

# Religious Freedoms, Church-State Separation, and Religiosity: Evidence from Randomly Assigned Judges

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## Abstract

This paper provides evidence on how laws related to the establishment or exercise of religion affect the level of religious activity. We exploit the random assignment of judges to regional appellate courts, along with the fact that judge politics, religion, and other characteristics predict decision-making in church-state jurisprudence, to obtain exogenous variation in religion caselaw. Our first-stage effect is driven by the fact that Democratic, minority-religion judges tend to favor greater separation of church and state than their Republican, majority-religion counterparts. In the second-stage estimates for the effect of law on outcomes, we report two findings. First, judicial decisions reducing government subsidies to mainstream religions reduce measures of supply-side religious services. Second, judicial decisions that strengthen the free exercise of fringe religions increase self-reported religiosity.

## 1 Introduction

It is well-documented empirically that countries with state religion have lower levels of religiosity (Chaves and Cann 1992; Finke and Stark 1992; Iannaccone 1998; North and Gwin 2004; Barro and McCleary 2005). At one end of the spectrum, 96% of Americans

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believe in God (Marshall 2002), while at the other, 51% of EU citizens believe in God, ranging from 79% in Poland to 18% in Sweden (Eurobarometer polls). Why are Americans more religious than Europeans?

An influential idea from economics is that a state-established church can be understood as a state-sanctioned monopoly that impedes a market for religious ideas [Barro and McCleary, 2005, McConnell and Posner, 1989]. In the same way that a monopoly firm constrains the supply of goods and reduces equilibrium consumption, a state church will constrain the supply of religious services and reduce equilibrium religiosity. There are many cross-country studies showing that countries with state religion have lower religiosity, consistent with this view (Chaves and Cann 1992; Finke and Stark 1992; Iannaccone 1998; North and Gwin 2004; Barro and McCleary 2005). However, there are no studies attempting to study this question using random variation in church-state separation.

This paper aims to provide well-identified empirical evidence of the impacts of church-state separation on religious activity. We obtain exogenous variation in religion jurisprudence using the random assignment of judges to U.S. Circuit Court decisions. Judges affiliated with the Democratic party and minority religions (e.g. Judaism) tend to favor stronger church-state separation; in circuits where a relatively high proportion of these types of judges were assigned to religion cases, the caselaw ensures relatively stronger church-state separation. Due to random assignment, the stronger legal protections for religion are orthogonal to other factors that may be associated with religious activity.

We focus on two different legal doctrines. First, Establishment Clause cases deal with whether government is favoring a particular religion, such as whether the government can compel students to pray in school. We find that a random increase in pro-separation precedent on Establishment Clause cases is associated with a reduction in supply-side measures of religious services, including the number of buildings and total payroll. We find no effect of Establishment caselaw on religiosity among individuals, however. This result is consistent with anti-establishment caselaw eliminating or reducing subsidies to favored mainstream religions, causing a reduction in supply.

Second, Free Exercise Clause cases deal with the freedom of religious expression – for example, the freedom for followers of Native American religions to use peyote even though peyote is otherwise banned as an illegal drug. We find that an exogenous increase in free-exercise protections results in an increase in religiosity among individuals. There are no impacts of Free Exercise caselaw on the supply side, however. This result is consistent with free-exercise protections making it less costly to practice fringe religions.

Religiosity has important socioeconomic impacts. Besides potential independent effects

on welfare [Stark and Maier, 2008], religion may have feedback effects on policy. Fogel (2000) provides the seminal discussion of how religious movements influence redistributive preferences, resulting in greater or lesser egalitarianism. Moreover, religious affiliations involve provision of social insurance (Iannaccone 1998; Berman 2000; Dehejia et al. 2005; Chen 2006; Chen 2010). In the nineteenth century U.S., for example, greater rainfall risk was associated with increased religiosity (Ager and Ciccone 2014). Frequent churchgoers report larger social networks, more contact with network members, and more types of social support received (Ellison and K. George 1994). Finally, all of these effects may be amplified by intergenerational transmission of religious preferences and habits from parents to children (Cornwall, 1987; Smith and Denton 2009).

Outside of economics, previous theories for the changing nature of religious movements have been descriptive (Carter 1956; Hubbard 1991 Bateman 1998; Hood et al. 2005). The descriptions tend to focus on other factors affecting religiosity. These include acceptance of scientific findings, urbanization, new media, legalized abortion via *Roe v. Wade*, the Cold War, the World Wars, and Prohibition. While these historical factors likely played a role in levels of American religiosity, we complement this work by focusing on an identified research design.

The rest of the paper is organized as follows. Section 2 provides a more detailed background in the literature and economic theory. Section 3 describes the datasets. Section 4 describes our empirical strategy. Section 5 reports results. Section 6 concludes.

## 2 Background

This section provides some background in the law and economics of religious activity.

Recent historical research has documented that separation of church and state was neither sought nor intended by the constitutional framers (Hamburger 2002; Feldman 2005). The Framers condoned an established church, but thought that should be left to individual state governments, rather than the federal government. It wasn't until the 1940s, with *Cantwell v. Connecticut*, 310 U.S. (1940) (applying the Free Exercise Clause) and *Everson v. Board of Education*, 330 U.S. 1 (1947) (applying the Establishment Clause), that the U.S. Supreme Court allowed federal constitutional challenges to state laws related to religion.

In general, there will be at least minimal level of government regulation of religion. As Chief Justice Warren Burger put it in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

Some relationship between government and religious organizations is inevitable.

Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are example of necessary and permissible contacts.

On the other hand, an official government church denomination would be outlawed. In between, there is wide scope for variation in judicial decision-making. Circuit-level variation in religion jurisprudence since 1940 are the source of our treatment variation. See Appendix A for a more detailed discussion of this jurisprudence.

We view the market for religious services as a market for two imperfect substitutes. There is a mainstream religion (a church) and a fringe religion (a sect). Government policy and regulations of religious activity can be understood as either taxes or subsidies on either the mainstream religion or the fringe religion. For example, a law that makes use of peyote illegal can be understood as a tax on Native American firms. Secondly, a law that requires Christian prayer in school can be seen as a subsidy to Christian firms. When a court strikes down a government policy for constitutional reasons, that can be understood as eliminating the tax or subsidy.

There is a long literature in social science taking an a economic approach to the study of religious behavior and religion policy. Azzi and Ehrenberg [1975] propose at least three motives for religious actions: social/communal well-being, improved social capital for business dealings, and increased “afterlife consumption.” The first two values accrue to any civic activity, so it is the last, the “salvation motive,” that specifically distinguishes religious behavior. Another idea from economics is that religion is an example of a pure credence good [Anderson and Tollison, 1992], with God having perfect information about the product and the consumer knowing nothing.

An important component of a model of religion is heterogeneity of preferences. Differing marginal utilities for additional time spent on religious activities is an important determinant of substantial differences across individuals in time spent on those activities [Azzi and Ehrenberg, 1975]. Gill [2003] notes that some people respond to emotional services, while others prefer intellectual presentations. This diversity of preferences for religion, paired with a free religious market, will lead to a diverse economy with imperfectly substitutable religious services serving various preference niches [Stark and Finke, 2000]. In particular, niches vary in the costs imposed on adherents, in terms of money, time, social exclusions, rules, etc. Not coincidentally, stricter churches tend to provide closer, more trusting friendships [Iannaccone, 1988].

The costliness of a religious firm can be understood as the degree to which it accepts the

prevailing social environment of the society at large. A firm with low tension accepts the social environment; Stark and Finke [2000] call this a church. A high-tension firm – a sect – characteristically rejects the social environment and requires that adherents make costly norm violations. In the spatial-location model provided by Barros and Garoupa [2002], religious firms set their tension levels the same way that non-religious firms do when setting prices. Consumers attend the church that most closely matches his or her tension preference. Religious firms make a strategic decision where to locate based on the distribution of tension preferences and the location of competitors. Institutional protections for religious freedoms protect free entry, and thereby lead to a diversity of firms – religious pluralism.

An established state-sponsored religion can be viewed as a religious subsidy. In that case, an established religion might serve to push out the supply curve and increase religion consumption [McConnell and Posner, 1989]. On the other hand, an established religion can impose costs on fringe religions, for example through crowd out from subsidizing the competing religion. An established religion may also result in negative externalities on fringe religions through social pressure and prejudice [Wybraniec and Finke, 2001]. In the words of Justice Hugo Black, “When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.” *Engel v. Vitale*, 270 U.S. 421 (1962).

Without active, donating members, a private church goes bankrupt and closes down. As a result, employees at religious firms depend on keeping consumers actively engaged [Finke, 1990, Gill, 2003]. In contrast, with subsidies the state pays a steady salary to the clergy regardless of their ability to gain or retain converts, disincentivizing aggressive proselytizing. Correspondingly, under private-sector religion, certain benefits from religious membership—such as a place for celebrating weddings and holidays—can only be attained by paying a church the costs of year-round weekly membership. Established churches supply these benefits to everyone regardless of their church membership status, allowing adherents to free-ride on the benefits without weekly attendance [Hamberg and Pettersson, 1994].

These are reasons that favoring a particular religion could actually result in decreased religious activity. A more direct way to reduce religiosity is active suppression of religion. An extreme example is the Saudi Arabian government enforces Shari’a Law, builds and maintains mosques with state money, and outlaws public practice of non-Muslim religions (International Religious Freedom Report). But even in the United States, local governments have repeatedly suppressed and/or restricted activities of fringe religions [Finke, 1990, Wybraniec and Finke, 2001, Hamburger, 2002]. In an economic framework, these can

be understood as taxes on religious consumption of fringe religions.

### 3 Setting and Data

This section describes our data sources and reports summary statistics.

There are three layers in the U.S. Federal Court system: the local level (District Court), intermediate level (Circuit Court), and national level (Supreme Court). Judges are appointed by the U.S. President and confirmed by the U.S. Senate. They are responsible for the adjudication of disputes involving common law and interpretation of federal statutes. Their decisions establish precedent for adjudication in future cases in the same court and in lower courts within its geographic boundaries. The 12 U.S. Circuit Courts (Courts of Appeals) take cases appealed from the District Courts, and review is mandatory. Each Circuit Court presides over 3-9 states. The vast majority (98%) of their decisions are final.<sup>1</sup> Each case is randomly assigned to a panel of three judges. The judges are drawn from a pool of 8-40 judges and the judges have life tenure.

Our data on religion caselaw is from [Sisk et al., 2004, Sisk and Heise, 2012, Heise and Sisk, 2012]. They coded up all the circuit cases making substantive decisions about freedom of religion, for the years 1986 through 2005. The data include two types of cases. Free Exercise cases deal with the freedom of religious expression, for example the freedom for followers of Native American religions to use peyote even though peyote is otherwise banned as an illegal drug. Establishment cases deal with whether government is favoring a particular religion, such as whether the government can compel students to pray in school.

For each case, Sisk et al. [2004], Sisk and Heise [2012] have collected data on whether the decision was pro-religious-liberty – in these types of cases, that means the claimant prevailed against the government. They also have information on the religion of the claimant. Table 1 has summary statistics on these cases. As can be immediately seen in the distribution over religions, these cases mostly feature religions that are outside the mainstream.

Our treatment variables for religious caselaw are constructed from the indicator variable for whether the court found in favor the the claimant against the government. In circuits where claimants prevailed at a relatively high rate, there will be a higher value for the religious freedom treatment variable.

Our second major source of data is the set of judge biographical characteristics from

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<sup>1</sup>In the remaining 2% that are appealed to the Supreme Court, 30% are affirmed.

Table 1: Summary Tabulations for Religion Caselaw Data

Circuit	Cases	Year	Cases	Category	Cases
1st	16	1986	31		
2nd	64	1987	29	Claimant Wins	233
3rd	29	1988	34	Claimant Loses	331
4th	35	1989	33		
5th	47	1990	38	Free Exercise	430
6th	54	1991	44	Establishment	134
7th	75	1992	24		
8th	82	1993	32	Catholic	24
9th	87	1994	31	Protestant	22
10th	39	1995	29	Other Christian	99
11th	36	1996	22	Jewish	30
		1997	21	Muslim	65
		1998	2	Other	321
		1999	14		
		2000	6		
		2001	21		
		2002	28		
		2003	45		
		2004	50		
		2005	30		

Table 2: Summary Statistics for Judge Characteristics

Variable	All Cases, 1986-2005 ( $N = 122,295$ )		Religion Cases, 1986-2005 ( $N = 564$ )	
	Mean	Std. Dev,	Mean	Std. Dev.
Female	0.1485	0.1049	0.1182	0.180
Black	0.0655	0.0540	.059	0.1341
Non-white	0.1057	0.0722	0.0942	0.16753
Protestant	0.387	0.2497	0.3984	0.3086
Catholic	0.28070	0.162	0.2726	0.2593
Evangelical	0.088	0.095	0.0942	0.1797
Jewish	0.13681	0.1268	0.1258	0.1992
Secular	0.0303	0.0522	0.027	0.0958

the Appeals Court Attribute Data,<sup>2</sup> Federal Judicial Center, and previous data collection.<sup>3</sup> From these data we constructed dummy indicators for whether the judge was female, non-white, black, Jewish, catholic, protestant, evangelical, mainline, non-religiously affiliated, whether the judge obtained a BA from within the state, attended a public university for college, had a graduate law degree (LLM or SJD), had any prior government experience, was a former magistrate judge, former bankruptcy judge, former law professor, former deputy or assistant district/county/city attorney, former Assistant U.S. Attorney, former U.S. Attorney, former Attorney-General, former Solicitor-General, former state high court judge, former state lower court judge, formerly in the state house, formerly in state senate, formerly in the U.S. House of Representatives, formerly a U.S. Senator, formerly in private practice, former mayor, former local/municipal court judge, formerly worked in the Solicitor-General's office, former governor, former District/County/City Attorney, former Congressional counsel, formerly in city council, born in the 1910s, 1920s, 1930s, 1940s, or 1950s, whether government (Congress and president) was unified or divided at the time of appointment, and whether judge and appointing president were of the same or different political parties.

Our judge assignment instruments are constructed from these judge covariates. As documented by Sisk et al. [2004], Sisk and Heise [2012], some of these covariates are highly correlated with decisions in these cases. Table 2 reports summary statistics on these variables. In the aggregate of cases, the distribution of characteristics across cases is similar for religion cases as for all cases, consistent with random assignment of judges to cases.

<sup>2</sup><http://www.cas.sc.edu/poli/juri/attributes.html>

<sup>3</sup>Missing data was filled in by searching transcripts of Congressional confirmation hearings and other official or news publications on Lexis (Chen and Yeh 2014).

Table 3: Summary Statistics for Religious Activity Outcomes

<u>County Business Patterns, by State</u>			<u>Individual Religious Activity</u>		
Variable	Mean	Std. Dev.	Variable	Mean	Std. Dev.
Religion Buildings (#)	2996.588	2609.698	Any Religion	0.893	0.30984
Religion Employment (# Workers)	26363.12	27149.45	Very Religious	0.36097	0.48029
Religion Payroll (\$)	\$1.8M	\$3.65M	Belief in After-Life	0.52007	0.4996
			Attends Church 1+ Per Week	0.26543	0.44157
All Industries Buildings	131905.8	140345.3	Attends Church 1+ Per Month	0.48650	0.49982
All Industries Employment	2M	2.1M	Pray Daily	0.29466	0.4559
All Industries Payroll	\$17B	\$70B	Support Prayer in School	0.21086	0.40792

Identification comes from variation across circuits over time.

Our third set of data include outcomes on religious activity in the United States. As measures of the supply for religious services, we have data from the County Business Patterns Census. This includes data on the number of buildings, number of employees, and total payroll for religious organizations in each state for the years 1962 through 2014. These were identified in the data as SIC code 8660 and NAICS code 81311. To normalize the measure and account for economic and population growth, we divide by the total for all businesses. Summary statistics on these measures are reported in the left side of Table 3.

As measures of the demand for religious services, and of individual religious activity, we have data from the General Social Survey with state identifiers for the years 1972 through 2004. The survey includes a range of questions related to religiosity. We have constructed a set of measures from answers to these questions, which are listed in the right-side columns of Table 3.

## 4 Empirical Strategy

We model the effects of religious-liberties precedent at the circuit-year level on several state-level outcomes. The second-stage estimating equation is

$$Y_{ict} = \beta_0 + \beta_1 Law_{ct} + \beta_2 \mathbf{1}[M_{ct} > 0] + \beta_3 S_i + \beta_4 T_t + \beta_5 X_{ict} + \beta_6 W_{ct} + \varepsilon_{ict}. \quad (1)$$

The dependent variable,  $Y_{ict}$ , is an outcome measure for individual or state  $i$  in circuit  $c$  at year  $t$ .

The main coefficient of interest is  $\beta_1$  on  $Law_{ct}$ , the measure of pro-religious-liberty decisions issued in Circuit  $c$  at year  $t$ . We construct this as the percentage of religious liberties

decisions that are pro-liberty in circuit  $c$  at time  $t$ . We have three specifications for  $Law_{ct}$ : 1) all religion cases, 2) just free-exercise cases, and 3) establishment cases.

$M_{ct}$  is the number of cases,  $S_i$  includes state fixed effects,  $T_t$  includes time fixed effects,  $X_{ict}$  includes state characteristics (such as GDP, population, or state time trends) or individual characteristics (such as gender, age, race, or college attendance), and  $W_{ct}$  includes characteristics of the pool of judges available to be assigned.

Our approach is analogous to a “stock” specification. We measure  $Law_{ct}$  as the average of pro-religion decisions (+1), anti-religion decisions (−1), and no decision (0). This approximately makes the restriction that  $\beta_2 = 0$ ; approximate because when a case appears, it is almost always appearing by itself ( $M_{ct} = 1$  or 0). This specification has the advantage that information in circuit-years without cases helps pin down auxiliary parameters, such as the coefficients on the controls. However, this specification explicitly assumes that the effects of pro-liberty and anti-liberty decisions are opposite in sign but equal in absolute value relative to the baseline of no case.

If a circuit-year has a higher fraction of pro-liberty judges ( $N_{ct}/M_{ct}$ ) assigned,<sup>4</sup> the precedent for that year will be that much more pro-liberty. The moment condition for causal inference is  $\mathbf{E}[(N_{ct}/M_{ct} - \mathbf{E}(N_{ct}/M_{ct}))\varepsilon_{ict}] = 0$ .  $\mathbf{E}(N_{ct}/M_{ct})$  is the expected proportion of judges who tend to be pro-liberty in religious liberty cases.

We estimate how outcomes  $Y_{ict}$  respond to idiosyncratic variation in excess proportion,  $N_{ct}/M_{ct}$ , controlling for  $\mathbf{E}(N_{ct}/M_{ct})$ .<sup>5</sup> We control for expectations rather than use deviations from expectations because, in simulations, measurement error in  $\mathbf{E}(N_{ct}/M_{ct})$  can lead to large biases when deviations are employed as instrumental variables. We calculate the expectations based on the composition of the circuit’s pool of judges available to be assigned in any circuit-year assuming that all judges have an equal probability of assignment. We weight senior judges according to the frequency that a typical senior judge sits on cases.

Next, we construct an instrumental variable whose moment conditions are implied by the original moment condition. Consider an instrument,  $p_{ct} - \mathbf{E}(p_{ct})$ , where  $p_{ct}$  is the proportion of judges who tend to be pro-choice and  $p_{ct}$  is defined as 0 when there are no cases:

$$p_{ct} = \begin{cases} N_{ct}/M_{ct} & \text{if } \mathbf{1}[M_{ct} > 0] = 1 \\ 0 & \text{if } \mathbf{1}[M_{ct} > 0] = 0 \end{cases}$$

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<sup>4</sup>Without loss of generality, we focus on the contemporaneous lag in the subsequent discussion.

<sup>5</sup>In the main specification, this is represented in  $W_{ct}$ .

Observe that we can rewrite the moment condition for the new instrument as:

$$\begin{aligned}\mathbf{E}[(p_{ct} - \mathbf{E}(p_{ct}))\varepsilon_{ict}] &= \mathbf{Pr}[M_{ct} > 0]\mathbf{E}[(p_{ct} - \mathbf{E}(p_{ct}))\varepsilon_{ict}|M_{ct} > 0] + \mathbf{Pr}[M_{ct} = 0]\mathbf{E}[(p_{ct} - \mathbf{E}(p_{ct}))\varepsilon_{ict}|M_{ct} = 0] \\ &= \mathbf{Pr}[M_{ct} > 0] * 0 + \mathbf{Pr}[M_{ct} = 0] * 0 \\ &= 0\end{aligned}$$

Notice where the original moment condition is substituted with 0, so the new moment condition is implied by the old one.

The first stage equation is

$$Law_{ct} = \gamma_0 + \gamma_1 Z_{ct} + \gamma_2 \mathbf{1}[M_{ct} > 0] + \gamma_3 S_i + \gamma_4 T_t + \gamma_5 X_{ict} + \gamma_6 W_{ct} + \eta_{ict} \quad (2)$$

where the terms have been defined as above, and  $Z_{ct}$  includes the instruments selected for post-Lasso 2SLS [Belloni et al., 2012]. Lasso is run separately for Establishment cases and Free Exercise cases.<sup>6</sup>

Estimates for  $\vec{\gamma}$  and  $\vec{\beta}$  are estimated using optimal GMM in Stata's `ivreg2` command. Standard errors are clustered by circuit (Barrios et al. 2012).<sup>7</sup>

## 5 Results

This section reports the results.

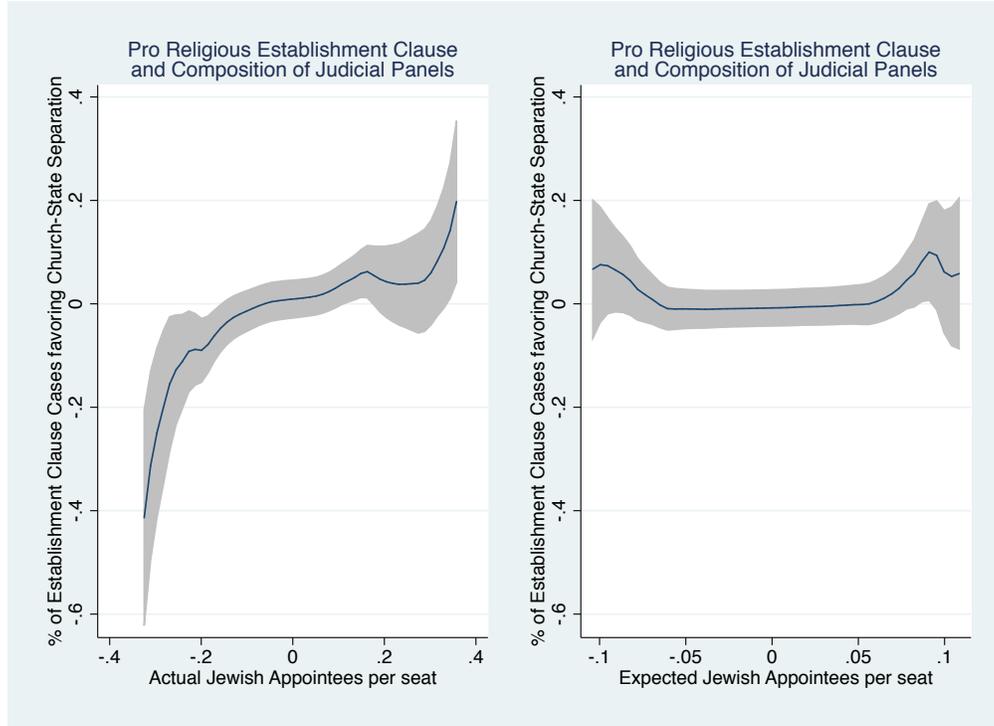
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<sup>6</sup>For computational reasons the Lasso instrument selection step was run without  $W_{ct}$  and the time trends, which may bias against finding some of the weaker instruments than would be optimal. These additional covariates are included in subsequent 2SLS regressions.

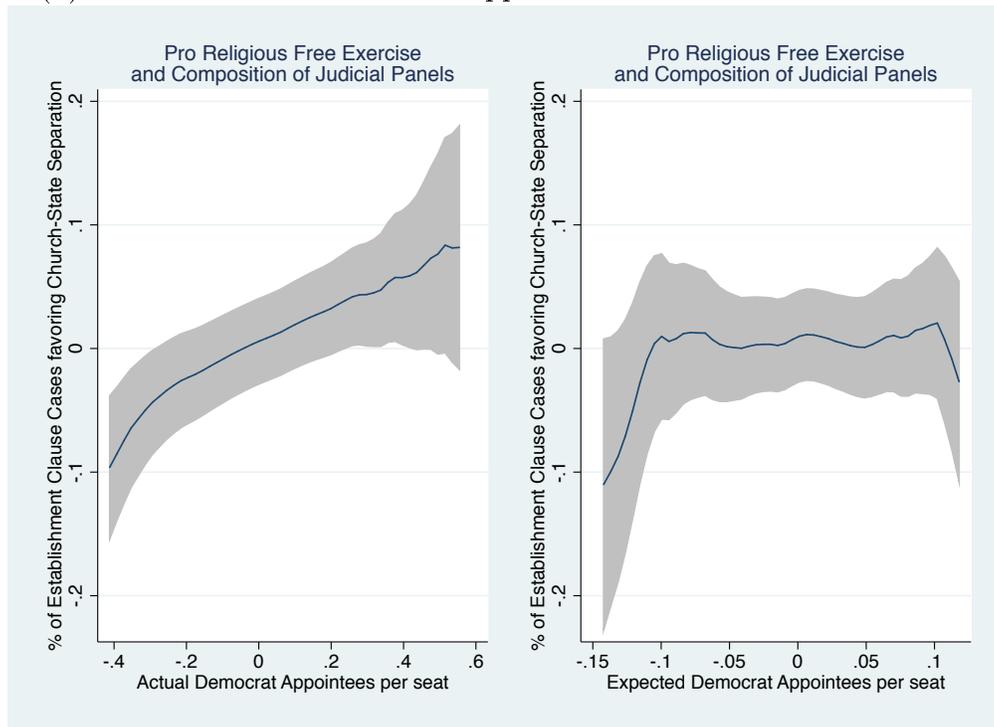
<sup>7</sup>Results are similar with clustering by circuit-year, or by state.

Figure 1: Local Polynomial Smooth Plots for First Stage

(a) Effect of More Jewish Appointees in Establishment Decisions



(b) Effect of More Democratic Appointees in Free Exercise Decisions



We begin by focusing on the first stage. We report local polynomial smooth plots for select first-stage effects in Figure 1. As seen in Panel (a), more Jewish judges on a court case is associated with Establishment Clause cases that strengthen church-state separation. In Panel (b), we see that more Democratic judges assigned to a case is associated with more pro-religious-freedom Free Exercise decisions. In the right-hand-side graphs, we see that the proportion of Jewish/Democratic judges on the whole court does not have an effect. This supports the view that our first-stage estimates are due to the preferences of the assigned judges, rather than other correlated factors at the circuit level.<sup>8</sup>

Using the Lasso-selected instruments, we obtain a strong first-stage F-statistic for all reported specifications. Judicial characteristics are significantly related to decisions in religion cases.

Table 4: Establishment-Clause Jurisprudence and Supply-Side Religious Activity

<i>Outcome</i>	(1)	(2)	(3)	(4)	(5)	(6)
	<i>Effect of Decisions Strengthening Church-State Separation</i>					
	<i>OLS</i>	<i>2SLS</i>	<i>OLS</i>	<i>2SLS</i>	<i>OLS</i>	<i>2SLS</i>
Religious Org. Buildings	0.00487 (0.00838)	-0.0246** (0.00784)				
Religious Org. Employment			-0.0108 (0.0175)	-0.0307 (0.0354)		
Religious Org. Payroll					-0.033 (0.0259)	-0.0386+ (0.0222)
First-Stage F-statistic		359.5		359.5		359.5
N	950	950	950	950	950	950

Estimates for Equation (1) with Establishment cases. Standard errors in parentheses, clustered by circuit. All regressions include state and year fixed effects, state time trends, and controls for panel-wide judge characteristics. Outcome measures give the share of the all-industries business activity due to religious organizations, normalized to mean zero and standard deviation 1. + p<0.10, \* p<0.05, \*\* p<0.01. First-Stage F-statistic gives the Kleibergen-Paap rk Wald F statistic.

Next we report second-stage results for the effects of Establishment Clause jurisprudence on supply-side religious activity. Table 4 reports the effect of a greater proportion of pro-liberty decisions on our supply-side County Business Patterns variables. There is no significant effect estimated in OLS. In 2SLS, we see a significant negative effect on the share of buildings owned by religious organizations, and the share of wages paid by religious

<sup>8</sup>See Table 8 in the appendix for the full set of first-stage estimates for Equation (2).

organizations. This is consistent with the view that separating church and state removes a subsidy for religion.

Table 5: Establishment-Clause Jurisprudence and Individual Religious Activity

	(1)	(2)	(3)	(4)	(5)	(6)
	<i>Effect of Decisions Strengthening Church-State Separation</i>					
<i>Outcome</i>	<i>OLS</i>	<i>2SLS</i>	<i>OLS</i>	<i>2SLS</i>	<i>OLS</i>	<i>2SLS</i>
Any Religion	-0.00439 (0.00428)	0.00291 (0.00888)				
Strong Religion			-0.00486 (0.00358)	0.00327 (0.00939)		
Attend Weekly					-0.0122* (0.00421)	-0.00742 (0.0104)
First-Stage F-statistic		56.6		56.6		56.6
N	27852	27852	27852	27852	27852	27852

Estimates for Equation (1) with Establishment cases. Standard errors in parentheses, clustered by circuit. All regressions include state and year fixed effects, state time trends, respondent demographic covariates, and controls for panel-wide judge characteristics. 2SLS regressions include state time trends and controls for panel-wide judge characteristics. Outcome measures give proportion of GSS respondents answering yes to the listed question. Regressions use population weights provided by GSS. + p<0.10, \* p<0.05, \*\* p<0.01. First-Stage F-statistic gives the Kleibergen-Paap rk Wald F statistic.

Next we look at the impact of establishment-clause cases on individual religious activity as measured in the General Social Survey. Table 5 reports these results. While there is a negative estimated OLS effect for weekly church attendance, that disappears with 2SLS.

Table 6: Free-Exercise Jurisprudence and Supply-Side Religious Activity

<i>Outcome</i>	(1)	(2)	(3)	(4)	(5)	(6)
	<i>Effect of Decisions Strengthening Free Exercise</i>					
	<i>OLS</i>	<i>2SLS</i>	<i>OLS</i>	<i>2SLS</i>	<i>OLS</i>	<i>2SLS</i>
Religious Org. Buildings	-0.00166 (0.00902)	-0.00691 (0.00776)				
Religious Org. Employment			0.00945 (0.0174)	-0.0144 (0.0393)		
Religious Org. Payroll					0.00928 (0.0299)	0.0173 (0.0293)
First-Stage F-statistic		24.54		24.54		24.54
N	950	950	950	950	950	950

Estimates for Equation (1) with Free Exercise cases. Standard errors in parentheses, clustered by circuit. All regressions include state and year fixed effects, state time trends, and controls for panel-wide judge characteristics. Outcome measures give the share of the all-industries business activity due to religious organizations, normalized to mean zero and standard deviation 1. +  $p < 0.10$ , \*  $p < 0.05$ , \*\*  $p < 0.01$ . First-Stage F-statistic gives the Kleibergen-Paap rk Wald F statistic.

Now we look at Free Exercise jurisprudence. First, Table 6 reports the effects on the supply-side County Business patterns outcomes. Across the specifications, we see no effect.

Table 7: Free-Exercise Jurisprudence and Individual Religious Activity

<i>Outcome</i>	(1)	(2)	(3)	(4)	(5)	(6)
	<i>Effect of Decisions Strengthening Free Exercise</i>					
	<i>OLS</i>	<i>2SLS</i>	<i>OLS</i>	<i>2SLS</i>	<i>OLS</i>	<i>2SLS</i>
Any Religion	-0.00126 (0.00426)	0.00459 (0.00998)				
Strongly Religious			0.00793 (0.00632)	0.0264* (0.0130)		
Attend Weekly					-0.00247 (0.00690)	0.0120 (0.0131)
First-Stage F-statistic		15.1		15.1		15.1
N	27852	27852	27852	27852	27852	27852

Estimates for Equation (1) with Free Exercise cases. Standard errors in parentheses, clustered by circuit. All regressions include state and year fixed effects, state time trends, respondent demographic covariates, and controls for panel-wide judge characteristics. Outcome measures give proportion of GSS respondents answering yes to the listed question. Regressions use population weights provided by GSS. +  $p < 0.10$ , \*  $p < 0.05$ , \*\*  $p < 0.01$ . First-Stage F-statistic gives the Kleibergen-Paap rk Wald F statistic.

Finally, Table 7 reports the effect of free-exercise jurisprudence on individual religious activity. While most of the estimates are zeros, we see a positive and significant effect on the Strongly Religious outcome measure. Stronger Free Exercise protections increase the proportion of people who report that religion has a very important impact in their lives.

## 6 Conclusion

Our results can be summarized as follows. A random increase in pro-separation precedent on Establishment Clause cases is associated with a reduction in supply-side measures of religious services, include the number of buildings, and payroll. Increasing free-exercise protection results in an increase in religiosity among individuals.

These results suggest that Establishment Clause protections serve to reduce subsidies to favored mainstream religions, causing a reduction in supply. Free Exercise protections reduce restrictions on fringe religions, increasing religiosity.

We have measured the average effect on all religions. In future work it would be productive to look at heterogeneous effects on mainstream versus fringe religions. In the short term, one might see fringe religiosity to increase more. Due to greater religious competition,

there may be a broader long-term effect as mainstream churches improve quality of services.

For the supply side, we have focused on religious organizations as a share of all industries. There could be more nuanced substitution effects between religious and non-religious firms due to our treatments. For example, one could compare growth in religious versus non-religious charitable organizations.

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## A Appendix Tables

## B Religious Jurisprudence

This appendix discusses U.S. jurisprudence on religious freedoms in light of the economics of religion explained previously. We recount the Supreme Court cases since 1940 that set precedents in weakening state regulation of religion. These cases highlight examples of the types of issues that U.S. Circuit Courts are deciding when looking at these cases.

Table 8: First Stage Estimates with Lasso-Selected Instruments

	(1)	(2)	(3)	(4)	(5)	(6)
	Establishment	Cases	Free		All Cases	
x_unity	0.707+	0.678+			1.054**	1.056*
	(0.351)	(0.359)			(0.325)	(0.336)
x_aba	0.504+	0.430				
	(0.273)	(0.262)				
x_pscab	1.260+	1.182				
	(0.649)	(0.684)				
x_pgov	2.735*	2.247**			3.836**	5.311**
	(0.986)	(0.631)			(0.333)	(0.472)
x_pgovt	-1.084**	-1.296**				
	(0.156)	(0.245)				
x_evang	-0.893**	-1.031**				
	(0.187)	(0.223)				
x_cath	0.749	0.582				
	(0.418)	(0.543)				
x_jew	0.978*	0.938+			0.639+	0.826*
	(0.380)	(0.449)			(0.336)	(0.318)
x_pprivate			-0.228	-0.930	-0.750*	-1.150+
			(0.190)	(0.594)	(0.247)	(0.609)
x_pcc			-1.197	-1.582		
			(0.934)	(0.946)		
x_pccoun			-2.772**	-2.665**	-3.231**	-3.153**
			(0.573)	(0.676)	(0.580)	(0.641)
x_nw			0.927*	0.942*		
			(0.301)	(0.348)		
x_fem			-0.954+	-1.165*		
			(0.472)	(0.458)		
x_b50s			1.709**	1.257*	1.137*	1.068*
			(0.380)	(0.503)	(0.411)	(0.389)
x_psgo					1.060*	0.937*
					(0.441)	(0.344)
N	950	950	950	950	950	950
adj. R-sq	0.271	0.279	0.261	0.276	0.287	0.320

The First Amendment to the United States Constitution reads, in part, as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof (U.S. Const., amend. I).

It's worth noting that the clause specifically prohibits "Congress" from making a law respecting establishment or abridging fair exercise. At the time it was ratified, the amendment imposed no restriction on state and local governments. For almost a century, states and municipalities were free to infringe religious freedoms. That changed in 1868 with the enactment of the Fourteenth Amendment, which states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (Amend. XIV).

This amendment is now understood as applying the restrictions set forth in the Bill of Rights to state governments. John A. Bingham, who authored this section of the amendment, described it as a "grant of power to enforce the Bill of Rights" (Congressional Globe, 39th Congress., 1st Sess. 1034, 1866). The Supreme Court generally followed this guiding principle in the successive decades, applying Bill-of-Rights restrictions to state legislation. For example, *Miller v. Texas* (1894) applied the right to bear arms, *Quincy Railways v. Chicago* (1897) applied the right to just compensation, *Gitlow v. New York* (1925) extended freedom of speech, *Near v. Minnesota* (1931) extended freedom of the press, and *Dejonge v. Oregon* (1937) applied the right to peaceful assembly. In 1940, *Cantwell v. Connecticut* banned state laws that infringed on free exercise of religion, while *Everson v. Board of Education* (1947) affirmed that the constitutional ban on religious establishments also applied to state law.

The two-part application of religious protections to the states as implemented in *Cantwell* and *Everson* highlights the dichotomy of religious protections in the First Amendment's clause on religion: it dually bans laws "respecting an establishment" and also those "prohibiting. . . free exercise."

The Establishment Clause invalidates any law that would implement an established religion in the United States. Justice Abe Fortas writes that this clause "mandates government neutrality between religion and religion, and between religion and non-religion" *Epperson v. Arkansas* 393 U.S. 97 (1968). Laws that differentiate between religions are unconstitutional, as are those that favor or disfavor of religion relative to secularism. Justice Hugo Black is more specific, writing that the Establishment Clause

means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to 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 a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. *Everson v. Board of Education*, 330 U.S. 1 (1947).

In economic terms, this can be understood as precluding any type of tax or subsidy on religion relative to non-religion.

The Free Exercise Clause, rather than preventing a religious establishment, reserves the right of American citizens to accept any religious belief and engage in religious rituals. McConnell et al. [2002] discusses the free-exercise clauses of state constitutions and argues that “[o]pinion, expression of opinion, and practice were all expressly protected” by the Free Exercise Clause (105). The clause protects not just religious beliefs but actions made on behalf of those beliefs. More importantly, the wording of state constitutions suggests that “free exercise envisions religiously compelled exemptions from at least some generally applicable laws” (107).

Speaking in terms of the economics of religion, again, the Free Exercise Clause can operate as a subsidy to religion because some activities that would otherwise be punished are allowed for members of particular religions. It has the potential to promote a free religious market. Specifically, it should prevent regulatory suppression of sectarian activities. Because of free-exercise protections, sects should have an easier time entering the American religious economy.

Constitutional scholars and even Supreme Court justices have contended that the two religion clauses may be in conflict (see, e.g., *Thomas v. Review Board* 450 U.S. 707 (1981)). The Free Exercise Clause implies special accommodation of religious ideas and actions, even to the point of exemptions to generally applicable laws. Such a special benefit seems to violate the neutrality between “religion and non-religion.” As McConnell et al. [2002] explains:

If there is a constitutional requirement for accommodation of religious conduct,

it will most likely be found in the Free Exercise Clause. Some say, though, that it is a violation of the Establishment Clause for the government to give any special benefit or recognition of religion. In that case, we have a First Amendment in conflict with itself—the Establishment Clause forbidding what the Free Exercise Clause requires (102).

Historically, the Supreme Court has been inconsistent in dealing with this problem. When the Court leans toward more accommodation for the Free Exercise Clause, there is greater conflict. This conflict allows discretion, which is partly responsible for the variation in pro-religious tendencies across judges and across circuits.

The caselaw on established religion goes back to 1789, right after the Constitution was ratified. The first Congress passed a law funding House and Senate chaplains [McConnell et al., 2002]. Justice Stewart noted in his dissent to *Engel v. Vitale* (1962) that “[the Supreme Court’s] Crier has from the beginning [of the court’s history] announced the convening of the Court and then added ‘God save the United States and this Honorable Court.’”

Before the ratification of the Fourteenth Amendment, religious entanglement in state government was the norm. In 1859’s *Commonwealth v. Cooke* (1859), for example, a Boston teacher was sued for punishing a student who refused to recite the Ten Commandments, an official part of the curriculum at that time. The Massachusetts State Supreme Court found for Cooke. This rule endured for well into the twentieth century, only to be overturned by *Everson* in 1947.

The Supreme Court further implemented this principle through a series of cases starting with 1961’s *Torcaso v. Watkins*, 367 U.S. 488 (1961). In that case, the plaintiff sued the state of Maryland for requiring state employees to take a test oath swearing “belief in the existence of God.” The Supreme Court agreed that the oath requirement violated the Establishment Clause. Justice Black cited *Everson*’s precedential ban on laws that force a person “to profess a belief or disbelief in any religion,” as well as the Constitution’s explicit ban on religious tests for public office (Art. VI). One of the few cases where the Court refused to strike down a law like this was *Marsh v. Chambers* (1983), where the Court upheld the tradition of the Nebraska legislature opening its sessions with a Christian prayer.

In *Engel v. Vitale* (1962), a New York parent sued his school district after state public schools instituted an official prayer for student recitation at the beginning of each school day. In *Abington School District v. Schempp* (1963), a Pennsylvania parent did the same in protest to a law requiring that “ten verses from the Holy Bible be read, without comment, at the opening of each public school on each school day.” In both cases, the Court ruled

that the institution of religious rituals in public schools violated the Establishment Clause. The court affirmed this stance in later cases, most notably in *Stone v. Graham* (1980), *Wallace v. Jaffree* (1985), and *Lee v. Weismann* (1992). Similarly, public schools set the stage for challenges in religious interference in curricula. In 1968, Arkansas biology teacher Susan Epperson challenged a decades-old state law prohibiting the inclusion of Darwinism in science classes. In *Epperson v. Arkansas* (1968), the Supreme Court rules for the teacher. Even if a democratic majority holds a particular religious view, its status as religious doctrine precludes the view from being endorsed by state institutions. In *McCollum v. Board of Education* (1948), the Court found in favor of Illinois taxpayers who challenged the practice of using state funds for weekly lessons at public schools in Protestant, Catholic, and Jewish faiths.

Another important development in this area was *Lemon v. Kurtzman* (1971). Pennsylvania had passed a statute reserving taxpayer money to subsidize “secular educational services” for religious private schools. Rhode Island had passed legislation whereby the state would subsidize the salaries of teachers in nonpublic schools in order to help those schools attract better teachers. Chief Justice Burger introduced a three-part test:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’

This so-called “Lemon test” became a kind of heuristic by which lower courts could judge whether a particular law violated the Establishment Clause. In the cases of both Rhode Island and Pennsylvania, the court decided that “the cumulative impact of the entire relationship... involves excessive entanglement between government and religion.” Two years later, the court made a similar ruling in *Committee for Public Education and Religious Liberty v. Nyquist* (1973). In that case, the court held that a state may not support religious education either through direct grants to parochial schools or through financial aid to parents of parochial school students.

*School District of Grand Rapids v. Ball* (1985) took a Michigan School District to task for allowing religious schools to use public school resources for after-school activities. The Court held that this subsidy provided “a direct and substantial advancement of the sectarian enterprise,” violating the second criterion of the Lemon test. Schools advancing a religious agenda could hypothetically become mostly or fully bankrolled by tax revenue.

The United States has a long history of suppressing the activities of minority religions, or sects. In the 1740s, when the fiery minister George Whitefield and others won converts

away from New England's Congregationalist establishment, "the local clergy and political elites moved against them" (Finke and Stark 1992, p. 60). In 1801, Presbyterians and Congregationalists joined the Plan of Union to contractually obligate each other to "unified, noncompeting missionary efforts to the western frontier" (63), an agreement backed by "political and economic elites" (63).

In the first half of the twentieth century, the Supreme Court's jurisprudential shift in enforcing the Establishment Clause extended to banning state laws that suppressed sectarian activities. Before the 1940s, it was common for Protestant majorities to pass legislation at the state level that constrained radical religious movements.

The first Supreme Court decision that reigned in these restrictions was *Cantwell v. Connecticut* (1940). The court ruled that because a statute restricting religious solicitation was unconstitutional. McConnell comments that

Cantwell was one of a host of decisions in the 1940s and 1950s in which the court extended First Amendment protection to the Jehovah's Witnesses, a group whose aggressive street preaching and solicitation provoked hostile or violent reactions. In these decisions, the Court began to establish free exercise of religion, along with freedom of speech, as a 'preferred freedom' that could only be restricted on a strong showing by the government (149).

This "preferred freedom" status came through in *Board of Education v. Barnette* (1943). In that case, the court ruled that Jehovah's Witnesses could refuse to obey a West Virginia law requiring schoolchildren to salute the flag.

Since the 1940s, other cases have reaffirmed the status of religious activities as a preferred freedom. In *Sherbert v. Verner* (1963), the Court ruled in favor of a woman who was fired without unemployment benefits for refusing to work on her Sabbath day, Saturday. Because South Carolina law guaranteed a worker's right to take Sundays off for religious reasons, the court required the state to extend the same right to those engaging in religious worship on Saturdays. In *Wisconsin v. Yoder* (1972), the court decided that Amish teenagers could be exempted from a Wisconsin law mandating education at an accredited school until the age of 16. In *Thomas v. Review Board* (1981), the Court required the state to provide unemployment compensation even when a worker left his job for religious reasons.

In 1990, though, the court somewhat reversed this trend in *Employment Division v. Smith* (1990). The law in question was an Oregon statute that prohibited the possession of peyote, a hallucinogen. The respondents were fired without unemployment benefits for ingesting peyote as part of a ceremony in the Native American Church; they sued on free

exercise grounds. The court ruled that the termination without benefits was constitutional, denying these men “a private right to ignore generally applicable laws” for religion reasons. Religious activities were no longer a preferred freedom in the previous sense—the government no longer needed a “compelling state interest” to interfere with religion.