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FREE EXERCISE OF RELIGION BEFORE THE BENCH: EMPIRICAL EVIDENCE FROM THE FEDERAL COURTS

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We analyze various factors that influence judicial decisions in cases involving Free Exercise Clause or religious accommodation claims and decided by lower federal courts. Religious liberty claims, including those moored in the Free Exercise Clause, typically generate particularly difficult questions about how best to structure the sometimes contentious relation between the religious faithful and the sovereign government. Such difficult questions arise frequently in and are often framed by litigation. Our analyses include all digested Free Exercise and religious accommodation claim decisions by federal court of appeals and district court judges from 1996 through 2005. As it relates to one key extra-judicial factor—judicial ideology—our main finding is that judicial ideology did not correlate with case outcomes. While judicial ideology did not emerge as a significant influence in the Free Exercise context, however, other variables did. Notably, Muslim claimants fared poorly, cases involving exemption from anti-discrimination laws were significantly more likely to result in pro-accommodation rulings, and Asian and Latino judges as well as judges who were former law professors were particularly amenable to Free Exercise and accommodation claims. On balance, our results paint a more complex and nuanced picture of how extra-judicial factors inform Free Exercise and accommodation litigation outcomes as well as judicial decision-making more generally.

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INTRODUCTION

"Religion is among the most fragile of our freedoms,"[1] and, as such, religious-based challenges pitting individuals against the State and framed by litigation frequently generate particularly difficult questions about the proper relationship between religiously faithful citizens and the sovereign government. Given our nation's early and continuing history as a place of refuge for religious dissenters, it surprises few that tensions and questions endure about the contours of individuals' religious conscience and practice as well as what the State can—and, sometimes, must—properly do to accommodate religious beliefs and practices. Such tensions and questions both reflect and inform evolving understandings of religion's proper role in American public and political life and the tolerance of religious autonomy against an ever-encroaching government. Similarly unsurprising is that the persistently evolving nature of contests over religious liberty in each generation help account for changes in religious liberty jurisprudence over time. Given the import of the issues incident to litigation over religious liberty issues, combined with increased public attention to the role of religion in public life, a deeper understanding of the various factors that influence judicial outcomes is both warranted and timely.

Religious liberty claims moored in the Free Exercise Clause, including requests for accommodation, aptly illustrate the judiciary's frequently-changing approach toward resolving contests over individual religious practices and governmental regulations and commands. Of course, it was not until 1925 when the Supreme Court formally applied the Free Exercise Clause against the states. In *Pierce v. Society of Sisters*,[2] the Court precluded the State of Oregon from mandating public school attendance as a parent's sole way of complying with state compulsory education laws.[3] *Pierce* accommodated a claim for religious freedom by permitting parents to satisfy state compulsory education laws by sending their children to religious-based schools.

To be sure, religious rights, even when the beliefs are practices that are deeply-held, are not absolute. For example, decades after *Pierce* the Supreme Court in *Employment Division v. Smith*[4] allowed the State of Oregon to sanction two workers for using peyote (a controlled substance) even though peyote use was part of a genuinely-held religious ritual. Moreover, the Court's decision in *Smith* made

1 JOSEPH P. VITERITTI, THE LAST FREEDOM ix (2007).
2 268 U.S. 510 (1925).
3 *Id.* at 535.
4 494 U.S. 872 (1990).

clear that the state need not demonstrate that enforcing a generally applicable law promoted a compelling interest, even if enforcing such a law made the practice of a religion impossible.[5]

Perhaps not surprisingly, Congress quickly responded to the *Smith* decision by passing the Religious Freedom Restoration Act (RFRA) three years later in 1993.[6] Signed into law by President Clinton, RFRA sought to prevent governments at all levels (local, state, and federal) from substantially burdening Free Exercise rights with generally applicable laws unless the government could articulate a compelling interest.[7] That is, through RFRA, Congress (and the President) sought to unwind the practical consequences of the Court's *Smith* decision. Four years later, however, the Court reminded Congress once again that the Court had the final word when it came to construing the contours of the Free Exercise Clause. In *City of Boerne v. Flores*,[8] the Court declared that Congress exceeded its Fourteenth Amendment authority by enacting legislation designed to enforce the Free Exercise Clause against the states.[9] (Every court to directly address the question agrees that RFRA continues to apply to the federal government, as having validly accepted additional obligations to protect religious exercise.[10])

In the early wake of the *Smith* decision, Professor Douglas Laycock wrote that the Court's analysis left the Free Exercise Clause with "little independent substantive content" and opened the door to religious discrimination.[11] Importantly, Professor Laycock also went on to predict that "[i]f the Court intends to defer to any formally neutral law restricting religion, then it has created a legal framework for persecution, and persecutions will result."[12]

While side-stepping questions about persecution, this Article takes a slightly different approach toward Professor Laycock's predictions. Specifically, we assess whether and, if so, the degree to which

5 *Id.* at 878–89.

6 Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993).

7 *Id.* at 1488–89.

8 521 U.S. 507 (1997).

9 *Id.* at 507.

10 *See, e.g.*, Hankins v. Lyght, 441 F.3d 96, 106 (2d Cir. 2006); O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003); Guam v. Guerrero, 290 F.3d 1210, 1221 (9th Cir. 2002); Kikumura v. Hurley, 242 F.3d 950, 959–60 (10th Cir. 2001); *see also* Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418, 430–32 (2006) (unanimously assuming that RFRA continues to apply to the federal government and demands a "focused" and not a "categorical approach" in balancing the government's interest against the burden on the claimant's religious exercise).

11 Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 4 (1991).

12 *Id.*

extra-judicial factors help explain judicial outcomes in religious liberty litigation involving the Free Exercise Clause and accommodation claims. As Professor Laycock contends, Free Exercise Clause jurisprudence has lacked consistent and coherent substance, which, combined with the Supreme Court's traditional use of malleable balancing tests and open-ended exceptions, certainly helps explain a Religious Clause doctrine noted for its instability and uncertainty. Of course, one benefit for empiricists is that such instability and uncertainty makes a study of extra-judicial influences on judicial decisions, such as ours, more likely to bear fruit.

To assess the influence of extra-judicial factors on judicial outcomes, incident to our larger, on-going empirical analysis of religious liberty decisions in the lower federal courts,[13] we studied all digested Free Exercise Clause and accommodation claim decisions by federal court of appeals and district court judges from 1996 through 2005.[14] One of our important findings is negative; specifically, judicial ideology was *not* a significant independent explanatory variable.[15] The absence of a judge-based ideological influence in the Free Exercise and accommodation context stands in stark contrast to the strong evidence of influence exerted by judge ideology that we found in a separate (though related) study of Establishment Clause cases.[16] In this way, we now see important and quite interesting variations between the two major streams of Religious Clause litigation (Establishment Clause and Free Exercise Clause) in terms of judicial ideology's influence (or lack thereof).

While judicial ideology did not emerge as a significant influence in the Free Exercise context, however, other variables did. Notably, among claimants, Muslims were significantly and powerfully associated with adverse outcomes before the courts. Among the various types of Free Exercise and accommodation cases, cases involving

13 *See* Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. COLO. L. REV. 1021 (2005); Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201 (2012) [hereinafter Sisk & Heise, *Establishment Clause Decisions*]; Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743 (2005) [hereinafter Sisk & Heise, *Judges and Ideology*]; Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004).

14 *See infra* Part I.

15 *See infra* Part III.C.

16 *See generally* Sisk & Heise, *Establishment Clause Decisions*, *supra* note 13 (providing an empirical study of Establishment Clause cases in federal courts between 1996–2005).

exemption from anti-discrimination laws enjoyed particularly high rates of success. Finally, while a judge's ideology did not prove important, a judge's ethnicity did. Specifically, Asian and Latino judges were particularly amenable to Free Exercise and accommodation claims. Moreover, while having a modest effect, judges who had been law professors also responded more positively to Free Exercise/Accommodation claims.

Assessing the tug of extra-judicial factors on judicial outcomes in the religious liberty context is important for both obvious and non-obvious reasons. Insofar as religion "is among the most fragile of our freedoms,"[17] how governments approach and resolve individuals' claims grounded in religious exercise warrants particular attention. Moreover, we are mindful that struggles with demands from its citizenry for religious tolerance, sometimes in the form of accommodation from legal mandates, are certainly not unique to the United States. In 2004, then-French President Jacques Chirac signed a law prohibiting French students from wearing symbols or clothing that were "conspicuously" religious in school. As Professor Viteritti observes, most understand this new French law to be directed against young Muslim women who wear headscarves.[18] Recognizing that the issues are important and cross national borders only increases the need for a deeper understanding of how judges decide religious liberty cases presented to them.

As is often the case in empirical work, our findings sometimes surprise and, on balance, paint a more complex and nuanced picture of the how extra-judicial factors inform Free Exercise and accommodation litigation outcomes. In Part I, we summarize our data and present our results in a table. Part II discusses our findings for the claimant variables; Part III does the same for the judge variables. In our Conclusion, we emphasize our results' limitations, locate them in the context of our larger study of religious liberty litigation, and consider ways in which our research could be expanded and developed in the future.

I. Empirical Study of Religious Free Exercise/Accommodation Decisions in the Federal Courts, 1996-2005

A. Nature of the Religious Free Exercise/Accommodation Study

In this study, we conducted an analysis of decisions made by judges of both the federal courts of appeals and the district courts in

17 Viteritti, *supra* note 1, at ix.

18 *Id.* at 9.

cases raising constitutional religious freedom issues.[19] For this Religious Free Exercise/Accommodation phase of the study, we created a database of the universe of digested decisions by the federal district courts and courts of appeals from 1996 through 2005 in which a religious believer or institution sought accommodation by the government or asserted that a governmental action burdened the free exercise of religion, inhibited religious expression, or discriminated on religious grounds.[20]

As with our prior study of decisions from 1986–1995,[21] we defined "Religious Free Exercise/Accommodation" cases to include (1) claims arising directly under the Free Exercise Clause of the First Amendment of the United States Constitution;[22] (2) claims under the Free Speech Clause of the First Amendment involving alleged governmental suppression of expression that was religious in content;[23] (3) claims based on federal statutes designed to promote freedom of religious exercise and speech, such as the Religious Freedom Restoration Act (RFRA),[24] the Equal Access Act (EAA),[25] and the Religious Land Use and Institutionalized Persons Act (RLUIPA);[26] and (4) charges against governmental entities of discrimination against or inequitable treatment of individuals or organizations based on their religious nature or identification, including equal protection constitu-

19 Our data set, regression-run results, coding of each decision, coding of each judge, and coding information may be found at: http://courseweb.stthomas.edu/gcsisk/religion.study.data/cover.html.

20 In our prior study of 1986–1995 religious liberty decisions, we included only published decisions in our database. In so doing, we knowingly "biased our database in favor of decisions that raise highly visible, controversial, landmark, or difficult questions of religious freedom, or at least issues of religious freedom that a judicial actor found particularly interesting and thus worthy of publication." Sisk, *supra* note 13, at 1049. For this 1996–2005 study, we have expanded the database to include the set of unpublished but digested opinions available on Westlaw. In addition to 1,290 judicial participations from published decisions, our database for Religious Free Exercise/Accommodation decisions includes 341 judicial participations from decisions that were digested by Westlaw but not published in the reporter system.

21 For further explanation of the definition and coding of Free Exercise/Accommodation, see Sisk, Heise & Morriss, *supra* note 13, at 530–34; Sisk, *supra* note 13, at 1031–35.

22 U.S. CONST. amend. I.

23 *Id.*

24 42 U.S.C. §§ 2000bb–2000bb-4 (2006). Although the Supreme Court invalidated RFRA as applied to state and local governments as exceeding congressional powers under the Fourteenth Amendment, City of Boerne v. Flores, 521 U.S. 507 (1997), the statute continues to apply to the federal government. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–32 (2006).

25 20 U.S.C. §§ 4071–74 (2006).

26 42 U.S.C. § 2000cc–2000cc-5 (2006).

tional claims and employment discrimination claims against public employers.

A substantial majority (58.5%) of the claims addressed by the judges in this data set were premised, at least in part, directly on the Free Exercise Clause, with the next largest claim category being assertions of unequal governmental treatment (raised in 30.4% of cases). Statutory religious liberty claims were raised in 20.9% of cases, and free speech claims for religious expression were raised in 26.7% of cases.

As the decisions were collected, the direction of each ruling,[27] the general factual category of the case, the religious affiliation of the claimant and judge, the religious demographics of the judge's community, the judge's ideology, the judge's race and gender, and various background and employment variables for the judge were coded.[28] As the point of analysis, we examined each individual judge's ruling in an individual case as a "judicial participation."[29] Each district judge's ruling was coded separately, as was each vote by the multiple judges participating on an appellate panel.

Our Religious Free Exercise/Accommodation data set consisted of 1,631 judicial participations (395 by district court judges and 1,236 by court of appeals judges). In terms of raw frequencies, before multivariate regression analysis, the claim was favorably received by the ruling judge 35.5% of the time.[30]

The dependent variable was the direction of the individual judge's vote in each case, coded as "1" when the Religious Free Exercise/Accommodation claim was accepted and as "0" when it was

27 For further information on how we coded a religious liberty decision on the merits, see Sisk & Heise, *Establishment Clause Decisions*, *supra* note 13, at 1208–11; Sisk, Heise & Morriss, *supra* note 13, at 546–53.

28 Every decision was independently coded by both a trained law student and one of the authors. For more detailed information about our study, data collection, and coding, see the description published as part of our prior study of religious liberty decisions from 1986–1995, see Sisk, Heise & Morriss, *supra* note 13, at 530–54, 571–612. The few changes in the selection of variables and coding from the prior study may be found by reviewing our table and coding. *See supra* note 19.

29 For a further discussion of judicial participations as the data point, see Sisk, Heise & Morriss, *supra* note 13, at 539–41.

30 Within the claim type categories, success rates varied from a low of 21.8% for discrimination claims to a high of 39.6% for free speech claims. For Free Exercise Clause claims, claimants prevailed with the voting judge at a rate of 26.6%, while statutory religious liberty claimants succeeded at a rate of 38.4%. In our prior study of lower federal court decisions from 1986–1995, Free Exercise/Accommodation claimants were successful in 35.6% of the judicial observations, Sisk, Heise & Morriss, *supra* note 13, at 553, reflecting a truly astoundingly stable rate of success across two decades, varying only by one-tenth of a percentage point.

rejected. Because we analyzed the influences of multiple variables, multiple regression models were adopted. Because the dependent variable was dichotomous, we applied logistic regression.[31]

B. Primary Models: Clustering Standard Errors at the Judge and Circuit Levels

Recognizing that our judicial observations (judge votes) are not fully independent from one another by reason of precedential constraints within a circuit or because of the repeated participation of the same judge in multiple observations, we adjusted the standard errors by clustering on one or the other level. In the earlier Establishment Clause phase of our study, we found no substantive differences in clustering at the circuit level or at the judge level. Because the chosen dimension did not make a substantive difference, and believing that those Establishment Clause cases were more likely to be responsive to circuit precedent, we reported the regression results in that companion article with clustering at the circuit level.[32]

In this Religious Free Exercise/Accommodation phase of study, 1,379 of the 1,631 observations were by judges who participated in more than one observation. Moreover, based on our review of the opinions, the Free Exercise cases appeared to turn more on judicial evaluation of the merits of individual claims rather than circuit-specific precedents. Mindful that "[c]lustering helps mitigate the underestimation of standard errors . . . and reduces the risk of rejecting a true null,"[33] following the path of other researchers in judicial decision-making, and appreciating that a larger number of clusters enhances accurate inference,[34] we have adopted clustering at the judge level as the first of our primary models here. At the same time, we employed clustering at the circuit level as an alternative and second primary model, and we report the results of both clustering approaches in the regression table below. Results from these two primary models, while similar, are not identical, as some variables meet significance levels for one clustering approach but not the other. We note those differences in significance of variables when relevant in the discussion below.

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31 *See* Sisk, Heise & Morriss, *supra* note 13, at 553–54.

32 *See* Sisk & Heise, *Establishment Clause Cases*, *supra* note 13, at 1211–13 tbl.1.

33 Matthew Sag, Tonja Jacobi & Maxim Sytch, *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CAL. L. REV. 801, 837 n.168 (2009).

34 In our primary model, the standard error was adjusted for 581 clusters by judge.

In our religious liberty study, we also used alternative proxies for ideology, which produced nearly identical results (and where they differ, we will so note). For convenience, we set out below a table for only the model using "Common Space Scores" to measure ideology.[35]

C. Statistical Significance for Finding a Correlation Between an Independent Variable and the Dependent Variable

By convention among social scientists, statistical significance is traditionally set at the .05 level (or 95% probability level),[36] which means roughly that the probability is less than 1 in 20 that the reported association between an independent variable and the dependent variable is a product of random variation. We of course acknowledge that selection of the .05 probability level as the demarcation point for identifying those variables deserving interpretive attention is arbitrary. We appreciate that the difference between, say, .05 and .07 is "not itself statistically significant."[37] Indeed, some researchers contend "that a finding of 'statistical' significance, or the lack of it, statistical *in*significance, is on its own almost valueless, a meaningless parlor game."[38] In challenging the statistical significance standard, these scholars argue that the size effect of the correlation is more important than the probability level for dismissing the null hypothesis. Nonetheless, for our own empirical work in the field of judicial decision-making, where the first question remains *whether* an association between selected variables actually does exist,[39] we cautiously adhere to convention and the .05 (or stronger) probability level for findings.

Accordingly, we regard an observed correlation found between variables in our study as reliable only when it is statistically significant at the .05 probability level or better in one of our two primary models—clustering at the (1) judge or (2) circuit levels. When that associ-

35 On Common Space Scores as a proxy for judicial ideology, see Sisk & Heise, *Establishment Clause Decisions*, *supra* note 13, at 1222–26. On proxy variables for measuring judicial ideology, see Sisk & Heise, *Judges and Ideology*, *supra* note 13, at 769–94.

36 *See* ALAN AGRESTI & BARBARA FINLEY, STATISTICAL METHODS FOR THE SOCIAL SCIENCES (4th ed., 2009) (explaining that researchers generally "do not regard the evidence against [the null hypothesis] are strong unless P is very small, say, $P < .05$ or $P < .01$").

37 *See* Andrew Gelman & Hal Stern, *The Difference Between "Significant" and "Not Significant" is Not Itself Statistically Significant*, 60 AM. STATISTICIAN 328 (2006).

38 STEPHEN T. ZILIAK & DEIRDRE N. MCCLOSKEY, THE CULT OF STATISTICAL SIGNIFICANCE 2 (2008).

39 *But see id.* at 4–5 (criticizing the statistical significance test as failing to "ask how much" and instead "ask[ing] 'whether,'" and asserting that "[e]xistence, the question of whether, is interesting [but] it is not scientific").

ation in a primary model is statistically significant or marginally significant in the alternative primary model as well, we express greater confidence in the reliability of that finding. When empirical scholars refer to a statistical correlation as "marginally significant," they typically mean that the probability level approaches significance, usually at the .10 level.[40] To be clear, however, marginal significance is not our standard for a finding. In this article, we do not discuss any correlation in a primary model as a finding unless it meets at least the .05 level, and we express hesitancy about even such a statistically significant finding unless the correlation is also at least marginally significant in the alternative primary model. For the reader who believes our strict approach to be unduly conservative or who wishes more detailed information, we have made our data set and other information available on-line, including regression runs of our primary models complete with probability values for every independent variable.[41]

We certainly agree that, beyond statistical significance, the substantive *size* of the effect of an independent variable on the dependent variable deserves central attention. As Professor Frank Cross reminds us, the "reader should not place undue importance on a finding of statistical significance, because such a finding shows a correlation between variables but by itself does not prove the substantive significance of that correlation."[42] As Cross emphasizes, "[o]ne must also consider the magnitude of the association."[43] In the discussion that follows, we chart most statistically significant findings in terms of predicted probabilities, along with confidence intervals, to describe the substantive size of the effect as well.

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40 *See* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1375 (2009); Anthony Niblett, Richard A. Posner & Andrei Shleifer, *The Evolution of a Legal Rule*, 39 J. LEGAL STUD. 325, 346 n.20 (2010); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1302 n.204 (2005). *See generally* Hovey v. Superior Court of Alameda Cnty., 616 P.2d 1301, 1314 n.58 (Cal. 1980) ("Normally in the social sciences, a 'p' value of .05 is said to be 'statistically significant.' Values between .05 and .10 are said to be 'marginally significant,' and a 'p' value of .01 is considered 'highly significant.' A 'p' value above .10 is generally said to be 'not significant.'").

41 Our data set, regression run results, coding of each decision, coding of each judge, and coding information may be found at:
http://courseweb.stthomas.edu/gcsisk/religion.study.data/cover.html.

42 FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 4 (2007).

43 *Id.*

D. Case Type Control Variables

We included case type control variables to ensure that any relationship discovered between other independent variables and the dependent variable was not an "artifact" of some correlation between that variable and a general factual type of case.[44]

The twelve Case Type dummy variables included in our Religious Free Exercise/Accommodation model were[45]

(1) Regulation of Private Activity (4.0% of observations);
(2) Private Education (2.8%);
(3) Public Education—Elementary (4.1%);
(4) Public Education—Secondary/Higher (3.3%);
(5) Religious Meetings (Public Facilities) (1.6%);
(6) Religious Expression (13.0%);
(7) Zoning (4.1%);
(8) Prisoner (35.9%);
(9) Employment Discrimination (Public Employer) (14.5%);
(10) Criminal (6.3%);
(11) Exemption from Anti-Discrimination Laws (4.4%); and
(12) Other (6.1%).[46]

If none of these Case Type variables had proven to be significant, that would have suggested an error in our selection of the appropriate control variables. In fact, as shown in the regression Table below, four of the eleven Case Type variables included in the regression runs[47] were statistically significant in both models (Private Education, Religious Expression, Prisoner, and Exemption from Anti-Discrimination), another (Public Education (Elementary)) was significant in one model, and two others (Religious Meetings and Employment Discrimination) were marginally significant in at least one model.

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44 Donald R. Songer & Susan J. Tabrizi, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. POL. 507, 517 (1999). The authors found that, in a study of evangelical Christian judges and rulings in death penalty, gender discrimination, and obscenity cases, "[t]he case facts employed in each model below are primarily viewed as control variables to insure that any associations discovered between religion and judicial decisions are not an artifact of some correlation between particular types of cases and the concentration of particular religions in regions giving rise to those types of cases." *Id.*

45 For a discussion of Case Type control variables and a further description of them as used in our prior study of Establishment Clause decisions, see Sisk, Heise & Morriss, *supra* note 13, at 573–74.

46 We selected "Other" as the reference variable for most of our observations, as it appeared to be the most general category and thus the one against which other types of cases could be most profitably compared.

47 The twelfth Case Type dummy variable—Other—was omitted as the reference variable.

TABLE 1: REGRESSION ANALYSIS FOR RELIGIOUS FREE EXERCISE/ ACCOMMODATION DECISIONS, FEDERAL COURTS, 1996–2005

	Model 1: Standard Errors Adjusted for Clusters by Judge		Model 2: Standard Errors Adjusted for Clusters by Circuit	
Case Type:				
Regulation	.435	(.378)	.435	(.633)
Public Educ. (Elemen.)	.714	(.378)	.714*	(.332)
Public Educ. (Sec./Higher)	.689	(.418)	.689	(.388)
Private Education	1.005*	(.438)	1.005*	(.501)
Religious Meetings	1.040	(.539)	1.040	(.725)
Religious Expression	1.113***	(.313)	1.113**	(.363)
Zoning	.364	(.369)	.364	(.569)
Prisoner	.971**	(.340)	.971	(.531)
Employment Discrimination	.642	(.339)	.642	(.457)
Exemption from Anti-Discrim. Laws	1.766***	(.422)	1.766**	(.606)
Criminal	-.502	(.402)	-.502	(.731)
Claimant Religion:				
Catholic	-.049	(.246)	-.049	(.458)
Mainline Protestant	-.016	(.375)	-.016	(.511)
Baptist	-.087	(.346)	-.087	(.329)
Christian Variation	.445	(.443)	.445	(.355)
Seventh-Day Adventist	-.252	(.422)	-.252	(.696)
Jehovah's Witness	-.307	(.457)	-.307	(.860)
Jewish Orthodox	.413	(.281)	.413	(.397)
Jewish Other	-.309	(.279)	-.309	(.443)
Muslim	-.767***	(.218)	-.767	(.399)
Native American	.253	(.283)	.253	(.561)
Rastafarian	.696*	(.355)	.696	(.612)
Buddhist	1.048**	(.408)	1.048	(.627)
White Separatist	-.275	(.406)	-.275	(.514)
Black Separatist	-2.294**	(.740)	-2.294*	(.939)
(Other)	-.210	(.216)	-.210	(.371)
Institutional Religious Claimant	.501*	(.201)	.501	(.327)
Defensive Free Exercise Claim	.493	(.313)	.493	(.418)
Judge Religion:				
Catholic	-.012	(.163)	-.012	(.107)
Baptist	-.175	(.259)	-.175	(.216)
Other Christian	-.157	(.245)	-.157	(.135)
Jewish	.019	(.184)	.019	(.212)
(Other)	-.165	(.355)	-.165	(.207)
None	-.0697	(.185)	-.0697	(.176)
Judge and Claim. Relig. Corr.	-.607*	(.292)	-.607*	(.269)
Judge Sex and Race:				
Sex (Female)	.162	(.163)	.162	(.106)
African-American	.203	(.212)	.203	(.245)
Latino	.468	(.267)	.468*	(.224)
Asian	1.239**	(.392)	1.239***	(.167)

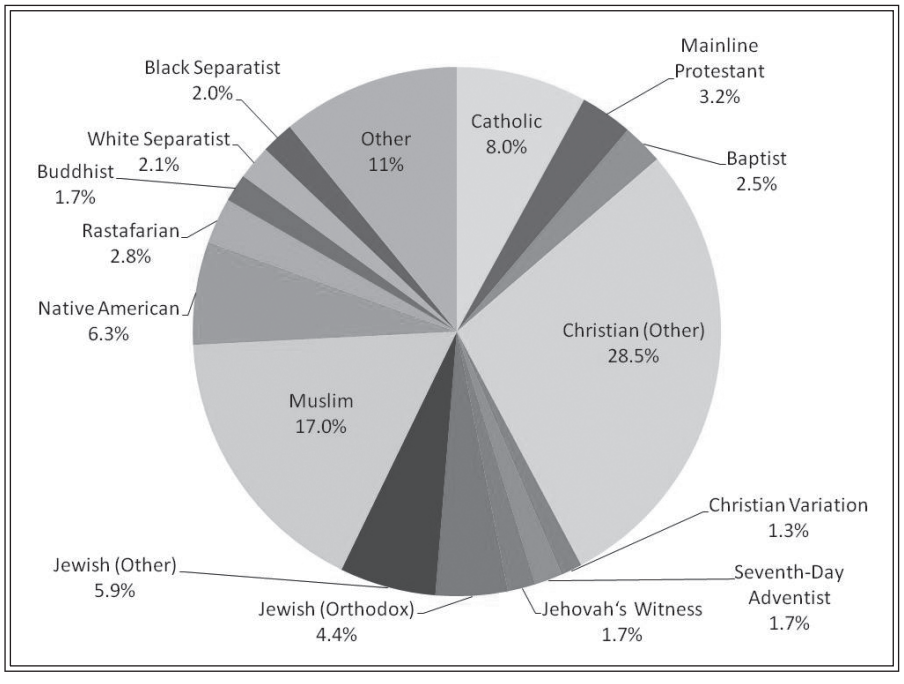
Judge Ideology or Attitude Factors:				
Common Space Score	-.136	(.180)	-.136	(.147)
ABA Rating-Above Qualified	.055	(.135)	.055	(.150)
ABA Rating-Below Qualified	.322	(.219)	.322	(.176)
Seniority on Federal Bench	-.001	(.001)	-.001	(.001)
Elite Law School	-.051	(.128)	-.051	(.070)
Judge Employment Background:				
Military	.079	(.146)	.079	(.131)
Government	-.086	(.122)	-.086	(.102)
State or Local Judge	-.112	(.136)	-.112	(.149)
Law Professor	.303	(.159)	.303*	(.120)
Community Demographics:				
Catholic Percentage	-.010	(.005)	-.010*	(.004)
Jewish Percentage	.002	(.012)	.002	(.012)
Adherence Rate	.011	(.006)	.011	(.007)
Precedent and Timing Variables:				
Boerne	.104	(.249)	.104	(.403)
After 9/11	.092	(.223)	.092	(.338)
Year of Decision	-.009	(.050)	-.009	(.081)
(constant)	16.375	(98.957)	16.375	(160.806)
pseudo R2		0.091		0.091
N		1631		1631

NOTES: Free Exercise Clause Successful Outcome=1. * $p < .05$; ** $p < .01$; *** $p < .001$.

II. FINDINGS (PART ONE): CLAIMANT RELIGIOUS VARIABLES

A. Identifying the Diverse Religions of Claimants

FIGURE 1. RELIGIOUS FREE EXERCISE CLAIMANTS BY RELIGION AS PERCENTAGE OF OBSERVATIONS, FEDERAL COURTS OF APPEALS, SEPTEMBER 11, 2001 TO DECEMBER 31, 2005



For the 1631 judicial observations in Religious Free Exercise/Accommodations cases in which the religious affiliation of claimants could be determined, we coded claimants[48] into sixteen general categories, for which dummy variables were created:

> CATHOLIC: Catholic claimants accounted for 8.0% (or 130) of the 1631 observations in Free Exercise cases.
>
> MAINLINE PROTESTANT: Mainline Protestants accounted for 3.2% (or 53) of these observations. In our prior study for the years 1986–1995, we did not have a sufficient number to include Mainline Protestant claimants as a separate dummy variable.
>
> BAPTIST: Baptist claimants accounted for 2.5% (or 41) of these observations.

48 In the rare case in which claimants from more than one religious background were involved in a case, the affiliation of the lead claimant was coded.

CHRISTIAN OTHER: Claimants who were affiliated with other Christian denominations or sects accounted for a total of 28.5% (or 465) of the observations in Free Exercise database cases. Although this is a diverse group, it is made up primarily of non-denominational, evangelical, and fundamentalist church members.

CHRISTIAN VARIATION: Claimants who were affiliated with religious communities related to traditional Christianity, namely Mormons, Christian Scientists, and Unitarians, accounted for a total of 1.3% (or 22) of the observations in Free Exercise database cases. We had not included this category as a separate dummy variable for the 1986–1995 study.

SEVENTH-DAY ADVENTIST: Seventh-Day Adventists accounted for 1.7% (or 28) of these observations. In our 1986–1995 study, we had been unable to include this as a separate dummy variable.

JEHOVAH'S WITNESS: Jehovah's Witnesses accounted for 1.7% (or 28) of these observations. In our 1986–1995 study, we did not have a sufficient number of Jehovah's Witnesses to include this as a separate dummy variable.

JEWISH ORTHODOX: Orthodox Jews accounted for 4.4% (or 72) of the observations in Free Exercise cases.

JEWISH OTHER: Other Jewish claimants accounted for 5.9% (or 96) of the judicial participations in the Free Exercise database.

MUSLIM: Muslim claimants accounted for 17.0% (or 277) of the judicial participations in the Free Exercise database.

NATIVE AMERICAN: Claimants who followed Native American religious practices accounted for 6.3% (or 103) of the observations.

RASTAFARIAN: Rastafarian claimants accounted for 2.8% (or 45) of the observations. In our 1986–1995 study, we had been unable to include this as a separate dummy variable.

BUDDHIST: Buddhist claimants accounted for 1.7% (or 27) of the observations. We had not included this category as a separate dummy variable for the 1986–1995 study.

WHITE SEPARATIST: White Separatist religious claimants accounted for 2.1% (or 34) of the observations. In our 1986–1995 study, we did not have a sufficient number to include White Separatist claimants as a separate dummy variable.

BLACK SEPARATIST: Black Separatist religious claimants accounted for 2.0% (or 33) of the observations. We had not included this category as a separate dummy variable for the 1986–1995 study.

OTHER: Claimants with other religious affiliations accounted for 10.9% (or 177) of the observations. These included an array of

other religions not falling within the other general categories listed above but with too few observations to justify separate categorization, including Sikh, Wiccan, and New Age.

Through access to pleadings and other court documents through the PACER federal court dockets system, we were able to establish the religious affiliation for a much larger proportion of claimants than in our prior study, even for cases in which the affiliation was not identified in the digested court decisions. In this study, claimants for whom a religious affiliation could not be determined accounted for 7.7% (or 136) of the total 1767 observations for Religious Free Exercise/Accommodation claims. By contrast, in the 1986–1995 study, we had been unable to determine religious affiliation for 19.1% of the observations, a figure nearly three times higher. We were forced to treat these observations as missing in our primary model for analyzing claimant religious affiliation dummy variables.

While no manifestly obvious candidate emerged as the appropriate reference variable, we selected CHRISTIAN OTHER as the variable that collected together various Christian adherents without a clear denominational association and thus as the one that appeared to be the most general description of the Christian mainstream. Not incidentally, this was the largest category, which ordinarily is preferable as a reference category.

B. Muslims

With but one exception, among all the diverse categories of religious claimants included in the primary models of our study of Religious Free Exercise/Accommodation claims, only Muslims were significantly and powerfully associated with a negative outcome before the courts. By comparison, claimants from other religious communities were nearly twice as likely to prevail as Muslims. (The exception is the statistically significant disfavoring of claims by Black Separatists, mostly in prisoner cases, as discussed in the next subsection of this article.) The "Muslim Deficit" in religious freedom cases is examined in considerable detail, along with possible reasons for the disparity and suggested responses in judicial decision-making, in a companion article.[49]

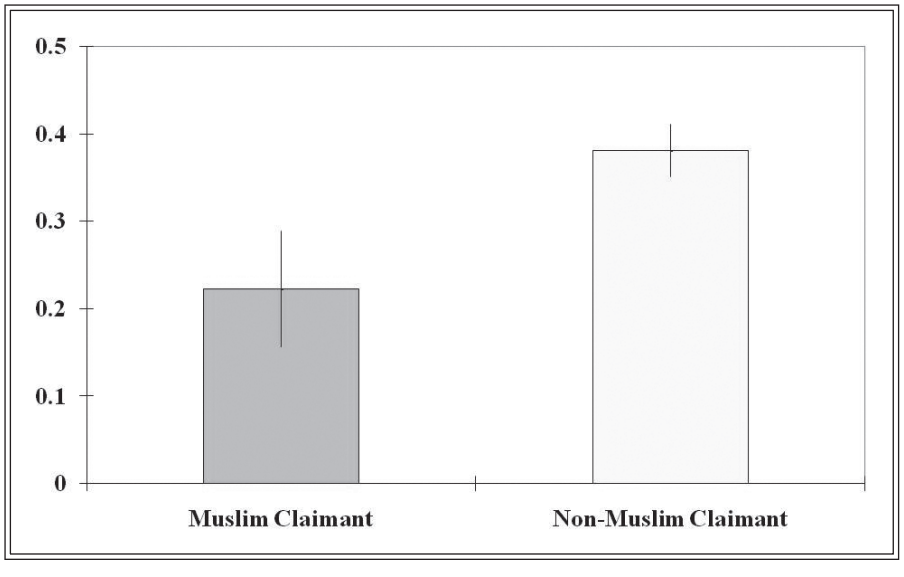
In our primary regression model clustering at the judge level, the variable for Muslim claimants was highly significant at the .001 level (or 99.9% probability level). The Muslim variable remains marginally

49 *See generally* Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence From the Federal Courts*, 98 IOWA L. REV. 231 (2012) (discussing reasons for the lack of success by Muslims in federal court).

significant, inside the .06 level, in the alternative model clustering at the circuit level, as well as in alternative models using party as the ideology proxy. When judges from each of the lower federal courts are examined separately in the primary model clustering at the judge level, the Muslim variable falls well out of significance for district court judges but remains highly significant for court of appeals judges, suggesting this finding applies primarily to appellate judges.

The magnitude of the association between the Muslim claimant variable and diminished success on the outcome dependent variable is substantial. As shown in Figure 2, holding all other independent variables constant at their means, the predicted probability that a Muslim claimant would succeed in presenting a Religious Free Exercise/Accommodation claim to an individual judge was 22.2%, while non-Muslim claimants succeeded at a rate of 38.0%.[50]

FIGURE 2. PREDICTED PROBABILITY THAT A CLAIMANT WILL SUCCEED ON A RELIGIOUS FREE EXERCISE/ACCOMMODATION CLAIM, BY MUSLIM IDENTITY



Almost three quarters (74.7%) of the observations involving Muslims in our data set are claims by prisoners, while a quarter of the claims by Muslims arose in other factual contexts including employment discrimination, regulations, and zoning. The success rate by

50 The 95% confidence interval for predicted success rate by a Muslim claimant in Model 1 ranges from 15.6% to 28.8%, and for non-Muslim claimants from 35.0% to 41.1%.

prisoners of all religious affiliations asserting Religious Free Exercise/Accommodation claims is 33.0%, which is nearly the same as the overall success rate in cases of all types of 35.5%. Moreover, when prisoner cases are examined separately, Muslim prisoners and Black Separatists remain significantly less likely to succeed in a Religious Free Exercise/Accommodation claim (along with the Other minority religion category). Thus, our study documents a religious liberty success deficit for Muslims, Black Separatists, and followers of small minority religions specifically and not all prisoners generally.

Most importantly, even when prisoner cases are removed altogether, and a separate regression analysis is applied only to other cases, Muslims remain distinctly and significantly at a disadvantage in pursuing these claims in federal court. Indeed, when prisoner and non-prisoner cases are examined separately, the Muslim variable becomes highly significant in all models.

In our prior study of religious liberty decisions in the federal courts for the period of 1986–1995, the Muslim claimant variable did not approach significance in our standard model.[51] However, interestingly, the Muslim variable did rise to the .01 level (or 99% probability level) for statistical significance, and in a negative direction, when district court and court of appeals judges were separately analyzed in regression runs, although we were reluctant to rely on these cross-checks for findings.[52] In addition, in that earlier study, we found Muslims were significantly less likely to succeed in the sub-category of claims of unequal treatment or discrimination.[53] "[A]t least pending further study," we concluded in our study of 1986–1995 decisions, "there is some evidence that adherents to Islam, apparently alone among the non-Christian religious faiths, may encounter greater resistance in pressing claims for religious accommodation in federal courts."[54]

With that further study now completed, through this extension of our empirical analysis to the 1996–2005 period, we can now confirm that Muslims indeed do suffer a comparative disadvantage in asserting claims for religious free exercise or accommodation in the federal courts. For Religious Free Exercise/Accommodation cases in the federal courts from 1996–2005, the variable for Muslim claimants was statistically significant, negative in correlation with the outcome, and

51 Sisk, Heise & Morriss, *supra* note 13, at 566.

52 *Id.*

53 *Id.*

54 *Id.* at 566–67.

translated into a predicted success rate only slightly more than half that for other religious claimants.

C. Black Separatist Religious Sects

For the first time in this study of religious liberty decisions from 1996–2005, we included a separate variable for Black Separatist religious sects—such as the Moorish Temple and the Five Percenters.[55] Claims for religious accommodation by persons identifying with these sects typically arose (73%) in the context of criminal proceedings and prisons. The variable for Black Separatists was highly significant (at the .01 or 99% probability level) in our first model and significant (at the .05 or 95% probability level) in our second model and in alternative party ideology models. Black Separatist claimants obtained a positive ruling in a Religious Free Exercise/Accommodation case at the extraordinarily low rate of 5.4%, compared to a success rate of 36.1% for claimants with other religious identities[56]—a comparative proportion of 1 to 6.7.

Given the strong cultural premises of racial equality, especially in elite circles, antipathy by judicial decision-makers toward racial separatists would hardly be surprising. Moreover, as noted, claims by Black Separatists tended to arise in the prison setting where, as confirmed by many of the opinions in this study, racial tensions can pose security threats for both correctional officers and other prisoners.

Notably and by contrast, the antithesis variable for White Separatists, whose claims also typically arose (91%) in criminal and prison settings, did not approach significance in any model, although the coefficient was also negative. One should be chary in using statistical significance, or lack thereof, not only to confirm that a finding as to a particular variable is reliable but to compare and contrast hypotheses among variables. We are confident that Black Separatists do fail to succeed before federal judges in Religious Free Exercise/Accommodation claims at a disproportionate rate, given the significant and robust negative correlation with the outcome dependent variable across models. But, with respect to White Separatists, we can only say with confidence that we cannot reject the null hypothesis of no effect.

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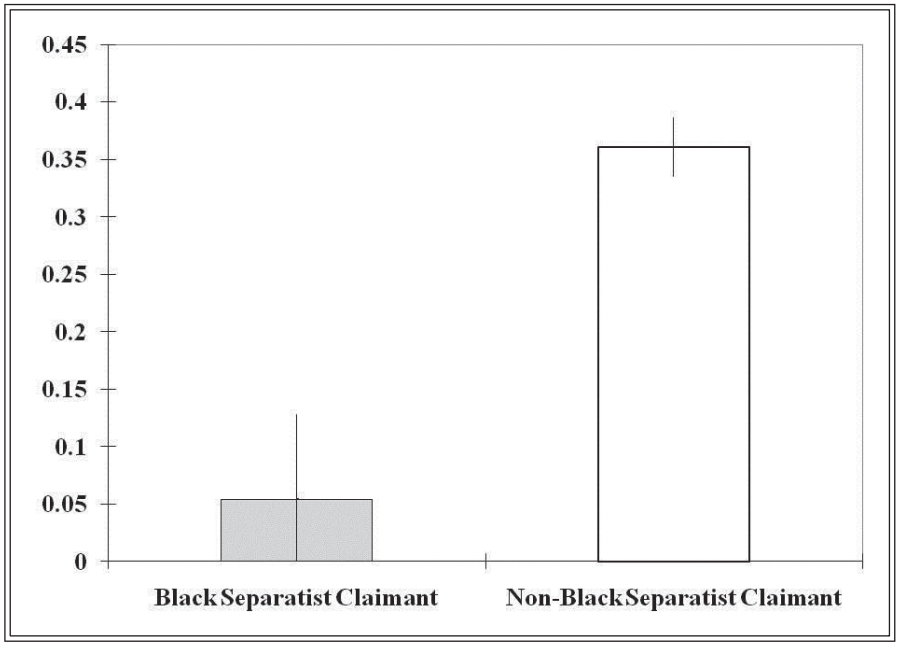
55 For further discussion of Black Separatist sects and their coding, see Sisk & Heise, *supra* note 49, at 248.

56 The 95% confidence interval for predicted success rate by a Black Separatist claimant in Model 1 ranges from -0.02 (which we raised to zero in the chart in Figure 3 as negative results do not translate to real-world situations) to 12.8%, and for non-Black Separatist claimants from 33.5% to 38.6%.

One cannot seize on the mere lack of statistical significance to *accept* a null hypothesis that an association is *not* present.[57]

FIGURE 3. PREDICTED PROBABILITY THAT A CLAIMANT WILL SUCCEED ON A RELIGIOUS FREE EXERCISE/ACCOMMODATION CLAIM, BY BLACK SEPARATIST IDENTITY



To be sure, given the substantial distance from significance that we find as to White Separatists (at about the .50 level), and the consistency of that low probability value throughout the models, we may be forgiven for harboring a suspicion that the null hypothesis is correct here. At best, however, we can say that the question as to whether, how, and why Black Separatists are treated differently—not just from other religious claimants generally (as shown in Figure 3), but from White Separatists in particular—warrants additional study.

D. Rastafarians and Buddhists

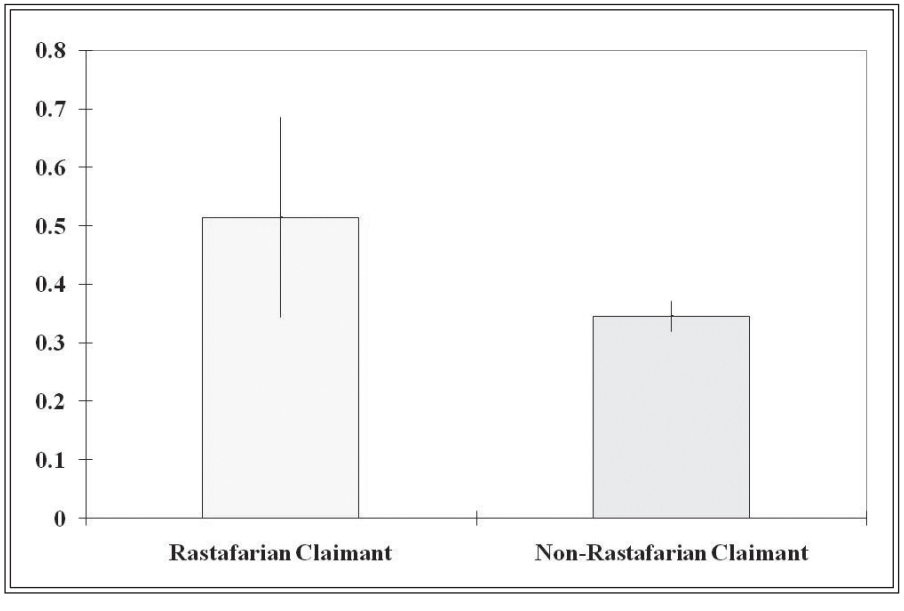
The variables for travelers along two religious paths—Rastafarians and Buddhists—were significant in at least one model as *positively* associated with the dependent variable. In other words, claimants

57 *See* LARRY D. SCHROEDER ET AL., UNDERSTANDING REGRESSION ANALYSIS 41 (1986) ("Nonrejection [by significance testing] does not imply that one accepts the null hypothesis.").

from these religious traditions appeared to be *more* likely to succeed in presenting Religious Free Exercise/Accommodation claims than were claimants from other religious backgrounds.

The variable for Rastafarian claimants was significant in Model 1 (clustering at the judge level), but did not approach significance in Model 2 (clustering at the circuit level) or in alternative models with party as the ideology proxy. Thus, we note the finding of favorable treatment of Rastafarian religious liberty claimants with caution.

FIGURE 4. PREDICTED PROBABILITY THAT A CLAIMANT WILL SUCCEED ON A RELIGIOUS FREE EXERCISE/ACCOMMODATION CLAIM, BY RASTAFARIAN IDENTITY



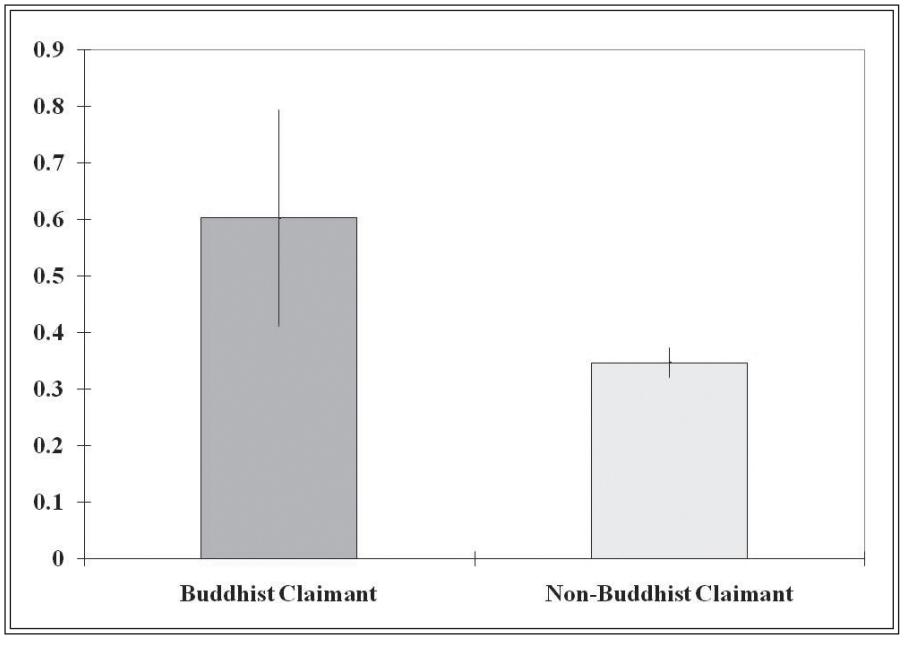
Holding all other independent variables constant, the predicted probability that a Rastafarian claimant would succeed in presenting a Religious Free Exercise/Accommodation claim to an individual judge was 51.5%, while non-Rastafarian claimants succeeded at a rate of 34.6%.[58] By this best estimate then, Rastafarians achieved a success rate about 1.5 times higher than those from other religious traditions.

The variable for Buddhist claimants was highly significant in Model 1 (clustering at the judge level) and marginally significant in the other and alternative models. However, given that more than half

58 The 95% confidence interval for predicted success rate by a Rastafarian claimant in Model 1 ranges from 34.3% to 68.6%, and for non-Rastafarian claimants from 32.0% to 37.2%.

(16 of 27) of the judicial observations involving Buddhists came from a single case working its way through the court system (including an en banc court of appeals decision),[59] we do not attach much credence to this finding of more favorable treatment of Buddhist claimants.

FIGURE 5. PREDICTED PROBABILITY THAT A CLAIMANT WILL SUCCEED ON A RELIGIOUS FREE EXERCISE/ ACCOMMODATION CLAIM, BY BUDDHIST IDENTITY



Holding all other independent variables constant, the predicted probability that a Buddhist claimant would succeed in presenting a Religious Free Exercise/Accommodation claim to an individual judge was 60.2%, while non-Buddhist claimants succeeded at a rate of 34.6%.[60] By this best estimate, Buddhists achieved a success rate almost 1.75 times higher than those from other religious traditions.

To the extent that these two findings or either one of them are reliable, we would speculate that both religious communities may have been more favorably received because of their peaceful and tolerant reputation, which is consistent with the hypothesis that small

59 DeHart v. Horn, 390 F.3d 262 (3d Cir. 2004); DeHart v. Horn, 227 F.3d 47 (3d Cir. 2000) (en banc).

60 The 95% confidence interval for predicted success rate by a Buddhist claimant in Model 1 ranges from 41.1% to 79.3%, and for non-Buddhist claimants from 32.1% to 37.2%.

minority religions generally are regarded as non-threatening and easily accommodated with little inconvenience to the majority.[61] Moreover, the substantial majority of Rastafarian (68.9%) and Buddhist (88.9%) claims were by prisoners, in which the claims made tended to involve such matters as diet requests, hair or beard grooming, religious items, and resistance to medical testing, the kinds of claims that even in a prison context appeared to raise few genuine security concerns.

E. Traditionalist Christians

In our prior study of religious liberty decisions dating from 1986–1995, we found that adherents to traditionalist religions, specifically Roman Catholics and Baptists, were significantly less likely to succeed in seeking religious accommodations in the federal courts. In various phases of that study, these two religious groupings emerged as consistently and significantly associated with a negative outcome—Catholics (at the .01 or 99% probability level) and Baptists (at the .05 or 95% probability level).[62]

Based on those results, "we suggest[ed] that the phenomenon of impaired success for claimants from these two religious communities may [best] be understood as part of what Thomas Berg describes as 'a broader distrust of politically active social conservatives,' which now includes both Catholics and evangelical Protestants."[63] Thus, when traditionalist Catholics and Baptists, adhering to conservative social values and moral principles, resist government regulations of private schools or application of gay rights ordinances in certain metropolitan areas, such claims "tend[ ] to be a shot right across the bow of the secular ship of state."[64] And, given that federal judges are drawn from the cultural elite of American society, they may react with greater skepticism to the claims of traditionalist Christians that raise familiar and controversial social and cultural challenges to the social-policy initiatives of liberal, secular governments, especially in metropolitan areas.

Having now the benefit of additional empirical evidence from our latest study, has the nation's continuing controversies regarding the nature and scope of religious liberty evolved into what one of us called "a new conflict between the agenda of a liberal secular elite and

61 Sisk, *supra* note 13, at 1042–43.

62 Sisk, Heise & Morriss, *supra* note 13, at 564; Sisk, *supra* note 13, at 1037.

63 Sisk, Heise & Morriss, *supra* note 13, at 565 (quoting Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 Loy. U. Chi. L.J. 121, 123 (2001)).

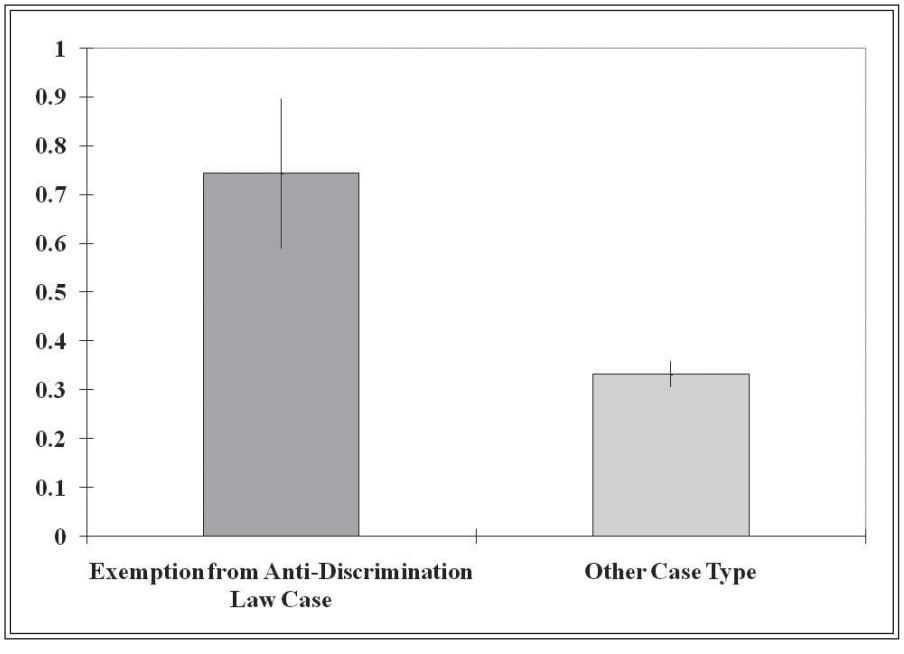
64 Sisk, Heise & Morriss, *supra* note 13.

the practices and values of traditional religious believers[?]"[65] Does the current study confirm those prior findings that traditionalist Christians found a less than warm welcome when entering the courthouse to assert religious liberty claims? The short answer from our current study is that we have no new evidence to support these propositions. Indeed, the deficit in success in asserting religious liberty claims that we found for Catholics and Baptists in that prior era has faded away to statistical insignificance in our current study of decisions from 1996–2005.

Four possibilities may account for the result that Catholics and Baptists were significantly less likely to succeed in 1986–1995, but that these variables did not achieve statistical significance in the data for 1996–2005. First, the finding in our prior study may be mistaken or the product of chance, although the 95% and 99% probability level together with the stability of those results across various phases of that earlier study suggest otherwise. Second, random variations in the current study may have obscured evidence of a continuing association. Third, judicial attitudes may have changed in the intervening years, which certainly would be a salutary development (although the stronger emergence of a deficit for Muslims, who also might be categorized as traditionalist in perspective, remains as a sobering contraindication). Fourth, something else may have changed, which we think is the most likely explanation.

65 *Id.* at 1024.

FIGURE 6. PREDICTED PROBABILITY THAT A RELIGIOUS CLAIMANT SEEKING AN EXEMPTION FROM AN ANTI-DISCRIMINATION LAW WILL SUCCEED



During the 1986–1995 period, Catholic and Baptist claims were particularly likely to arise in challenges to social welfare and regulatory programs and anti-discrimination law.[66] Catholic and Baptist objections to application of employment discrimination laws against religious colleges, schools, and other institutions were especially common in that data set.[67] With this in mind, for this new study of the 1996–2005 period, we added another Case Type variable for claims asserting Exemption from Anti-Discrimination Laws, which accounted for 4.4% of the claims in our Religious Free Exercise/Accommodation data set. That new variable was highly significant in all models and in a positive direction.

Moreover, the substantive effect of the Exemption from Anti-Discrimination Laws variable was powerful. While parties seeking religious accommodation succeeded at an overall rate of 35.5% of the time, religiously affiliated organizations claiming exemption from anti-discrimination laws prevailed at a rate of 76.6%. As shown below in Figure 6, when all other independent variables are held constant at

66 *Id.* at 1045.
67 *Id.*

their means, the predicted probability that a religious claimant would succeed with a claim for exemption from an anti-discrimination law was 74.4%, while parties in other types of Religious Free Exercise/Accommodation cases were likely to succeed at a rate of 33.1%.[68]

In sum, during the 1996–2005 period, those requesting exemption from anti-discrimination laws—one of the case types that most directly conflicts with the strong equality principle of liberal secularism—had a distinct and powerful advantage before the federal courts. During this period, the federal courts of appeals affirmed a "ministerial exception" to anti-discrimination laws and also broadly construed statutory exceptions for religious employers.[69] Grounded in the First Amendment to the United States Constitution, the ministerial exception precludes lawsuits challenging a religious organization's choice of employees who perform religious functions, which includes not only the primary minister, priest, rabbi, or imam, but frequently is extended to individuals with religious teaching responsibilities.[70] Our finding that religious parties presenting such claims were highly likely to succeed suggests that the clarification and solidification of the ministerial exception doctrine in the lower federal courts has reduced judicial discretion and eliminated many occasions for contrary rulings against traditionalist religious organizations that were accused of discriminatory employment practices.

In *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*,[71] decided early in 2012, the Supreme Court confirmed the constitutional foundation of the ministerial exception and applied it

68 The 95% confidence interval for predicted success rate by claimants in Exemption from Anti-Discrimination Laws cases in Model 1 ranges from 59.0% to 89.7%, and for claimants in other case types from 30.5% to 35.7%.

69 *See, e.g.*, Werft v. Desert Sw. Annual Conference of the United Methodist Church, 377 F.3d 1099 (9th Cir. 2004); Shaliehsabou v. Hebrew Home of Greater Washington, Inc., 363 F.3d 299 (4th Cir. 2004); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648 (10th Cir. 2002); E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795 (4th Cir. 2000); Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618 (6th Cir. 2000); Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999); Killinger v. Samford Univ., 113 F.3d 196 (11th Cir. 1997); E.E.O.C. v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Ticali v. Roman Catholic Diocese of Brooklyn, 41 F. Supp. 2d 249 (E.D.N.Y. 1999) Each of these cited cases was included in our data set. *See generally* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 21 (2011) ("As it stands now, every federal circuit has adopted some form of the ministerial exception, with the exception of the Federal Circuit (which has no jurisdiction over such cases)."(footnote omitted)).

70 *See* Gregory A. Kalscheur, S.J., *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43, 48–49 (2008).

71 132 S. Ct. 694 (2012).

to preclude an employment discrimination suit against a religious school by a teacher who had the title and responsibilities of a minister.[72] Although the Court majority stated that the "ministerial exception is not limited to the head of a religious congregation" and that a "rigid formula" should not be applied, the Court did not clearly indicate the scope of the exception as applied to other employees of a religious organization who are not formally commissioned as ministers.[73] Two concurring opinions in *Hosanna-Tabor* suggested a broad understanding of the exception, either by "defer[ring] to a religious organization's good-faith understanding of who qualifies as its minister"[74] or by a "focus on the function performed by persons who work for religious bodies" (such that the exception would "apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith").[75]

Thus, while the generally broad application of the exception in the lower courts is likely to continue in the wake of *Hosanna-Tabor*, further litigation about the scope of the exemption and how far it extends to lay religious leaders and teachers undoubtedly will persist.[76]

F. Institutional versus Individual Claimants

As a control for the perhaps greater credibility and presumably greater access to litigation resources of religious organizations as contrasted with individuals, we included a dummy "Institutional Religious Claimant" variable in the 1996–2005 study. Thus, churches, dioceses, parishes, synagogues, mosques, religious-affiliated hospitals and universities, and other religious organizations were coded as institutional claimants. In Model 1 (clustering at the judge level), the Religious Institutional Claimant variable was significant and in the positive direction as hypothesized, but the variable was not even marginally significant in Model 2 (clustering at the circuit level) or the alternative models using party as an ideology proxy. Given that we included the variable as a control so as to separate the effects of organizational support and litigation resources from religious identity of claimants,

72 *Id.* at 707.

73 *Id.* at 707–08.

74 *Id.* at 710 (Thomas, J., concurring).

75 *Id.* at 711–12 (Alito, J., concurring).

76 *See* Lund, *supra* note 69, at 1 (explaining that the exception's contours are "fiercely disputed"); *see also id.* at 3 n.3 ("Courts have, for example, come to quite different conclusions about whether parochial school teachers fall within the ministerial exception.").

these results confirm the wisdom of adding such a control variable to our model.

III. FINDINGS (PART TWO): JUDGE VARIABLES

A. Judge Race: Latino and Asian

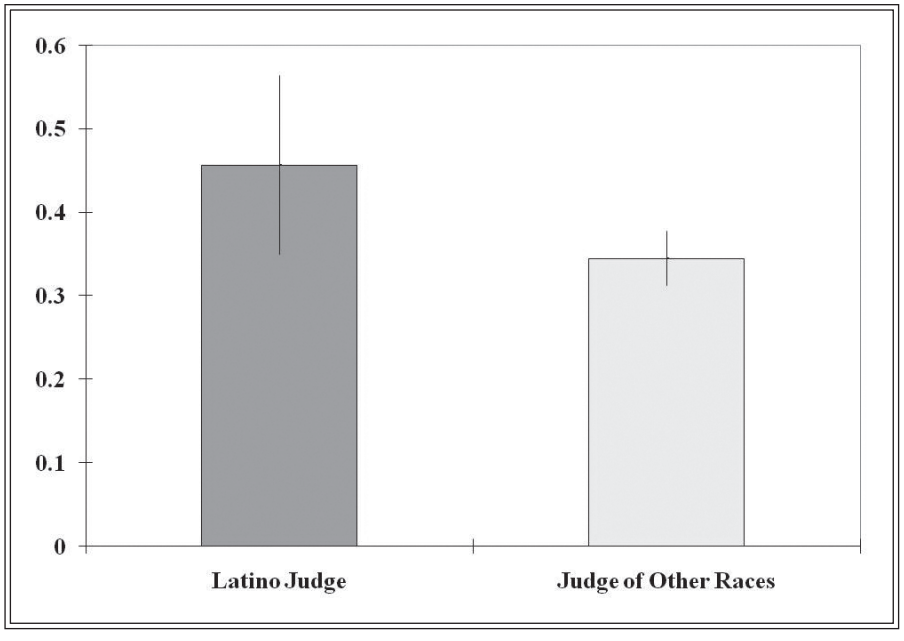
Two variables for racial/ethnic background of the judges proved significant in at least one primary model and associated with a positive outcome on Religious Free Exercise/Accommodation claims. The variable for Latino judges (which included 109 observations) was statistically significant in Model 2 (clustering at the circuit level) and marginally significant in Model 1 (clustering at the judge level) and alternative models with party as the ideology proxy. The variable for Asian judges was highly significant in all models, although it involved only twenty-one judicial observations, more than half of which (twelve) were by a single court of appeals judge and all of which involved only six judges. Accordingly, while we believe the finding as to Latino judges is reliable, we question the finding as to Asian judges, pending further study of religious liberty decisions in the future.[77]

Holding all other independent variables constant (in Model 2), Latino judges were predicted to rule in favor of a Religious Free Exercise/Accommodation claimant at a rate of 45.7%, while judges of other races were predicted to rule favorably 34.5% of the time.[78] The margin of 11% may be described as moderate.

77 The variable for African-American judges was statistically significant in a separate regression run for court of appeals judges only.

78 The 95% confidence interval for predicted success rate before a Latino judge ranges from 35.0% to 56.4%, and before judges of other races from 31.2% to 37.7%.

FIGURE 7. PREDICTED PROBABILITY THAT A LATINO JUDGE WOULD VOTE IN FAVOR OF A RELIGIOUS FREE EXERCISE/ ACCOMMODATION CLAIM



Holding all other independent variables constant, Asian judges were predicted to rule in favor of a Religious Free Exercise/Accommodation claimant at a rate of 64.7%, while judges of other races were predicted to rule favorably 34.7% of the time.[79] Assuming this finding is reliable, which as noted we question, the magnitude of the effect of this variable may be described as large.

Both of these findings are consistent with the conventional hypothesis that minority judges are more liberal and sympathetic to the "underdog."[80] When religious claimants challenge regulations or decisions by the government, they typically fit the description of the under-dog, fighting against the exercise of power by authority.

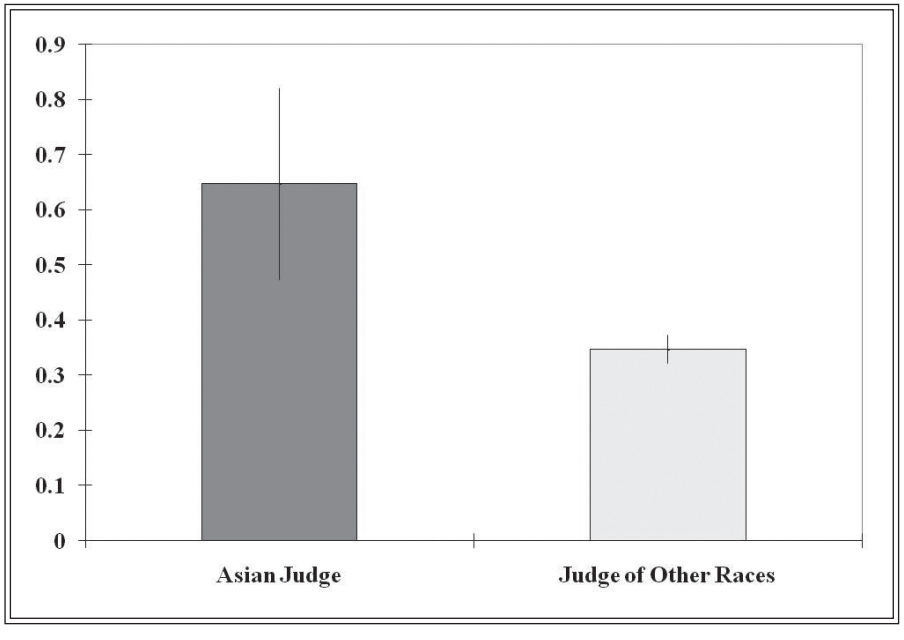
Because many Asians and Latinos are from families that immigrated to the United States in recent generations, judges from that ethnic background may have a greater appreciation for the difficulties that minority religious claimants (many of whom also come from immigrant communities) face in asking for tolerance from main-

79 The 95% confidence interval for predicted success rate before an Asian judge ranges from 47.3% to 82.1%, and before judges of other races from 32.1% to 37.3%.

80 *See* Susan Welch et al., *Do Black Judges Make a Difference?*, 32 AM. J. POL. SCI. 126, 127 (1988).

stream society for different or unconventional religious beliefs, styles of worship, and practices. Moreover, just as researchers have suggested that Asian-American judges may better "recognize that the image of the successfully assimilated Asian-American is an inaccurate overgeneralization for many Asian-American subgroups,"[81] Asian-American judges may also recognize that many subgroups of religious believers continue to experience serious conflicts of conscience with secular government, despite the conventional wisdom that America is a religious country and the attendant assumption that religious believers then cannot really claim to be disadvantaged in this society.

FIGURE 8. PREDICTED PROBABILITY THAT AN ASIAN JUDGE WOULD VOTE IN FAVOR OF A RELIGIOUS FREE EXERCISE/ ACCOMMODATION CLAIM



At the same time, one must always be careful about attributing attitudes or influences generally to minority judges as a category or judges within a general ethnic grouping. While our study does move a significant step beyond categorizing all minority judges into the same category and further in treating Asian and Latino judges distinctly (when they often are combined in research), we recognize that the influences on and experiences of Asian judges and Latino judges are

81 Pat K. Chew & Luke T. Kelley-Chew, *The Missing Minority Judges*, 14 J. GENDER RACE & JUST. 179, 189 (2010).

different—and that judges from one cultural background originated in one part of Asia or Latin America will hardly be fungible with one another.[82] Thus, more complex dynamics undoubtedly are at play here than the broader hypotheses we have presented. The subject deserves further empirical research and additional and more sophisticated analysis in interpretation of results.

B. Judge Employment Background: Former Law Professor

Among the various employment background variables included in our study, a judge's prior position as a tenured or tenure-track law professor was significantly (at the .05 or 95% probability level) and positively associated with a ruling to uphold a Religious Free Exercise/Accommodation claim in Model 2 (clustering at the circuit level) and alternative models with a party proxy for ideology, as well as marginally significant in Model 1 (clustering at the judge level).

Holding all other independent variables constant (in Model 2), judges who had been law professors were predicted to rule in favor of a Religious Free Exercise/Accommodation claimant at a rate of 41.2%, while judges with other employment backgrounds were predicted to rule favorably 34.1% of the time.[83] Given that the margin between the best estimates is only 7%, the size effect of the Former Law Professor variable may be described as modest.

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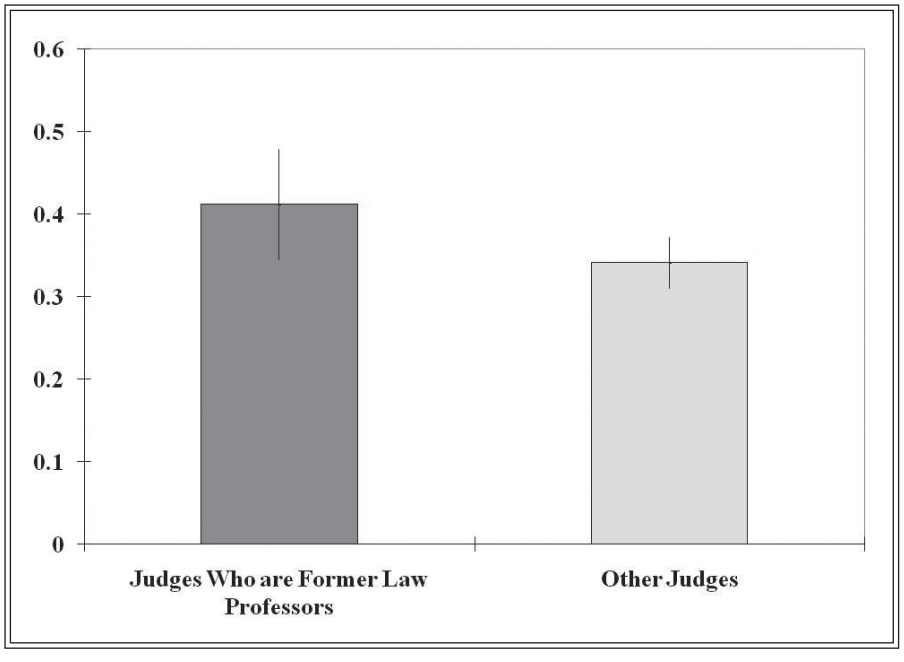
82 *See* Linda Maria Wayner, *The Affirmatively Hispanic Judge: Modern Opportunities for Increasing Hispanic Representation on the Federal Bench*, 16 TEX. WESLEYAN L. REV. 535, 553 (2010) ("The experiences of a Mexican-American judge versus that of a Puerto Rican judge versus that of a Cuban-American judge, although united in language and certain cultural hallmarks, are also wildly distinct due to varied historical and social backgrounds.").

83 The 95% confidence interval for predicted success rate before judges who were formerly law professors ranges from 34.5% to 47.9%, and other judges from 31.1% to 37.2%. Under these circumstances, "while the confidence intervals for these two predictions overlap, there is still a statistically significant difference between the predictions." Lee Epstein et al., *On the Effective Communication of the Results of Empirical Studies, Part 1*, 59 VAND. L. REV. 1811, 1815 n.12 (2006). Even with the confidence interval overlap, the probability is well below 5% that the actual predicted success value for judges who were former law professors lies in the very lower bottom of that interval and, simultaneously, the actual predicted success value for judges who were not former law professors lies in the very top of that interval. *See* Peter C. Austin & Janet E. Hux, *A Brief Note on Overlapping Confidence Intervals*, 36 J. VASCULAR SURGERY 194, 194 (2002).

FIGURE 9. PREDICTED PROBABILITY THAT A JUDGE WHO WAS A FORMER LAW PROFESSOR WOULD VOTE IN FAVOR OF A RELIGIOUS FREE EXERCISE/ACCOMMODATION CLAIM



As a group, law professors are not representative of the general public in terms of their attitudes. Fifteen years ago, a study of law professors found that they identified themselves as Democrats nearly twice as often as members of the general public, while persons in the general working population identified themselves as Republicans more than three times as often as law professors.[84] More recently, another study found that political contributions by faculty at elite law schools were directed to Democratic candidates at a rate five times

84 *See generally* Neal Devins, *The Interactive Constitution: An Essay on Clothing Emperors and Searching for Constitutional Truth*, 85 GEO. L.J. 691 (1997) (reviewing LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF (1996)). Devins reports that 80.4% of law professors are Democrats, compared with 46.2% of full-time working population. *Id.* at 704 n.92 (citation omitted). For further evidence, see Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2073 n.23 (1996) (reporting that 12.9% of law professors are Republicans, compared with 41.0% of the working population (citation omitted)); *see also* Carl E. Schneider & Lee E. Teitelbaum, *Life's Golden Tree: Empirical Scholarship and American Law*, 2006 UTAH L. REV. 53, 60 (2006) ("Sociologically, law professors inhabit a ludicrously unrepresentative sliver of American society.").

higher than to Republican candidates.[85] Five years ago, Judge Richard Posner wrote: "The left-liberal domination of elite law school faculties has had the debilitating effect on the intellect that John Stuart Mill in *On Liberty* assigned to the groupthink of his day."[86]

Of course, given "the nonrandom selection of professorial candidates for the federal bench,"[87] we would not expect the leftward political slant of the legal academy to be translated directly into the ideology of judges who had served on law faculties. Professor Tracey George reminds us that "the fact that law professors as a group are liberal does not mean that scholar-jurists as a group are liberal."[88]

Instead, George suggests that scholar-jurists may have a distinctive and more individualistic conception of the judicial role, being more inclined to stand by preexisting views developed during their academic careers, more likely to write separate opinions, and more willing to try new theories and push the law in a particular direction (three hypotheses that were supported by her study of federal appellate judges).[89] As George writes, "[l]aw professors are rewarded for questioning court rulings and for thinking unconventionally."[90] Accordingly, if the conventional approach in the courts is to validate a majoritarian government policy or rule against a claim for accommodation by an unconventional religious claimant, attitudinal tendencies might move a former law professor judge toward a ruling in favor of the claimant.

Moreover, even if law professors are justly accused of "inhabit[ing] a cozy burrow of like thinkers,"[91] they still like to think of themselves as being cultivated and urbane and worldly in perspective. Perhaps, then, religious claimants from a diversity of faith and ethnic backgrounds could be the beneficiaries of the iconoclastic attitudes and cosmopolitan pretensions that former law professors may bring along with them to the federal bench.

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85 John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1170 (2005) ("[Eighty-one percent] of law faculty members in the study who make political contributions contribute wholly or predominantly to Democrats, while 15% contribute wholly or predominantly to Republicans.").

86 Richard A. Posner, *A Note on* Rumsfeld v. FAIR *and the Legal Academy*, 2006 SUP. CT. REV. 47, 57 (2006) (footnote omitted).

87 Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1479 (1998).

88 Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 38 (2001).

89 *See id.* at 38–43.

90 *Id.* at 42.

91 Posner, *supra* note 86, at 57.

C. *Judge Ideology*

In the separate phase of this religious liberty study that examines Establishment Clause decisions in the federal courts from 1996–2005, the most important finding is the powerful ideological or political party influence on outcomes. "Holding other variables constant, Democratic-appointed judges were predicted to uphold Establishment Clause challenges at a 57.3% rate, while the predicted probability of success fell to 25.4% before Republican-appointed judges."[92] By contrast, in this Religious Free Exercise/Accommodation phase of the study, neither of our ideology proxy variables—the Party-of-Appointing-President and judicial Common Space Scores—proves statistically significant in any of our primary models. The political party proxy variable is marginally significant in alternate models, thus inviting continued exploration in future studies, while the ideology score variable falls quite distant from significance levels.

D. *Judge Religion and Religious Correlation with Claimant*

In our prior study of religious liberty decisions in the lower federal courts from 1986–1995, Jewish judges and judges from Christian denominations outside of the Catholic and Mainline Protestant traditions were significantly more likely to approve judicially-ordered accommodations under the Free Exercise Clause of the First Amendment or related statutory, free speech, and equal protection claims.[93] Based on this and other findings for that time period, we observed that "the single most prominent, salient, and consistent influence on judicial decision-making was *religion*—religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community."[94] We concluded, however, by saying that these results remained to be confirmed in future studies on religious liberty decisions.[95]

For the 1996–2005 period, none of the variables for the judge's religious affiliation approached significance in our primary models.[96]

92 Sisk & Heise, *Establishment Clause Decisions*, *supra* note 13 at 1201.

93 Sisk, Heise & Morriss, *supra* note 13, at 582–83.

94 *Id.* at 614.

95 *Id.*

96 When district court judges were examined in separate regression runs (and the N dropped to 383), the variable for Catholic judges was significant and negative in the model that clustered at the judge level and marginally significant in the model that clustered at the circuit level, while the variable for non-religious judges was significant and negative on both models. No variable for judge religious affiliation approached significance in the separate regression run for court of appeals judges alone (N=1236).

For whatever reason, we find no evidence that a judge's religious worldview affected his or her ruling on claims for Religious Free Exercise/Accommodation. As before, we will have to await additional studies to see if such a correlation emerges again in the future in religious liberty decisions.

In addition, we created a special variable to see if judges were more likely to look with favor upon a claim by a fellow believer in the same religious tradition. In 4.5% of the judicial participations from 1996–2005, the judge shared the same general religious affiliation as the claimant.[97] In our prior study of federal court cases from 1986–1995, in which a similar set of 4.9% of the observations involved a judge of the same religious affiliation as a claimant, the variable was not statistically significant. For that study, we suggested that this was "a comforting reminder that impartiality amongst persons remains a hallmark of our federal judiciary" and that "[e]ven when the opportunity was most poignantly presented, religious nepotism was not manifested."[98]

By contrast, for the 1996–2005 period, the Religious Correlation variable *was* statistically significant at the .05 level (95% probability level) in all of our models. Interestingly, however, the variable was correlated negatively with the outcome, meaning that judges apparently were more likely to rule against fellow believers. One possible explanation is that judges, self-consciously wishing to avoid any favoritism toward a fellow in the same faith, bend over too far in the other direction. Another explanation may be that judges who share the same religious background may be tempted to question claimants' descriptions of their religious duties or the burdens on religious practice allegedly suffered at the hands of governmental actions or rules.[99]

E. Community Religious Demographics

In measuring the religious demographics of the community in which the judge has chambers, we included a variable for the percentage of Catholic adherents compared to the entire population (Catholic Percentage).[100] The Catholic Percentage variable was significantly

97 On coding for this Religious Correlation variable, see Sisk, Heise & Morriss, *supra* note 13, at 584.

98 *Id.*

99 *But see* Thomas v. Review Bd., 450 U.S. 707, 716 (1981) ("Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker [also a Jehovah's Witness] more correctly perceived the commands of their common faith.").

100 For the source of the religious demographic data in our study, which is based on reports from 149 religious bodies broken down by region and county, see DALE E.

and negatively associated with the Religious Free Exercise/Accommodation claim outcome dependent variable at the .05 level (95% probability level) in Model 2 (clustering at the circuit level).[101] The Catholic Percentage variable was marginally significant in Model 1 (clustering at the judge level) and was significant in alternative models with party as an ideology proxy.[102] As in the Establishment Clause decision phase of our study,[103] the association is not in the direction we hypothesized, which was that a higher Catholic demographic would move community attitudes (and the judge situated in that community) toward a more favorable attitude toward religion, both on interactions between government and religious institutions in Establishment Clause cases and on accommodations in Free Exercise cases.

As discussed at greater length in our companion article on the parallel Establishment Clause phase of our study, we suggest that this particular result may have been caused by a confounding unmeasured variable, which could be the population density, regional leanings, or political demographics that exist in the very same metropolitan areas with higher rates of Catholic adherence.[104] For that reason, we are reluctant to place any weight on this particular finding absent further study in the future.

CONCLUSION

Our study of Free Exercise Clause decisions by lower federal judges from 1996 through 2005 is just as notable for what it did *not* find as for what it did find. Indeed, one central result is a null finding; specifically, that judge ideology did not emerge as an influence on Free Exercise Clause decision outcomes. This null finding is nonetheless important, especially as it stands in contrast to our findings in a separate (though related) study of Establishment Clause cases.[105] Interestingly, while judge ideology did not achieve statistical significance, judge ethnicity did, as Asian and Latino judges were particularly partial toward Free Exercise and accommodation claims. Another key finding involves Muslim claimants' lack of success pursuing their Free Exercise Clause claims.

JONES ET AL., GLENMARY RES. CTR., RELIGIOUS CONGREGATIONS & MEMBERSHIP IN THE UNITED STATES: 2000 (2002).

101 *See supra* Part III.B.

102 *See supra* Table 1.

103 *See* Sisk & Heise, *Establishment Clause Decisions*, *supra* note 13, at 1228–29.

104 *Id.*

105 *See id.* at 1214–26.

On balance, results from our study of Free Exercise Clause decisions provide only mixed support for adherents of the attitudinal and legal models of judicial decision-making. While attitudinalists emphasize the role that various proxies for judge ideology play in judicial outcomes, legalists, by contrast, downplay extra-legal factors. Insofar as findings from our study fall somewhere in between these two traditional—if stylized—accounts of judicial behavior, we find support for the more muted proposition that while extra-legal factors cannot be ignored, they explain only a relatively modest part of lower federal court judicial decisions in Free Exercise Clause cases.

To be sure, important factors limit the scope and strength of our findings and remind us of the need for caution. First, findings from a study consciously limited to Free Exercise Clause decisions may or may not map onto studies (including our own) of judicial decisions in other areas. While our research design benefits from the distinctiveness of the religious freedom context, at the same time we remain mindful that this very distinctiveness blunts our results' generalizability. Second, while we endeavored to make as transparent as possible the necessary coding and technical decisions incident to any empirical study, we understand that future researchers will evaluate the persuasiveness of the various judgments that we made.

Given the historic and current import of religion and religious exercise to public and private life, both in the United States and elsewhere, our results also underscore the need for a deeper and more granular understanding of how American federal courts approach Free Exercise and accommodations claims advanced by an array of claimants. The scholarly and practical importance for a greater understanding of the often complex interaction between federal courts and religiously-based claims does not make the task of studying these relations any easier, however. If anything, studies such as ours—empirical forays into highly complex and nuanced and too often overly-politicized areas—lay bare the considerable amount of unfinished work—empirical and theoretical—in this area.