The Judicialization of Religious Freedom: An Institutionalist Approach

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Abstract

Recent years have seen growing interest in the judicialization of religious freedom (JRF). In this article, I identify two distinct meanings of JRF, which are often conflated but which need to be kept separate. I then argue for a stronger institutionalist approach to JRF. An institutionalist approach focuses our attention on both the rules internal to courts, and the relationship of courts to administrative agencies, legislatures, and other governing bodies. I argue that there is room to strengthen our analyses of JRF by paying greater attention to these institutional dynamics. I demonstrate this by highlighting two overlooked features of courts—interpretive rules and access rules—that are particularly important for governing JRF; and by developing a framework that relates the courts to other institutional venues and political actors. In so doing, I identify a number of promising directions for future research into the causes and consequences of JRF.
The Judicialization of Religious Freedom: An Institutionalist Approach

The past decade has seen growing interest in the judicialization of religious freedom (JRF). In North America, two major conferences for the study of religion—the Society for the Scientific Study of Religion (SSSR) and the Association for the Sociology of Religion (ASR)—have featured presidential addresses devoted specifically to the topic (Richardson 2015) or to the broader question of the relationship between the courts and religious freedom (Finke 2013). In Europe, sociologists of law and religion have similarly begun to analyze the “juridification of religion” (Sandberg 2011, 2014) and the role of the European Court of Human Rights (ECtHR) in the expansion and protection of religious freedoms (Fokas 2015, 2016; Koenig 2015).

In this article, I review this emergent literature and identify two limitations, one conceptual, the other analytic. Conceptually, existing scholarship ascribes two distinct meanings to JRF, often conflating them when they need to be kept separate. Analytically, most existing studies treat courts in isolation, rather than considering how JRF might alter relationships between the courts and other political actors and institutions. I argue that both of these shortcomings can be overcome by adopting a stronger institutionalist approach to JRF. An institutionalist approach treats courts both as organizations characterized by rules and procedures, and as venues within a broader political system containing other political actors and governing bodies. I argue that by paying greater attention to courts as institutions, we can transform current conceptual ambiguity into a productive set of research questions, and also open up new and promising directions for future research into the broader systemic effects of JRF.

This article is intended as a theoretical and clarifying exercise. Consequently, it is not centered around a single original empirical analysis, but instead draws from a variety of existing
published cases that illustrate the nature of the issues at hand. Its primary goal is to illuminate some problematic features of the existing literature and to suggest ways of reconstructing it that may encourage more fruitful research going forward. To that end, the article proceeds as follows:

In the first section, I review existing scholarship on JRF and assess its limitations. Next, I consider how the institutional features of courts themselves can affect the possibility of JRF, and develop some tentative hypotheses about how those features might advance or retard JRF. In the third section, I consider how courts act as venues in a broader institutional ecology, and develop a framework for analyzing how JRF may affect the courts’ relationship to other institutional venues and political actors. Finally, in the conclusion, I review the merits of an institutionalist approach and consider possible directions for further research.

**The Judicialization of Religious Freedom Revisited**

The judicialization of religious freedom is typically presented as an extension or application of the expansive literature on the judicialization of politics (for a review, see Hirschl 2011). Although it is generally acknowledged that the judicialization of politics (and the closely related “juridification” of politics, more commonly discussed in European circles) encompasses a variety of meanings (Vallinder 1995; Blichner and Molander 2008), the judicialization of politics is generally understood to refer to a global trend toward “the increased presence of judicial processes and court rulings in political and social life, and the increasing resolution of political, social, or state-society conflicts in the courts” (Sieder, Schjolden, and Angell 2005:3).

Because the judicialization of politics includes “the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies” (Hirschl 2011:253), its application to the topic of religious freedom is a natural extension of this
line of research. Yet as it has been developed to date within the sociological literature, JRF has two important limitations. First, JRF is used to describe two distinct aspects of a judicializing process that are not kept distinct—in fact, they are often treated as necessary and complementary components of a singular trend. Second, although the literature on the judicialization of politics understands judicialization as a process that involves changing relationships among multiple political venues, the literature on JRF often treats courts in isolation, obscuring the important institutional effects that JRF may have on the broader political sphere.

Two Aspects of the Judicialization of Religious Freedom

As applied to religious freedom, judicialization has been used to describe two related but distinct trends. The first is an increasing reliance upon judicial activity in deciding religious matters. Thus, in his SSSR Presidential Address on the topic, Richardson (2015) argues that “courts rather than legislative or executive branches decide major political issues” (p. 4) and that “courts [are] playing a major role in the management of religion” (p. 14). Sandberg (2011:193), in his discussion of the “juridification of religion” in Britain, similarly observes a “legal explosion” since 2000 which “has seen a great deal of legislation concerning religion and a great deal of litigation.” At times, this observation on the increasing prominence of judicial activity is cast as the increasing dominance of the courts, such that “the courts have had the ‘last word’ and that word often (but not always) has been respected by the other branches of government” (Richardson and Lee 2014:313).

This understanding of JRF is distinct from a second trend identified in the literature: an expanded legal definition of religious freedom. Richardson (2015:4) notes that “religious freedom is being interpreted in new and different ways” by the courts; consequently, “the
meaning of religious freedom…expanded, allowing smaller and less popular faiths the freedom to practice their religion with less fear of being attacked in the legal arena” (p. 10). Sandberg (2011:195) similarly argues that the juridification of religion should be understood as “a convenient shorthand to describe the significant shift by which the passive tolerance of religious difference has been superseded by the prescriptive regulation of religion and the active promotion of religious liberty as a right.”

These two aspects of JRF are frequently discussed together, presenting increased judicial activity as being uniformly beneficial for the scope of religious freedom. Richardson (2007:425) straightforwardly predicts, “If judicial systems can maintain or develop more autonomy, religious freedom will gain”; while Sandberg (2011:37, emphasis in original) similarly declares that “litigation concerning religious rights has become the norm. The religion law of the twenty-first century represents a change from passive religious tolerance to the active promotion of religious liberty as a basic right.” This assumption, that increased judicial activity and an expanded definition of religious freedom go together, is also common in the broader sociological literature on law and religion. Roger Finke, both in his ASR Presidential Address and in related work with Robert Martin, has made this argument most explicitly and consistently. According to Finke (2013:303, emphasis in original), “when religious freedoms are supported by an independent judiciary, restrictions on religion are reduced.” This is because “courts serve to uphold constitutional promises and protect minorities from the legislation of the majority as well as executive powers” (Finke and Martin 2014:701; see also Finke, Martin, and Fox 2017). In short, the literature on JRF largely conceives of these two aspects of JRF as complementary parts advancing together, such that the increasing prominence of courts will necessarily beget an expanded definition of religious freedom.
Nevertheless, there are important reasons to treat increased judicial involvement and the scope of religious freedom as independent and separable aspects of JRF. On the one hand, more expansive definitions of religious freedom do not necessarily imply increased judicial activity. One of the peculiar features of Richardson’s (2015) Presidential Address is that he treats recent decisions by the American courts—among them a series of procedural decisions surrounding the admissibility of evidence in cult “brainwashing” cases, and the controversial Smith and Hobby Lobby decisions—as evidence for JRF. While these cases arguably expand the scope of religious freedom, it is difficult to point to these cases as evidence for a significant increase in judicial activity in the United States, where politics has long been judicialized and the courts have an extensive history of adjudicating religious freedom (e.g., Tocqueville 1988).

Just as it seems possible for the scope of religious freedom to expand without requiring additional judicial activity, it is also the case that increased judicial activity need not imply an expanded definition of religious freedom. The US Supreme Court’s Smith decision, referenced by Richardson (2015:11) as evidence for JRF, was roundly condemned for its chilling effect on the religious practices of minority faiths, and scholarly analyses revealed that religious freedoms were in fact restricted in the wake of that ruling (Wybraniec and Finke 2001). In Europe, too, where the increasing activity of the ECtHR provides some of the most compelling evidence of JRF, that activity has led to inconsistent rulings that sometimes constrict religious freedom. In a direct restriction of religious freedom, for example, the ECtHR in 2014 upheld France’s ban on the wearing of burqas in public places; while still more recently, the Court of Justice of the European Union (CJEU) similarly permitted employers to prohibit their Muslim employees from wearing headscarves. Notably, and in opposition to the idea that the two aspects of JRF are necessarily related, the case took place in the context of the expanding activity of European
courts. And looking beyond the West, scholars have observed that judicialization and restrictions on religious freedom often go hand in hand as part of a broader political project wherein the courts are used to regulate and “tame” religious fundamentalism (e.g., Hirschl 2010).

The fact that the two aspects of JRF are evidently separable and independent raises a variety of important questions. Normatively, it should provide grounds for tempering our optimism about what courts can and cannot do in the realm of religious freedom. But for social scientists, it also opens up an important empirical question for future research: what are the conditions under which increasing judicial activity and the scope of religious freedom advance together, and what are the conditions under which they diverge? As I discuss below, the answer to this question may lie in a richer analysis of institutional features of national legal systems.

Judicialization and the Broader Political Sphere

“Judicialization,” a process noun, implies changing relationships between courts and other political venues. The broader literature on the judicialization of politics regularly makes this point. Judicialization entails “the expansion of the province of the courts or the judges at the expense of the politicians and/or the administrators, that is, the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts” (Vallinder 1995:13, emphasis added). Yet one of the most striking things about the literature on JRF is that it pays little to no attention to these kinds of institutional relationships. Indeed, despite claims that JRF has led to an increase in the power of the courts, few studies have actually demonstrated how JRF has (or has not) transformed relationships between the courts and their broader political environments.

Existing work has not entirely ignored the relationship of courts to other actors. The most important contribution on this front is the acknowledgment that JRF relies upon the courts’
institutional autonomy (Finke 2013; Finke and Martin 2014; Richardson 2006; Richardson and Lee 2014). Richardson (2006:281), for example, argues that courts can only play an important role when “judges are able to exercise discretion in their decision-making” rather than being “dominated by other institutions, such as political or military institutions, or even by a…state church.” Yet these discussions cast autonomy as a prerequisite for JRF, rather than addressing how autonomous courts relate to other institutions once that autonomy has been obtained.

More often, studies have sought to show how courts interact with legal activists and legal professionals. Some of these studies show that JRF can be both cause and consequence of legal mobilization among religious actors and their “third-party partisans”—independent, experienced advocates such as advocacy groups or non-governmental organizations (NGOs) who provide support during litigation (Richardson 2006). The mobilization and development of “strategic litigation” by third-party partisans and grassroots actors has been crucial to the expansion of JRF at the ECtHR, for instance (Fokas 2015, 2016). In the United States, meanwhile, religious minorities have responded to JRF by increasingly devoting resources to legal efforts (Richardson 2016). Other scholarship has shown how the spread of JRF has been facilitated by transnational connections within the legal profession. Koenig (2015), for instance, argues that JRF at the ECtHR was promoted and transmitted through the court’s interactions with legal actors and professionals steeped in global human rights discourses. The growing mobilization of international law firms and human rights NGOs from the 1970s onward created a field of actors at the transnational level who advanced the judicialization of human rights. As the ECtHR became embedded within this field, through interactions among judges, lawyers, and international legal professionals, the court drifted toward a more activist stance on human rights that produced new legal opportunities for religious minorities.
In sum, then, we have a sense of how courts relate to important social actors, especially legal activists and legal professionals. But what is missing is an analysis of how JRF may alter the relationship between the courts, other political institutions, and the broader political strategies of interested actors. As discussed above, “judicialization” suggests a relative shift in the jurisdiction of the courts, whereby courts become more prominent in political life on religious matters, while other political venues become less prominent. Describing and analyzing these shifts offers an important opportunity to improve our understanding of how JRF affects the broader politics of religious freedom outside the legal sphere. How does JRF affect the relationship between courts and legislatures, administrative agencies, school boards, quasi-public authorities, and other political institutions? And how do these changing relationships affect the political strategies of interested actors? To date, these links have not been explored or theorized.

In short, current approaches to JRF are constrained both conceptually and analytically. Both of these constraints, I argue, could be overcome by adopting an institutionalist approach. First, adopting an institutional approach to the courts themselves may help identify those features of the courts that can contribute to disjunctures between judicial activity and the scope of religious freedom. By examining how courts vary institutionally, we may reveal how those variations affect how promising they appear to potential religious minority litigants. Second, adopting an institutional approach to the political sphere, and situating the courts in their broader institutional ecology, can help us theorize how relationships among different political institutions may change, and how those changing relationships may influence the broader politics of religious freedom. In so doing, we can investigate how JRF may reorganize the politics of religious freedom in ways that produce distinctive effects, not only on the legal system, but on the broader political order.
Courts as Institutions: Internal Variation and the Possibility of Religious Freedom

Political institutions are those “formal or informal procedures, routines, norms, and conventions embedded in the organizational structure of the polity or political economy” (Hall and Taylor 1996:938). This broad definition of institution encompasses both large sets of rules such as the division of jurisdictions within a federal system or constitutional order, as well as more meso- and micro-level sets of rules such as conventions governing the admissibility of evidence or the rules for gaining standing in a court of law (Halfmann 2011; Hall and Taylor 1996). For these reasons, we can think of institutions as being nested. At the societal level, political institutions (such as courts or legislatures) provide routinized ways of creating policies and resolving political conflicts; while each political institution also contains its own rules, procedures, and norms guiding how it approaches issues and reaches decisions.

Several scholars have already made important contributions to our understanding of how institutions shape the possibility of JRF. In a seminal article, Richardson (2006) identifies several key features of legal systems that can promote religious freedom. Foremost among these is judicial autonomy, or the extent to which “judges are able to exercise discretion in their decision-making” (p. 281). As Richardson explains, “the inherent discretion of any legal system can become a bulwark for religious freedom” so long as courts are not subordinated to other political actors (p. 289). Richardson typically treats autonomy as the most important institutional feature of the courts (Richardson 2006, 2007, 2014; Richardson and Lee 2014), and quantitative studies have confirmed the importance of judicial autonomy in promoting religious freedom (Finke and Martin 2014; Finke et al. 2017).

Yet while autonomy has received the most scholarly attention, Richardson (2006) also identifies several other institutional features of the courts that enhance religious freedom. One of
these is whether the courts operate under an adversarial system—that is, whether it permits 
plaintiffs to have an independent advocate or experienced attorney arguing on their behalf—as is 
common in the United States, but less common in “inquisitorial” European legal systems 
(Richardson 2006:284; cf. Richardson 2007). Because adversarial systems increase the odds 
“that relatively powerless religious groups will attract assistance in their legal conflicts” 
(Richardson 2006:289), Richardson treats adversarialism as the second-most important 
institutional feature of a legal system for promoting religious freedom (p. 284). Richardson also 
highlights legal systems’ degree of centralization; in decentralized systems (such as those 
common to many federated polities), “there is more variety in how legal systems operate, thus 
allowing for more flexibility and opportunity for citizens in such a society” (Richardson 
2014:36). Finally, Richardson points to the degree of discretion, or the “rules and criteria for 
acceptance of evidence and the discretion involved in their application” (Richardson 2006:287), 
permitted in a legal system. When courts have the ability to decide what kinds of evidence to 
admit or to demand as part of a trial, this can have the effect of promoting religious freedom— 
although it does not necessitate it.

While the above institutional features of courts are undeniably important, they do not 
exhaust the potentially relevant institutional features of legal systems which may affect whether 
and how JRF leads to an expansion of religious freedom. In the balance of this section, I 
highlight two additional features: (1) interpretive rules, and (2) rules governing access.

Interpretive Rules

Constitutions are not straightforward documents. Indeed, a common finding in the 
literature on religious freedom is that constitutional religious freedom protections do not
necessarily translate into religious freedom in practice (Finke 2013; Finke and Martin 2014; Fox and Flores 2009). In part, this is because, as Bader (2008:45) observes, “principles and rights (e.g., religious freedoms), have been and have to be continuously reinterpreted and reframed.” Legal systems typically develop a number of interpretive rules that guide them in determining how religious freedom provisions get put into practice.

First, different legal systems may be distinguished by their legal hermeneutics—that is, the broad approaches that they take to interpreting constitutions. Some courts embrace interpretation as a necessary and positive feature of judicial work, while others attempt to adopt more modest or restrictive approaches that minimize the extent to which courts are required to interpret their constitutions at all. Whereas American courts emphasize starting with existing precedents and building their interpretations through an application of particular aspects of the constitution, for instance, German courts start with uniform principles that govern review and apply these to the details of a challenged law in a pragmatic fashion that maximizes the “practical concordance” across a variety of implicated rights (Beatty 2001).

An example of the relevance of legal hermeneutics to religious freedom matters can be found in Mayrl’s (2016) recent comparison of the development of religious education laws in Australia and the United States. The American Supreme Court adopted a “realist” hermeneutic in the early twentieth century which encouraged it to interpret the constitution “in light of the social and political realities of the postwar era” (p. 198). In Australia, by contrast, the High Court ruled according to a “legalist” hermeneutic which discouraged the consideration of factors outside the text of a statute or constitutional provision and the political context in which it was enacted. This difference had substantial effects. In the United States, the Supreme Court interpreted the Establishment Clause in light of a broader history of social conflict, which it used to justify the
exclusion of Christian devotional exercises from American public schools. By contrast, Australian courts in the 1970s interpreted a statutory proscription against “dogmatic or polemical theology” being taught in state schools in light of its meaning in 1880, thereby upholding a religious education program that offered “teaching in the Christian religion” (pp. 184, 199). Religious freedom for non-Christian groups, therefore, developed quite differently in the two countries thanks in part to hermeneutic traditions.

Beyond legal hermeneutics, however, courts also vary in the jurisprudential resources—i.e., those rules, tests, precedents, and constitutional provisions—that they have at their disposal. Some of these, such as constitutional provisions, are external constraints on the court, whereas others, like tests and standards, are internally derived. Both, however, comprise rules and norms that affect how religious freedom promises get transformed into practice through the courts.

Different constitutions may be more or less ambiguous, and thus subject to interpretation. Lerner (2013) distinguishes between “permissive” constitutions that contain ambiguous or vague provisions, and more “restrictive” constitutions that constrain possibilities for interpretation. Permissive constitutions create a degree of “constitutional flexibility” that may allow judges to devise decisions that grant increased “protection of rights of religious groups” (pp. 618, 611). For instance, the more permissive constitutions of Israel and India allow those countries to recognize and protect a wider range of religious groups than the more restrictive constitutions of Turkey or Indonesia (Lerner 2013). However, permissive constitutions need not translate into increased religious freedom, since textual ambiguities can also function as loopholes that courts can use to restrict religious freedom (Fox and Flores 2009). Relatedly, some constitutions may contain religious freedom provisions that are in tension with other provisions, in ways that require courts to decide whether religious freedom is relatively more or less important than other
constitutional requirements. In the United States, for instance, religious freedom may have expanded in recent years as a result of the Supreme Court’s decision to give greater weight to free speech requirements rather than Establishment Clause restrictions (Brown 2002).

Finally, courts can also devise, through their jurisprudence, a number of tests and standards that they use in deciding subsequent decisions. The choice to apply a particular test to a given case may lead to decisions that are more favorable to or restrictive of religious freedom. This “jurisprudential structure” can make certain kinds of rights claims and litigation strategies more or less difficult to develop and win (Smith 2008). In the United States, for instance, the jurisprudential structure would include things like rational-basis and strict-scrutiny standards for adjudicating equal protection claims, as well as a variety of “tests” of establishment derived from previous decisions. As Robert Martin (2013) has shown, the American Supreme Court’s shift to a “balancing test” rather than a “rational basis” test in free exercise cases has facilitated an expansion in the scope of religious freedom in recent years.9

Access Rules

Beyond their interpretive rules, courts also differ in the extent to which they facilitate or erect barriers to access to interested plaintiffs. Litigation depends upon ready access to the courts, since courts are dependent upon litigants to bring cases to their attention (Epp 1998). Yet rules governing access have not featured strongly in studies of religious freedom to date. Some studies, however, have pointed to the importance of changes in access procedures in promoting JRF in the European context (Fokas 2015; Koenig 2015). The most relevant shifts occurred in 1994, when Protocol 9 allowed for direct individual access to the court, and in 1998, when Protocol 11 made states’ acceptance of complaint procedures compulsory. As Koenig (2015:61)
observes, the “new legal opportunities” that these changes in access provided “seem to have prompted individuals to turn to the ECtHR on a more regular basis.”

One important factor governing access to the courts has to do with models of judicial review. Abstract models of judicial review allow a law to be challenged before it goes into effect, and are designed to determine whether a law violates the constitution in the abstract. By contrast, concrete models of judicial review require an actual case or controversy, and thus may only be applied to determine whether an active law violates a constitutional provision (Hirschl 2011). Some countries feature combinations of these models. Hirschl (2011) notes that abstract judicial review, because it can entertain a variety of hypothetical scenarios, may more readily promote the judicialization of politics, although he also observes that the American system certainly has not suffered from a lack of judicialization despite its concrete system.

Nevertheless, for the purposes of JRF, the most important implication of this distinction is that these different models typically also determine who is allowed to bring a case before the courts. Whereas many concrete review systems allow individuals or groups to initiate litigation based on cases or controversies, abstract review systems often restrict the initiation of judicial review to politicians or other elected or appointed officials. In the case of France, for instance, an abstract system of judicial review that restricts challenges to designated political actors locks individual plaintiffs out of the constitutional system, thereby reducing their ability to challenge the constitutionality of legislation (Joppke and Marzal 2004). Many African nations with a French colonial heritage impose similar restrictions (Polavarapu 2016). Because politicians’ behavior is conditioned by their electoral considerations, however, they may be unreliable partisans on behalf of (especially, unpopular) religious minorities—thereby making abstract review systems less accessible to minority plaintiffs.
A related institutional feature of legal systems that affects access has to do with standing rules. Courts grant standing—or recognition as a party authorized to bring a case before the court—based on different rules in different countries. These rules can make it easier or harder for plaintiffs to present their case before the courts (Rosenberg 1991). For instance, Australian courts historically granted standing only to state and federal attorneys-general, giving them a monopoly on standing in public interest law. This created obstacles for plaintiffs seeking redress through the courts, who needed to convince an attorney-general to file a case on their behalf (Mayrl 2016). By contrast, most American courts operate under a tradition of “taxpayer standing,” which grants taxpayers the right to challenge public expenditures. This makes it relatively easy for plaintiffs to bring their challenges before the courts. For much of the last fifty years, moreover, American courts embraced an even more relaxed approach to standing on church-state matters, which facilitated a flood of religious litigation (Green 2011). The relaxation of standing rules has also encouraged religious litigation in several other jurisdictions, including Canada (Hoover and den Dulk 2004) and the European Union. Even today, the ECtHR’s relatively permissive standing requirements continue to make it a readier target than the CJEU, which has stricter standing rules (Fokas 2015, 2016).

In sum, institutional features of the courts, including interpretive and access rules, can have important consequences for JRF. To facilitate future research, Table 1 presents some tentative hypotheses about the expected effects of these features. In contrast to decentralization, autonomy, and adversarialism, which seem to have generally (though not absolutely) positive
effects on both judicial activity and the scope of religious freedom (Richardson 2006), access and interpretive rules appear to have more strongly contingent effects, especially on the scope of religious freedom. Indeed, it is precisely this contingency which may help explain those cases where increased judicial activity and the scope of religious freedom fail to advance together.

Broadly speaking, countries whose courts have greater interpretive flexibility and which provide more ready access to the courts should experience higher levels of judicial activity on religious matters, since these factors should encourage and facilitate activity by minority religious groups. These expected effects do not necessarily extend to the scope of religious freedom, however. The presence of a realist or other non-formalist hermeneutic, or of a permissive constitution, gives courts the ability and grounds on which to issue rulings expanding the scope of religious freedom; however, it should be borne in mind that, though likely to be generally positive, this relationship is unlikely to be absolute, since nothing about these features requires judges to rule in favor of religious minorities. The effect of tests and standards, by contrast, is likely to depend heavily on the content of the test or standard adopted.

Even more strongly, it is difficult to make predictions about the effect of relaxed access rules (such as concrete review or expansive standing rules) on the scope of religious freedom. While increased access can provide routes for religious minorities to have their cases heard, it also provides routes for their opponents to countermobilize through the courts. In general, therefore, relaxed access is likely to sharply increase the amount of judicial activity while producing effects on the scope of religious freedom that reflect the larger dynamics of litigation. More than anything, then, interpretive and access rules appear to magnify external social and political factors in ways that can lead to disjunctures between increased judicial activity and the scope of religious freedom.
The Judicialization of Religious Freedom in Ecological Perspective

As discussed above, although judicialization implies changing relationships among political institutions, these changes have not been adequately addressed in the literature to date. As a result, how JRF affects either the other political institutions in the broader political sphere, or the nature of politics itself, remains largely untheorized. This last section represents an attempt to advance these questions. To do so, I draw on the literature on venue shopping.

The Judicialization of Religious Freedom as Venue Shopping

Over the past twenty years, scholars in political science and sociology have developed a sizeable literature on “venue shopping.” This literature is based around the concept of “policy venues,” which are “institutional locations where authoritative decisions are made concerning a given issue” (Baumgartner and Jones 1993:32). Legislatures, administrative agencies, and school boards are all potential policy venues—as are courts. Each venue has its own rules and different mobilizing potential. Venues differ considerably from one another in terms of their rules of access and participation, their standards of debate, their decision-making procedures, their major constituencies, and their biases and incentives (Halfmann 2011; Mello 2016; Pralle 2003). They also vary in terms of who “controls” them; some policy venues are more politically hostile to actors’ interests and goals than others (Constantelos 2010).

Venue shopping refers to efforts by political actors to change the focus of their energies to policy venues that would appear to offer them a greater chance of success. In general, actors seek venues “where the balance of forces is tipped in their favor”—i.e., where they are less constrained by existing rules, will encounter less opposition, or have potential allies (Guiraudon 2000:252). By seeking out alternative policy venues, political actors may be able to bypass or go
over the heads of hostile officials who seek to maintain the status quo (Pralle 2003), or to place their claims before “friendly interlocutors” who are inclined to support their efforts (Constantelos 2010). As a result, marginalized or “losing” groups (i.e., those dissatisfied with existing policy arrangements) tend to have greater incentives to seek out new and more favorable policy venues (Beyers and Kerremans 2012). For instance, pro-choice activists in the United States, having failed to persuade federal officials with their appeals, shifted their attention to state legislatures and to the courts, where they found more receptive terrain for their policy goals (Halfmann 2011).

As applied to JRF, the venue shopping literature suggests that we should view JRF as the result of a strategic decision by religious actors to shift their activity toward the courts, probably because they perceive them to be (relatively, at least) friendly venues. But it also reminds us that courts are but one option among other potential venues where claims and policies governing religious freedom may be made. Indeed, the number of venues in which religious freedom may be pursued is potentially vast. In his survey of laws and policies governing religion and the state, Fox (2013) identifies no fewer than fifteen issue areas relevant to religious freedom, from family law to legislatures, business to the military, education to criminal justice. Each of these areas implies specialized administrative and legislative venues which may be addressed in addition to the courts.

This makes it all the more essential to consider how JRF is implicated in efforts to select other venues. As Baumgartner (2007:484-85) notes, “One cannot simply study one venue…[I]n order to understand the impact of these institutional structures on policy issues, we have to trace the issues, not the venues.” If courts are increasingly being selected by religious actors as venues for religious freedom claims, what does this imply for the venues in which religious freedom
questions had previously been addressed? And how does JRF itself affect the decisions made by religious actors in terms of their selection of venues?

**Effects of the Judicialization of Religious Freedom on Other Venues**

A more active role by the courts in addressing or expanding religious freedom does not necessarily mean that other policy venues will fall silent. While pacification—i.e., the acceptance of court rulings as settled policy and a decrease in political activity in other venues—is thus one possible response to JRF, it is not the only possibility, nor even the most likely. Instead, as other political institutions seek to retain a voice in defining religious freedom, policymakers may respond through **gap-filling, disregard, evasion, or contestation** instead.

**GAP-FILLING.** In polities with powerful or plentiful local governments, the decentralized distribution of authority may induce local responses that can yield widespread divergence in actual practice (Giorgi and Itçaina 2016). Particularly because court rulings are often not comprehensive, or articulate principles and rules that do not anticipate changing situations and conditions, local officials must often make ad-hoc policy decisions that fill in the gaps left by incomplete jurisprudence (Mattes et al. 2016). In other cases, local bodies may attempt to forge “peaceable adjustments”—accommodations or compromises that operate as localized, pragmatic responses to conflict over religious freedom (Justice 2005). These accommodations may diverge from the policies articulated by the courts. In this way, even though judicialization may occur, it may be complemented by ongoing local action to fill in policy gaps in practice.

**DISREGARD.** Another possible response to a more active court is for other venues to disregard the court’s decisions, blatantly ignoring rulings or refusing to implement decisions. Courts depend upon other venues to implement their decisions (Canon and Johnson 1998;
Rosenberg 1991; Scheingold 1974), and when those venues refuse to do so, judicial expansions of JRF may not materialize in practice. In Russia, for instance, government bureaucrats regularly refuse to implement the pro-freedom decisions of its Constitutional Court (Richardson and Lee 2014). Similarly, in the United States, the Supreme Court’s 1963 ruling outlawing mandatory devotional Bible reading in American public schools met with substantial resistance by local educational bodies (Sorauf 1976). More recently, several ECtHR rulings have been disregarded by member states; Turkey, for instance, recently refused to implement a decision that would have offered human rights concessions to its Alevi minority (Massicard 2014).

**Evasion.** Evasion, by contrast, is a process whereby legislatures, administrative agencies, and other venues take proactive measures to keep conflict out of the courts. Evasive action may take at least two forms: preemptive mobilization and associational policymaking. In preemptive mobilization, legislatures and administrators mobilize religious actors in civil society in ways that they hope will head off religious freedom problems before they reach the courts. In Finland, for instance, officials facilitated the creation of two new councils of religious leaders in an attempt to foster dialogue among religious groups. In so doing, Finnish leaders essentially enlisted civil society actors to help manage religious diversity on its behalf (Martikainen 2016). These kinds of councils are an increasingly common feature across Europe, and in many cases governments actively finance or permit formal linkages between religious councils and administrative officials (Dawson 2016). Similarly, Britain selectively countenances the operation of private sharia councils as places where Muslims can address certain issues on their own religious terms. So long as they work in a complementary fashion to British law, the British state envisions these councils as a means of accommodating Muslim demands for religious freedom without formally accommodating them in law (Joppke 2015).
In associational policymaking, by contrast, legislatures and administrators actively create new institutional pathways with the specific intent of preventing courts from exercising judicial review. Associational policies are policy arrangements that enlist the private sector to help state officials undertake the work of governance (Mayrl and Quinn 2016). Many constitutional provisions only bind state actors; in such settings, political actors may design questionably-legal policies as associational policies in an attempt to place them beyond constitutional scrutiny. In this way, appearing to keep the management of religion out of the hands of “the state” can be an important means whereby legislators and administrators can evade court decisions regarding religious freedom. In the United States, where efforts to expand religious freedom by permitting government funding of religious agencies have repeatedly run up against Establishment Clause restrictions, legislators and administrators have responded by devising new associational policies that rely upon private action to complicate the application of existing Supreme Court jurisprudence. In the educational arena, these policies include voucher and scholarship tax-credit programs (Mayrl 2016). Whether through preemptive mobilization or associational policymaking, non-court venues attempt to evade judicialization and preserve their own autonomy by pursuing policy pathways that lie beyond the jurisdiction of the courts.

CONTESTATION. Finally, of course, other institutional venues may simply choose to contest court decisions by deliberately attempting to reassert their own power over the courts. A particularly aggressive form of contestation involves proposals to eliminate judicial review, as has occurred in the United States around the school prayer question (Dobkin 2007). Political actors may also enlist administrative or legislative bodies to diminish the autonomy of the courts, as occurred in Pakistan in the wake of the 1978 Mobashir decision (Saeed 2017). More commonly, legislatures may contest by passing legislation that counteracts court decisions. In a
particularly famous example of counteracting legislation, both state and federal legislatures responded to the American Supreme Court’s infamous Smith decision by passing the Religious Freedom Restoration Act and associated state-level legislation (Sullivan 2015; Wybraniec and Finke 2001). The Religious Land Use and Institutionalized Persons Act represents another, more recent example (Richardson 2015). No matter what form it takes, contestation represents an attempt by other venues to counteract JRF by reasserting their own power.

Effects of the Judicialization of Religious Freedom on Institutional Politics

While JRF may affect the actions of policymakers in different venues, it may also have effects on the broader institutional politics of religious freedom in ways that complement or complicate judicialization. In particular, political actors may reconfigure their stance toward both the courts and other venues in response to judicialization. While some of these responses may amplify JRF, others may encourage dejudicialization by shifting attention to other venues.

LEGAL COUNTER-MOBILIZATION. One common political effect of JRF is legal counter-mobilization, an effect which has the consequence of furthering JRF. Because venue shifts often occur when activists attempt to find venues where their opponents are not yet mobilized (Pralle 2003), their opponents may later mobilize to compete in that new venue. In the United States, early success by separationist groups in judicializing religious questions led to a successful counter-mobilization among religious conservatives that has forced the courts to consider a broader range of religious and free speech claims (Brown 2002). Similarly, Richardson (2016) observes that one response to JRF among minority religions has been to devote increased organizational resources to legal activities, as they recognize the importance of the courts in
protecting (or potentially undercutting) their interests. In this way, JRF may lead to an expanded roster of participants in legal settings that had initially been dominated by one set of actors.

**Classic Venue Shopping.** A second possible response to JRF may be for opponents to undertake venue shopping of their own, seeking out alternative and more favorable venues. This venue shopping may be either “horizontal”—that is, “between venues at the same level of government”—or “vertical”—that is, “between different levels of government” (Princen and Kerremans 2008:1137). Horizontal venue shopping can take place within the judicial system itself. As Fokas (2016) has shown, one response to the ECtHR’s recent more restrictive decisions has been for legal actors to attempt to shift venues to the CJEU, in hopes of a more positive response. More commonly, however, horizontal venue shifting entails finding alternative legislative or administrative agencies through which to pursue more favorable policies, a move that counteracts JRF.

Vertical venue shopping, by contrast, depends on the presence of a multi-level system, such as a federated polity or a transnational governmental body like the European Union. Within the EU, vertical venue shopping occurs when actors seek to press their claims through new European venues that permit them to bypass traditional national venues, as has happened with the ECtHR (Koenig 2015). Local administrative bodies are also favored alternative venues, as they tend to be more responsive to local pressures (Finke and Martin 2014). In many parts of Europe, for instance, local government agencies have restricted religious freedom by refusing to issue building permits for mosques (Fox 2013). Similarly, in the United States, school boards have been a frequent target of conservative Christian activists who seek a less secular curriculum (Deckman 2004). These kinds of local decisions can counteract JRF, particularly when affected
groups cannot mobilize the resources to mount a legal challenge in their own defense. In such cases, local legislative or administrative action de facto triumphs, acting as a check on JRF.

Transnational Venue Shopping. Because courts today are increasingly interconnected at the global level, through transnational legal fields of scholars, activists, and jurists (Koenig 2015), political actors may turn to a new strategy of transnational venue shopping. Because courts sometimes look overseas to gauge international consensus or trends in precedent, some organizations have begun to participate in foreign litigation in the hopes of obliquely influencing their home courts (McCrudden 2015). This move has been spearheaded by conservative American religious litigators, who have opened branch offices in Europe in an attempt to influence jurisprudence at ECtHR (Fokas 2016; McCrudden 2015). Unlike some other forms of venue shopping, transnational shopping furthers JRF by thickening the web of connections within the religious field and entrenching the courts as transnational arbiters of religious policy.

Multi-Venue Strategies. Venue shopping need not imply a zero-sum, “here or there” style of response. Indeed, actors may choose to respond to court decisions by engaging in a multi-pronged, multi-level advocacy strategy that opens several alternative fronts at once. As Sullivan (2015:234-35) observes, American religious freedom advocates responded to the Smith decision by performing “an immediate tactical shift from constitutional appeals to the drafting of legislation intended to protect religion at every level (even local school boards).” Multi-venue strategies are expensive and difficult to undertake, however; for this reason, they may be favored more among resource-rich or organizationally diverse coalitional campaigns (Baumgartner 2007). Smaller actors, however, may be less well equipped to adopt such a multi-venue strategy.

Advocacy Capture. One final possible effect of JRF is to reorient religious freedom activism among those groups who have successfully used the courts to advance their goals. As
Pralle (2003:243) argues, advocacy groups who succeed in a particular venue may “stop searching for alternative venues altogether,” believing they have discovered a stable formula for success. In the case of JRF, this means that success in the courts may lead those groups promoting religious freedom to rely heavily or exclusively on legal strategies, counting on the courts to advance their definition of religious freedom, and allowing other political activity to atrophy. It is possible that separationists in the United States currently fall in this category. After successfully cultivating the courts and winning a string of victories on Establishment Clause cases in the 1960s and 1970s, separationist groups now routinely rely on the courts to counteract or overturn challenges to their vision (Mayrl 2016). Thus they are in a vulnerable position if—as appears possible (Rahdert 2012)—the Supreme Court adopts a more accommodationist stance on Establishment Clause issues in the coming years that make it a less reliable venue.

The above listing is not intended to be comprehensive, but rather to serve as a starting point for identifying some important potential political dynamics that JRF may unleash in the broader institutional ecology of religious freedom. The key take-home is that venue shopping is an important mechanism, one of whose effects is often to keep other political institutions engaged on religious matters. This, in turn, suggests the need to supplement the study of JRF with studies of the “dejudicialization of religious freedom.” Paradoxically, JRF may contribute to its own undermining, in cyclical fashion, as venue shopping leads the losers of litigation to seek out alternative venues through which to push back against a rising tide of unfavorable legal decisions. As courts become, thanks to judicialization, less favorable or stalemated terrain, activists are more likely to adopt venue-shifting strategies as they seek out a strategic advantage.
The Road Ahead: New Directions for Future Research on JRF

JRF is an important trend, and social scientists would do well to continue considering its implications for religious life in many countries. In this article, I have tried to show that expanded judicial activity should be understood as separable from expanded definitions of religious freedom, and that adopting an institutionalist perspective can provide us with new and important research questions that can help us better track the causes and consequences of JRF.

Scholars have already begun to consider how different legal systems may provide distinct opportunities or roadblocks for religious groups seeking legal protection (e.g., Richardson 2006; Finke and Martin 2014). In this article, I have suggested two additional features of the courts that have not been adequately considered to date: interpretive rules and access rules. Considered alongside other institutional characteristics such as discretion, centralization, and adversarialism, these features provide a platform for understanding when religious minorities are more or less likely to find legal systems receptive to their claims. Consequently, it holds the promise of helping to explain when we are likely to experience a disjuncture between increasing legal activity and the expansion of religious freedom.

This expanded discussion of institutional features holds particular importance for studies that attempt to understand the role of the courts in protecting religious freedom in comparative, quantitative perspective. Important preliminary efforts have been made along these lines (e.g., Finke and Martin 2014; Finke et al. 2017; Schleutker 2016), but they have, for perfectly good reasons, tended to focus most heavily on legal autonomy. Future quantitative analyses will need to develop data and measures that capture these other institutional features as well. Ideally, these would be supplemented by comparative and historical studies that demonstrate, for example, through process tracing (Bennett and Checkel 2014), how political actors have encountered these
institutional features, and the effect that those encounters have had on their political strategy, opportunities for success, and the expansion of religious freedom.

While scholars have made some progress in identifying and analyzing institutional features of legal systems that may affect JRF, they have paid less attention to how JRF may have affected the broader institutional politics of religious freedom. Yet this is undoubtedly an important frontier for future research. In brief, what are the political consequences of JRF, both for other venues within the state, and for those groups who seek to expand or restrict religious freedom? While it is beyond the scope of this paper to develop systematic hypotheses around these questions, I wish to highlight a few research directions that seem particularly promising.

To begin, future research could examine how other institutions have responded to JRF, by inquiring into the features of other institutional venues that govern whether they respond to JRF through pacification, gap-filling, disregard, evasion, or contestation; or by investigating the political circumstances that might lead other venues to adopt particular tactics at some times but not others. Similarly, future research should investigate how political actors respond to JRF. How does JRF affect their sense of opportunities, their choice of venues, the kinds of political alliances they are able to forge, and their relationship to the courts? What factors determine which strategies they adopt in responding to JRF? Under what circumstances do the courts appear to be an attractive venue, and when do actors perceive greater opportunities elsewhere?

Understanding the mobilizational dynamics and consequences of JRF is crucial, because not only are the responses of religious freedom advocates important for definitions of religious freedom, they may have important consequences for JRF itself. Rather than treat JRF as a progressively expanding inevitability, I have suggested that certain political dynamics may make other venues equally or more attractive to other groups when compared to the courts. Scholars
should thus be attuned to instances of dejudicialization, and prepare to theorize the conditions under which the dejudicialization of religious freedom may also occur. Comparative and historical analyses of the expansion of JRF in the context of its broader institutional ecology promise to suggest answers to questions about how far we might expect JRF to expand, and what kinds of political and social circumstances might lead instead to a reduced role for the courts in addressing religious freedom concerns.

References


<table>
<thead>
<tr>
<th>Court Feature</th>
<th>Indicators</th>
<th>Expected relationship to court activity on religious matters</th>
<th>Expected relationship to court decisions expanding religious freedom</th>
</tr>
</thead>
<tbody>
<tr>
<td>Autonomy</td>
<td>Judicial independence</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Adversarial system</td>
<td>Third-party partisans</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Centralization</td>
<td>Decentralized administration</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Discretion</td>
<td>Evidentiary discretion</td>
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<td>Unclear</td>
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<tr>
<td>Interpretive rules</td>
<td>Realist/other non-formalist hermeneutic</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td></td>
<td>Permissive constitution</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td></td>
<td>More tests and standards</td>
<td>+</td>
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<tr>
<td>Access rules</td>
<td>Concrete judicial review</td>
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<td>Unclear</td>
</tr>
<tr>
<td></td>
<td>Relaxed standing rules</td>
<td>+</td>
<td>Unclear</td>
</tr>
</tbody>
</table>

*Note:* Expected effects for first four rows derived from Richardson (2006, 2015).
While other aspects of judicialization, such as the emergence of a religious rights discourse or legal consciousness (Sandberg 2011:194, 2014:8), are sometimes discussed, the two trends analyzed here are the most prominent and consistent in the existing literature.


Though often presented as self-evident, definitions of “religious freedom” vary substantially (Fox 2013, 2015). While this is not the place to discuss the merits of any of these particular definitions, it is important to note that, depending on one’s definition, “establishment” cases—which can expand “freedom from” religion (e.g., protection from coerced worship; see Lerner 2013:641)—may represent an expansion of religious freedom just as “free exercise” cases do. For this reason, I draw upon examples from both kinds of cases in this article.

It might be argued that these decisions amount to an incremental increase in the scope of court activity, and thus of judicialization, but in the context of an already heavily judicialized American system, the difference seems rather minute. It does suggest intriguing questions about whether the quantity of judicialization matters, whether JRF is subject to threshold effects, or whether its effects compound over time, all of which are important topics for further study.

ECtHR, S.A.S. v. France, application no. 43835/11, judgment of 1 July 2014.


Such caution would be consistent with a long line of socio-legal scholarship (e.g., Rosenberg 1991; Scheingold 1974) that emphasizes the ambiguous effects of courts on social change, and the complex dynamics of rights claims (for a recent example, see Mello 2016).
While not directly addressing religious rights, studies have shown that tests and standards facilitated the expansion of other rights in Canada (Smith 2008) and India (Epp 1998).

Though an enumeration of these factors is beyond the scope of this article, see Finke 2013 and Richardson 2006 for good discussions of the topic.

Of course, beyond the institutional dynamics enumerated here, JRF has many other political implications, including implications for the quality and comity of interfaith relations (e.g., Schonthal et al. 2016).