Roberts Court extended the Warren Court's protections for minority religions so as to encompass majority religions as well. The Roberts Court is pro-mainstream religion, and more pro-mainstream Christian than the Warren Court, but not exclusively pro-mainstream. In a **q4** well-known speech, Justice Alito couched his criticisms of liberal Justices as a defense of religious freedom rather than as a defense of conservative religious values.[38]

III. The Justices

We turn to the most natural explanation for the transformation of religion jurisprudence: changes in the personnel of the Court. Table 1 ranks the Justices by the percentage of pro-religion votes. While the small number of cases for several Justices, including Kavanaugh and Gorsuch, prevents strong conclusions, the pattern is clear. The top

[37] 138 S. Ct. 2392 (2018).

[38] Samuel Alito, *Address by Justice Samuel Alito for the Federalist Society's 2020 National Lawyers Convention*, The Federalist Society (Nov. 12, 2020), archived at https://perma.cc/S9T3-KB5L.

five most pro-religion judges sit on the Roberts Court; they are Republican appointees; they are ideologically conservative (0 is the most conservative); and they are (as we will see) more religious than average (2 is the most devout). More broadly, Republican and conservative Justices are more pro-religion than other Justices. And the Roberts Court is obviously the most polarized as well as the most pro-religion Court, as Justices Sotomayor and Ginsburg appear at the bottom of the ranking.

Although a substantial overlap exists between pro-religion and pro-mainstream Christian,[39] certain deviations stand out. Kagan and Breyer, both liberal Justices, are relatively high on the list under the pro-religion variable (79% and 65%) but drop significantly for the pro-mainstream Christian variable (54% and 44%) as one would expect. As we will see, this is a pattern for Democratic and liberal Justices. This is because Democratic and liberal Justices often (particularly before the Roberts Court) tended to cast pro-religion votes in cases involving non-mainstream religions.[40] *Trump v. Hawaii* illustrates this pattern. The conservative Justices rejected religion in favor of national security and presidential power—but it was Muslim, not Christian religion. The liberals sided with Muslims, a frequently targeted minority religious group. The pattern then reverses for the pandemic cases. The conservative Justices side with mostly (but not entirely) mainstream Christian organizations (but also Jewish), while the liberals side with government.

To unpack these results, we start by reporting some simple correlations in Table 2.

Neither variable capturing the Office of the Solicitor General (OSG) (or party of the president in office is correlated with pro-religion votes. This may suggest these are highly personal decisions unaffected by the political environment. The remaining variables are statistically significant in these correlations.

A. POLITICAL PARTY

Overall, there is a statistically significant ($p < 0.05$) relationship between voting for religion and political party. This holds regardless of

[39] The correlation between the percentages in Table 1 is 0.80. There is also a 75% overlap in the raw votes (for religion or not) and the votes (pro-Christian mainstream or not) (552/737) (includes Barrett's vote in *Fulton v. City of Philadelphia)*.

[40] The correlation between the percentages in Table 1 for the Democratic appointees is 0.70; it is 0.80 for the Republican appointees.

Table 1
Ranking Justices by Percentage of Pro-religion Votes, 1953–2020 Terms

Justice (Tenure)	% Pro-Religion (*N*)	% Pro-Mainstream Christian (*N*)	Religion	Party of Appointing President	Ideology	Devoutness
Kavanaugh (2018–)	100.0 (6)	83.3 (6)	Catholic	Republican	0.070	3.25
Thomas (1991–)	91.7 (36)	87.1 (31)	Catholic	Republican	0.160	5.00
Roberts (2005–)	88.9 (18)	86.7 (15)	Catholic	Republican	0.120	2.75
Gorsuch (2017–)	88.9 (9)	88.9 (9)	Catholic/Episcopalian	Republican	0.110	3.75
Alito (2006–)	88.2 (17)	86.7 (15)	Catholic	Republican	0.100	3.00
Scalia (1986–2016)	79.5 (39)	85.3 (34)	Catholic	Republican	0.000	4.75
Kagan (2010–)	78.6 (14)	53.8 (13)	Jewish	Democrat	0.730	3.00
Burger (1969–86)	77.1 (35)	67.7 (31)	Presbyterian	Republican	0.115	1.50
Kennedy (1988–2018)	70.3 (37)	71.9 (32)	Catholic	Republican	0.365	3.25
Rehnquist (1972–2005)	69.4 (62)	87.3 (55)	Lutheran	Republican	0.045	3.50
White (1962–93)	66.7 (57)	69.4 (49)	Episcopalian	Democrat	0.500	1.75
Stewart (1958–81)	65.6 (32)	42.3 (26)	Episcopalian	Republican	0.750	2.00
Breyer (1994–)	64.5 (31)	44.4 (27)	Jewish	Democrat	0.475	2.75
Frankfurter (1939–62)	60.0 (5)	60.0 (5)	Jewish	Democrat	0.665	1.25
O'Connor (1981–2006)	57.8 (45)	52.4 (42)	Episcopalian	Republican	0.415	3.75
Powell (1972–87)	51.4 (35)	51.6 (31)	Presbyterian	Republican	0.165	3.25
Goldberg (1962–65)	50.0 (2)	0.0 (2)	Jewish	Democrat	0.750	4.25
Blackmun (1970–94)	49.0 (51)	31.1 (45)	Methodist	Republican	0.115	3.75
Brennan (1956–90)	45.8 (59)	21.2 (52)	Catholic	Republican	1.000	4.50
Warren (1953–69)	45.5 (11)	44.4 (9)	Protestant	Republican	0.750	3.25
Marshall (1967–91)	44.9 (49)	21.4 (42)	Episcopalian	Democrat	1.000	3.25
Harlan (1955–71)	42.9 (14)	58.3 (12)	Presbyterian	Republican	0.875	2.50
Sotomayor (2009–)	41.2 (17)	13.3 (15)	Catholic	Democrat	0.780	1.75

Whittaker (1957–62)	40.0 (5)	80.0 (5)	Methodist	Republican	0.500	2.25
Clark (1949–67)	37.5 (8)	50.0 (8)	Presbyterian	Democrat	0.500	4.00
Souter (1990–2009)	36.8 (19)	18.8 (16)	Episcopalian	Republican	0.325	4.25
Black (1937–71)	35.7 (14)	41.7 (12)	Baptist	Democrat	0.875	1.50
Fortas (1965–69)	33.3 (3)	0.0 (1)	Jewish	Democrat	1.000	2.00
Stevens (1975–2010)	29.3 (58)	21.6 (51)	Protestant	Republican	0.250	1.50
Ginsburg (1993–2020)	23.3 (30)	7.7 (26)	Jewish	Democrat	0.680	2.25
Douglas (1939–75)	22.7 (22)	0.0 (19)	Presbyterian	Democrat	0.730	2.75

Sources: For the Justices' service: https://www.supremecourt.gov/about/members_text.aspx; for the Justices' religion and ideology score: Lee Epstein, et al., The Supreme Court Compendium (7th ed. 2021).

Notes:

1. Five Justices are excluded because they cast zero or one vote in religion cases: Barrett, Burton, Jackson, Minton and Reed.
2. Concerning the Justices' religion:
   - Frankfurter's religious faith was largely agnostic.
   - Gorsuch was raised Catholic but now worships at an Episcopalian church.
   - Thomas was born into a Baptist family but was raised by his grandparents as a Roman Catholic and studied for the Catholic priesthood. In his later adult years, he regularly attended a charismatic Episcopal church. In 1996 Thomas returned to the Roman Catholic Church.
3. Concerning the Justices' political party affiliation: Brennan and Powell were Democrats although appointed by Republican presidents; Frankfurter is sometimes classified as an Independent.
4. The ideology score ranges from 0 (most conservative) to 1 (liberal) and is based on an analysis of newspaper editorials prior to the Justices' confirmation (the Segal-Cover score). *See* Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 Am. Pol. Sci. Rev. 557 (1989).
5. The "Devoutness" scores, developed by the authors, range from 1 (least devout) to 5 (most devout). For more information on the scores, see the "Devoutness" section below.

Table 2
Relationship between Pro-religion Votes and Various Explanatory Variables

Variable	Pro-Religion Votes
*Appointing President's Party	61.1% (Rs) v. 48.8% (Ds)
*Justice's Party	63.6% (Rs) v. 48.6% (Ds)
*Ideology	64.5% (conservative) v. 61.0% (moderate) v. 44.5% (liberal)
*Justice's Religion	71.1% (Catholic) v. 52.0% (Non-Catholic)
*Justice's Devoutness	62.8% (most devout) v. 57.6% (moderate devout) v. 52.2% (least devout)
*Type of Case	66.1% (free exercise) v. 51.5% (establishment)
OSG	55.2% (no participation) v. 59.2% (pro-relig) v. 61.1% (anti-relig)
Party of President in Office	56.7% (Rs) v. 58.7% (Ds)
*USSC Petitioner	61.9% (pro-religion petitioner) v. 51.4% (anti-religion petitioner)
*Case Salience	61.7% (not-salient) v. 53.8% (salient)

Notes: Total number of votes (cast by 32 Justices) = 841. * = statistically significant at $p \leq 0.05$. Case Salience is whether the decision was reported on the front page of the *New York Times* on the day after it was issued. Ideology is based on newspaper editorials (see note 4 in Table 1). For Ideology, all comparisons significant except conservative v. moderate. For Devoutness, only the comparison between the most and least devout is significant.

whether the political party is the Justice's party or the appointing president's party. However, the differences are substantively and statistically significant only for the Roberts Court Justices.[41] In the earlier Courts, the partisan divide did not map as clearly into pro- and anti-religion votes, as Figure 3 shows.

B. IDEOLOGY

We use three measures of ideology: Segal-Cover scores, which are based on newspaper editorials (see note 4 in Table 1); Martin-Quinn term-by-term scores, and Martin-Quinn career average (both derived from analyses of voting patterns).[42] (Table 1 collapses the Segal-Cover score into three categories but in the analyses, we used the raw scores.) Regardless of which we use, logit regressions (clustered on Justice and

[41] For the Burger Court, the difference is statistically significant but only when partisanship is measured as the Justice's party affiliation, not the appointing president's party.

[42] Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 Pol. Analysis 134 (2002).

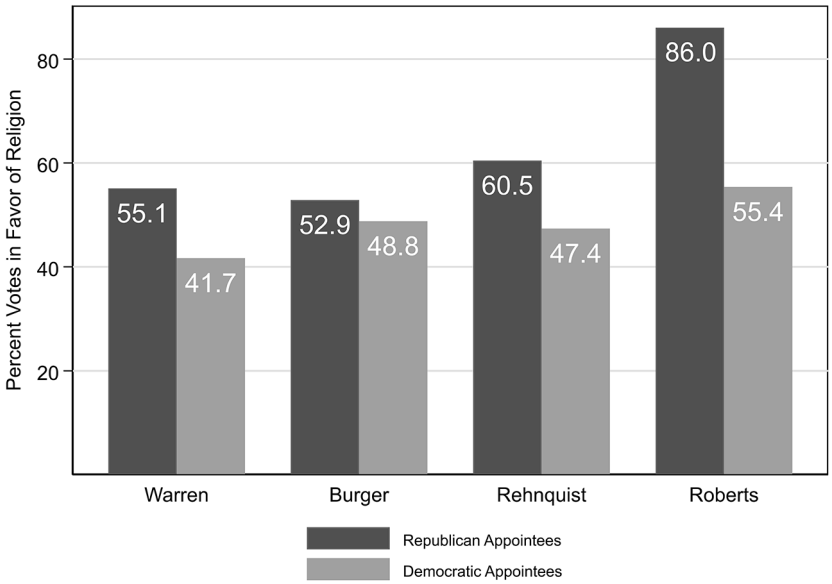

Figure 3. Votes in favor of religion by the party of the Justices' appointing presidents, 1953–2020 terms. Only the gap between the Ds and Rs on the Roberts Court is statistically significant at $p < 0.05$. *N* for the Warren Court = 49 R votes, 48 D votes; Burger Court = 227 R votes, 82 D votes; Rehnquist Court = 220 R votes, 57 D votes; Roberts Court = 93 R votes, 65 D votes.

controlling for whether the petitioner was pro- or anti-religion) show that ideology is a significant predictor of religion votes. Moreover, unlike partisanship the results (mostly) hold for each Court era.[43]

Figure 4 provides an example, using the Segal-Cover scores (which are easy to interpret). It shows the probability of voting in favor of religion by ideology, controlling for the petitioner (and clustered on Justice). Moving from the most conservative justices (e.g., Scalia, Kavanaugh, Alito) to the most liberal (e.g., Marshall, Brennan): the probability of voting for religion declines from about 0.71 to 0.45 when the petitioner is pro-religion. The pattern holds for the Roberts Court with one exception. The conservatives vote in favor of religion nearly all the time; Breyer, a moderate, is in the middle; and liberals Ginsburg and Sotomayor vote against religion most of the time. The exception

[43] The Warren Court is the major exception. No measure of ideology produces a significant result.

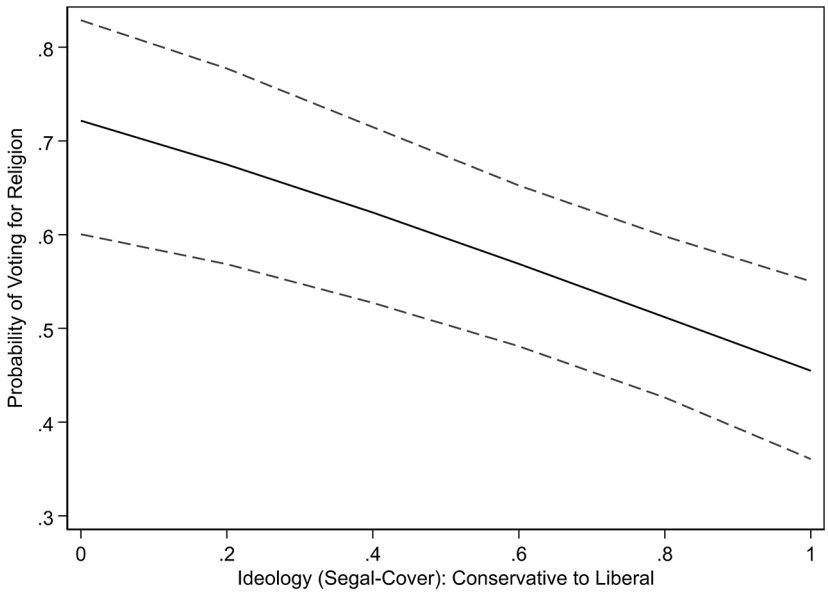

Figure 4. Probability of voting for religion by ideology, 1953–2020 terms. The dark line is the probability; the lighter lines are 95% confidence intervals. The probability is based on a logit model (clustered on Justice) that accounts for whether the petitioner in the Supreme Court is pro- or anti-religion.

is Kagan, who despite a high liberal ideology score (higher than Ginsburg's), tends to vote with the conservatives on religion, though frequently on narrower grounds (often joining a concurrence with Breyer). At the same time, Kagan differs from the conservatives by voting substantially less for the mainstream Christian position.

Overall, ideology is very important—seemingly more important than partisanship (save for the Roberts Court's Justices).

C. CATHOLIC JUSTICES

Scholars have found evidence that Catholic Justices vote differently from other Justices, and that they favor religious organizations.[44] Our results are consistent with this view. On average, Catholic Justices are significantly ($p < 0.05$) more likely to vote for religion than non-Catholic Justices are (71.1% versus 52.0%). This is largely a Roberts/

[44] Blake, *supra* note 27.

Rehnquist Court phenomenon, as Figure 5 below shows, and is easily explained. Six of the top ten most pro-religion Justices (and seven, if Gorsuch is included) are Catholic (see Table 1). All of them overlapped with one or both Courts. Only two other Catholic Justices are in our dataset. Justice Sotomayor, a liberal, ranks among the most anti-religion Justices especially on the pro-mainstream Christian variable. She is also not devout. Justice Brennan, another liberal, and the only Catholic justice during the Burger Court, accounts for the anomalous anti-religion slant of the one-person Catholic "bloc" in that Court.

Even though some of the Catholic Justices are among the most conservative in our dataset, the Catholic (or not) variable remains a significant predictor in a multivariate model that includes ideology and the petitioner in the Supreme Court (see Appendix, Table A2). All else equal,[45] for a Catholic Justice the probability of voting for religion is 0.73 [0.65, 0.81]; for a non-Catholic justice it is 0.55 [0.45, 0.66].

D. DEVOUTNESS

Not all religious judges are devout, or allow their religious commitments to influence their interpretations of the law. It seems plausible that devout Justices are more likely to vote for religious outcomes (or outcomes consistent with their particular religion) than less devout Justices. To test this hypothesis, we asked research assistants to gather biographical information about the Justices from the web, and then another group of (four) students, acting independently, to read that information and attach a numerical value from 1 (not devout) to 5 (very devout). The students (not all law students) were given only the biographical details and not told the Justice's name or that the biography was of a Supreme Court Justice. The ratings (the means of the four raters) thus reflected a collective judgment based on some rough sense of how people display their devoutness. While the ratings are obviously imperfect, they were highly correlated. There is, of course, some ambiguity whether the scores reflect true devotion or a desire to display one's religious devotion publicly.

Overall, there is generally no significant relationship between voting for religion and devoutness (regardless of how we categorize levels

[45] To make this calculation, ideology (the Segal-Cover score) is at its mean and the petitioner is pro-religion.

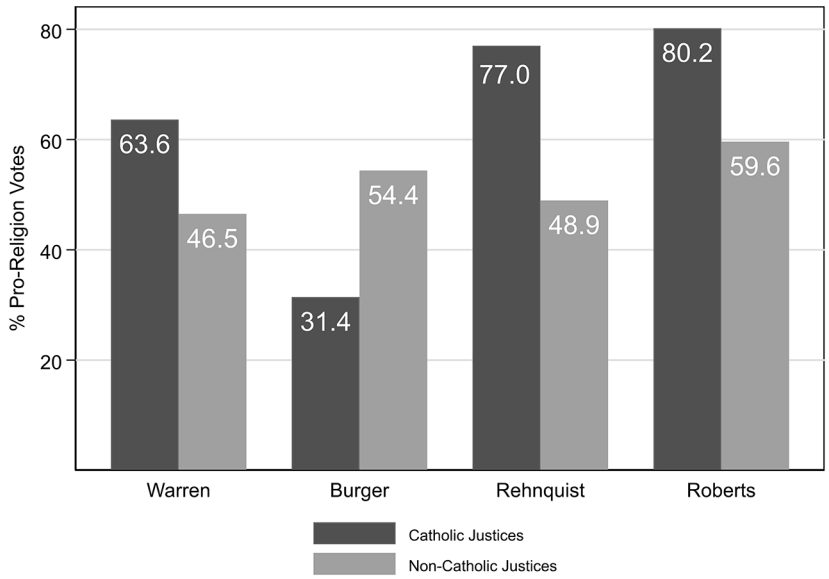

Figure 5. Voting for religion by religion (Catholic or not), 1953–2020 terms. The differences for the Rehnquist and Roberts Courts' Justices are significant in the expected direction ($p < 0.05$). The difference for the Burger Court Justice is significant but in the opposite direction. The difference for the Warren Court Justices is not significant.

of devoutness[46]). Likewise, multivariate models (controlling for petitioner and clustered on Justice) show that the devoutness variable is not statistically significant though it is positive as predicted.

Drilling down into the data helps explain this rather puzzling finding: The "devoutness" effect differs substantially by Court era, as Figure 6 shows. During the Warren years, devout and less devout (a score under 2) Justices cast a statistically equivalent percentage of votes in favor of religion. The Burger Court, once again, is anomalous. A statistically significant ($p < 0.05$) relationship exists between devoutness and votes but it is in the opposite direction: less devout Justices cast *a higher percentage* of votes in favor of religion. Only during the Rehnquist and especially Roberts Court eras, does the expected relationship emerge.

[46] Only the comparison between most and least devout is significant, as noted in Table 2.

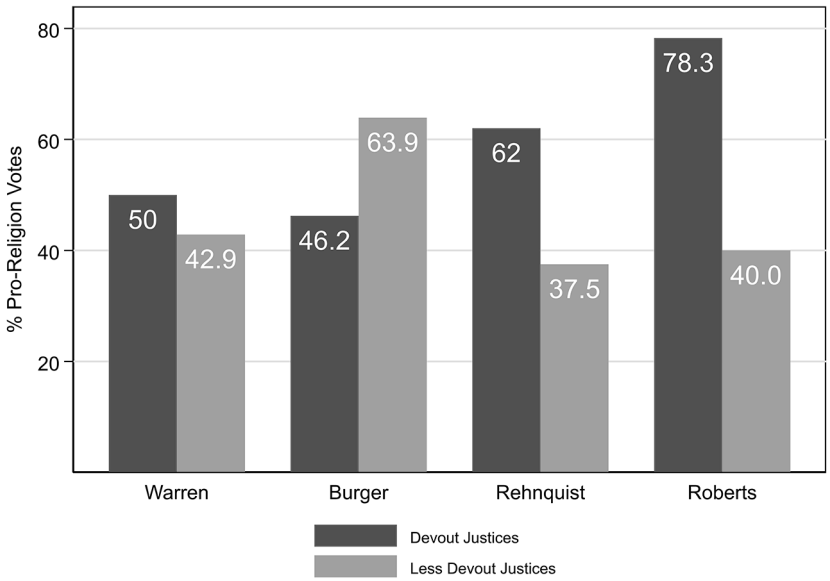

Figure 6. Voting for religion by devoutness, 1953–2020 terms. Less devout Justices are those with a score under 2 (see Table 1). The differences for the Rehnquist and Roberts Courts' Justices are significant in the expected direction ($p < 0.05$). The difference for the Burger Court justices is significant but in the opposite direction. The difference for the Warren Court Justices is not significant.

Estimating logit models (controlling for petitioner and clustered on Justice) confirms the raw data in Figure 6. For the Rehnquist Court: all else equal,[47] moving from a less devout Justice to a devout Justice, the probability of casting a pro-religion vote jumps from 0.43 to 0.67.[48] The increase is even greater for the Roberts Justices: from 0.40 (less devout) to 0.78 (most devout).[49] (Using the Justices' devoutness scores in Table 2 confirms a significant effect only for the Rehnquist and Roberts Court Justices.)

One other notable pattern is a significant relationship between votes cast by Catholic Justices and by devout Justices. Of the 186 votes cast by the least devout Justices, only 17 were by Catholic Justices (9%). And of the 164 cast by the most devout Justices, 135 were by Catholic

[47] This scenario sets the petitioner in the Supreme Court at pro-religion.

[48] The 95% confidence intervals are, respectively, [0.25, 0.61] and [0.53, 0.79].

[49] The 95% confidence intervals are, respectively, [0.35, 0.45] and [0.60, 0.90].

Justices (82%). While some very devout Justices were not Catholic (Goldberg, Clark, Souter), Catholic Justices tended to be devout.

E. TYPE OF CASE

On average, Justices are significantly more likely to vote for religion in Free Exercise cases than in Establishment cases. That gap exists in each Court era (see Fig. 7). But the gap in the raw data is significant only for the Warren and Roberts Courts; and only for the Roberts Court does a regression (controlling for petitioner and clustered on Justice) show a significant relationship.

The explanation is likely that the Warren Court used both clauses to protect religious minorities, leading to pro-religion votes in cases where religious minorities challenged laws and anti-religion cases where a law advanced a MS religion. The Roberts Court, focused on advancing MS religion, cast pro-religion votes in Free Exercise cases where laws constrained MS religion and pro-religion votes in Establishment clause cases where the law advanced MS religion.

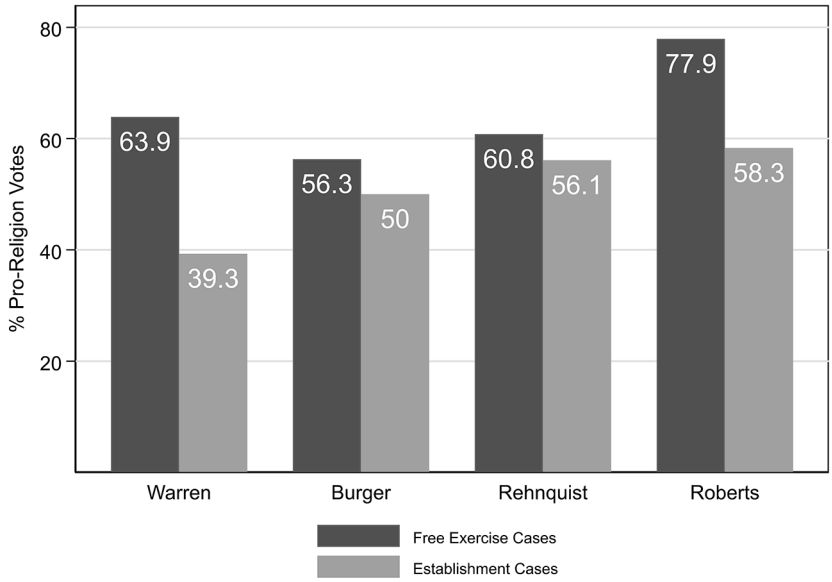

Figure 7. Relationship between pro-religion votes and type of religion case, 1953–2020 terms. For the Warren and Roberts Courts the relationship is significant ($p < 0.05$), though a regression (controlling for petitioner and clustered on Justice) shows a significant relationship only for the Roberts Court.

F. WHICH INDEPENDENT VARIABLES MATTER MOST?

Although we are hampered by a small data set, we can provide some evidence about which of the main explanatory variables appear most important in explaining the pattern of votes. We estimated several multivariate regressions that included ideology, Catholicism, devoutness, and various controls (including identity of petitioner and Court era) clustered on Justice. Overall, ideology and Catholicism matter consistently in the predicted direction, while devoutness does not. For the Roberts Court alone, all three variables are mostly statistically significant in the predicted direction, whereas in the Warren Court, none of the relationships are statistically significant (with the exception of Catholicism in one model). In the Burger and Rehnquist Courts, the relationships are more variable depending on the specification. Generally, ideology, Catholicism, and devoutness matter more (in the predicted direction) in the Roberts Court than in prior eras. The tables are in the Appendix.

IV. DISCUSSION

Plainly, the Roberts Court has ruled in favor of religious organizations, including mainstream Christian organizations, more frequently than its predecessors. With the replacement of Ruth Bader Ginsburg with Amy Coney Barrett, this trend will not end soon and may accelerate. The quantitative results dovetail with doctrinal analysis that suggests that the Court has weakened the Establishment Clause and strengthened the Free Exercise Clause. Relaxation of the Establishment Clause has benefited mainstream Christian (including Catholic) organizations because Christianity remains the overwhelmingly dominant religion in the United States, and in many jurisdictions evangelical Christians exercise significant political power. In *Town of Greece v. Galloway*, the Court held that a town's practice of opening legislative sessions with a prayer did not violate the Establishment Clause.[50] In *American Legion v. American Humanist Ass'n*, for example, the Court held that a cross-shaped monument erected to honor soldiers who died in World War I did not violate the Establishment Clause even though it was located on public lands.[51] These cases break from older

[50] 572 U.S. 565 (2014).

[51] *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962).

cases that disapproved of government practices with sectarian purposes or effects.

The trend with the Free Exercise Clause is more complicated and uncertain. The Court has strengthened the Free Exercise Clause which, in principle, could benefit minority religions that lack political power and so cannot block laws that interfere with their religious practices. In practice, the Court's rulings have mostly but not exclusively protected the conservative values of mainstream Christian organizations against secular laws, including public health orders to counter the Covid-19 pandemic and laws intended to prevent discrimination against sexual minorities and protect reproductive rights.[52]

One immediate question is whether our statistical results reflect selection effects rather than the changing ideologies or attitudes of the Justices. Imagine, for example, that the Roberts Court has simply encountered far more cases involving government actions and laws that are hostile to religion than earlier courts have. If so, a high rate of pro-religion outcomes is consistent with a static jurisprudence. But there are several reasons for doubting a selection-effects story, though the reason for doubt depends on the source of selection.

One possibility, for example, is that the Court grants certiorari to more extreme anti-religion cases than earlier Courts have. But it seems doubtful that earlier Courts would have ignored extreme cases. Another possibility is that courts of appeal have turned against religion, requiring correction from the Supreme Court; or that (moving backward in time) the public and legislators have become more hostile to religion in recent years. As we will see below, this set of explanations is not plausible either. A related development points in the opposite direction. Since *Employment Division v. Smith*, 21 states have enacted RFRAs, which means that state courts will have blocked anti-religion laws that might otherwise have made their way to the Supreme Court.[53]

As we turn from description to explanation, the proximate cause of the change in the Court's jurisprudence is clear. The Justices who are largely responsible for this shift are Clarence Thomas, Samuel Alito, Neil Gorsuch, John Roberts, and Brett Kavanaugh. While there are some differences among these Justices, and Kavanaugh has been

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[52] *See* Tandon v. Newsom, 141 S. Ct. 1294 (2021); Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[53] *See* Jonathan Griffin, *State Religious Freedom Restoration Acts*, Nat'l Conf. of State Legislatures (May 4, 2017), https://perma.cc/V2VS-K8Z8.

involved in only a handful of cases, they are clearly the most pro-religion justices on the Supreme Court going back at least to World War II. They are also all Christian, mostly Catholic, religiously devout (though this variable provides a weaker explanation than the others), and ideologically conservative. Amy Coney Barrett will likely advance this trend—though she has so far been slightly more cautious than the Alito-Gorsuch-Thomas bloc, and may turn out to be closer to Roberts than to the other conservatives.[54] By contrast, the dissenters are religiously mixed, not devout, and ideologically liberal. While correlation is not causation, it is hard to see any other explanation for the voting pattern.

But that raises an additional question, which is how all these people ended up on the Court. Republican presidents have not always appointed religiously devout, ideologically conservative jurists to the Supreme Court. In 1990, President George H.W. Bush nominated David Souter to the Court. Souter, whose ideological views were not widely known at the time, drifted left over the course of his tenure on the Court. Justice Anthony Kennedy, who had joined the Court in 1988, was more reliably conservative, including on religious issues. But he frustrated conservatives by refusing to overturn *Roe v. Wade* and by advancing constitutional protections for sexual minorities, culminating in his majority opinion recognizing the right to same-sex marriage in *Obergefell v. Hodges* in 2015.[55] Justice O'Connor was also a source of frustration for conservatives; she, too, was not an ideological standard-bearer and ended up as a swing vote on the Court. Long before O'Connor, Kennedy, and Souter left the Court, conservative Christians began devoting political resources to ensuring that Republican presidents and senators would ensure appointment of religious conservatives on the Supreme Court.[56]

But this does not seem to be the whole story. These appointments also received the enthusiastic support of the business wing of the Republican Party, as well as other non-religious mainstream Republicans. This raises the possibility that religiousness has become a screening mechanism for Republicans. The problem facing Republicans until

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[54] South Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 717 (2021) (Barrett, J., concurring); Fulton v. City of Philadelphia, 141 S. Ct. at 1882–83 (Barrett, J., concurring).

[55] 576 U.S. 644 (2015).

[56] Amanda Hollis-Brusky & Joshua C. Wilson, Separate But Faithful: The Christian Right's Radical Struggle to Transform Law & Legal Culture (2020).

recently was that potential nominees with ideologically impeachable credentials usually leave paper trails that can be used against them, as occurred with Robert Bork in 1987. Religiously devout people who are Republicans and familiar in conservative legal circles may have offered a way around this problem. Religious devotion is difficult to fake (at least, if it involves public acts like attending church), so a combination of religious devotion and conservative views may all but guarantee that a nominee will support conservative values on the Supreme Court and will not drift left, as so many Republican appointees did in an earlier era. Meanwhile, attacking a political nominee on religious grounds remains politically taboo, as was so clear when liberals found themselves unable to mount serious opposition to Amy Coney Barrett, even though many of her supporters made no secret of the fact that they supported her because of her conservative religious views.[57]

This hypothesis has some support in an incident that took place during the Kavanaugh nomination, described in Ruth Marcus's book *Supreme Ambition*.

> The Trump judge pickers' focus during those early discussions was not on prospective nominees' positions on the hottest-button social issues, abortion and same-sex marriage. Instead, it was on the less sexy but—to the assembled lawyers and, as significantly, to the wealthy donors who financed the Republican party—even more important matter of what Steve Bannon would later call the "deconstruction of the administrative state." Priebus laid it out: the social conservatives who had helped elect Trump might focus on abortion and same-sex marriage, but the donors cared about regulation. They were eager to undo what they viewed as the out-of-control regulatory apparatus that had been assembled since Franklin Roosevelt's New Deal.
>
> . . .
>
> And that, for all evangelical voters' focus on the Supreme Court and social issues such as abortion, was the real goal. The emphasis on social conservatism and its associated hot-button issues ended with Scalia, McGahn said at the first meeting after the election to discuss the justice's successor. It was now all about regulatory relief.[58]

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[57] Tom Gjelten, *Amy Coney Barrett's Catholicism Is Controversial But May Not Be Confirmation Issue*, Nat'l Pub. Radio (Sept. 29, 2020), https://perma.cc/ME6G-BRMQ; Kadhim Shubber & Lauren Fedor, *Why Conservatives Have Faith in Amy Coney Barrett*, Financial Times (Sept. 26, 2020), https://www.ft.com/content/c7129d24-f48b-45c8-b11f-21aa4a6b6921 (visited on March 12, 2021).

[58] Ruth Marcus, Supreme Ambition: Brett Kavanaugh and the Conservative Takeover 63–64 (2020).

On this account, Republican presidents appoint religious lawyers (or, more to the point, conservative religious lawyers) to the Court in order to please their business constituency, not their evangelical constituency. Of course, publicly pious lawyers who publicly express hostility toward the administrative state, as Gorsuch and Kavanaugh had done, would please both constituencies.

We have so far described the transformation of the religion clauses as a political power play. But defenders of this transformation argue that it is constitutionally legitimate. Michael McConnell, for example, argued decades ago that the Supreme Court was too stingy with religious rights.[59] In an op-ed in 2020, he returned to this theme, celebrated the modern Court "as protecting pluralism—the right of individuals and institutions to be different, to teach different doctrines, to dissent from dominant cultural norms and to practice what they preach."[60] The Constitution protects religious rights, and it was wrong for earlier generations of the Court to limit those protections.

Ironically, McConnell's defense of the Court sounds more like the liberal defense of minority religious rights than the modern Court's robust protection of mainstream Christian values. But McConnell's defense could be recalibrated in the following way. The role of religion in American life has changed, and even mainstream believers should now be regarded as a "discrete and insular minority" even if not one that has historically faced discrimination. The most important change is greater tolerance for sexual minorities, exemplified by the decisions of the Supreme Court itself in *United States v. Windsor*[61] and *Obergefell*. These decisions outraged many religious conservatives, who believed that they would be compelled to respect practices that violated their religious commitments. And when a baker was ordered to sell wedding cakes to same-sex couples,[62] and a for-profit chain store run by devout Christians was forced to cover contraception in its group health care plan, those fears were vindicated[63]—until the

[59] Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1.

[60] Michael W. McConnell, *On Religion, the Supreme Court Protects the Right to Be Different*, N.Y. Times (Jul. 9, 2020), https://perma.cc/8UCS-GW4S.

[61] 570 U.S. 744 (2015)

[62] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018).

[63] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

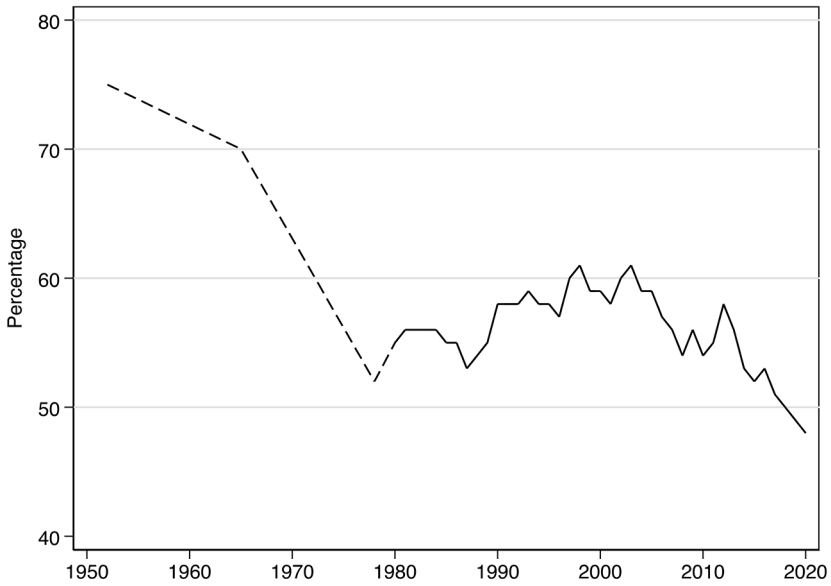

Figure 8. "How important would you say religion is in your own life— very important, fairly important or not very important?" Percentage of Americans who perceive religion to be very important (1952–2020). The dashed parts of the line connect years without data (Gallup did not ask the question). Source: Gallup Polls, with data at https://news.gallup.com/poll/1690/religion.aspx and https://news.gallup.com/poll/245651/religion-considered-important-americans.aspx.

Supreme Court rode to the rescue. But were these cases anomalous or part of a larger secularizing trend?

There is some evidence for such a trend. Socially conservative values associated with mainstream Christianity have become less popular in the last several decades. Religious belief has declined as well, as Figure 8 shows.[64] Christianity, which was once dominated by mainstream Protestant denominations, has splintered. It has also been challenged by a variety of other religions and secular ideologies. Fewer Americans say that religion is important in their lives than in the past, though this trend has remained stable since the 1970s. Finally, the liberal Justices themselves divided in quite a few cases in the Roberts Court. Breyer and Kagan occasionally sided with the conservative majority, and even

[64] Data on religion's importance to Americans are presented at *In Depth: Religion*, Gallup .com, https://perma.cc/G7B5-M3LD.

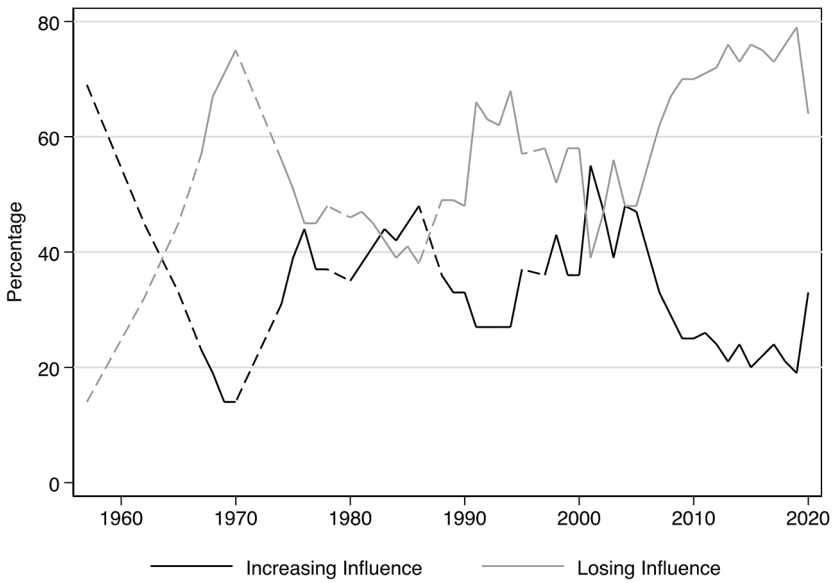

Figure 9. "At the present time, do you think religion as a whole is increasing its influence on American life or losing its influence?" Americans' view of the influence of religion on life in the US. The dashed parts of each line connect years without data (Gallup did not ask the question). Source: Gallup Polls, with data at https://news.gallup.com/poll/1690/religion.aspx and https://news.gallup.com/poll/162803/americans-say-religion-losing-influence.aspx.

when they dissented, they were less scathing than Ginsburg and Sotomayor. While Breyer and Kagan tended to concur on technical grounds, one senses that they felt less hostility toward religious individuals and organizations who believed that they faced discrimination from secular authorities.[65]

A more striking statistic is the fraction of Americans who say that religion is losing its influence on American life. That number has fluctuated for decades but began a significant upswing in 2006, when 48% said that religion is losing its influence, to 76% in 2016.[66] That may

[65] *See* the disagreements between Breyer/Kagan and Ginsburg/Sotomayor in, among others, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020).

[66] *See* Megan Brennan, *Religion Considered Important to 72% of Americans*, Gallup, https://perma.cc/6V6L-AY8X.

explain why many Christians, who were once accustomed in most places to seeing their views and practices being accepted without question, now see themselves as victims of religious discrimination. A recent poll indicates that while most Americans do not believe that their religious liberty is under threat, large majorities of evangelicals and religious Republicans do.[67] Justice Alito belongs to the latter group. As he said in a speech to the Federalist Society, "It pains me to say this, but in certain quarters, religious liberty is fast becoming a disfavored right."[68]

But the spike at the end of the period may suggest that religion may be regaining its influence—and perhaps thanks in part to the Supreme Court (see Fig. 9). q5

V. Conclusion

A great deal of recent work examines efforts by various Christian leaders and institutions to counter secular trends in American policy and constitutional law.[69] According to this literature, conservative Christians have taken a page from the civil rights movement and gone to the courts, hoping to expand religious rights. They have also organized and promoted legal institutions, like the Alliance Defending Freedom, which litigates on behalf of religious rights; the Blackstone Fellowship, which offers Christian-themed legal training; and law schools, like Ava Maria Law School. Christian organizations also lobby for judicial appointments that will advance their values. In just the last half century, Christian conservatism has been transformed from the mainstream ideology of the country into the agenda of a minority group, which claims to need and deserve protection under the Constitution. This group has benefited from some like-minded or sympathetic Justices, some of whom received the support of evangelical Christian organizations when they were nominated.

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[67] *Is Religious Liberty a Shield or a Sword?*, Pub. Religion Rsch. Inst. (Feb. 10, 2021), https://perma.cc/3WVD-VTVV.

[68] *Supreme Court Justice Samuel Alito Speech Transcript to Federalist Society*, Rev (Nov. 12, 2020), https://perma.cc/JY45-QEC9.

[69] *See, e.g.*, Hollis-Brusky & Wilson, *supra* note 57.

Appendix

Table A1 provides summary statistics. The dataset is organized in two ways. For the "Court-level" analysis, an observation is a single case. For the "Justice-level" analysis, an observation is a Justice's vote.

Table A1
Summary Statistics

Outcomes		
	Court-Level	
	Conservative Christian Wins (48)	58.0%
	Liberal Wins (35)	42.0%
	Justice-Level	
	Conservative Christian Wins (360)	50.0%
	Liberal Wins (360)	50.0%
Court-Level Variables		
	Chief Justice Era	
	Warren (9)	10.8%
	Burger (31)	37.4%
	Rehnquist (28)	33.7%
	Roberts (15)	18.1%
	Type of Religion Case	
	Religious Establishment (52)	62.7%
	Free Exercise (31)	37.3%
	Petitioner in the U.S. Supreme Court	
	Liberal (31)	37.3%
	Conservative Christian (52)	62.7%
	Case Salience	
	Not Front Page NYT (37)	44.6%
	Front Page NYT (46)	55.4%
Justice-Level Variables		
	Votes by Appointing President's Party	
	Republican (518)	70.3%
	Democrat (219)	29.7%
	Votes by Justice's Party	
	Republican (435)	59.0%
	Democrat (302)	41.0%
	Votes by Catholic Justice	
	Non-Catholic (527)	71.5%
	Catholic (210)	28.5%
	Devoutness Score	
	Mean	3.08
	Median	3.25
	Ideology: Segal-Cover	
	Mean	0.43
	Most Liberal (Fortas, Marshall, Brennan)	1
	Most Conservative (Scalia)	0

Table A1 *Continued*

Ideology: Martin-Quinn Career Average	
Mean	0.06
Most Liberal (Douglas)	−4.76
Most Conservative (Thomas)	3.49
Ideology: Martin-Quinn Term by Term	
Mean	0.01
Most Liberal (Douglas)	−7.95
Most Conservative (Rehnquist)	4.52

Table A2 displays the results of various multivariate regressions, broken down by Chief Justice era (with the first column covering the entire period). The first two panels show the results when we use "pro-religion" as the dependent variable. The second two panels show the results when we use "pro-mainstream Christian" as the dependent variable. The first panel in each pair uses a dummy variable for "Justice devoutness." The second panel in each pair uses a score for "Justice devoutness."

Table A2
Multivariate Regression Using Key Variables, 1953–2020 Terms

	Pro-Religion with Justice Devoutness Dummy Variable				
	All Eras	Warren	Burger	Rehnquist	Roberts
Petitioner	0.25	0.65	−0.14	0.69	0.02
	(0.17)	(0.34)	(0.16)	(0.39)	(0.50)
Justice Ideology	−1.17*	0.20	−0.85	−0.49	−1.81
	(0.33)	(0.79)	(0.47)	(0.65)	(0.97)
Justice Catholic	0.76*	0.62	−0.26	1.09*	0.73*
	(0.24)	(0.38)	(0.31)	(0.34)	(0.33)
Justice Devout or Not	0.15	0.21	−0.52	0.64	1.30*
	(0.46)	(0.39)	(0.55)	(0.46)	(0.55)
Constant	0.36	−0.69	0.90	−0.82*	0.23
	(0.50)	(0.66)	(0.50)	(0.48)	(0.87)
Observations	841	97	309	277	158

	Pro-Religion with Justice Devoutness Score				
	All Eras	Warren	Burger	Rehnquist	Roberts
Petitioner	0.25	0.67	−0.11	0.71	0.07
	(0.17)	(0.36)	(0.18)	(0.40)	(0.49)
Justice Ideology	−1.16*	−0.02	−1.03*	−0.24	−1.90*
	(0.37)	(0.93)	(0.45)	(0.62)	(0.88)
Justice Catholic	0.77*	1.08*	0.16	0.77*	0.17
	(0.26)	(0.47)	(0.54)	(0.37)	(0.34)

Table A2 *Continued*

	Pro-Religion with Justice Devoutness Score				
	All Eras	Warren	Burger	Rehnquist	Roberts
Justice Devout Score	0.01	−0.18	−0.26	0.38	0.63
	(0.18)	(0.21)	(0.28)	(0.20)	(0.34)
Constant	0.44	0.06	1.32	−1.59*	−0.18
	(0.69)	(1.01)	(0.92)	(0.71)	(1.19)
Observations	841	97	309	277	158

	Pro-Mainstream Christian with Devoutness Dummy Variable				
	All Eras	Warren	Burger	Rehnquist	Roberts
Petitioner	0.30	−0.05	−0.15	1.05*	2.52*
	(0.18)	(0.25)	(0.16)	(0.28)	(0.21)
Justice Ideology	−2.20*	−1.93	−1.50*	−2.57*	−1.08
	(0.56)	(1.66)	(0.72)	(0.91)	(1.76)
Justice Catholic	0.70*	−0.28	−0.31	1.18*	2.20*
	(0.33)	(0.68)	(0.35)	(0.42)	(0.48)
Justice Devout or Not	0.08	−0.37	−0.42	0.39	3.45*
	(0.65)	(0.47)	(0.63)	(0.99)	(1.07)
Constant	0.50	1.34	0.89	−0.46	−5.63*
	(0.65)	(1.30)	(0.53)	(0.92)	(1.78)
Observations	737	79	273	251	134

	Pro-Mainstream Christian with Devoutness Score				
	All Eras	Warren	Burger	Rehnquist	Roberts
Petitioner	0.30	−0.03	−0.14	1.04*	2.67*
	(0.18)	(0.26)	(0.16)	(0.29)	(0.43)
Justice Ideology	−2.20*	−2.59	−1.64*	−2.48*	−2.84*
	(0.55)	(1.85)	(0.62)	(0.89)	(1.27)
Justice Catholic	0.73	0.59	−0.01	1.09*	0.57
	(0.40)	(1.04)	(0.56)	(0.54)	(0.44)
Justice Devout Score	−0.02	−0.39	−0.20	0.15	0.99*
	(0.25)	(0.23)	(0.32)	(0.36)	(0.50)
Constant	0.61	2.50	1.20	−0.65	−3.98
	(0.87)	(1.67)	(0.92)	(1.30)	(2.08)
Observations	737	79	273	251	134

Note. Each pair of tables uses separate specifications for devoutness—a dummy variable or score. Regression results are included for the effect of petitioner, ideology, religion, and devoutness on Justice vote. Cell entries of logit coefficients with robust standard errors (clustered on Justice) are included in parentheses below each. Ideology is the Justice's Segal-Cover score; Religion is 1 if the Justice is Catholic and 0 if not; Justice Devout is 1 if the Justice was scored as devout or moderately devout (a score over 2) and 0 is less devout (a score under 2). Justice Devout Score is the mean of the coders' rating of the Justice's devoutness (for our Justices, the range is from 1.25 to 5).

* $p \leq 0.05$.

QUERIES TO THE AUTHOR

Q1. Au: From UCP and RA—Should "refused to inform" be reformulated as "refused to serve as informants"?
Q2. Au: From UCP and RA—Just a note that we added the full citation because, unlike *Sherbert*, the full citation had not been given in-text before.
Q3. Au: From UCP and RA—It appears there may be a word missing here. We added one, but please check if it is consistent with your intended meaning.
Q4. Au: From UCP and RA—Again, it appears there may be a missing word here. Otherwise, "pro-mainstream" would have the same meaning as "pro-mainstream religion" in the previous clause of the sentence.
Q5. Au: Per journal style, we have included in-text citations for your figures. Is the placement of the citation for fig. 9 acceptable?