

Testing the Court: Examining the Role of Ideology on Judicial Tests through Social Science Measures

The United States Supreme Court is a critically important institution that renders decisions that impact both the government and the daily lives of individual citizens. Most believe that as the court of last resort, the Supreme Court represents fairness in its rulings. However, it has recently come under attack for being an ideological institution. In fact, several political scientists have argued that the decisions of the Court are not based on law, but rather on individual attitudes of the justices themselves.¹ Justices on the Supreme Court may therefore be viewed as being political. This is not surprising since the justices on the Court are selected through a political process. More particularly, the President nominates the justice, and the Senate confirms him/her. Due to this political process, it is likely that decisions of the Court may also be viewed as being ideological. This article explores the role of ideology in judicial decision-making on the Supreme Court through examining judicial tests that were created in several different Constitutional areas.

Establishment Clause

In 1971, the United States Supreme Court decided a controversial case involving the Establishment Clause of the Constitution.² The case involved two separate state statutes that provided financial support for private primary and secondary schools, many of which were religious in nature. One of the statutes authorized the state superintendent to purchase secular educational services from nonpublic schools. This included reimbursement for teachers' salaries, textbooks, and other instructional materials. The other statute at issue authorized teacher salaries to be supplemented if they teach secular subjects in nonpublic elementary schools. Both of these statutes were challenged in *Lemon v. Kurtzman* (1971).³

In determining that there was a constitutional violation, the Court developed a three-prong test, known as the Lemon test. This test required that “first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances or inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion...’”⁴ In the case of both statutes at issue, the Court deemed that there was government entanglement with religion, and hence the statutes were unconstitutional.

The Court followed this test for the most part for several decades, although it recently fell into disfavor. More specifically, the Court in *Kennedy v. Bremerton School District* (2022),⁵ held that the approach adopted in *Lemon* was ahistorical, and even claimed that the Court had long abandoned the Lemon test. In its place, the Court stated that the Establishment Clause should be interpreted by “reference to historical practices and understandings.”⁶ *Lemon v. Kurtzman* was thus directly overruled.

When one examines the Lemon test, and its subsequent demise, one may wonder under what circumstances does the Court create new tests, and why these tests are subsequently discarded. Through the introduction of several different Constitutional areas, this article argues that courts introduce tests as a way of maintaining precedent. These courts may disagree with the current path of decision-making, but instead of overturning it, seek as much consensus as possible. Hence, they either create new tests, or modify them where appropriate. This differs from more modern conservative courts, which appear to have less qualms with overruling precedent, and thus entirely discard former tests created by the Court.

In order to properly infer the ideological nature of a particular court, Martin-Quinn⁷ scores are used. These measures place each justice on a scale that is negative for liberal justices and positive for conservatives. Using these measures help identify the ideological makeup of the

court and permit an inference with regard to what type of court is modifying and overruling judicial tests. This is important as it will support or discredit the argument of this article.

An initial assessment of the underlying argument can be undertaken by examining the 1971 *Lemon* Court with the 2022 *Kennedy* Court.⁸ According to the Martin-Quinn scores, the total average of the 1971 *Lemon* Court is -.03, which is slightly liberal, but close to moderate (.00). This contrasts with the *Kennedy* Court, which had a total average of .16, indicating that the court was more conservative than the *Lemon* Court. This initially supports the argument raised above that while a liberal court created the test, a conservative one subsequently discards it, with no apparent care regarding maintaining precedent.⁹

An additional approach of analysis would be to compare the ideological values of the median justice since the median is often deemed the most important as their decision can sway the court.¹⁰ After all, if there are nine justices on the Court, and four are liberal and four are conservative, then arguments should target the median/middle justice since that justice will ultimately make the decision. In this instant case, the *Kennedy* Court is again more conservative, as the median's (Brett Kavanaugh)¹¹ Martin-Quinn value is .814, which compares to the *Lemon* Court's result of .64 (Byron White.)¹² Thus, the median measure provides some additional support for the argument that ideology matters in terms of test creation and its subsequent demise.

Free Exercise

In the previous section, the *Lemon* test was introduced and subsequently discarded. This section will review cases involving the Free Exercise clause, which prohibits Congress from making laws that prevent citizens from freely exercising your religion. However, unlike the prior section, the tests will not be formally discarded. Rather, as will be explained below, the tests will

be created, and then subsequently modified. Thus, this section will examine whether the same pattern identified with the Free Exercise Clause is consistent, in spite of the difference in the test not being completely overruled.

The first case in this area that established an official test was *Sherbert v. Verner* (1963).¹³ In *Sherbert*, a woman was fired for refusing to work on Saturdays, which conflicted with her Sabbath day. She attempted to find other work but was unable to do so due to her beliefs. Therefore, she sought unemployment compensation, but was subsequently denied. The South Carolina Employment Security Commission found that she “fail[ed], without good cause, to accept ‘suitable work when offered...by the employment office or the employer.’”¹⁴ The South Carolina Supreme Court sided with the Employment Commission, and denied the woman’s claim that her freedom of exercise rights were violated.

This decision was subsequently overturned by the United States Supreme Court, which held that the disqualification of benefits imposed a burden on her free exercise rights of her religion. In reaching this conclusion, the Court applied strict scrutiny, which requires that the government must show a compelling reason for violating a person’s right of free exercise of their religion. In the context of free exercise, this became known as the *Sherbert* test. Interestingly, consistent with the results for the Establishment Clause, this test was created by a liberal court, whose Martin-Quinn average was -1.058. The median on the Court (Brennan)¹⁵ was also identified as being ideologically liberal, with a score of -1.225.

The *Sherbert* test was arguably applied next in *Wisconsin v. Yoder* (1972),¹⁶ although some may say that it was slightly modified. In *Yoder*, members of the Amish community challenged a compulsory school attendance law. Their objection to sending their children to school was limited to high school, as they believed that the children should have some limited

form of education. However, their objections were based on the idea that later instruction at the high school level may expose their children to worldly values that conflict with their religious beliefs. Ultimately, the Supreme Court agreed with the Amish. In reaching its conclusion, the Court applied a balancing test with the interests of the parents and government in mind. As stated by the Court, “[A] state’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children...”¹⁷

Similar to that of *Sherbert*, the Court also appeared to apply strict scrutiny in their analysis. More specifically, the state argued that their interests were compelling, as the Court noted, “We turn, then, to the State’s broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way.”¹⁸ The Court would cast aside the state’s asserted compelling interests. However, for present purposes, this causes one to wonder whether the Court is using the *Sherbert* test, or whether it is modifying it using some sort of balancing analysis as described above. Either way, *Yoder* is an important Free Exercise case that should be examined using Martin-Quinn scores. Comparing it to *Sherbert*, the average value of the court is more conservative, but still liberal at -.077. However, interestingly, the Martin-Quinn value of the median (Byron White)¹⁹ was conservative at .97. Thus, there is a more conservative court potentially modifying one test (Strict Scrutiny) and applying another (Balancing test).

However, this potential modification or application of a particular rule was seemingly replaced with another in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990).²⁰ In *Smith*, two Native Americans ingested peyote (an illegal drug in Oregon) as

part of a religious ceremony. They were subsequently fired from their job following a drug test and were also denied unemployment benefits from the state. Many compared this case to *Sherbert* since the state's involvement in the case dealt with unemployment compensation. However, instead of ruling in favor of the individual, this time the Court ruled in favor of the state. In order to do so, the Court created the *Smith* test, in which the state would win if a criminal law were generally applicable and neutral. As there were no exceptions in this case, and the law did not target a particular religion, but rather applied to everyone, the Court deemed that the Free Exercise rights of the two native Americans had not been violated.

When one considers the ideological values of the median and the *Smith* Court, an apparent trend toward conservatism appears again. While the Martin-Quinn ideological value of the median (David Souter)²¹ stays relatively the same when compared to the *Yoder* Court (.972), the *Smith* Court's value is .176, which is more conservative than the liberal leaning *Yoder* Court (-.077). Thus, at first glance, the replacement of a test with another appears to be an ideological endeavor.

Since *Smith*, several cases have been resolved that have utilized the same framework announced in the case. The best example is the case of *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993),²² in which members of the Santeria faith planned to move to the city of Hialeah. In response, the city passed several ordinances, one of which prohibited animal sacrifice, which was a central tenant of the Santeria religion. The Court applied *Smith*, and determined that the ordinances were neither neutral nor generally applicable as they targeted the religion. In such cases, the Court stated that strict scrutiny would apply. Most scholars would agree that this is not a new test, but rather the application of the *Smith* test, and the

Sherbert/Yoder test due to it lacking neutrality and general applicability. Thus, the case fits within the general *Smith* analytical framework.

It should be noted that *Smith* remains controversial, as it was even argued before the Court in *Fulton v. City of Philadelphia* (2021),²³ that it should be overruled. In *Fulton*, the city refused to contract with one entity for foster care services because the entity failed to certify same-sex couples as foster parents. The Court held that this refusal by the city amounted to a violation of the Free Exercise Clause. Ultimately the Court held that *Smith* still applied as there were exceptions in the case that prevented the issue from being generally applicable. Therefore, consistent with the *City of Hialeah* case, the Court applied strict scrutiny.

One recent case is also worth mentioning, as it too applies the *Smith* framework. *Kennedy v. Bremerton School District* (2022),²⁴ is a case in which a football coach consistently prayed on or near a football field following every game. Several students would join the coach, although he did not directly ask them to. The Court held that the actions of the state (School district) in attempting to forbid Kennedy from continuing his activity were neither neutral nor generally applicable and decided in Kennedy's favor. *Kennedy* is important as it shows the continued viability of the *Smith* test.²⁵

Overall, the ideological pattern regarding Free Exercise appears clear. The initial test established in *Sherbert* was created by a liberal court. This was modified/reaffirmed in *Yoder*, which was a moderate court. However, the new *Smith* test was created by a slightly conservative court. This pattern seemingly reaffirms the argument that ideology matters, at least in the context of test creation and modification.

Commerce Clause

Perhaps no other constitutional issue area has experienced as much change involving tests as the commerce clause. However, as will be discussed below, most of these tests were created prior to 1937, which is the beginning of the ideological values of Martin-Quinn scores. Thus, instead of measuring the creation of the original tests, this section will examine the creation/modification of one test, and its application from the 1930s and 1940s to modern times. As will be seen, the Court interprets the test completely differently at different times. The remaining question is whether ideology plays a role in the different interpretations. Before answering this question, and before analyzing the modern test, a brief review of several commerce clause cases involving various tests will be presented.

Perhaps the first and most famous case is *Gibbons v. Ogden* (1824),²⁶ where one individual claimed that they had a state-granted monopoly to operate a ferry from New York to New Jersey. Another individual claimed that the monopoly was invalid since Congress had the only authority in regulating interstate commerce. The Court concluded that Congress could regulate matters of interstate commerce, but issues pertaining to intrastate regulations remained with the states. Thus was born the inter-intrastate test. Some may claim that this is not really a test, but rather a simple interpretation of the commerce clause. Either way, this case is important for being one of the first to interpret the commerce clause.

The next test was created nearly seventy years later and was seen in the case of *United States v. E.C. Knight* (1895).²⁷ In *E.C. Knight*, a sugar company purchased the stock of another, which effectively gave 98 percent control over all sugar of the United States. The issue was whether Congress had the ability to pass the Sherman-Antitrust Act (which prevented monopolies) pursuant to the Commerce clause. The Court held that the act was valid, and that the

sale of stock was also valid since Congress could not regulate the production of materials through the Commerce Clause. Rather, Congress can only regulate the distribution of goods, which constituted commerce, thus establishing the production/distribution rule..

This rule was used again in *Hammer v. Dagenhart* (1918),²⁸ which involved the Federal Child Labor Act of 1916. In *Hammer*, a father attempted to prevent the Act from going into effect as his minor sons worked in a cotton mill in North Carolina. The Act itself forbade children under fourteen from working, and placed hour limitations on those older than that age.²⁹ In striking down the Act, the Court stated that “[o]ver interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation.”³⁰ Thus, the Court continued its adherence to the production/distribution rule during this time frame. However, another important aspect of this case is that during this era the Court was consistently ruling in favor of states’ rights. Thus, most federal legislation involving the commerce clause was deemed unconstitutional. This would change during the next era, when the Court created new tests to justify ruling in favor of the federal government.

More specifically, the Court, in *United States v. Darby Lumber Company* (1941),³¹ examined whether the Fair Labor Standards Act of 1938 was constitutional. The act in question prohibited the shipment of goods by companies who paid less than the minimum wage. Fred Darby, who was the owner of a lumber business, was accused of violating this Act and challenged it in court. The district court held in Darby’s favor by applying the precedent of *Hammer v. Dagenhart*. However, the Supreme Court overturned the district court’s decision,³² and determined that the Act was constitutional even though it may regulate some local activities. As stated by the Court, “[t]he power of Congress over interstate commerce is not confined to the

regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end...”³³ The Court furthermore noted that “it does not follow that Congress may not, by appropriate legislation, regulate intrastate activities where they have a substantial effect on interstate commerce.”³⁴ This has become known as the Substantial Effects Test.

The creation of this test replaced the production/distribution and direct/indirect effects test. For purposes of this article, and as previously noted, the ideological measures for the courts using the production/distribution test is unavailable. However, the purpose of this section on the Commerce Clause is to illustrate the different interpretations of the same test that the Court can adopt. As presently presented, the Court uses the Substantial Effects Test in favor of the federal government. The ideological value of the *Darby Lumber* Court is -.636, which makes sense as it indicates a liberal court favoring federal rights. The value for the median (James F. Byrnes³⁵) was -.191, which also indicates that the justice was slightly liberal.

This test would continuously be used for the next fifty years. For example, in *Wickard v. Filburn* (1942)³⁶, the Court was faced with whether an acreage allotment allowing farmers to grow a certain amount of wheat was constitutional. Filburn, who owned a small farm, was allocated eleven acres to grow wheat. However, he ended planting over twenty three acres, intending to use the rest of the wheat for consumption by his livestock. The Court upheld the act and the allotment, and stated that “even if appellee's activity be local, and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’”³⁷

This test was even applied in *Katzenbach v. McClung* (1964),³⁸ which held that a business that discriminated against persons based on race was subject to the Commerce Clause due to it shipping several of its ingredients interstate. The Court held that the Civil Rights Act of 1964 was applicable, and Congress could regulate race relations through the Commerce Clause. For present purposes, it is important to note that the case continued to use the Substantial Effects Test.

In 1995, dramatic changes would occur regarding commerce clause interpretation. Instead of the Court finding in favor of the federal government, which it had done so consistently for the past fifty years, the Court shifted and began ruling in favor of states' rights. However, the Court still applied the Substantial Effects Test, but again, applied it differently than the previous decades.

This can particularly be seen in *United States v. Lopez* (1995),³⁹ in which the Court decided a dispute involving the Gun-Free School Zones Act, which under the auspices of the Commerce Clause, Congress made it a federal crime to possess a firearm near a school. Lopez was a student at a San Antonio, Texas high school who brought a handgun to class. The District Court found him guilty of violating the Gun-Free School Zones Act, and sentenced him to six months in prison, and two months of probation. Lopez would succeed on his challenge to the Supreme Court. This case illustrates conflicting rights, as typically states have the responsibility for regulations involving education. The Court decided that the statute did not substantially affect commerce, as it was a criminal statute. As stated by the Court, "Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise...It cannot therefore be sustained under our cases upholding regulations of activities

that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce...”⁴⁰

When one examines the ideological makeup of this new application of an old test, things become a bit clearer. The *Lopez* Court’s Martin-Quinn average was conservative (.631), and so too was the median (Anthony Kennedy⁴¹) at .731. Thus, the liberal Court in *Darby Lumber* created the Substantial Effects Test, effectively overruling the production/distribution test. However, in implementing this test, the Court consistently ruled in a liberal manner by upholding Congressional acts. This pattern changed with a conservative Court, who used the same test to rule in favor of the state government. Not only did this result occur in *Lopez* but was followed by a similar interpretation in *United States v. Morrison* (2000).⁴² Based on *Lopez* and *Morrison*, it becomes clear that the conservative majority would now use the Substantial Effects Test in favor of states’ rights and would go against Congressional legislation.

Abortion

The final constitutional area under analysis is abortion. This area has been filled with controversy and change since the 1970s. The primary case associated with this area is *Roe v. Wade* (1973)⁴³, which was the first major case to tackle this issue. In *Roe*, a poor high school drop out who already had a five-year-old was unsuccessful in seeking an abortion. At the time, Texas prohibited abortions unless it was necessary to save the mother’s life. The mother had the child but gave it up for adoption soon after birth. Soon thereafter, the mother decided to challenge the constitutionality of the Texas statute.⁴⁴

While several arguments were raised regarding why the statute should be deemed to be unconstitutional, the Court ultimately rested its decision on the right to privacy. However, the Court also noted that the state retained certain rights involving the unborn. The Court ended up

crafting a three-part test to determine when abortions could be undertaken. In general, for the stage prior to the end of the first trimester, the abortion decision was up to the attending medical doctor and mother. For the second trimester, the state could reasonably regulate abortion procedures. Finally, for the third trimester, the state could regulate and even proscribe abortions.

While the creation of this trimester test was controversial, it remained intact for a few decades following the decision. However, for present purposes of this article, it is worth noting that the *Roe* Court's average Martin-Quinn score was negative (-.121), indicating that it was liberal leaning. However, the median member of the *Roe* Court was Justice Byron White, whose score was .561. These scores will serve as baseline measures and will be compared to other cases that modified or even overturned the *Roe* test.

The next major case involving the issue of abortion was *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992),⁴⁵ which involved the State of Pennsylvania's attempt to limit abortions through several restrictions. These restrictions included: (1) requiring women to "be informed by doctors about fetal development; 2) give their consent or, if they were minors, obtain parental consent; and 3) wait at least 24 hours after giving their informed consent before obtaining an abortion as well as 4) imposing certain reporting and public disclosure requirements on doctors who perform abortions."⁴⁶ While several of these restrictions were deemed unconstitutional, for present purposes, it is how the Court rendered its ruling. The Court claimed to "adhere to the essence of *Roe*'s original decision," but in doing so discarded the previous trimester test. Specifically, the Court stated that "[w]e reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*."⁴⁷ In its place, the Court adopted an undue burden analysis, in which abortion restrictions would be deemed

unconstitutional if they “place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”⁴⁸

The replacement of tests in the abortion realm is substantively interesting, especially from an ideological standpoint. Both the median and the overall Court had dramatically shifted more conservative. The median member of the Court was Justice Sandra Day O’Connor,⁴⁹ who was slightly conservative (.854), which contrasts with Justice Byron White, who was the median of the *Roe* Court, and had a Martin-Quinn value of .561. The averages were more conservative for the court, as it was .705 for the *Casey* Court, and -.121 for the *Roe* Court. Thus, it initially appears that consistent with other Constitutional areas, in the context of abortion, a liberal court was willing to create a test, while a more conservative one was willing to discard and replace the test with a new one.

However, abortion is an interesting area of constitutional study involving tests, since not only does the Court modify or replace a test with another one, but later it flat out overrules the prior cases. This can particularly be seen in *Dobbs v. Jackson Women’s Health Organization* (2022)⁵⁰, in which Mississippi passed a law which restricted all abortions after fifteen weeks. In upholding the restrictions, the Court noted that there was no mention of abortion in the Constitution, and that it was not a fundamental right, as it was not deeply rooted in our nation’s traditions and history. Furthermore, *Roe* and *Casey* were directly overruled. This is important since instead of simply creating a modified test and ruling in favor of Mississippi, the Court chose to overrule precedent.

With regard to ideology, one would expect that this Court is much more conservative than the past, and that the median member is also more conservative. However, when Martin-Quinn scores are examined, this does not prove to be the case. The median member (Brett Kavanaugh)

scores roughly .814, which is comparable to Sandra Day O'Connor's score (.854), and is still much more conservative than Byron White (.64). The average of the *Dobbs* court however is only .156, which is less conservative than the *Casey* Court (.705) but more conservative than the *Roe* Court (-.121). This finding begs the question, is ideology really the underlying culprit? After all, it appeared to be so with regard to the test replacement between *Roe* and *Casey*. However, this is not the case with overruling the tests, as seen between *Casey* and *Dobbs*. Thus, test replacement or modification may be an ideological endeavor, while perhaps overruling tests may not necessarily be as ideological. It should be noted however, that overruling tests did appear ideological for the Establishment clause cases. Furthermore, while not appearing with the same pattern as other constitutional areas, the *Dobbs* court was still conservative. This trend was consistent throughout this article.

Discussion

Overall, in three of the four issue areas presented in this article, the underlying argument was confirmed. Even for the one issue area in which it was not (abortion), when the test was just modified, it did follow the expected trend. It only failed to follow expectations when the test was completely overturned in *Dobbs*. Using these findings, it would appear that for the most part, the Court creates rules when it is more moderate or liberal. Test creation is an attempt by the Court to have subsequent courts interpret the law in a similar way. However, as the Court has grown more conservative over time, it decides to modify or flat out overrule the prior courts. Ideology thus appears to play a central role in the decision to modify or overrule judicial tests.

Another possible factor, and one alluded to throughout the article, depends on whether a test is being modified or overruled. A more conservative court always appears willing to modify a prior test, but the same cannot be said with regard to overruling a prior decision. For example,

in both the areas of abortion and Free Exercise, a more liberal court created the test, which was modified by a more conservative court. This is similar to the outcome of the commerce clause cases, in which a more liberal court created a test, which was applied differently by a conservative court. However, there are conflicting results for test creation and overruling.

Whereas the Establishment clause cases illustrate the typical pattern, again the abortion cases do not, as the *Dobbs* Court that overruled the *Casey* and *Roe* decisions was not as conservative as the *Casey* Court. Thus, test modification tends to show a more conservative court appearing to stick to some of the guidelines established by the prior test, while not completely overturning the decision. This is sometimes the case with overruling courts.

In the future, several different avenues of research involving similar topics as discussed in this article can be undertaken. First, more constitutional areas can be examined with similar in-depth analysis. While a thorough analysis was performed in this article, adding more areas would permit a determination whether the patterns found above are consistent. This not only includes the pattern of test creation, modification and overruling, but also the relationship found in test application with the commerce clause. Recall that underlying the substantial effects test was the different interpretations by the Court, which involved adhering to states' rights or the federal government. This dispute involving federalism is likely present in other issue areas, and should be examined as a potential factor for rule creation, modification, and overruling.

Another potential future avenue of research would involve analyzing additional relationships that may affect the outcomes reached in this article. For instance, polarization has drastically increased during the past several decades. This has coincided with an increase in conservatism on the United States Supreme Court. Thus, there may be a relationship between polarization between the parties, and the increase in conservatism on the Court. After all, the

conservatives on the Court may not feel as constrained in the past with regards to overruling precedent if the parties are badly split. Being split would prevent legislative retaliation should it disagree with the Court. This would suggest that ideology still matters, whether it is on the Court or with the political parties.

In conclusion, judicial tests are critically important as they ensure that the Court remains consistent over time, and that ideology does not impact its decisions. One primary tenant of the Court is that it adheres to precedent so that it maintains its legitimacy. After all, a Court that continually reverses itself would appear political, which is the opposite of what it attempts to portray to the American public. However, in several of the issue areas, this is precisely what occurred, as the Court overturned various tests in a seemingly ideological way. While the Court also modified the tests in a similar fashion, this does not have the same impact, since the test was not directly overruled. Rather, the Court could claim during times of test modification that it was still adhering to precedent by maintaining the test, albeit in a different form. Regardless, the findings in this article are important as they suggest that ideology does in fact matter when the Supreme Court considers judicial tests.

ENDNOTES

¹ Segal, Jeffrey A. and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University Press. This book argues that unlike most legal scholars who believe that case decisions are strictly based on legal factors, actual case outcomes are based on the political attitudes of the justices.

² The Establishment Clause is found in the First Amendment of the United States Constitution and provides that "Congress shall make no law respecting an establishment of religion..."

³ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁴ *Lemon*, 403 U.S. at 612-613.

⁵ *Kennedy v. Bremerton School District*, 597 U.S. ____ (2022).

⁶ *Kennedy*, 597 US at 23.

⁷ Andrew D. Martin and Kevin M. Quinn. "Dynamic Ideal Point Estimation via Markov

Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. Vol. 10 (2002):134-153. Measures available at: <https://mqscores.lsa.umich.edu/measures.php>

⁸ It is important to note that Martin Quinn scores are currently only available through the 2021 term. However, each current justice was sitting on the bench in 2021, and therefore the measures can still be used to infer score values for the 2022 term.

⁹ This is not to suggest that liberal courts do not overturn precedent. Rather, the primary purpose of the article is to argue that liberal courts are more likely to create tests during the period under analysis, and that conservative courts tend to overrule these tests.

¹⁰ Several judicial scholars recognize the importance of the median justice and include them in their works. This includes: Jeffrey A. Segal. "Separation of Powers Games in the Positive Theory of Congress and Courts. *American Political Science Review*. Vol. 91 (1997): 28.; Lee Epstein, Jack Knight and Andrew D. Martin. "The Political (Science) Context of Judging." *Saint Louis University Law Journal*. Vol. 47 (2003): 783; and Andrew D. Martin, Kevin M. Quinn and Lee Epstein. "The Median Justice on the United States Supreme Court." *North Carolina Law Review*, Vol. 83 (2005): 1275-1322.

¹¹ Brett Kavanaugh is a current Associate Justice on the United States Supreme Court. He was nominated by President Trump and is therefore considered to be a more conservative member on the court. For more information on Kavanaugh, see the Supreme Court Historical Society, available at: <https://supremecourthistory.org/supreme-court-justices/associate-justice-brett-m-kavanaugh/>

¹² Byron White was an Associate Justice on the United States Supreme Court. He served from 1962-1993 and was originally nominated by President John F. Kennedy. Based on his Martin-Quinn scores, White began his judicial career ruling more liberally, but later during his term, ruled more conservatively. More information regarding White can be found at the Supreme Court Historical Society, available at: <https://supremecourthistory.org/associate-justices/byron-r-white-1962-1993/>

¹³ *Sherbert v. Verner*, 374 U.S. 398 (1963). Some may argue that the first real case in this area was *Reynolds v. United States*, 98 U.S. 145 (1879). However, this predates Martin-Quinn scores and therefore could not be compared to the other cases in this issue area. In addition, the case did not really establish an identifiable test. Rather, the issue and holding involved whether a person could be criminally charged for their sincerely held religious beliefs in polygamy, which Congress had forbidden.

¹⁴ *Sherbert*, 374 U.S. at 401.

¹⁵ William J. Brennan Jr. was an Associate Justice on the United States Supreme Court, who served from 1956-1990. While being nominated by Eisenhower, he proved to be liberal throughout his judicial career. More information regarding Brennan can be found at: <https://supremecourthistory.org/associate-justices/william-j-brennan-jr-1956-1990/>

¹⁶ *Wisconsin v. Yoder*, 406 U.S. 205 (1972)

¹⁷ *Yoder*, 406 U.S. at 214.

¹⁸ *Yoder*, 406 U.S. at 221.

¹⁹ Byron White varied in his ideology while on the bench. See end note 10.

²⁰ *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

²¹ President George H.W. Bush nominated David Souter in 1990, who served until 2009. Unlike most justices, who it is assumed mirror the ideology of their nominating President, Souter is

notoriously liberal. For more information regarding Justice Souter, see <https://supremecourthistory.org/associate-justices/david-h-souter-1990-2009/>.

²² *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

²³ *Fulton v. City of Philadelphia*, 593 U.S. ____ (2021).

²⁴ *Kennedy v. Bremerton School District*, 597 U.S. ____ (2022).

²⁵ It should be noted that the *Church of Lukumi Babalu Aye*, *Fulton*, and *Kennedy* cases all applied a variation of the *Smith* test, and thus adhered to the test. More specifically, the cases held that if a legal situation was not generally applicable or neutral, then strict scrutiny would apply. Since these cases applied the *Smith* framework, there was no need to analyze Martin-Quinn scores with each of them since no new test was created, and the *Smith* test was not modified.

²⁶ *Gibbons v. Ogden*, 9 Wheat (22 U.S.) 1 (1824).

²⁷ *United States v. E.C. Knight*, 156 U.S. 1 (1895).

²⁸ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

²⁹ For more information on the background and ruling of *Hammer v. Dagenhart*, see O'Brien, David M. and Gordon Silverstein. 2023. *Constitutional Law and Politics, Volume 1*. 12th ed. New York: W.W. Norton Inc., 578-583.

³⁰ *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918).

³¹ *United States v. Darby Lumber Company*, 312 U.S. 100 (1941).

³² For more information on the background and ruling of *United States v. Darby Lumber Company*, see O'Brien, David M. and Gordon Silverstein. 2023. *Constitutional Law and Politics, Volume 1*. 12th ed. New York: W.W. Norton Inc., 596-600.

³³ *United States v. Darby Lumber Company*, 312 U.S. 100, 118 (1941)

³⁴ *Darby Lumber Company*, 312 U.S. at FN2.

³⁵ James F. Byrnes was an Associate member of the Supreme Court from 1941-1942. He was nominated by President Franklin D. Roosevelt, and tended to rule liberally. More information regarding Byrnes' career can be found at: <https://supremecourthistory.org/associate-justices/james-f-byrnes-1941-1942/>

³⁶ *Wickard v. Filburn*, 317 U.S. 111 (1942).

³⁷ *Wickard*, 317 U.S. at 125.

³⁸ *Katzenbach v. McClung*, 379 U.S. 294 (1964).

³⁹ *United States v. Lopez*, 514 U.S. 549 (1995).

⁴⁰ *Lopez*, 514 U.S. at 561.

⁴¹ Justice Kennedy was nominated by President Reagan in 1987, and served from 1988-2018. He is considered by many legal scholars to be slightly conservative, although he was considered the median member of the court for several years. For more on Justice Kennedy, see <https://supremecourthistory.org/associate-justices/anthony-m-kennedy-1988-2018/>

⁴² *United States v. Morrison*, 529 U.S. 598 (2000). In *Morrison*, the Court declared that the Violence Against Women Act was unconstitutional under the Commerce Clause.

⁴³ *Roe v. Wade*, 381 U.S. 479 (1973).

⁴⁴ O'Brien, David M. and Silverstein, Gordon. "Constitutional Law and Politics", Volume 2. 11th ed. (New York: W.W. Norton, 2020), 1247-1248.

⁴⁵ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

⁴⁶ O'Brien and Silverstein, 1267.

⁴⁷ *Casey*, 505 U.S. at 873.

⁴⁸ *Casey*, 505 U.S. at 925.

⁴⁹ Justice Sandra Day O'Connor was the first female justice nominated to the United States Supreme Court. She was nominated by President Ronald Reagan in 1981, and served until 2006. While being slightly conservative, she was known for being the median member of the court for most of her career. For more information, see <https://supremecourthistory.org/associate-justices/sandra-day-oconnor-1981-2006/>

⁵⁰ *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ____ (2022).