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U.S. Supreme Court Decision Making in the Area of Religion, 1987-2011

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***Abstract*—**There are many views on how human decision makers behave. In this work, the Justices of the United States Supreme Court will be viewed in terms of constrained maximization and cognitive-cybernetic theory. This paper will integrate research in such fields as law, political science, psychology, economics and decision making theory. It will be argued that due to its heavy workload, the Supreme Court is forced to make decisions in a boundedly rational manner. The ideas and theory put forward here will be tested in the area of the Court's decisions involving religion. Therefore, the cases involving the U.S. Constitution's Free Exercise Clause and Establishment Clause will be analyzed. Also, variables such as the U.S. government's involvement in these cases will be considered. The years to be studied will be 1987-2011.

***Keywords*—**Establishment Clause, Free Exercise Clause, U.S. Constitution, U.S. Supreme Court.

I. Introduction

FOR well over 100 years, the United States Supreme Court has been asked repeatedly to interpret and then reinterpret the two clauses of the First Amendment which deal with the area of religion. The amendment mandates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." These clauses are known as the Establishment and Free Exercise Clauses. While these clauses may appear to be straightforward at first glance, upon further reflection one realizes that they allow for numerous interpretations and at times may conflict with one another. These differing interpretations have led to a number of bitter disputes over the years. Martha McCarthy has noted that "The relationship between religion and government has created extensive controversy in the history of this nation" [1].

A. The Establishment Clause

It was in 1947 when the Supreme Court first found it necessary to define the meaning of the Establishment Clause. In Everson v. Board of Education, Justice Black wrote:

The "establishment of religion" clause of the First Amendment means at least this: Neither a State nor the Federal Government can set up a church: Neither can pass laws that aid religion, aid all religions, nor prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation" between church and state [2].

While Black's statement is probably the most often quoted language concerning the Establishment Clause, it by no means settled its exact meaning. What precisely breached this "wall of separation" between church and state continued to crop up. The Everson no-aid test was quoted and applied in several later decisions; however, in the early 1960s the Court enunciated a new test. In cases dealing with prayers and Bible reading in public schools, the Court used the "secular purpose and primary effect" test in making its decisions [3]. This required that when a law was challenged under the Establishment Clause it must have both a secular purpose and a primary effect of neither advancing nor inhibiting religion. Then in 1970, in the first Establishment Clause case decided during Warren Burger's tenure as chief justice, the Supreme Court laid down the entanglement dimension of the present Establishment Clause test, the purpose-effect-entanglement test [4]. This new test added to the purpose and effect test the requirement that a law must not involve the government in an excessive entanglement with religion. In decisions from 1971-1975, the Court began placing increased reliance on whether the program being considered caused political division along religious lines [5].

In recent years while the Court has found some breaches of the "wall of separation," (e.g., Lee v. Weisman or Santa Fe Independent School District v. Doe), there have been a series of cases where the majority seemed less concerned about issues such as entanglement or political divisiveness (Rosenberger v. University of Virginia, Agostini v. Felton, Good News Club v. Milford Central School, and Zelman v. Simmons Harris) [6]. Justices in these majorities have seemed to be less wedded to the Lemon test and have brought up such issues as "viewpoint discrimination" and the "private choice" of citizens to allow for more overlap between church and state. Possibly illustrating how slight distinctions can alter the

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its decisions, on the same day in 2005, in one case the Court upheld allowing a monument of the Ten Commandments on the grounds of the Texas Capital, while disallowing the posting of the Ten Commandment in county courthouses in another [7].

This series of tests and cases to be considered has not cleared up the matter for many scholars. In fact, one chief complaint is that constitutional law in this area is "confused, conflicting and uncertain" [8]. In the area of aid to nonpublic schools, McCarthy claims that the Supreme Court has not provided clear guidance, but rather has provided more questions than answers [9]. Jesse Choper has referred to these decisions as "ad hoc judgments which are incapable of being reconciled on any principled basis" [10]. This "confusion" has led some legal scholars to doubt that reasonable predictions can be made about future cases [11]. Evan Tager has written that "Establishment Clause cases have become totally unpredictable" [12]. John Nowak, Ronald Rotunda, and J. Nelson Young have simply stated that "it would be foolish to predict the results of future cases" [13]. More recently, David Schultz, John Vile, and Michelle Deardorff stated: “The Court continues to weigh the circumstances of individual cases in a manner that might not be conducive to establishing clear rules” [14]. Alpheus Mason and Donald Stephenson write: “The fact that the Court has applied different tests to a variety of factual situations at different times has generated uncertainty and sometimes exasperation” [15].

B. The Free Exercise Clause

In 1878 the Supreme Court first tackled what the meaning and implementation of the Free Exercise Clause would be. In Reynolds v. United States, the Court upheld a congressional statute making polygamy a crime even though some Mormons practiced it as a religious belief and duty [16]. Chief Justice Waite stated: “Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.” Thus, according to the Court, the Free Exercise Clause absolutely protected a person’s right to have a belief but not necessarily action based on that belief. This became known as the belief-action distinction.

In 1961, a four justice plurality departed from previous cases in Braunfeld v. Brown [17]. Their opinion essentially laid out a two-part test in reaching its decisions. First, does the policy or regulation place a burden on the exercise of religion by an individual or group? Second, does the policy or regulation burden religion no more than is necessary to achieve a secular goal? If the policy does place a burden on free exercise and it is not the least restrictive means by which to achieve the government’s goal, the regulation may be deemed invalid.

Two years later, in Sherbert v. Verner, the Supreme Court much more clearly espoused and adopted the principles seen in the Braunfeld case [18]. The Court also added to the previous test the requirement that there be a compelling state interest in order to justify a burden placed upon free exercise. This requirement was reaffirmed and given greater emphasis in Wisconsin v. Yoder [19]. Chief Justice Burger wrote that “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” Under the Sherbert test, free exercise of religion had become far more protected.

However, in 1990, the Court dramatically reversed directions again, at least in terms of the official test. In a case involving the use of peyote by members of the Native American Church and the denial of unemployment compensation (Employment Division v. Smith), a five member majority knocked most of the life out of the Sherbert test [20]. Justice Scalia concluded that the Free Exercise Clause does not entitle religious based conduct to an exemption from a general criminal law even if this places a burden on the practice on one’s religion. Generally applicable laws not aimed at religious practices are constitutional.

Congress was so concerned that the Court had almost wiped out the protection of the Free Exercise Clause that it passed the Religious Freedom Restoration Act in 1993. This federal statute directed the Court to go back to using the compelling state interest test from Sherbert and Yoder (and thus reverse the Smith decision). The Court since then has voided this law for state cases and followed it for federal [21].

It is quite clear upon reviewing the Supreme Court’s history in deciding Free Exercise Clause cases that the doctrine and tests supposedly relied upon have changed over the years. Furthermore, many scholars have been quite critical of the Court’s decision in this area. For example, Mark Tushnet has written that constitutional law of religion is in “significant disarray” and is a “mass of intellectual confusion” [22]. Laurence Tribe has claimed that “it seems impossible to divine a coherent set of principles to explain the judicial evaluation” [23]. Robert Miller and Ronald Flowers state: “No one test has been exclusively or consistently applied and it has sometimes seemed that the justices were groping for argument to justify their preconceived conclusions” [24]. Michael McConnell concluded that Court’s doctrine “was more talk than substance” [25]. Kenneth Wald pronounces that “in the face of such a fluid pattern of decision-making, it would be hazardous to generalize about future Court decisions” [26]. After reviewing recent decision making in this area, Schultz, Vile, and Deardorff conclude that “the dialogue on this subject is likely to continue” [27].

The U.S. Supreme Court and its rulings involving the Free Exercise and Establishment Clauses of the First Amendment of the U.S. Constitution will be the focus of this study. This research attempts to show that Supreme Court decisions in this area are not as "conflicting" and "confused" or even "unpredictable" as many scholars believe. This work also attempts to contribute to explaining Supreme Court decision making in general. It provides a theoretical basis for the analysis and variables which are presented to potentially explain and predict Supreme Court decisions in these areas. The work also looks at the importance or possible significance of the U.S. government as a party or amicus in these cases.

Lastly, this research involves a preliminary analysis to see if the work and model presented by Ignagni (1993, 1994) continues to be supported [28]. Therefore, the years to be analyzed will be 1987-2011, which pick up where Ignagni's Establishment Clause research ended.

II. The Justices of the Supreme Court as Human Decision Makers

A. Rohde-Spaeth Framework

David Rohde and Harold Spaeth have written that Supreme Court decisions "are the consequence of three factors: goals, rules, and situations" [29]. Rohde and Spaeth assume that the justices have certain goals they wish to achieve. In their decision making on the Supreme Court, these goals are policy goals. "Each member of the Court has preferences concerning the policy questions faced by the Court, and when the justices make decisions they want the outcomes to approximate as nearly as possible those policy preferences." [30] It should be pointed out that these personal policy preferences are based on the individual's beliefs, attitudes, and values [31]. Thus, the justices have certain policy goals which are based on their policy preferences, which in turn spring from their attitudes and values.

While each individual's goals and personal policy preferences matter a great deal, they do not operate in a vacuum. In addition to goals and preferences, a justice's decision could be affected by the "rules of the game," the second factor in the Rohde-Spaeth framework. "These rules of the game, or rule structures, are the various formal and informal rules and norms within the framework of which decisions are made." [32] In the case of the Supreme Court, there are a number of rules which influence how it operates. For example, the Court must wait for actual cases to come to it, and cannot give advisory opinions [33]. Before a case is granted review, four of the nine justices ("The Rule of Four") must be in favor of hearing and deciding the case [34].

Yet, while there are certain restrictions placed upon the Supreme Court, the rules of the game also allow the justices great liberty in their actions. Harold Spaeth has elaborated on this point by stating that the Court's rules "do not preclude any justice from voting compatibly with his personal policy preferences" [35]. Justices are not electorally accountable, they generally lack ambition for higher office, and the Supreme Court is the court of last resort. Therefore, the members of the Court are relieved of many of the pressures felt by policy makers in other branches of the government. Instead, the rules give the justices flexibility to pursue their goals. Rohde and Spaeth conclude: "The Supreme Court's rule structure permits the justices greater freedom than other political decision makers to base their decisions solely upon personal policy preferences" [36].

The third factor in this framework is the particular situation facing the Court. In addition to goals and rules, "decisions are affected by the particular configuration of circumstances that constitute the various decision-making situations in which individuals find themselves." [37] Thus, the specific situational factors or facts in a case before the Court can influence a justice's vote. If the facts or situation change, so can the decision of the Court.

This third factor is closely related to the ideas underlying previous work done on fact models and cue theory [38]. It is also the linchpin for what is to be discussed next. For the remainder of this study there will be an attempt to fuse previous attitudinal research with cue theory and fact models. This will be accomplished by applying Herbert Simon's view of decision making and cognitive-cybernetic theory. In doing so, the framework given by Rohde and Spaeth will be elaborated upon and expanded. Their work dealt primarily with the first step of the framework (due to the freedom allowed by the rules of the game--step two). The third step was not considered to the same extent. In addition, most work on cue theory and previous fact models have lacked theoretical support. Therefore, this theoretical discussion will focus upon the importance of facts or cues, and then will be tied back to the other two parts of the framework. The Supreme Court will then be examined in terms of these concepts and ideas.

B. Bounded Rationality and Cognitive-Cybernetic Theory

There are different views of how human decision makers behave. In this work, human decision makers (Supreme Court justices) will be viewed in terms of constrained maximization and cognitive-cybernetic theory, thus combining the work of Herbert Simon and John Steinbruner, among others. If individuals had unlimited computational powers and resources they might behave as utility maximizers, but it will be assumed here that instead their behavior is boundedly rational.

For over forty years, Simon focused closely upon the limits of human rationality and information processing. He writes that if one takes into account the limitations of knowledge and computing power of a choosing organism, he or she may find it incapable of making objectively optimal choices [39]. However, if this organism uses methods of choice which are as effective as its decision making and problem solving permit, then one could speak of bounded rationality, that is, "behavior that is adaptive within the constraints imposed both by the external situation and by the capacities of the decision maker" [40]. More specifically, bounded rationality is defined by Simon as rationality in situations where the complexity of the environment is immensely greater than the computational powers of the adaptive system [41]. Relating this to humans, he states, "The capacity of the human mind for formulating and solving complex problems is very small compared with the size of the problem whose solution is required for objectively rational behavior in the real world--or even for a reasonable approximation of such objective rationality" [42]. Therefore, according to Simon, if humans are to behave rationally, the most they can achieve is bounded rationality.

Closely tied to this is the notion of "satisficing." As has been mentioned, due to uncertainty, complexity, and limitations on human knowledge and ability, people cannot

always maximize their utility. Faced with this situation, Simon argues, individuals "must be content to satisfice--to find 'good enough' solutions to their problems and 'good enough' courses of action" [43]. The claim is that instead of perfect or optimal solutions, individuals are often content to achieve satisfactory ones. They have some specified level of basic satisfaction which is below their optimal level [44]. Satisficing is a relatively simple mechanism for decision making. It does not require comprehensive knowledge or comparisons because it has an end of search rule. The search ends when a good enough alternative is found [45]. Therefore, Simon believes that man is a satisficer, "not because he prefers less to more but because he has no choice" [46].

Similar in many ways to the work of Simon is cognitive-cybernetic theory [47]. According to John Steinbruner, human beings attempt to hold the psychological effects of uncertainty to a minimum [48]. A human decision maker is "engaged in buffering himself against the overwhelming variety which inheres in his world" [49]. Thus, Steinbruner believes that uncertainty control occurs in the decision making process of human thought. Completely in conformity with Herbert Simon, Steinbruner holds that uncertainty control entails highly focused sensitivity [50]. Individuals are not capable of accurately perceiving every feature of their environment. Some variables are focused upon, many others are left out. "The cybernetic thesis is that the decision mechanisms screen out information which the established set of responses are not programmed to accept" [51]. In other words, uncertainty and variety are greatly reduced because only a few critical variables receive attention. The decision maker leaves most of the environment outside of the decision making process.

In more specific terms, Steinbruner views the cybernetic decision making process progressing in the following manner. A cybernetic decision maker focuses on a few incoming variables while eliminating entirely any serious calculation of probable outcomes. The decision maker is assumed to have a small set of 'responses' and decision rules which determine the course of action to take once he has received information to which he is sensitive. That is, decision rules associate a given action with a range of 'values' for the critical variables in focus. The 'responses' are action sequences, of the character of a recipe established by prior experience. They are programs which accept and adjust to very specific and very limited kinds of information [52].

C. The U.S. Supreme Court's Workload

This theoretical view of decision making must now be related back to the U.S. Supreme Court and previous literature on this institution. Henry Abraham has stated: "That the Supreme Court of the U.S. is a busy tribunal is axiomatic" [53]. Such a claim is based on two features of the Supreme Court. First of all, the Court often decides what are usually considered to be difficult policy and legal questions. Secondly, it can be argued that the Court is responsible for a very large amount of work. In fact, David O'Brien has asserted that "the Court's docket has grown phenomenally" in the last fifty years [54]. Other scholars writing on this change in the Court's caseload have described it as a "massive increase," a "huge increase," "spectacular growth," and "dramatic growth" [55]. The October Term of 2010 had roughly eight times the number of docketed cases as there were in 1930 (8,000 compared to 1,000) [56]. In fact, the number of cases has again doubled since just 1986. Justice John Paul Stevens has claimed that the justices are "too busy to decide whether there [is] anything [they] can do about the problem of being too busy" [57]. In 1978, all nine members of the Burger Court signed a public letter that included the statement that "the Court's caseload is heavy and growing" [58].

The point of this discussion is to provide some evidence that the justices face a heavy workload. With approximately eight thousand cases to deal with each year, they are kept quite busy. In a 1976 study, Casper and Posner found that at most each justice can spend an average of 9.5 minutes per paid petition for certiorari and considerably less time on petitions filed in forma pauperis [59]. Of course, the number of cases has gone up steadily since then and therefore the amount of time spend per case is even less. Furthermore, this workload is not usually of a trivial or mundane nature. It is often quite detailed and complex.

How then do the justices deal with this arguably complicated and large amount of information when, as Justice Burger has stated, they have less "time and freshness of mind for private study and reflection . . . [and] fruitful interchange . . . indispensable to thoughtful, unhurried decision?"[60]. It would seem that the justices must, by necessity, develop some type of simplified decision procedure. It is claimed that in Bob Woodward and Scott Armstrong's book, *The Brethren*, for Justice William Brennan sorting through petitions to the Court was "like separating the weeds from the flowers in the garden" [61]. Brennan spent only ten to fifteen seconds on some petitions, because after sixteen years on the Court "he had developed a special feel for recognizing the important cases [62]. Chief Justice Warren (citing Justice John Harlan) has also asserted that whether a case is certworthy "is more a matter of 'feel' than of precisely ascertainable rules" [63]. Along similar lines, Justice Harry Blackmun has admitted, "The heavier the burden, the less is the possibility of adequate performance and the greater is the probability of less-than-well considered adjudication… One, therefore, to a large degree, relies on innate and hopefully already developed proper judicial reaction" [64].

The conclusion reached in this research is that, due to the amount of work before the Court and its complexity, the justices must often rely upon a simple decision making structure. They arguably do not have the time, resources, or intellectual capacity to make all of their decisions in a more comprehensive manner. The justices instead are often forced to behave in a boundedly rational or cognitive-cybernetic fashion. As discussed above, with a cognitive-cybernetic decision maker there is no attempt to be comprehensive or make extensive calculations. Instead, only a few critical

variables or cues are focused on. The individual relies upon previous experience and decision rules to aid in the decision making process. This more simplistic view of human decision making aptly explains Brennan and Warren's "feel" and Blackmun's "proper judicial reaction" in examining cases.

This cybernetic-boundedly rational view also fits nicely into the Rohde-Spaeth framework of Supreme Court decision making and previous work on fact models and cue theory. While the Rohde-Spaeth framework was written with rational choice theory in mind, it is quite compatible with the work of Simon and Steinbruner. Their work simply bolsters and fleshes out the importance of the particular situation facing the Court (or part three of the framework). Thus, the cognitive-cybernetic model and bounded rationality can be used to supplement Rohde and Spaeth's work. This simplified approach to decision making can also provide a theoretical foundation for cue theory or fact models. It gives a cognitive basis for such explanations of Supreme Court behavior. Consequently, in many respects these different ideas and theories dovetail. Therefore, they have the potential to be unified and provide a more complete view of Supreme Court decision making. In the next section, this combined approach will be specifically applied to the Court's religion cases.

D.Previous Related Research

As discussed above, this study views the justices as boundedly rational or cognitive-cybernetic decision makers. In almost every case there are countless facts or factors that could be considered. The justices do not have the time, resources, or ability to consider every feature of every case. It will be argued therefore that the justices tend to pick out certain cues or facts which simplify the decision they need to make. In doing this, the justices have created an internal formula or mechanism which aids them in their decision making process. Thus, when hearing a case on the Establishment Clause or Free Exercise Clause, certain facts will stand out as being important to a justice.

In 1993 and 1994, Ignagni applied these concepts and theories to the Supreme Court's religion cases [65]. In his 1993 work, he considered the Supreme Court's Free Exercise Clause decisions from 1960-1990. His 1994 article focuses on the Court's Establishment Clause decision making during the Burger Court years (1969-1986).

In the Free Exercise Clause article, Ignagni tested a model with ten variables to see if he could explain or even predict the 57 observations during this time period. Seven of the variables were case related facts (Marginal, Employment, Education, Tax, General Government, Neutral, and History) which he argued were cues that simplify and affect the decisions of the Justices [66]. These variables or facts included such issues as whether the religion involved in the case could be viewed as a "marginal" religion or if the case involved educational institutions. The eighth variable concerned a possible complicating influence in Free Exercise Clause decisions. This variable was coded to see if the U.S. Government was involved in a case. The bulk of previous research indicates that the federal government seems to enjoy an advantage before the Supreme Court [67]. For example, in the 834 cases from 1953 to 2000 where the federal government filed an amicus curiae brief, the Court usually decided in favor of the federal government's position almost 75% of the time [68]. The winning percentage for various presidential administrations ranged from 66% during the Carter years to 89% when President Johnson was in office [69]. The ninth and tenth variable measured whether the decisions occurred during the Warren, Burger or Rehnquist Court years.

The results for the Free Exercise Clause model using a probit estimation were rather impressive. Nine of the ten variables coefficients were in the expected direction and eight were significant at the .05 level. The model predicted or correctly categorized 82% of the decisions [70]. This is a 60% reduction in error from the modal category of 56%. Thus, viewing the Justices as boundedly rational or cognitive-cybernetic decision makers was corroborated by this study.

Likewise, Ignagni's 1994 Establishment Clause article used this theoretical framework, but considered the other type of First Amendment religion cases. Once again, the theoretical framework was corroborated by the results of this research project. The model here consisted of nine variables which were used in an attempt to explain and predict 92 observations. Seven of the variables were fact variables (Purpose, General Government, Neutral, Level, History, Surveillance, and One-Time) [71]. Two of these variables (Neutral and History) had also been used in the Free Exercise Clause research, which indicates the possible overlapping in some ways of these areas of law. The final two variables included were potential complicating issues. Once again, Ignagni considered whether the presence of the U.S. government had an impact, or if there was also a free exercise claim being made in the case.

The results indicated that the model did a good job of generally explaining and predicting these decisions. The probit coefficients were all in the expected direction for all nine of the variables. Three of the variables were significant at the .01 level and three at the .10 level. The model also predicted or correctly categorized 88% of these decisions correctly [72]. This is a 62% reduction in error from the modal category of 68%.

Thus, these two earlier pieces of research clearly support what has been argued here. However, do these ideas continue to capture or explain decision making on the U.S. Supreme Court? In other words, are these results time bound? In part, this paper is an attempt to update and test Ignagni's previous work. We will now consider all of the cases heard by the Court in these two areas at the point where Ignagni's Establishment Clause research ended through 2011.

E. Data and Results

Our data are all Supreme Court cases between 1987 and 2011 that dealt with freedom of religion. In these twenty four years, there were 37 cases in total. Of them, thirteen were free exercise cases and 24 were establishment cases. This

represents markedly fewer cases than in the earlier time period. In the years from 1961 - 1990, there were fifty seven free exercise decisions [70]. This averages to 1.97 cases over the 29 years. Compare that to the recent period in which there was an average of less than one case per year. There were ninety two establishment decisions from 1969 - 1985 [71], or an average of 5.75 over those sixteen years. In the latter time period, there was an average of one case a year. The decline or downward trend in the number of religion cases the Court hears is further illustrated by the fact that the Rehnquist Court heard 32 of these cases (from 1987 – 2005) and the Roberts Court heard five in the period from 2005-2010, almost half the rate of the Rehnquist Court.

Table I displays the frequency of cues or characteristics that the literature suggests might be related to decisions made by the Justices. All of the independent variables that were tested in the earlier research by Ignagni were also considered here. They were operationalized and coded in a similar or identical manner (usually "O" if absent in a case, and "1" if present). Two new variables were additionally considered. First, if the Court's decision occurred after 1990 (in other words, after the Smith ruling). The second new variable involved whether a freedom of speech claim was made in a religion case which might be a potential complicating factor. However, due to the low number of decisions by the Supreme Court, two of the independent variables (One-Time and Tax) were present in only a very small or insignificant number of cases and are, therefore, not shown in Table I. In terms of the dependent variable, it was also coded in a manner consistent with the 1993 and 1994 articles. So, with Establishment Clause cases, each decision was considered as either "accommodationist" (usually meaning that the law in question was considered to be constitutional and should be upheld) or "separationist" (usually meaning the law in question was considered to be unconstitutional and should be struck down). Accommodationist votes were coded as "1" and separationist votes as "0." In Free Exercise Clause cases, each decision can be seen as ruling to support the free exercise claim or ruling against it. Ruling to uphold a free exercise claim was coded "1" and voting against it was coded "0."

TABLE I
DISTRIBUTION OF INDEPENDENT VARIABLES BY FREE EXERCISE AND ESTABLISHMENT CASES

	Free Exercise		**Establishment**	
Variable	**N**	**% of those cases**	**N**	% of those cases
Rehnquist	10	77	22	92
Roberts	3	23	2	8
Uphold free exercise/take an accommodationist position	5	39	16	67
Clear religious purpose	2	15	12	50
Appears to treat people equally	10	77	7	29
18+ years old	12	92	13	54
200+ years of tradition	6	46	9	38
Marginal group	12	92	7	29
Education	1	8	14	58
Government Service	1	8	10	42
Surveillance	2	15	4	17
Employment	4	31	1	4
Zoning	3	23	2	8
Private	1	8	15	63
1990 or after	7	54	18	75
US in favor	2	15	17	71
US against	3	23	0	0
Both free exercise and establishment and both **in favor** of law/practice	1	8	2	8
Both free exercise and establishment and both **against** law/practice	4	31	21	88
Free speech and in favor of law/practice	2	15	2	8
Free speech and against law/practice	1	8	6	25

Turning now to the basic question of the outcome of the case, we see a difference between establishment clause cases and free exercise cases. Laws in Establishment Clause cases are more often than not (67% of the time) upheld. That is to say, 67% of the time the Court takes an accommodationist view that the law or practice does not violate the Establishment Clause. This is almost identical to the 68% found by Ignagni during the Burger Court years. In free exercise cases, the Court does not usually find in favor of the free exercise claim; in only 39% of the cases does the free exercise argument win the day. This is a drop from the 44% that Ignagni found in his earlier research. This drop would appear to be consistent or expected due to the Court's decision in the Smith case in 1990.

It should also be mentioned that the difference in the results involving the dependent variable could point to another important issue. The dependent variable was coded "1" in 57% of establishment cases (57% of the time accommodating religion) versus 39% of the free exercise cases (39% of the supporting religious claims). Thus, while possibly sharing some characteristics, this sample of cases points to there being differences in the Court's decision making between the two types of religion cases. There is the possibility that this is related to the Court accommodating or helping many religions in Establishment Clause jurisprudence while only looking at helping, typically, a single church in the Free Exercise Clause cases. Therefore, it is probably the case that, overall, different cues or a different emphasis needs to be considered in for each. For example, while half of all Establishment Clause cases had a clear religious purpose, only fifteen percent of free

exercise cases had that quality. Similarly, while 77% of the free exercise cases were ones in which the law or practice in question appeared to be neutral or treat people equally, only 29% of the establishment cases did so.

Overall, the characteristics or variables appearing in over half of the Free Exercise Clause cases are: neutral or treating people equally (77%); marginal group (92%); and level or a case involving adults (92%). By contrast those appearing in half or more of the Establishment Clause cases are: laws with a clear religious purpose (50%); the law dealing with adults (54%); the law dealing with education (58%); and cases involving a ruling where government property use, service, or monetary assistance was first given to a private citizen who then uses it for a religious purpose (63%).

Turning to the characteristics that were evidence less frequently, we see that relatively few cases involved a long established practice, but among free exercise cases there were more (46%) than among establishment cases (38%). The law involving a clear provision of a regular government service (like fire or law enforcement) occurred more often in establishment clause cases (41%) than among free exercise cases (only one case). Cases in which the government provided a benefit or money to a religious institution but then required surveillance of how the money or benefit was used did not occur often: only in four Establishment Clause cases (17%) and in two Free Exercise Clause cases (15%). A few cases pertained to employment law (four free exercise and one establishment case) and a few to zoning (three free exercise and two Establishment Clause cases).

Given the high rates of success of the U.S. before the Supreme Court, as discussed above, we would expect the role of the U.S. to be potentially important. We find that the U.S. behaves differently in the two types of religion cases. In Establishment Clause cases, the U.S. appeared quite frequently. The U.S. was a party to the case or an amicus in 17 of the 24 establishment cases (71% of these decisions). Furthermore, when the U.S. weighs in on Establishment Clause case, it always argues in favor of the law being upheld (an accommodationist position). By contrast, the U.S. gets involved less frequently in Free Exercise Clause cases (five or the 13 or 38% of the time). When it does, it is relatively split; in two cases it argued in favor of the free exercise claim and in three cases it argued against.

We might also be interested in whether the presence of another constitutional issue might push the outcome in one direction or another. For that reason, we also noted when cases touched on both a free exercise and establishment, and where a religion case also brought up issues of freedom of speech. There were twenty eight cases which raised both free exercise and establishment issues; five among free exercise and 23 among establishment cases. Where the primary issue was free exercise and establishment was also present, in four out of the five cases the establishment argument was to strike down the law or practice or to take a separationist view. However, in almost all of the primarily establishment clause cases (23 of the 24 cases), there is also a free exercise claim and in almost all of these cases the free exercise claim argued for an accommodationist view – upholding the law or practice (in 21 of the cases- 88%).

Next we turn to an examination of the relationship between these independent variables and the outcome of the case. We see some interesting trends. Among establishment clause cases, whether the law had a clear religious purpose was important to the outcome (see Table II). In cases where there was no clear religious aspect to the law or practice, it was upheld – the Court took an accommodationist view of religion. However, in the cases where religion was clearly pronounced, more often than not (in 58% of the cases) the law was struck down as unconstitutionally violating "church and state" separation. This relationship is also statistically significant.

TABLE II
OUTCOME OF THE CASE BY CLEAR RELIGIOUS PURPOSE, CONTROLLING FOR TYPE OF CASE

	Free Exercise		
	No clear religious purpose	Clear religious purpose	
Struck Down	6 (55%)	2 (100%)	8
Upheld	5 (45)	0	5
	11	2	
Not significant			
	Establishment		
	No clear religious purpose	Clear religious purpose	
Separationist	1 (8%)	7 (58%)	8
Accommodationist	11 (92%)	5 (42)	16
	12	12	
	Correlation significance = .014		
	Chi Square significance = .008		

Recall that a higher percentage of free exercise cases involved a law in question which appeared to treat people equally as compared to establishment cases. However, these free exercise cases were equally split uphold/strike down (see Table III) and the relationship is not statistically significant. Yet, among establishment clause cases, those that involved treating people equally were more likely (100%) than among no equal treatment (53%) to be upheld. Said another way, among Establishment Clause cases equal treatment leads to the law's success in withstanding a constitutional challenge. However, when that characteristic is not present, almost half the laws are struck down (47%).

TABLE III
OUTCOME OF THE CASE BY EQUAL TREATMENT, CONTROLLING FOR TYPE OF CASE

	Free Exercise		
	Treat people equally	No equal treatment	
Struck Down	6 (60%)	2 (67%)	8
Upheld	4 (40)	1 (33)	5
	10	3	
Not significant			
	Establishment		
	Treat people equally	No equal treatment	
Separationist	0	8 (47%)	8
Accommodationist	7 (100%)	9 (53)	16
	7	17	
	Correlation significance = .033		
	Chi Square significance = .026		

Whether the case involved a distinction over whether adults or children were involved did not evidence a strong pattern with the outcome of the case. Among Establishment Clause cases it made almost no difference. Among Free Exercise Clause cases, twelve of the thirteen cases did involve adults and in those twelve cases, only four were upheld.

The extent to which a law involved a long history or established tradition was important among establishment cases but not among free exercise cases (see Table IV). Among the former, when there was no tradition, the law was upheld and religion was accommodated 80% of the time. However, when there was a long established tradition (for example an opening prayer at the start of a legislative session), the outcome was more mixed. In these instances the Court was more likely to find against the practice (56% of the time) than to take a position accommodating religion (44% of the time), perhaps in part due to the outcome of the elementary and middle-school prayer cases.

TABLE IV
OUTCOME OF THE CASE BY TRADITION, CONTROLLING FOR TYPE OF CASE

Free Exercise			
	Not more than 200+ years of tradition	More than 200+ years of tradition	
Struck Down	4 (57%)	4 (67%)	8
Upheld	3 (43)	2 (33)	5
	7	6	
Not significant			
Establishment			
	Not more than 200+ years of tradition	More than 200+ years of tradition	
Separationist	3 (20%)	5 (56%)	8
Accommodationist	12 (80)	4 (44)	16
	15	9	
Correlation significance = .091			
Chi Square significance = .079			

Turning now to the relationship between marginal groups and the outcome of the case, among Free Exercise Clause cases, being a member of a marginalized group made little difference in the outcome of the case (see Table V). Marginalized group arguments were slightly more likely to be struck down (58%). However, within establishment cases, being a member of a marginalized group garnered a distinct advantage. In all of these Establishment Clause cases, the law affecting the marginalized group was upheld and thus the religious activity or practice was upheld. In the cases where there was no marginalized group, slightly more than half were upheld (53%). This relationship was also statistically significant.

Recall that we found that the percentage of education cases was greater within establishment cases. However, among these cases the law was likely to be upheld both when it was an education case (64% of the time) and when it was not (70%). Among free exercise cases, there was only one of the 14 cases that was an education case, and it was struck down.

There was only one free exercise case that involved a provision of a regular government service such as fire or police protection. In the one case that did, the law was struck down. However, among ten establishment clause cases that did involve a general government service, in eight of them the practice or law was upheld as a constitutionally permissible.

There were not many cases where the government provided money or benefits to a religious organization but then required the organization to allow surveillance of its activities by the government. These would be instances where, for example, the government provided subsidized math tutoring for a parochial school but then required observation the instructor in the parochial setting to guarantee that the tutor was only teaching calculus or secular topics. There were only two cases of clear government review or surveillance among free exercise cases (both were struck down), and only four among establishment cases (two were upheld and two stuck down).

There were also few employment cases. Among the four such Free Exercise Clause cases, the outcome was split. Within Establishment Clause cases, there was only one such case and in it the Court found the practice constitutional. Similarly, there were few zoning cases. In all three free exercise cases, the practices were struck down. There were two Establishment Clause cases and the outcomes were split; one was upheld, accommodating religion and one was not.

Especially among Establishment clause cases, the Court made a distinction over government funds that first passed through a private citizen's hands before going to a religious institution. The Court argued that if the government gave, for example, tuition vouchers to families and they chose to send their children to a parochial school, there was no violation of church and state. As Table VII shows, in 80% of these cases (12 of 15 cases) the Court does take an accommodationist view. This relationship is statistically significant.

TABLE V
OUTCOME OF THE CASE BY MARGINALIZED GROUP, CONTROLLING FOR TYPE OF CASE

Free Exercise			
	Marginal Group	No reference to marginal group	
Struck Down	7 (58%)	1 (100%)	8
Upheld	5 (42)	0	5
	12	1	
Not significant			
Establishment			
	Marginal Group	No reference to marginal group	
Separationist	0	8 (47%)	8
Accommodationist	7 (100%)	9 (53)	16
	7	17	
Correlation significance = .033			
Chi Square significance = .026			

TABLE VI
OUTCOME OF THE CASE BY GOVERNMENT SERVICE, CONTROLLING FOR TYPE OF CASE

Free Exercise			
	No general government service	General government service	
Struck Down	7 (58%)	1 (100%)	8
Upheld	5 (42)	0	5
Not significant	12	1	
Establishment			
	No general government service	General government service	
Separationist	6 (43%)	2 (20%)	8
Accommodationist	8 (57)	8 (80)	16
	14	10	
	Correlation significance = .234		
	Chi Square significance = .261		

TABLE VII
OUTCOME OF THE CASE BY PRIVATE CITIZEN, CONTROLLING FOR TYPE OF CASE

Free Exercise			
	No decision made by private citizen	Decision made by private citizen	
Struck Down	7 (58%)	1 (100%)	8
Upheld	5 (42)	0	5
Not significant	12	1	
Establishment			
	No decision made by private citizen	Decision made by private citizen	
Separationist	5 (56%)	3 (20%)	8
Accommodationist	4 (44)	12 (80)	16
	9	15	
	Correlation significance = .091		
	Chi Square significance = .079		

Recall that in the 1990 Smith case, the Court issued a decision that made it much more difficult for people to bring suit successfully claiming infringement on their free exercise of religion. Though the relationships are not statistically significant and the number of cases very small, the pattern is not one which would have been expected. As Table VIII shows, among Free Exercise Clause cases, those before 1990 are actually more likely to struck down (67%) than those after 1990 (57%). Among establishment clause cases after 1990, the Court is much more likely to be accommodating of religion.

TABLE VIII
OUTCOME OF THE CASE BY 1990 OR AFTER, CONTROLLING FOR TYPE OF CASE

Free Exercise			
	Before 1990	After 1990	
Struck Down	4 (67%)	4 (57%)	8
Upheld	2 (33)	3 (43)	5
Not significant	6	7	
Establishment			
	Before 1990	After 1990	
Separationist	3 (50%)	5 (28%)	8
Accommodationist	3 (50)	13 (72)	16
	6	18	

As discussed above, the impact that U.S. government has as party or an amicus in these cases varies by free exercise versus establishment (see Table IX). Within free exercise cases, if the U.S. was present and opposed to the law, it was struck down in two of the three cases. However, if it was present and in favor of the law, the outcome was split (in one case the law was upheld and in one case it was struck down). In establishment cases, the U.S .if present, was always in favor of the law was usually victorious; the laws were upheld 77% of the time.

TABLE IX
OUTCOME OF THE CASE BY US ROLE, CONTROLLING FOR TYPE OF CASE

Free Exercise				
	US as party or as Amicus			
	Present and against law	Not present	Present and in favor of law	
Struck Down	2 (67%)	5 (63%)	1 (50%)	8
Upheld	1 (33)	3 (38)	1 (50)	5
Not significant				
Establishment				
	US as party or as Amicus			
	Present and against law	Not present	Present and in favor of law	
Separationist	0	4 (57%)	4 (24%)	8
Accommodationist	0	3 (43)	13 (77)	16
	Correlation significance = .134			
	Chi Square significance = .122			

While there are not very many Free Exercise Clause cases where there are both free exercise and establishment claims, there are interesting patterns (see Table X). Among the free exercise cases, in the five cases where there was also an establishment clause claim, if the establishment clause claim argued against the law, it was struck down as many times as it was upheld. The Establishment Clause claim arguing for the law was not helpful either, in the one case falling into this category, the law was struck down. The pattern is equally odd among establishment cases. In the 21 cases where there was a free exercise claim arguing against the law, it was upheld two thirds of the time. In the two cases where the free exercise claim argued for the law, it was upheld once and struck down once.

TABLE X
OUTCOME OF THE CASE BY ADDITIONAL FREEDOM OF RELIGION ISSUE

Free Exercise				
	Free exercise and Establishment present			
	Both present and against law	Neither present	Both present and in favor of law	
Struck Down	2 (50%)	5 (63%)	1 (100%)	8
Upheld	2 (50)	3 (38)	0	5
Not significant				
Establishment				
	Free exercise and Establishment present			
	Both present and against law	Neither present	Both present and in favor of law	
Separationist	7 (33%)	0	1 (50%)	8
Accommodationist	14 (67)	1 (100%)	1 (50%)	16
Not significant				

There were few free exercise cases where there was also a free speech claim. In one case where the free speech claim

argued against the law, it was struck down by the Court. In the two cases where the claim supported the law the outcome was a 50/50 split (see Table XI).

TABLE XI
OUTCOME OF THE CASE BY ADDED CONSTITUTIONAL ISSUE OF FREE SPEECH, CONTROLLING FOR TYPE OF CASE

	Free Exercise			
	Free speech			
	Present and against law	Not present	Present and in favor of law	
Struck Down	0	7 (70%)	1(50%)	8
Upheld	1 (100%)	3 (30)	1 (50)	5
Not significant				
	Establishment			
	Free Speech			
	Present and against law	Not present	Present and in favor of law	
Separationist	1 (17%)	6 (38%)	1 (50%)	8
Accommodationist	5 (83)	10 (63)	1 (50)	16
Not significant				

F. Summary and Conclusions

We found a number of interesting results in our analysis of these U.S. Supreme Court rulings dealing with religion. First of all, the rate of hearing such cases has clearly dropped in the last twenty years or so. What makes this interesting is the fact that the Supreme Court controls its own docket and decides which cases it wishes to hear. Therefore, the Court is choosing to hear less of these types of cases (because they certainly continue to be argued and heard in lower courts). One obvious possibility is that the Court has decided to stay clear of most of these cases because there is no clear legal test or doctrine on which the majority agrees. This finding should be of interest to those who study constitutional law and the Court.

Additionally, we found some different results in terms of the decisions of the Supreme Court compared to earlier research. While the Court seems to be as accommodating of religion in its Establishment Clause jurisprudence, there has been a drop in support of free exercise claims. This seems reasonable when one considers the changes in Court personnel and the Smith free exercise decision. However, we found that the drop in support may have actually preceded the Smith case. We found that 39% of all free exercise claims were upheld during this entire time period. Prior to 1990 only 33% were upheld. Post-Smith, the rate of upholding these claims increases to 43%. This is interesting and counter-intuitive, perhaps suggesting a self-selection effect either among the cases that applied for certiorari or in the cases the Court decided to hear, once the Smith doctrine was established. There were also some unexpected findings in terms of some of the variables including History-Tradition. This factor seemed to have no impact or the opposite effect in these cases than what was predicted.

In terms of the theoretical approach and the variables under consideration here, the trends are suggestive of Ignagni's earlier work and in many ways supportive of it. Ignagni's 1993 and 1994 articles clearly provided support for the argument that Justices' are possibly forced to often behave in a boundedly rational or cognitive-cybernetic manner. It also indicated that cases in these areas could be explained and predicted using such an approach. This paper includes several interesting findings connected to many of the factors from this earlier work. For example, the results when there was U.S. involvement in a case or when both establishment and free exercise concerns were present in a decision seem worthy of even further study. With the statistical analysis provided in this paper there is evidence that some of the variables studied are significantly related to these cases (e.g., Purpose, Neutral, Marginal). The important caveat, though, is that several others bivariate relationships could not adequately be tested due to the scarcity of decisions, nor could a full model be tested. Several interesting trends were noted, but the trends we present here are our preliminary analysis and form the foundation for future study in an important area of constitutional law.

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