APPROACHING EQUILIBRIUM IN FREE EXERCISE OF RELIGION CASES? EMPIRICAL EVIDENCE FROM THE FEDERAL COURTS

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Drawing on our continuing empirical study of decisions on the free exercise of religion, we suggest that the federal courts were approaching equilibrium in outcomes from 2006 to 2015. In a departure from our prior studies examining the preceding twenty years, we now observe that claimants from the majority of religions did not experience either success or failure at significantly different rates.

The principle of expansive and inclusive religious freedom in the United States has been blemished by a persistent history of inequality and intolerance. In prior studies, we found that Catholics, Baptists, and Muslims suffered marked disadvantages when they sought accommodation for religious practices. From 2006 to 2015, by contrast, variation in claimant outcomes from Catholic, Baptist, Islamic, and most (but not all) other traditions did not achieve significance.

Consistent with a possible trend toward equilibrium, our Case-Type variables are remarkably robust and significant. In an ideal religious liberty doctrinal regime, the balance between accommodating religious exercise and upholding important government purposes will shift with the character of the dispute defined by these conflicting interests. Our encouraging results indicate that the driving force in religious liberty decisions increasingly lies in the case's contextual background rather than the claimant's religious identity.

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INTRODUCTION

A state inmate wore a kouplock—uncut hair at the base of the skull—as a symbol of his Native American religious beliefs.[1] He alleged that prison staff forced him to shave the kouplock and then harassed him as it began to grow back.[2] The federal court of appeals vacated the district court's dismissal of his claim under the Free Exercise Clause of the First Amendment.[3] The court of appeals rejected the state's defenses of security interests and qualified immunity, ruling that the inmate

1. Marshall v. Wyoming Dep't of Corr., 592 F. App'x 713, 715 (10th Cir. 2014).
2. *Id.*
3. *Id.* at 716–17.

alleged maltreatment by prison officials simply because they did not like his kouplock. Arbitrary conduct inconsistent with prison regulations that allow religious hairstyles, the court ruled, cannot reasonably be thought to be constitutional.[4]

A Muslim prisoner alleged that while he was fasting during daylight hours in observation of Ramadan, prison officials ordered him to provide a urine sample, rejected his explanation that he could not drink water during that period to aid compliance, and refused to allow him to wait until after sunset.[5] When the prisoner failed to comply, he was sent to detention, where he missed the Eid al-Fitr feast celebrating the end of Ramadan.[6] The federal district court rejected the prisoner's free exercise claim, saying that requiring the urine sample placed only a de minimis burden on his religious exercise.[7] Vacating the judgment against him, the court of appeals concluded that "the choice either to provide a urine sample by drinking water during his fast or to face disciplinary action placed a substantial burden on [the prisoner's] religious exercise."[8]

A Catholic pretrial detainee requested a rosary and prayer book in a facility that offered no Catholic mass. Refusing the request, the chief of the detention center instead promised a visit by a priest, which came months later.[9] Saying that he was also a Catholic, the chief declared that a rosary or booklet was not necessary for a Catholic.[10] The federal district court dismissed the detainee's complaint as failing to state a claim.[11] The court of appeals reversed, noted the absence in the record of any security basis for denying the religious objects, and characterized as illegitimate the center chief's opinion that the items were not necessary to worship.[12] The court concluded that a person's religious beliefs "are not subject to restriction by the personal theological views of another."[13]

The most salient point to be drawn from these three cases is not that prisoners prevailed in a challenge to prison rules on free exercise or related statutory grounds. To be sure, the successful outcome in these cases illustrates that strong religious exercise protections are in place and offer relief even to those who are incarcerated. Indeed, as our empirical studies have demonstrated before and demonstrate again here,[14] contrary to conventional wisdom, free exercise claims by prisoners do not have a weaker success rate than those brought in other contexts. These are important observations.

But even more notable is that in each case, practitioners of diverse faiths shared success in upholding their religious practices against strict regulations by correctional institutions.

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4. *Id.* at 716.
5. Holland v. Goord, 758 F.3d 215, 217–19 (2d Cir. 2014).
6. *Id.* at 219.
7. *Id.* at 218.
8. *Id.*
9. Ortiz v. Downey, 561 F.3d 664, 666 (7th Cir. 2009).
10. *Id.*
11. *Id.*
12. *Id.* at 669.
13. *Id.*
14. *See infra* Part III.D.1.

These three cases arising in a prisoner rights context are part of our new empirical study of thousands of federal judge rulings across a spectrum of case type categories. They suggest an increased possibility of equal opportunity for Americans of widely differing religious views in obtaining accommodation against various governmental regulations and policies on religious grounds. Perhaps the age of religious liberty only for certain favored religious groups may be on the wane, bringing us closer to a future in which religious liberty is equally enjoyed by Americans across all faiths.

The Britannica Dictionary defines "equilibrium" as "a state in which opposing forces or actions are balanced so that one is not stronger or greater than the other."[15] The followers of one religion should neither enjoy a greater probability to prevail nor suffer a disadvantage in seeking state recognition of religious practices when such unequal results are based on religious identity of the follower or the cultural dominance of that religious tradition. If religious liberty in America is to be genuinely available in practice, as well as in theory, it must mean that every person of every faith may expect equal consideration when presenting a demand for accommodation of religious exercise against governmental restrictions.

America's history of religious tolerance has been blemished by inequality and intolerance, with certain religions favored by political and judicial recognition, while other religions have been disadvantaged and left unprotected by the courts against majoritarian demands.[16]

During the nineteenth and early twentieth centuries, Mormons were attacked by mobs, immigrant Catholics were assaulted and subjected to regular discrimination in urban centers, and anti-Semitic attitudes limited educational and vocational opportunities for Jews. During the surge in patriotic zeal after World War II, children of Jehovah's Witnesses were forced to salute the flag in public schools. As the War on Drugs accelerated in the 1970s and 1980s, sacramental use of peyote by Native Americans was interrupted by strict enforcement of drug laws.

In our first empirical study of religious liberty decisions in federal courts from 1986 to 1995, we found that traditionalist Christians such as orthodox Catholics and Baptists were significantly less successful than claimants from other

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15. *Equilibrium*, BRITANNICA DICTIONARY, https://www.britannica.com/dictionary/equilibrium (last visited Oct. 2, 2022)[https://perma.cc/E6WQ-XA26]. Scholars have postulated an "equilibrium-adjustment" theory for explaining and justifying constitutional doctrine, in such areas as the Fourth Amendment protection against unreasonable searches and the Second Amendment protection of the right to keep and bear arms. *See* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. Rev. 476, 478 (2011); Darrell A.H. Miller, *Second Amendment Equilibria*, 116 NW. U. L. REV. 239 (2021). In contrast with "equilibrium-adjustment," we do not use the term "equilibrium" here to posit dynamic adjustment of doctrine by the Supreme Court to accommodate changing facts and strike a balance that maintains stability in constitutional protection. Rather, we speak of equilibrium as that state of adjudication of Free Exercise claims that achieves essential equality of effect on a diverse spectrum of religious claimants.

16. *See infra* Part II.B.

religious groups in seeking religious accommodations.[17] Resistance by traditionalist Christians to the application of social welfare regulations and anti-discrimination laws to church-related institutions was suppressed in favor of secular mandates.[18]

Just as the disadvantage for traditional Christians appeared to be fading in our empirical study of religious liberty decisions for 1996–2005,[19] we found that Muslims nearly alone were significantly and powerfully disadvantaged before the federal courts.[20] During this era of 9/11, Muslim claimants were predicted to succeed in free exercise accommodation claims at only about half the rate of non-Muslims.[21]

We now bring our continuing empirical study of religious liberty cases before the federal courts into a third decade, 2006–2015. We have an unprecedented and inclusive dataset of 2,847 judicial observations of federal judges from all 13 of the federal appellate circuits and 90 of the 94 federal districts.[22]

Reaching now the 2006–2015 period, things may be inching toward that aspirational point in which claimants from most religious backgrounds across the spectrum of religious experience in American life appear to suffer no systematic disadvantage in seeking accommodations for religious exercise.[23] With shrinking exceptions, judges of the federal courts of appeals and district courts appear to be adjudicating constitutional and statutory religious exercise claims with even-handed impartiality. Claims by Catholics, Mainline Protestants, Baptists, Seventh-day Adventists, Mormons, Muslims, and others did not achieve success or experience failure at a significantly different rate than for claims of the same type made by others.[24]

To be sure, the *absence* of statistical significance in one study is not directly a negative finding.[25] Still, we explore other evidence that may corroborate a shift in adjudication of religious liberty that moves toward equipoise.[26]

This does not mean that most free exercise claims succeed. Indeed, most do not and probably should not, given that such claims seek to set aside the rules and regulations that bind us all generally. The success rate in our 2,847 observations for religious accommodation claims during the 2006–2015 period was 37.7%, which has been remarkably stable over thirty years, landing within two percentage points

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17. 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, 564 (2004) [hereinafter Sisk, Heise & Morriss, *Searching for Soul*].

18. Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. COLO. L. REV. 1021, 1045, 1049–50 (2005) [hereinafter Sisk, *Traditional Religions*].

19. 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, 267 (2012) [hereinafter Sisk & Heise, *Muslims and Religious Liberty*].

20. *Id.* at 248–49.

21. *Id.* at 251–52.

22. *See infra* Part I.

23. *See infra* Part II.C.

24. *See id.*

25. *See id.*

26. *See infra* Part II.C–D.

for each previous period.[27] But the success rate is of secondary importance. Rather, what we highlight here is that the rate of success might be more evenly shared among those of diverse religious faith.

Maybe we are trending toward an ideal point of equilibrium in religious liberty, where decisions are made based on the merits within categories of cases rather than on subjective attitudes about this or that religious affiliation.

But while equilibrium may be in sight, we have not quite arrived. Our findings suggest that two minority religious groups—Orthodox Jews and Rastafarians—remain at a disadvantage.[28] Two other minority religious groups—Buddhists and perhaps Native Americans[29]—benefit from a comparatively greater rate of success.[30] Yet even these exceptions further highlight the remarkable absence of evidence of the type of discrimination that has historically been suffered by such prominent religious groups as Catholics, Baptists, and Muslims. More troubling is our finding that the prospects of a free exercise claimant rise significantly and substantially before a judge who shares the same religion.[31] Any presence of "religious nepotism" challenges the ideal of impartial adjudication.

Our study also reveals a significant disadvantage in pressing free exercise claims by those who identify with no religion or whose religious basis is difficult to discern.[32] This new finding does not surprise. Given that religious accommodation claims are designed to protect the rights of those whose sincere exercise and moral positions are grounded in belief of a higher religious law, those who do not have religious convictions do not fit comfortably within a free exercise of religion regime.

The independent variables in our study that do achieve statistical significance strongly and comprehensively—Case-Type variables—are precisely those that should correlate with the outcome of religious liberty disputes.[33] Not every free exercise or related claim is positioned to be positively affirmed in every context. And we find that the likelihood of success does vary by case category. Indeed, of our 12 Case-Type variables, eight are significant, namely Public Secondary and Higher Education, Private Education, Religious Meetings, Religious Expression, Zoning, Prisoner, Exemption from Anti-Discrimination Laws, and Criminal Defense.

In an ideal religious liberty doctrinal regime, the balance between accommodating religious exercise and upholding important government purposes will shift with the character of the dispute as defined by these conflicting interests. Thus, these encouraging results suggest that the driving force in deciding religious liberty decisions increasingly is the contextual background to the case.

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27. *See infra* Part I.
28. *See infra* Part II.E.1–2.
29. On the particular results for Native American claimants, see *infra* notes 131–137 and accompanying text.
30. *See infra* Part II.E.3–4.
31. *See infra* Part II.F.
32. *See infra* Part II.E.5.
33. *See infra* Part III.

I. EMPIRICAL STUDY OF RELIGIOUS FREE EXERCISE/ACCOMMODATION DECISIONS IN THE FEDERAL COURTS, 2006–2015

As part of our continuing empirical study of religious liberty decisions in the federal courts, we have now extended our examination across thirty years. We analyze decisions made by judges of both the federal courts of appeals and the district courts in cases that raise religious freedom claims.[34] For the Religious Free Exercise/Accommodation phase of our study, we created a dataset of the universe of digested decisions by the federal district courts and courts of appeals from 2006 through 2015 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.

As in our 1996–2005 study, our dataset extends well beyond published decisions to include the set of unpublished but digested opinions available on Westlaw.[35] For this 2006–2015 period, in addition to 1,609 judicial participations from published decisions, our dataset for Religious Free Exercise/Accommodation decisions includes 1,238 judicial participations[36] from decisions that were digested by Westlaw but not published in the reporter system. Thus, we substantially expanded our exploration beyond the set of published decisions, with 43.5% of the observations coming from unpublished rulings by judges in a district or court of appeals.

As with our prior studies of decisions from 1986–1995 and 1996–2005,[37] we define "Religious Free Exercise/Accommodation" cases to include the following: (1) claims arising directly under the Free Exercise Clause of the First Amendment of the United States Constitution;[38] (2) claims based on federal statutes designed to promote freedom of religious exercise and speech, such as the Religious Freedom Restoration Act (RFRA),[39] the Equal Access Act (EAA),[40] and the Religious Land Use and Institutionalized Persons Act (RLUIPA);[41] (3) claims under the Free Speech Clause of the First Amendment involving alleged governmental

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34. Our dataset, primary regression run results, coding of each decision, coding of each judge, and coding information may be found at https://www.thearda.com/data-archive?fid=SISK201.

35. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 237 n.29.

36. For the explanation of "judicial participations," see *infra* note 46 and accompanying text.

37. With the addition that we have included unpublished digested decisions for the past two decades of study, our Westlaw search terms and our method for identifying religious liberty decisions is described in Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 17, at 534–44.

38. U.S. CONST., amend. I.

39. 42 U.S.C. §§ 2000bb–2000bb-4. 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 (2006).

40. 20 U.S.C. §§ 4071–74.

41. 42 U.S.C. §§ 2000cc–2000cc-5.

suppression of expression that was religious in content;[42] and (4) charges against governmental entities of discrimination or inequitable treatment of individuals or organizations based on religious nature or identification, including equal protection constitutional claims and employment discrimination claims against government employers.

A substantial majority (60.2%) of the claims addressed by the judges in this dataset for the 2006–2015 period were premised, at least in part, directly on the Free Exercise Clause.[43] The next largest claim category came under religious freedom statutes (45.0% of observations), followed by assertions of unequal governmental treatment (39.1%) and free speech claims for religious expression (21.7%).

As digested decisions for 2006–2015 were collected, the direction of each ruling,[44] the general type or category of the case, the religious affiliations 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.[45]

As in the prior two stages of our longitudinal study, our point of analysis is each individual judge's ruling in an individual case as a "judicial participation."[46] The primary focus of our study is the judge rather than the court as an institution. We measured the individual response of each district or circuit judge to each Free Exercise/Accommodation claim. Each district court judge's ruling was coded separately, as was each vote by the multiple judges participating on an appellate panel.

Our Religious Free Exercise/Accommodation dataset consisted of 2,847 judicial participations (773 by district court judges and 2,074 by court of appeals judges). This dataset of these religious liberty decisions is unprecedented in its size and its inclusiveness of judicial actors from multiple Article III courts. In addition to including multiple decisions from every one of the 13 federal courts of appeals, our dataset includes decisions from district judges in 90 of the 94 federal districts.[47]

Before multivariate regression analysis, the religious liberty claim was favorably received by the ruling judge 37.7% of the time. In the 30 years of decisions in our studies, this success rate has remained remarkably stable, consistently falling

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42. U.S. CONST., amend. I.

43. Note that many cases presented claims under multiple legal theories, not all of which resulted in the same outcome.

44. For further information on how we coded a religious liberty decision on the merits, see Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 17, at 546.

45. Every decision was independently coded by trained law students, with one of the authors double-checking.

46. For a further discussion of judicial participations as the data point, see Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 17, at 539–41.

47. Only four districts failed to produce digested religious liberty decisions for this period: Guam, the Eastern District of Oklahoma, the Northern Mariana Islands, and the Virgin Islands.

within a two percentage point band. For the 1986–1995 period, that positive ruling rate was 35.6%;[48] for 1996–2005, it was 35.5%.[49]

Within the general category of Free Exercise/Accommodation claims, claims based on a religious liberty statute prevailed at the highest rate of 37.8%.[50] Next were free speech claims at 36.2%, followed by claims that were founded directly on the Free Exercise Clause of the First Amendment, which prevailed at 29.8%. The least successful category of claims were those asserting inequitable treatment by the government, which prevailed at only 22.1%.

Our dependent variable is 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 rejected. In coding decisions on the merits, a ruling by a district judge must have accepted or rejected a particular claim in a manner that engaged the merits of the claim, even if the ruling was not a final judgment, while procedural rulings not decided on the merits were excluded.[51] For court of appeals decisions, a ruling was coded on the merits if it affirmed or reversed a final judgment by a district court on a Free Exercise/Accommodation claim or remanded the case after an evaluation of a significant element of the merits of the claim. If a three-judge appellate panel issued a decision that later was reheard en banc (or was the subject of a dissent from the denial of rehearing en banc), each judge was recorded as having cast only one judicial vote, even if the judge participated on both the three-judge panel and the en banc panel (or a dissent from the denial of rehearing).

Because our dependent variable is dichotomous and given the hierarchical structure of our data, we estimate mixed-effects models of our dichotomous outcome variable.[52] Recognizing that our judicial observations (judge votes) may not be 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 level or another. As shown in Table 2 below, the results are quite robust across both models.

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48. Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 17, at 555, 571.

49. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 238–39.

50. Stephanie Barclay and Mark Rienzi found that the government prevailed in religious liberty statutory claims in the federal appellate courts in 2014–2017 at a 50% rate, or 71% if challenges to the Affordable Care Act were excluded. Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1639–40 (2018).

51. *See also* Adam M. Samaha & Roy Germano, *Are Commercial Speech Cases Ideological? An Empirical Inquiry*, 25 WM. & MARY BILL RTS. J. 827, 847 (2017) (similarly excluding "anterior" procedural decisions from rulings on the merits).

52. Specifically, our core results emerge from estimations using the "meqrlogit" command in Stata (v.17.1).

Table 1: Summary Descriptive Statistics

	Mean	Std. Dev.
Dep. Var:		
Judge vote (1=relig. claimant prevailed on an issue)	0.38	0.48
Case Type:		
Regulation	0.08	0.26
Public Education (Elementary)	0.02	0.13
Public Education (Secondary and Higher)	0.04	0.21
Private Education	0.01	0.08
Religious Meetings	0.02	0.15
Religious Expression	0.07	0.25
Zoning	0.08	0.28
Prisoner	0.45	0.50
Employment Discrimination	0.12	0.33
Exemption from Anti-Discrimination Laws	0.03	0.17
Criminal	0.03	0.18
Other	0.05	0.22
Claimant Religion:		
Catholic	0.09	0.29
Mainline Protestant	0.02	0.15
Baptist	0.02	0.14
Christian Other	0.26	0.44
Seventh-day Adventist	0.01	0.10
Christian Variation	0.02	0.12
Jewish (Orthodox/Non-Reform)	0.04	0.20
Jewish (Reform)	0.04	0.21
Muslim	0.23	0.42
Native American	0.05	0.21
White Separatist	0.02	0.15
Black Separatist	0.03	0.16
Rastafarian	0.02	0.13
Buddhist	0.01	0.09
Other	0.09	0.29
No Religious Affiliation	0.06	0.23
Judge Religion:		
Catholic	0.28	0.45
Baptist	0.04	0.19
Other Christian	0.28	0.45
Jewish	0.13	0.34
Other	0.01	0.09
No Religious Affiliation	0.13	0.33
Religious Correlation Between Judge and Claimant	0.04	0.19

Judge Sex and Race:		
Sex (Female=1)	0.26	0.44
African American	0.09	0.29
Asian-American/Latino	0.08	0.26
Judge Ideology or Attitude:		
Party of Appointing President (Republican=1)	0.56	0.50
ABA-Above Qualified	0.66	0.47
ABA-Below Qualified	0.09	0.29
Seniority on Fed. Bench (months)	209.5	120.7
Elite Law School	0.33	0.47
Judge Employment Background:		
Military	0.28	0.45
Government	0.63	0.48
State or Local Judge	0.32	0.47
Law Professor	0.10	0.31
Community Demographics:		
Catholic %	21.4	8.4
Jewish %	2.2	1.9
Nonreligious %	22.8	4.8
Timing, Precedent, and Other Variables:		
Affordable Care Act	0.04	0.20
Administrative-Legislative	0.88	0.32
Hosanna-Tabor	0.35	0.48
Christian Legal Society	0.51	0.50

NOTE: N=2,847.

Table 2: Mixed-Effects Logistic Regression Models of Free Exercise/Accommodation Judicial Participations, Federal Courts, 2006–2015

	Model 1: Clustered on Circuit		*Model 2*: Clustered on Judge	
Case Type				
Regulation	1.43	(0.45)	1.45	(0.46)
Pub. Educ. (Elemen.)	1.14	(0.45)	1.15	(0.46)
Pub. Educ. (Sec./High.)	2.06**	(0.58)	2.09**	(0.59)
Private Education	3.34*	(1.71)	3.34*	(1.73)
Religious Meetings	4.38**	(1.51)	4.75**	(1.64)
Religious Expression	2.46**	(0.63)	2.48**	(0.64)
Zoning	3.24**	(0.78)	3.25**	(0.80)

Prisoner	2.15**	(0.46)	2.17**	(0.47)
Emp. Discrim.	1.14	(0.27)	1.15	(0.28)
Exemption from Anti-Discrim. Laws	14.84**	(5.51)	15.32**	(5.75)
Criminal	0.37*	(0.15)	0.38*	(0.15)
(other) (ref.)	—		—	
Claimant Religion				
Catholic	0.74	(0.15)	0.74	(0.15)
Mainline Protestant	0.53	(0.17)	0.55	(0.18)
Baptist	1.82	(0.57)	1.83	(0.58)
Christian (other) (ref.)	—		—	
Seventh-day Adventist	0.85	(0.36)	0.88	(0.37)
Christian (variants)	1.10	(0.37)	1.10	(0.38)
Jewish (Orthodox)	0.50**	(0.12)	0.51**	(0.12)
Jewish (Reform)	1.03	(0.24)	1.06	(0.24)
Muslim	0.80	(0.12)	0.80	(0.12)
Native American	1.53	(0.33)	1.56*	(0.35)
White Separatist	0.83	(0.25)	0.86	(0.26)
Black Separatist	1.36	(0.37)	1.38	(0.38)
Rastafarian	0.43*	(0.17)	0.43*	(0.17)
Buddhist	2.70*	(1.24)	2.86*	(1.34)
Other	0.74	(0.13)	0.73	(0.14)
No Relig. Affiliation	0.50**	(0.11)	0.50**	(0.11)
Judge Religion				
Catholic	0.92	(0.14)	0.89	(0.14)
Baptist	1.05	(0.26)	1.11	(0.29)
Other Christian	1.05	(0.15)	1.02	(0.15)
Jewish	1.20	(0.21)	1.16	(0.21)
Other	1.38	(0.66)	1.29	(0.66)
No Relig. Affiliation	1.10	(0.18)	1.10	(0.19)
Religious Correlation Between Judge and Claimant	2.15**	(0.52)	2.15**	(0.53)

Judge Sex and Race				
Sex (Female=1)	0.94	(0.10)	0.94	(0.11)
African American	1.12	(0.18)	1.08	(0.18)
Asian-Amer./Latino	1.00	(0.17)	1.01	(0.18)
Judge Ideology or Attitude Factors				
Party of Appoint. President (Republican=1)	1.06	(0.10)	1.05	(0.10)
ABA—Above Qual.	0.93	(0.09)	0.91	(0.09)
ABA—Below Qual.	0.74	(0.13)	0.72	(0.13)
Seniority on Fed. Bench	1.00*	(0.00)	1.00*	(0.00)
Elite Law School	0.97	(0.09)	0.97	(0.10)
Judge Employment Background				
Military	1.07	(0.12)	1.08	(0.13)
Government	0.91	(0.08)	0.90	(0.08)
State or Local Judge	1.05	(0.10)	1.05	(0.11)
Law Professor	1.12	(0.16)	1.16	(0.18)

Community Demographics				
Catholic %	1.01	(0.01)	1.01	(0.01)
Jewish %	0.98	(0.03)	0.99	(0.03)
Nonreligious %	1.01	(0.01)	1.01	(0.01)
Precedent, Timing, and Other Variables				
Affordable Care Act	1.67	(0.55)	1.66	(0.55)
Admin-Leg.	0.81	(0.13)	0.81	(0.14)
After *Hosanna-Tabor*	0.00	(0.00)	0.00	(0.00)
After *Christian Legal Society*	0.86	(0.22)	0.85	(0.22)
(Constant)	0.44	(0.19)	0.45	(0.19)
Year fixed effects?	Y		Y	
N	*2,846*		*2,847*	

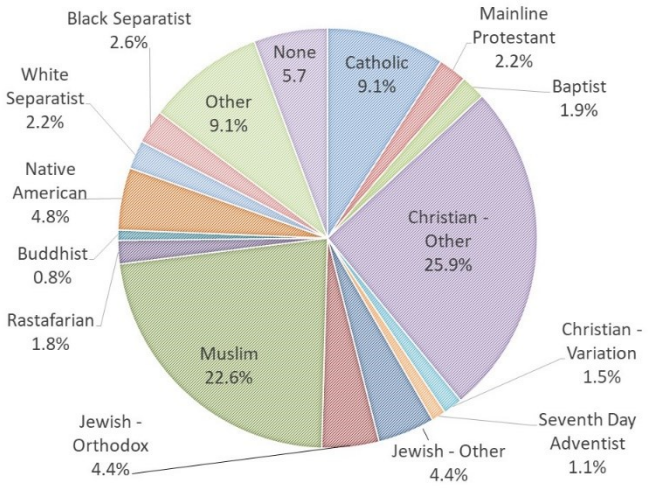
NOTES: The dependent variable in both models is Free Exercise/Accommodation Outcome=1. The models were estimated using the "meqrlogit" command in Stata (v.17.1) and the odds-ratio option. Robust standard errors, clustered on circuits (model 1) and individual judges (model 2), in parentheses. * $p < .05$; ** $p < .01$.

II. APPROACHING EQUILIBRIUM IN ADJUDICATING FREE EXERCISE CLAIMS FROM DIVERSE RELIGIONS?

A. Religious Claimant Variables: Identity, Coding, and Frequencies

The primary focus of this study of Free Exercise/Accommodation decisions is the religious identity of the claimant. With shrinking exceptions, and in a marked departure from our study of the prior two decades, no major (Catholic, Baptist, Islamic) and few minor (Orthodox Jewish, Native American, Rastafarian, and Buddhist) religious groups proved to succeed or fail on accommodation claims at a statistically significant rate.

Figure 1. Religious Free Exercise Claimants by Religion as Percentage of Observations, Federal Courts, 2006–2015



For the 2,847 judicial observations in Religious Free Exercise/Accommodations cases in which the religious affiliation of claimants could be determined, we coded claimants[53] into 16 general categories, for which dummy variables were created:

> CATHOLIC: Catholic claimants accounted for 9.1% (or 259) of the 2,847 observations in Free Exercise/Accommodation cases.
>
> MAINLINE PROTESTANT: Mainline Protestants accounted for 2.2% (or 62) of these observations.

53. 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.

BAPTIST: Baptist claimants accounted for 1.9% (or 53) of these observations.

CHRISTIAN OTHER: Claimants who were affiliated with other Christian denominations or sects accounted for a total of 25.9% (or 737) of the observations in our dataset. Although this is a diverse group, it is made up primarily of nondenominational, evangelical, and fundamentalist church members.

CHRISTIAN VARIATION: Claimants who were affiliated with religious communities related to traditional Christianity, namely Mormons, Christian Scientists, Unitarians, and Jehovah's Witnesses accounted for a total of 1.5% (or 43) of the observations in our dataset.

SEVENTH-DAY ADVENTIST: Seventh-day Adventists accounted for 1.1% (or 30) of these observations.

JEWISH ORTHODOX/NON-REFORM: Orthodox Jews accounted for 4.4% (or 124) of the observations in free exercise cases.

JEWISH REFORM: Reform (or non-Orthodox) Jewish claimants accounted for 4.4% (or 126) of the judicial participations in our dataset.

MUSLIM: Muslim claimants accounted for 22.6% (or 644) of the judicial participations.

NATIVE AMERICAN: Claimants who followed Native American religious practices accounted for 4.8% (or 137) of the observations.

RASTAFARIAN: Rastafarian claimants accounted for 1.8% (or 51) of the observations.

BUDDHIST: Buddhist claimants accounted for 0.8% (or 23) of the observations.

WHITE SEPARATIST: White Separatist religious claimants accounted for 2.2% (or 63) of the observations.

BLACK SEPARATIST: Black Separatist religious claimants accounted for 2.6% (or 75) of the observations.

OTHER: Claimants with other religious affiliations accounted for 9.1% (or 259) 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.

NO RELIGIOUS AFFILIATION: Persons without an identifiable religious affiliation accounted for 5.7% (or 161) of the observations.

By accessing pleadings and other court documents through the PACER federal court dockets system, we were able to confirm the religious affiliation of nearly all of the claimants in our study. For our 1996–2005 study, we were unable to determine religious affiliation for only 7.7% of the observations. For this 2006–2015 period, that number dropped further to only 5.7%. Indeed, for most of these, it is not that we were unable to discern religious affiliation but that the claimant was

affirmatively secular or atheist or the court itself indicated doubts about whether any religious claim was presented.[54]

As we have done previously, we selected CHRISTIAN OTHER as the reference variable. This category collects together various Christian adherents without a clear denominational association and appears to be the most general description of the Christian mainstream today.[55] Not incidentally, this was the largest category, at 25.9%, which ordinarily is preferable as a reference category.

B. The History of Inequality in American Religious Liberty

While the Declaration of Independence may pronounce that "all men are created equal,"[56] equality has been more of an aspiration than a reality throughout American history. Nor did the adoption of the Free Exercise Clause of the First Amendment to the United States Constitution[57] at the beginning of the Republic immediately change the reality. During the nineteenth century, America experienced what Thomas Berg has called a "'de facto' establishment of Protestantism" [58] and Andrew Koppelman has described as "semi-established nondenominational Protestantism."[59]

Throughout the first hundred years of the American Republic and well into the twentieth century, Protestant Christianity dominated the cultural and legal regime. During this period, for example, Catholic children in public schools were forced to submit to readings from the Protestant Bible,[60] and states either forbade Catholics from sending their children anywhere other than public school[61] or

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54. *See infra* notes 143–45 and accompanying text.

55. Matthew Dahl, Devan Patel, and Matthew Hall critique our practice of gathering together such Christian groupings as Amish, Pentecostals, Missouri-Synod, fundamentalist, and nondenominational into a coding category, saying "it is not clear why any of these sub-groups would be expected to behave like the others, except insofar as they all espouse beliefs outside the Protestant mainstream." Matthew Dahl, Devan N. Patel, Matthew E.K. Hall, *The Dogma Within? Examining Religious Bias in Private Title VII Claims*, 18 J. EMPIRICAL LEGAL STUD. 742, 753 (2021). While the grouping was more eclectic in the past, it has largely resolved together into a nondenominational and fundamentalist category that Dahl, Patel, and Hall label as "evangelical." *Id.* at 754. As it has evolved, with claims from such categories as Amish and Pentecostals declining, our Christian Other category is likely the same as their Evangelical category, with the exception that we separate Southern Baptists into a separate group. Nonetheless, we are intrigued by their thoughtful treatment of Evangelicals as collecting Baptists with nondenominational and fundamentalist Christians and will explore that element in future iterations.

56. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

57. U.S. CONST., amend. I.

58. THOMAS C. BERG, THE STATE AND RELIGION IN A NUTSHELL 58 (3d ed. 2016); *see also* JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 118 (2d ed. 2005) ("[S]tate and local governments patronized a 'public' religion that was generally Christian, if not Protestant, in character.").

59. ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 28 (2013).

60. *Id.* at 34.

61. Sisk, *Traditional Religions*, *supra* note 18, at 1024; BERG, *supra* note 58, at 59, 65.

prohibited any public monetary support for Catholic schools.[62] Mormons were persecuted, hounded by angry mobs, and forced by the federal government to abandon polygamous marriage.[63] And as John Witte has written, legislatures and courts failed to "show[] much respect for the religious rights of the few Jews or Muslims in the United States, let alone the religious rights of Native Americans or those of enslaved or emancipated African Americans."[64]

In the twentieth century, with a "public demand for fealty to America in the face of external and internal threats of totalitarian ideologies,"[65] the Jehovah's Witnesses came under attack for their antigovernment views and refusal to salute the American flag.[66] While not previously a friend to minority religious rights, the Supreme Court ultimately changed course and affirmed the constitutionally protected right of the children of Jehovah's Witnesses to refuse to participate in the Pledge of Allegiance in school.[67]

New political and cultural threats to religious exercise arose during the latter half of the twentieth century. During the height of the War on Drugs, governments suppressed a core religious exercise by enforcing drug laws against sacramental use of peyote by Native Americans;[68] the enforcement actions were approved by a divided Supreme Court.[69] By statute, Congress intervened to specifically authorize ceremonial use of peyote by members of recognized Indian Tribes.[70] Subsequently, the Supreme Court applied the congressionally enacted Religious Freedom Restoration Act[71] to hold that the government's general prohibition on nonmedical use of narcotics was not a compelling government purpose that could override the sincere sacramental use of a hallucinogenic substance.[72]

During the latter half of the twentieth century and into the twenty-first, as American religious demographics changed dramatically, traditionalist Christians found themselves on the disadvantaged side. Their orthodox Christian understanding of religious commands conflicted with the directives of an increasingly secular society, especially in metropolitan areas. Contrary to the conventional wisdom that minority religions were significantly more likely to encounter obstacles in obtaining a favorable hearing in court, our empirical study of federal court religious liberty rulings in the 1986–1995 period found that "adherents

62. KOPPELMAN, *supra* note 59, at 34.
63. BERG, *supra* note 58, at 61–62.
64. WITTE, *supra* note 58, at 118.
65. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 289.
66. BERG, *supra* note 58, at 65–66.
67. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
68. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 289.
69. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 890 (1990).
70. 42 U.S.C. § 1996a(b)(1).
71. 42 U.S.C. §§ 2000bb–2000bb-4.
72. Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418, 432 (2006).

to traditionalist Christian faiths, most notably Roman Catholics and Baptists, [had proven] to be the ones who enter the courthouse doors at a distinct disadvantage."[73]

We suggested that, while the beliefs of these religious groups were comfortably within the Christian mainstream, they were then "com[ing] into court struggling against negative perceptions and attitudes shared by political and legal elites."[74] Thus, the parallel resistance of Catholics and Baptists to various social welfare regulations and the application of discrimination laws to church-related institutions ran hard against the liberal secular side of the so-called culture wars, leading judges to find those present-day secular priorities to be sufficiently compelling to override claims of religious exercise.[75]

However, by the next decade, 1996–2005, the doctrinal landscape was changing[76] with Supreme Court decisions strengthening the religious liberty rights of religious institutions, most notably the constitutional right to select religious ministers and teachers without government interference through civil rights law.[77] In that decade, the Christian and Baptist disadvantage appeared to fade into statistical insignificance.[78]

At the same time, amidst the darkness of the 9/11 terrorist attacks, we found that nearly alone among the diverse groups of religious claimants in our empirical study, "Muslims were significantly and powerfully associated with a negative outcome."[79] Although we had found hints that Muslims encountered greater resistance in pressing religious accommodation claims in the 1986–1995 period,[80] our study of federal court decisions for 1996–2005 produced a reliable and robust finding that Muslims were significantly less likely than claimants from other religions to prevail.[81] And the size effect was dramatic. Holding all other independent variables constant, a Muslim claimant would succeed in presenting a religious free exercise claim at a rate of 22.2%, compared to a success rate for non-Muslims at 38.0%.[82] In other words, Muslims enjoyed a success rate only about half as strong as the followers of other religions in obtaining accommodation for religious exercise.

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73. Sisk, *Traditional Religions*, *supra* note 18, at 1023–24. For those empirical findings, see Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 17, at 555.

74. Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 17, at 564.

75. Sisk, *Traditional Religions*, *supra* note 18, at 1024, 1054.

76. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 266–67.

77. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–95 (2012) (confirming the constitutional foundation of the ministerial exception to anti-discrimination laws and applying it to preclude an employment discrimination suit against a religious school by a teacher who had the title and responsibilities of a minister).

78. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 267. For the regression table showing no statistical significance for Catholic and Baptist claimants for 1996–2005, see *id.* at 243.

79. *Id.* at 288.

80. Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 17, at 566–67.

81. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 267. For the finding on Muslims, see *id.* at 243.

82. *Id.* at 251.

Our efforts to prove a specific "9/11 Effect"—that is, that Muslim success rates were significantly different after that date—were at best mixed.[83] But even if 9/11 itself did not dramatically alter the trajectory, that particular terrorist attack came against the background of considerable pejorative news about Islam. Although the negative portrayal of Muslims was badly distorted in its description of the lives and views of American Muslims, the negative international news had made Islam "a target in the eyes of mainstream America."[84] As we said in our prior study, we feared that "an uneasiness about Muslims in America and disquiet about Islam had filtered into the federal judiciary."[85]

Having highlighted the apparent implicit bias against Muslim religious liberty claimants, we urged judges to engage in "careful self-examinations and emphasized conscious cognition in deliberations about religious-liberty cases involving Muslims (and other claimants)."[86] Indeed, we saw reason to hope that ongoing changes in free exercise of religion doctrine "may advance more equitable and properly differentiated treatment of each religious claimant, Muslim or otherwise."[87]

Perhaps that hope is now being realized, as we turn to our new study of federal court religious liberty decisions for 2006–2015.

C. The Possible Shift Toward Equilibrium Among Religions in American Religious Liberty

Writing a quarter-century ago, Verna Sánchez saw that "[t]he journey of religious freedom in this country has been a linear one," in which the course was set from the beginning to prefer Christian understandings of religion, "and there has been virtually no deviation since."[88] Mark Tushnet quipped a decade earlier that in Supreme Court religious liberty cases, "sometimes Christians win but non-Christians never do."[89]

That verdict of blatant inequality in American religious liberty has plainly been overturned. Preferential treatment for Christians has not persevered uninterrupted, as even such mainstream Christian groups as Catholics and Baptists have experienced a significant disadvantage in federal religious liberty cases in recent history.[90] And by the end of the twentieth century, as our past empirical studies reveal, "the myth that members of outsider faiths fail at a disproportionate rate" was "found to be without empirical support."[91] A striking exception was our

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83. *Id.* at 253–54.

84. Matt A. Barreto & Dino N. Bozonelos, *Democrat, Republican, or None of the Above? The Role of Religiosity in Muslim American Party Identification*, 2 POL. & REL. 200, 212 (2009).

85. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 282.

86. *Id.* at 285.

87. *Id.* at 288.

88. Verna C. Sánchez, *All Roads are Good: Beyond the Lexicon of Christianity in Free Exercise Jurisprudence*, 8 HASTINGS WOMEN'S L.J. 31, 31–32 (1997).

89. Mark Tushnet, *Of Church and State and the Supreme Court: Kurland Revisisted*, 1989 SUP. CT. REV. 373, 381.

90. *See supra* Part II.B.

91. Sisk, *Traditional Religions*, *supra* note 18, at 1024.

prior finding for 1996–2005—during the period leading up to and following 9/11—that Muslims were experiencing a dramatic deficit of success in free exercise claims, succeeding at only about half the rate of other religious claimants.[92]

Bringing our empirical study forward another decade by examining 2006–2015, the most notable contrast from our past studies is the near dearth of religious claimant groups that experienced a statistically significant advantage or disadvantage in free exercise claims in federal court. Among social scientists, statistical significance is traditionally set at the .05 level (or 95% probability level),[93] 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 chance.[94]

Accounting for 56.7% of our observations (to which we might add the 25.9% for Christian-Other that serves as our reference variable), the religious groups across the spectrum of American religious life showed no statistically significant evidence for a disproportionate outcome when seeking a religious accommodation. These included Catholics, Baptists, Mainline Protestants, Muslims, Reform Jews, Seventh-day Adventists, and a series of other minority religions.

This departure from our past empirical studies raises the possibility that neither Christian nor other religions enter the courthouse doors with an unfair advantage or unjust disadvantage.

But we begin by urging caution before reaching a possibly premature conclusion. When looked at in one-study isolation in terms of statistical significance alone, our study is distinctive by *not* producing major findings on claimants by religious identity.

As informed readers will immediately disclaim, the failure of an empirical study to *disprove* the null hypothesis (that is, the hypothesis that an independent variable is not correlated with the dependent variable) does not translate into a finding that the study has actually *proved* the null hypothesis.[95] In plain English, that we have failed to prove that something *does* exist is not, by itself, proof that it *does not* exist. In general, the absence of a statistically significant finding (or a "null" result) tells us that we must reserve judgment and refrain from making a strong

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92. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 243, 251–52, 267.

93. *See* ALAN AGRESTI & BARBARA FINLEY, STATISTICAL METHODS FOR THE SOCIAL SCIENCES 154 (4th ed. 2009) (explaining that researchers generally "do not regard the evidence against [the null hypothesis] as strong unless P is very small, say, $P < .05$ or $P < .01$").

94. Stated technically, statistical significance measures the likelihood that an estimated regression coefficient for an explanatory variable was generated by random variation when the true coefficient value is zero. Significance at the .05 level means that we can be 95% confident that the actual coefficient is not zero, which thus allows us to draw the inference that there is a correlation between the explanatory (independent) variable and the dependent variable.

95. *See* LARRY D. SCHROEDER, DAVID L. SJOQUIST & PAUL E. STEPHAN, UNDERSTANDING REGRESSION ANALYSIS 41 (1986) ("Nonrejection [by significance testing] does not imply that one accepts the null hypothesis.").

declaration. Readers familiar with the phrase "absence of evidence is not evidence of absence" should understand what we are driving at here.

As explained below, we have found corroborating evidence to suggest that the absence of statistically significant findings for disproportionate free exercise claim outcomes along a diverse range of religious claimants may imply something more. First, as our studies multiply and the failure to achieve statistical significance becomes a pattern over time, we should cautiously raise the real possibility that the independent variable has become disassociated with the dependent variable. Notably, a conventional reason for discounting nonsignificance as a contradiction of the null hypothesis is that "the possibility always exists that an incorrect conclusion has been drawn regarding the population parameter from the sample evidence."[96] In our study, however, we investigated not merely a sample, but the entire universe of digested religious liberty in the federal courts for this period.

Second, recognizing that some scholars have criticized the focus on statistical significance as a cultic obsession,[97] we go beyond statistical significance to explore whether meaningful size differences in outcome are hiding just below the surface.[98] If they are not, the prospect that equilibrium is being realized becomes ever more intriguing.

Third, because our empirical studies can only be understood in the context of religious liberty doctrine, we identify changes in Supreme Court precedent that should move the ball toward greater equality in outcomes among claimants of different religions.[99]

And finally, we report significant and abundant findings on Case-Type variables, which in turn suggest that something else—something compatible with equilibrium among religions—is the true driving force in the outcome of religious liberty disputes.[100]

But again, as captivating to the inclusive imagination as our corroborating evidence may be, we emphasize that our study should be more modestly understood to provoke a continuing analysis that is open to the possibility that equilibrium is emerging.

In terms of corroborating evidence, we start by looking at three religious groups that have been notably and significantly less likely than others to prevail on a free exercise claim in our past studies: Catholics, Baptists, and Muslims.

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96. *See* LARRY D. SCHROEDER, DAVID L. SJOQUIST & PAUL E. STEPHAN, UNDERSTANDING REGRESSION ANALYSIS 34 (2d ed. 2017).

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

98. *See infra* Parts II.C.1–3.

99. *See infra* Part II.D.

100. *See infra* Part III.

1. Catholics

For the 1986–1995 period, we found that Catholics were significantly less likely to succeed when asserting free exercise claims.[101] That finding faded into insignificance for the next study period of 1996–2005. And it has not reemerged in our new study of 2006–2015, where the Catholic claimant variable does not approach statistical significance.

When the variable fails to achieve significance over what is now a 20-year period, even as the number of Catholic observations climbs ever higher (130 for 1996–2005 and 259 for 2006–2015), the possibility that nothing is there must be taken ever more seriously.

2. Baptists

The variable for Baptist claimants was negatively associated with the free exercise outcome for the 1986–1995 period.[102] But it too faded into statistical insignificance in studies for the next 20 years.

Interestingly, although it is marginally significant (at 0.056) for 2006–2015, the direction of the association has reversed, meaning that the Baptist variable points toward a greater advantage in a free exercise claim.[103] Thus, our most recent study hardly supports any suggestion that Baptists suffer a lingering discriminatory treatment when seeking a religious accommodation.

3. Muslims

For Muslim claimants, the contrast between the past two periods of study is striking.

For 1996–2005, Muslim claimants suffered a disadvantage that was large in effect, being only about half as likely as non-Muslims to succeed in free exercise claims.[104] Further, our confidence in the influence of this variable was high as the Muslim variable was significant at the 99.9% probability level.[105]

For 2006–2015, the Muslim variable falls out of statistical significance and does not even approach marginal significance (which typically is set at the 10% probability level).

Still, given that the Muslim variable was so powerful so recently, we take the additional step here of looking beyond statistical significance and exploring the size of any possible effect for Muslims. In so doing, the contrast with the prior decade of study becomes more pronounced. As noted, some scholars contend that the size effect of any correlation between the independent and dependent variables

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101. Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 17, at 555–57; Sisk, *Traditional Religions*, *supra* note 18, at 1024.

102. Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 17, at 555–57; Sisk, *Traditional Religions*, *supra* note 18, at 1023–24.

103. A predicted probability calculation for this marginally significant variable suggests that Baptist claimants are most likely to succeed at a 50.0% rate, although it could be as low as 36.2%, while non-Baptist claimants succeed at a rate of 38.34%.

104. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 243.

105. *Id.* at 249.

is more important than the probability level for evaluating the null hypothesis.[106] And certainly, as Frank Cross reminds us, even if we do find statistical significance, "such a finding shows a correlation between variables but by itself does not prove the substantive significance of that correlation."[107] For that purpose, "[o]ne must also consider the magnitude of the association."[108]

For 1996–2005, the Muslim claimant variable had a substantively powerful correlation with the dependent variable and in a negative direction. 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 federal judge between 1996 and 2005 was 22.2%, while non-Muslim claimants succeeded at a rate of 38.0%.[109]

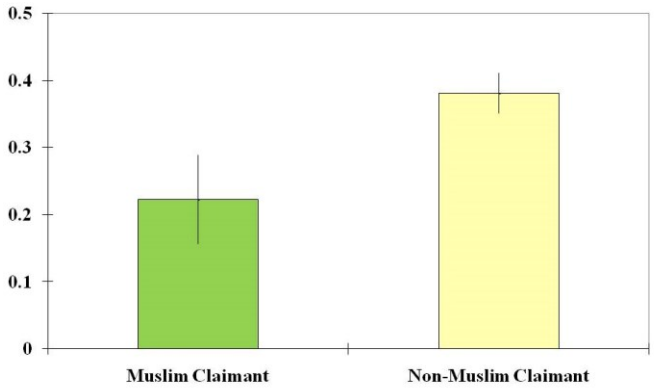
106. *See* ZILIAK & MCCLOSKEY, *supra* note 97, at 4–5 (criticizing the statistical significance test as failing to "ask how much" and instead "ask[ing] 'whether,'" and asserting that "[e]xistence, the question of whether, is interesting [but] it is not scientific"); *see also* SCHROEDER, SJOQUIST & STEPHAN, *supra* note 96, at 51–52 ("Finding that a coefficient is statistically significantly different from zero does not imply that the corresponding variable is necessarily important.").

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

108. *Id.*

109. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 251. The vertical lines in Figure 2 represent the 95% confidence intervals for these two predictions. By "95% confidence interval," statisticians mean that the interval is "one within which we are 95% certain that the true variable falls." ROBERT M. LAWLESS, JENNIFER K. ROBBENNOLT & THOMAS S. ULEN, EMPIRICAL METHODS IN LAW 239 (2010); *see also* Lee Epstein, Andrew D. Martin & Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies*, 59 VAND. L. REV. 1811, 1814 (2006) ("Such is the reality of the statistical world: We can never be certain about our best guesses (i.e., inferences) because they themselves are based on estimates. We can, however, report on level of uncertainty (e.g., a confidence interval) about those guesses."). Thus, while our best estimate is that a Muslim claimant had a 22.2% likelihood of succeeding on a Religious Free Exercise/Accommodation claim, the probability could be as low as 15.6% or as high as 28.8%. Similarly, while we predict that a non-Muslim claimant would succeed 38.0% of the time, the probability could be as low as 35.0% or as high as 41.1%.

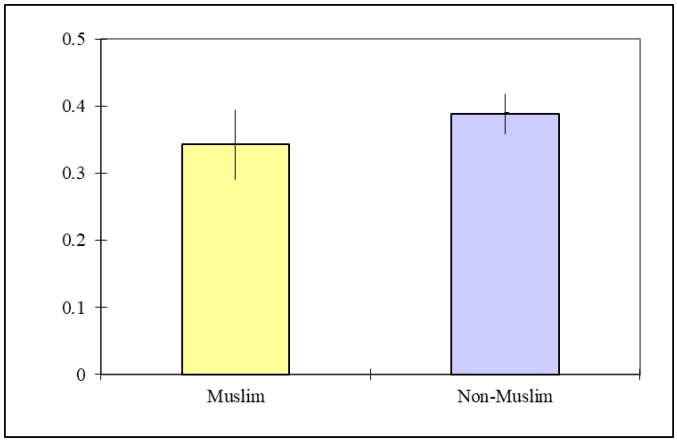
Figure 2. 1996–2005: Predicted Probability that a Claimant Will Succeed on a Religious Free Exercise/Accommodation Claim, by Muslim Identity



For 2006–2015, the size effect for the Muslim variable, even if we ignore the absence of traditional statistical significance, became substantially smaller. As shown in Figure 3, 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 federal judge between 2006 and 2015 was 34.1%, while non-Muslim claimants succeeded at a rate of 38.9%.[110] In other words, even if the variable had reached the necessary confidence level to declare that there is a significant disadvantage for Muslims, the effect size for 2006–2015 had dropped since 1996–2005 from a margin of 16% to only 4.8%, while the success ratio declined from 1.7 to 1.1.

110. While our best estimate is that a Muslim claimant had a 34.1% likelihood of succeeding on a Religious Free Exercise/Accommodation claim, the probability could be as low as 28.9% or as high as 39.2%. While we predict that a non-Muslim claimant would succeed 38.9% of the time, the probability could be as low as 36.0% or as high as 41.8%. For the curious, while the predicted probability rate for a Muslim, that is, the rate when holding all other independent variable constant, was 34.1%, the raw frequency success rate for Muslims was a remarkably similar 32.1%.

Figure 3. 2006–2015: Predicted Probability that a Claimant Will Succeed on a Religious Free Exercise/Accommodation Claim, by Muslim Identity



In sum, the worst may be in the past for Muslims seeking a place at the table for religious accommodation, such that, as Andrew Koppelman has observed, "the circle [of tolerable diversity] is widening again to include Muslims."[111]

Two other categories of corroborating evidence for a trend toward equilibrium are addressed below. Later, we explore the powerful and expansive association of factual Case Types with free exercise claim results, which suggests that the factual circumstances of the case are increasingly driving the outcome.[112]

Next, we look to the legal and doctrinal context within which free exercise claims were made in 2006–2015. If equilibrium is emerging and most religious groups are no longer enjoying or suffering disproportionate outcomes in free exercise claims, developments in legal doctrine may point to the reason why. Key doctrinal developments in the Supreme Court are the subject of the next section.

D. If Religious Liberty Equilibrium is Coming into Sight, What Might Have Brought Us Here?

We cannot understand the results of our empirical investigation of religious liberty decisions in the lower federal courts without placing the decisions in the doctrinal context within which those decisions were rendered. If the federal courts are moving toward equilibrium among diverse religious claimants in Free Exercise/Accommodation cases, the Supreme Court's pronouncements on the subject may well be leading the way.

While we did not identify statistical significance for the two Supreme Court precedents that we coded, the ongoing impact of one of those precedents likely is reflected in another of our findings. And more importantly, the doctrinal directions

111. KOPPELMAN, *supra* note 59, at 172.
112. *See infra* Part III.

set even before this recent period of our study included elements that arguably move the inquiry toward more tolerant measures of religious liberty.

As a first example, the Supreme Court's 2012 decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*[113] emphatically confirmed the First Amendment foundation of the "ministerial exception" to anti-discrimination laws and applied it to preclude an employment discrimination suit against a religious school by a teacher who had the title and responsibilities of a minister. Our before-and-after variable for *Hosanna-Tabor* is not significantly associated with the free exercise outcome. But that is not surprising, because the trend in most of the lower federal courts was already well-established toward deferring to religious groups in making their own employment decisions without second-guessing by courts in the form of adjudicating employment discrimination cases.[114]

Moreover, this consolidation and expansion is powerfully reflected in our variables in both the past study and this one, which may explain why the impact is not duplicated in the precedential variable. For our 1996–2005 study, our Case-Type variable for Exemption from Anti-Discrimination Laws was significant at the 99.9% probability level and was so powerful in effect as to move the predicted success rate to 74.6% as compared to 33.6% in all other Free Exercise/Accommodation observations.[115]

That same Case-Type variable for Exemption from Anti-Discrimination Laws continues to be both very significant (at the 99% probability level) and even larger in substantive effect for 2006–2015. As shown in Figure 4, holding all other independent variables constant at their means, the predicted probability that a religious claimant seeking an exemption from an anti-discrimination law would succeed was 87.2%, while claimants raising other Free Exercise/Accommodation claims succeeded at a rate of 36.0%.[116]

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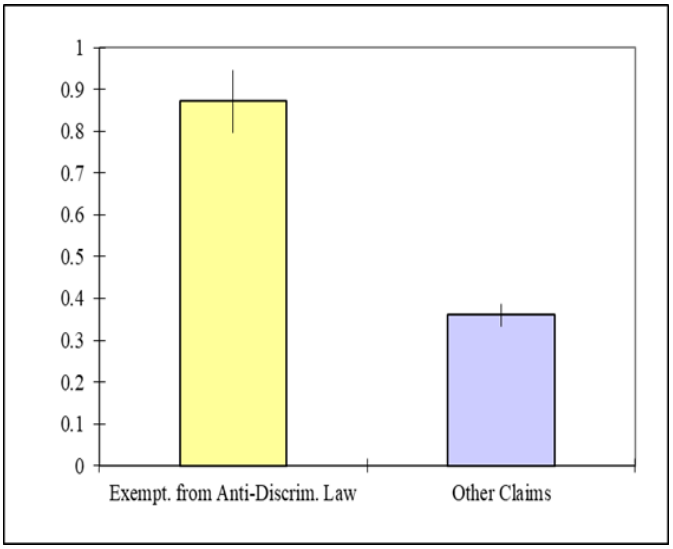
113. Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171, 186–96 (2012).

114. *See* Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 268.

115. *Id.* at 267–68.

116. Within the 95% confidence interval, the success rate for claimants seeking Exemption from Anti-Discrimination Law could be 79.7%–94.7%, while the rate for other religious claimants could be between 35.6% and 40.5%.

Figure 4. 2006–2015: Predicted Probability that a Claimant Will Succeed on a Religious Free Exercise/Accommodation Claim, by Exemption from Anti-Discrimination Law



As a second example, the Supreme Court's 2006 decision in *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*[117] provided the tools for "loosening the grip of stereotypes."[118] This decision, which came right at the beginning of the 2006–2015 period of our most recent study, held that the government could not preclude a religious sect from sacramental use of a hallucinogenic substance by the "mere invocation" of a general prohibition on nonmedical use of narcotics.[119] As we've written previously, by instead requiring an individualized case-specific scrutiny that focuses on the religious claimant's particular attributes, the *O Centro* decision encourages the judge "to abandon stereotypical generalizations and engage in a differentiated and individualized treatment of each claim."[120]

In this way, a court instead may better appreciate the character of the claimant's religious practice and the nature of the requested accommodation. To undertake that examination, the judge should learn about each claimant's faith perspective objectively and rigorously, but also sympathetically, thereby substituting new information and understanding for implicit beliefs.[121]

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117. 546 U.S. 418 (2006).
118. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 287.
119. *O Centro*, 546 U.S. at 432.
120. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 287.
121. *Id.*; *see also* Holt v. Hobbs, 574 U.S. 352, 361–62 (2015) (directing courts to evaluate on whether the government has substantially burdened a particular religious exercise rather than other forms of religious exercise in which the claimant might engage, thus requiring courts to focus on the specific nature of a particular religious exercise).

Marc DeGirolami similarly envisions this approach to adjudication of religious liberty cases, what he calls "the method of tragedy and history," which "takes much more careful stock of the values that both sides [the religious claimant and the government] bring to bear."[122] In "rough terms," this method asks the judge "to describe fully the nature of the conflicting values and the social and doctrinal context in rendering his decision."[123]

The Supreme Court's most recent free exercise decisions, coming after the period of our study, further emphasize equality of treatment for religious persons. In cases involving public benefits, the Court has stated forthrightly and broadly that "the Free Exercise Clause forbids discrimination on the basis of religious status."[124]

In sum, the Supreme Court appears to be setting the stage for a more equitable and expansive protection of religious liberty[125] that also demands paying closer attention to the religious needs of each claimant, while not neglecting the interests of the government. As this inquiry is conscientiously applied, it should produce more equitable results, as is perhaps now being realized.

E. Even If the Ideal of Equilibrium in Religious Liberty is Drawing Closer, It Is Not Yet Here

While equilibrium may be in sight, we have not yet reached the promised land. Two minority religious groups—Orthodox Jews and Rastafarians—remain at a significant disadvantage for 2006–2015. Two other minority religious groups—Buddhists and perhaps Native Americans[126]—benefit from a greater rate of success. In a different category are those for whom a religious affiliation was missing, who also suffered a significant disadvantage. Given the purpose of the Free Exercise Clause to protect religious exercise, it is understandable that those who fall outside of or on the margins of religious motivation find greater difficulty in successfully asserting a claim for religious accommodation.

1. Orthodox Jews

The results concerning Orthodox and Non-Reform Jews are powerful, both in terms of statistical significance and the size of the disparity. Not only is this variable highly significant (at the 99% probability level), but the deficit for claimants from this group is substantial.

As shown in Figure 5, holding all other independent variables constant at their means, the predicted probability that an Orthodox or Non-Reform Jew would succeed in presenting a Religious Free Exercise/Accommodation claim to an individual federal judge between 2006 and 2015 was 25.3%, while other religious

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122. MARC O. DEGIROLAMI, THE TRAGEDY OF RELIGIOUS FREEDOM 170 (2013).

123. *Id.* at 159.

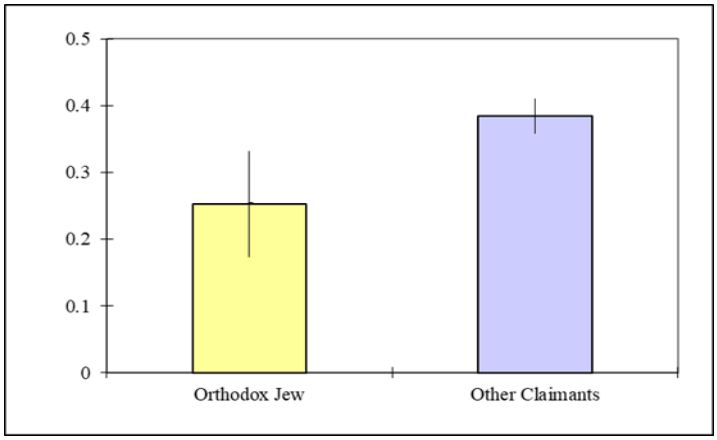
124. Carson v. Makin, 142 S. Ct. 1987, 2001 (2022).

125. If anything, that more expansive approach may have accelerated in the years after the 2006–2015 period of our study. *See generally* Josh Blackmun, *The "Essential" Free Exercise Clause*, 44 HARV. J.L. & PUB. POL'Y 637, 645–47 (2021) (describing rapid changes in Free Exercise doctrine during the Covid pandemic including the elevation of Free Exercise to a "most-favored" constitutional right).

126. On the particular results for Native American claimants, *see infra* notes 131–37 and accompanying text.

claimants succeeded at a rate of 38.4%.[127] This is a margin of more than 13%, which means that religious claimants other than Orthodox or Non-Reform Jews prevailed at a rate that was about 1.5 times higher.

Figure 5. 2006–2015: Predicted Probability that a Claimant Will Succeed on a Religious Free Exercise/Accommodation Claim, by Orthodox or Non-Reform Jewish Identity



No obvious reason emerges for why Orthodox and Non-Reform Jews are at a significant and substantial disadvantage in presenting free exercise claims. Orthodox and Non-Reform Jews presented claims during 2006–2015 that fell across a broad range of Case Types. The largest single category was Prisoner claims (accounting for 61.3% of the observations). But contrary to the conventional wisdom that claims made by prisoners are more likely to fail, we've found previously and again for this period that prisoner claims are actually significantly and substantially more likely to succeed.[128] Indeed, that such a large portion of the claims by Orthodox Jews was in the advantaged category of prisoner claims, and yet Orthodox Jews overall failed at a greater rate, serves only to highlight the force of the disadvantage.

In the end, maybe it is more difficult to move past the traditional negative views that society has harbored against Jews, which may be more marked for Orthodox Jews whose religious exercise and appearance may be more conspicuous than those of modern Reform Jews who suffered no significant disadvantage in presenting free exercise claims.

2. Rastafarians

The new results for Rastafarians are rather curious because this religious claimant group was significantly and *positively* associated with free exercise claim

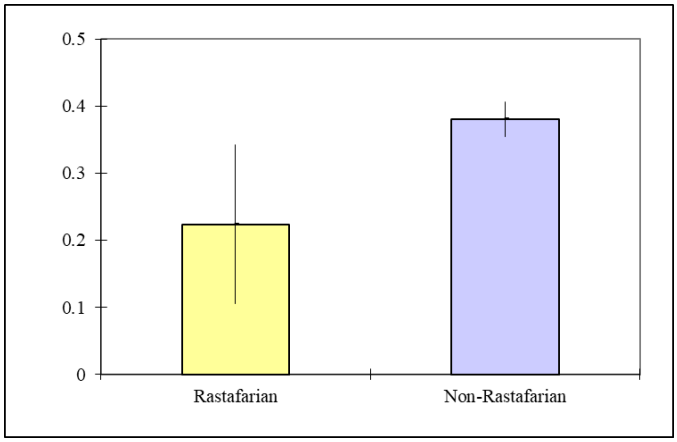
127. Within the 95% confidence interval, the success rate for Orthodox and Non-Reform Jews could be 17.4%–33.2%, while the rate for other religious claimants could be between 35.9% and 41.0%.

128. *See infra* Part III.D.1.

success in 1996–2005[129] But now the Rastafarian variable is *negatively* associated with outcome for 2006–2015. Moreover, the disadvantage is substantial in size as well.

As shown in Figure 6, holding all other independent variables constant at their means, the predicted probability that a Rastafarian would succeed in presenting a Religious Free Exercise/Accommodation claim to an individual federal judge between 2006 and 2015 was 22.6%, while non-Rastafarian claimants succeeded at a rate of 38.1%.[130] This is a margin of more than 15% and means that religious claimants other than Rastafarians prevailed at a rate nearly 1.7 times higher.

Figure 6. 2006–2015: Predicted Probability that a Claimant Will Succeed on a Religious Free Exercise/Accommodation Claim, by Rastafarian Identity



As in the past, the overwhelming majority of free exercise claims by Rastafarians arise in the prison context—nearly three-quarters or 74.5% of observations. But again, prisoner claims are not at a disadvantage compared to other claim types. And in any event, it is not apparent why Rastafarian prisoners in the past were favored to win but then fell behind in 2006–2015.

3. Native Americans

In our past study of federal court decisions for 1996–2005, Native American religious claimants were not significantly advantaged or disadvantaged in presenting free exercise claims.[131] From 2006 to 2015, the variable for Native American religious claimants emerged as significant in one of our two models, our secondary model that adjusted the standard error for clusters by judge (as shown in Table 2). However, it came close to traditional significance (at $p < .053$ probability

129. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 243.

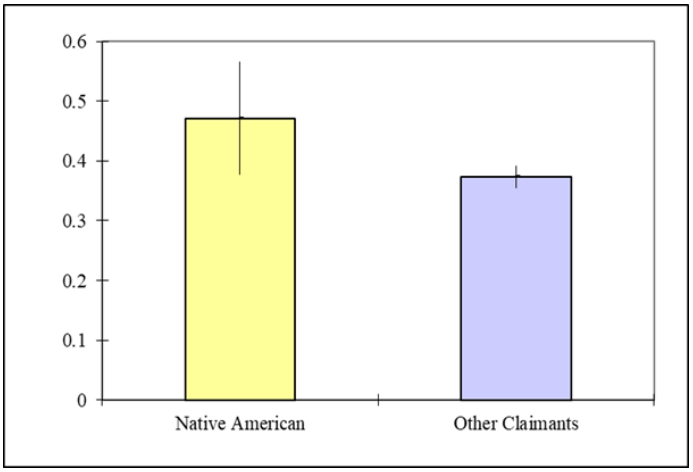
130. Within the 95% confidence interval, the success rate for Orthodox and Non-Reform Jews could be between 17.4% and 33.2%, while the rate for other religious claimants could be between 35.9%– and 41.0%.

131. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 243.

level) in our primary model. Interestingly, and contrary to the historical discrimination suffered by Native Americans, the variable is positive; that is, Native Americans are more likely to succeed in presenting free exercise claims.

As shown in Figure 7, holding all other independent variables constant at their means, the predicted probability that a claimant identifying with a Native American religion would succeed in presenting a Religious Free Exercise/ Accommodation claim to an individual federal judge between 2006 and 2015 was 47.1%, while other claimants succeeded at a rate of 37.4%.[132] This is a margin of more than 10%.

Figure 7. 2006–2015: Predicted Probability that a Claimant Will Succeed on a Religious Free Exercise/Accommodation Claim, by Native American Religious Identity [Model 2]



At first glance, our result appears to conflict with a study conducted by Luke Goodrich and Rachel Busick on religious freedom decisions in the Tenth Circuit in the years 2012–2017.[133] They found that Native Americans made up a significant proportion of claims under the Religious Freedom Restoration Act and were "largely unsuccessful."[134] Yet Goodrich and Busick note that courts in the Tenth Circuit "may be underenforcing RFRA for religious minorities,"[135] especially in questionable decisions that failed to uphold Native American religious use of eagle feathers.[136] They further noted that another circuit had reached a contrary

132. Within the 95% confidence interval, the success rate for Native American religious claimants could be between 37.7% and 56.6%, while the rate for other religious claimants could be between 35.5% and 40.1%.

133. *See* Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. 353, 356 (2018).

134. *Id.* at 367.

135. *Id.* at 385.

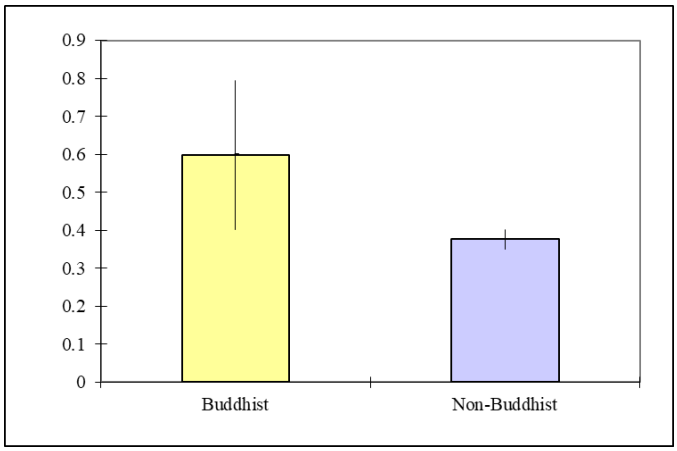
136. *Id.* at 385–88.

decision and the federal government had settled claims allowing hundreds of Native Americans not part of recognized tribes to possess eagle feathers.[137] Thus, Goodrich and Busick anticipate that the environment for Native American religious claims may be more favorable outside the Tenth Circuit.

4. Buddhist

In both our past study of federal court decisions 1996–2005[138] and the current 2006–2015 study, Buddhist religious claimants were significantly advantaged in presenting free exercise claims.[139] Indeed, the success rate for Buddhists is one of the most powerful influences found in our 2006–2015 study. As shown in Figure 8, holding all other independent variables constant at their means, the predicted probability that a Buddhist claimant would succeed in presenting a Religious Free Exercise/Accommodation claim to an individual federal judge was 59.8%, while non-Buddhist claimants succeeded at a rate of 37.5%.[140] This is an extraordinary margin of more than 20%.

Figure 8. 2006–2015: Predicted Probability that a Claimant Will Succeed on a Religious Free Exercise/Accommodation Claim, by Buddhist Identity



The number of Buddhist claimants was small—only 23, or less than 1% of our observations. More than two-thirds (69.6%) of the observations arose in the prison context. Given that prison restrictions are primarily justified to protect security, our past speculation on why Buddhists succeed at such a higher rate may be further confirmed. We've suggested that the Buddhist religious community "may

137. *Id.* at 387–88.

138. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 243.

139. *Id.*

140. Within the 95% confidence interval, the success rate for Buddhist claimants could be between 40.2% and 79.4%, while the rate for other religious claimants could be between 35.1% and 40.1%.

have been more favorably received because of their peaceful and tolerant reputation."[141]

5. Claimants with No Religious Affiliation

Despite extended investigation with the greater availability of court docket filings to identify religious background of claimants, we found that claimants for 5.7% of observations were affirmatively nonreligious in nature, were vague and doubtful as to religious basis, or had no detectable religious affiliation.

In the words of Joel Thiessen and Sarah Wilkins-Laflamme, "religious nones come in all shapes and sizes: involved seculars, inactive nonbelievers, inactive believers, the spiritual but not religious, and religiously involved believers."[142] Looking at general American population demographics, it would be a mistake to characterize most of the "Nones" as secularist or atheist. But that description appears accurate for the lion's share of the cases we included in this free exercise study.

Based on our analysis of the Free Exercise/Accommodation dataset, a substantial majority of the cases in which the claimant had no religious affiliation involved either those who were affirmatively secular or atheist in attitude (42%) or those for whom the courts struggled to find any clear religious basis for the claim being submitted (18%). The smaller remainder appeared to be claims that were loosely religious or spiritual in nature but not associated with a recognized religious grouping or that appear to have an incoherent content.[143]

For 2006–2015, we treat this set of observations as a separate category, believing that a secular outlook, assertion of atheism, doubts about the religious nature of the claimant, and the inability to discern a religious affiliation are distinctive in the evaluation of a religious liberty claim in these cases. And as a separately coded category, claimants without a clear religious affiliation are significantly and substantially less likely to prevail in a Free Exercise/Accommodation claim.

As shown in Figure 9, holding all other independent variables constant at their means, the predicted probability that a claimant without a religious affiliation would succeed in presenting a Religious Free Exercise/Accommodation claim to an

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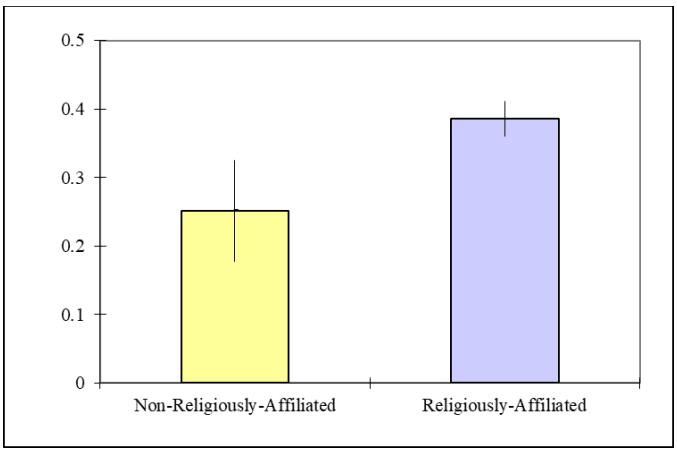
141. Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371, 1392–93 (2013).

142. JOEL THIESSEN & SARAH WILKINS-LAFLAMME, NONE OF THE ABOVE: NONRELIGIOUS IDENTITY IN THE US AND CANADA 171 (2020). We address the increasing number of Nones and their place in Church and State disputes in greater depth in our companion article on federal judges with no religious affiliation in Establishment Clause cases. *See* Gregory C. Sisk & Michael Heise, *Where to Place the "Nones" in the Church and State Debate: Empirical Evidence from Establishment Clause Cases in Federal Court* (forthcoming).

143. For concerns about whether those who identify as spiritual but not religious are adequately protected "from spiritual harm that the Free Exercise Clause is meant to offer," *see* Courtney Miller, Note, *"Spiritual But Not Religious": Rethinking the Legal Definition of Religion*, 102 VA. L. REV. 833, 839 (2016).

individual federal judge was 25.1%, while other religious claimants succeeded at a rate of 38.6%.[144]

Figure 9. 2006–2015: Predicted Probability that a Claimant Will Succeed on a Religious Free Exercise/Accommodation Claim, by Not Religiously Affiliated



Modern scholars have long debated whether claims of conscience invoking religious beliefs to resist governmental commands should be given preferential treatment over those dissidents whose values are grounded in nonreligious precepts.

John Garvey and Michael Paulsen contend that the Religion Clauses of the First Amendment should be understood as intended or designed not merely for the neutral purpose of promoting general freedom of choice, but rather to specifically protect religion as a value to society or a response to a higher calling.[145] Paulsen forthrightly declares that "[t]he philosophical premises upon which a serious commitment to religious liberty depends are ultimately religious premises,"[146] as unsettling as it may be to "the skeptical,

144. Within the 95% confidence interval, the success rate for claimants without a religious affiliation could be 17.8%–32.4%, while the rate for those with a religious affiliation could be between 36.0% and 41.1%.

145. JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 42–57 (1996); Michael Stokes Paulsen, *God is Great, Garvey is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1600–10 (1997) (book review); *see also* Gregory C. Sisk, *Stating the Obvious: Protecting Religion for Religion's Sake*, 47 DRAKE L. REV. 45, 45 (1998) (arguing that constitutional "[f]reedoms exist not merely for the neutral purpose of promoting individual autonomy in its most isolated sense but rather to protect certain higher values or goods that we as a society have selected as especially worthy," most especially including "the positive good of religious faith and practice").

146. Michael Stokes Paulsen, *Is Religious Freedom Irrational*?, 112 MICH. L. REV. 1043, 1043 (2014) (book review); *see also* Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1160 (2013) [hereinafter Paulsen, *Priority of God*] (saying that "[r]eligious freedom only makes entire sense as a social and constitutional arrangement" if we suppose that "God exists," that "God makes claims on" people, and that God's claims "are prior to, and superior to" human authority).

rationalist, nonreligious or irreligious mind."[147] On Paulsen's account, religion properly is "single[d] out for special protection, and perhaps even preferred treatment," while not providing "comparable protection for skepticism, agnosticism, rationalism, humanism, or atheism."[148] Andrew Koppelman agrees that "[i]n deciding to treat religion as a distinctive human good, even defined in a very inclusive way, the state is taking sides on fundamental matters."[149]

Michael McConnell also affirms the singular nature of religion:

> If we want to have both an activist state and religious freedom, it is not enough to say that religious institutions and religiously motivated individuals must be treated the same way as comparable secular institutions and individuals. The effect of applying secular norms to religious entities is simply not the same as applying those norms to secular entities. The government must make special provision to preserve a degree of independence for religion, unless religion is to become—like secular entities—subject to pervasive regulation by majoritarian institutions.[150]

McConnell concludes that "religious freedom [is distinct] from other liberties of the individual" because "[n]o other freedom is a duty to a higher authority."[151] Even for those who do not believe in religion, they should "refrain from using the power of the state to create conflicts with what are perceived (even if incorrectly) as divine commands."[152]

In a similar vein, John Witte reminds us that "[r]eligion remains today a unique source of individual and personal identity for many," as well as of "public and social identity, involving a vast plurality of sanctuaries, schools, charities, missions, and other forms and forums of faith."[153]

Other scholars, notably Brian Leiter today, question whether there is any "moral reason to single out matters of religious conscience for special legal consideration and solicitude."[154] Beginning from the premise that religious belief is "a culpable form of unwarranted belief,"[155] Leiter denies any "apparent moral reason why states should carve out special protections that encourage individuals to structure their lives around categorical demands that are insulated from the standards of evidence and reasoning we everywhere else expect to constitute constraints on judgment and action."[156] Society may well "protect liberty of conscience under the rubric of principled toleration," Leiter

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147. Paulsen, *supra* note 145, at 1612.
148. *Id.*
149. KOPPELMAN, *supra* note 59, at 26.
150. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 692–93 (1992).
151. Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 30 (2000).
152. *Id.*
153. WITTE, *supra* note 58, at 277.
154. BRIAN LEITER, WHY TOLERATE RELIGION? xvii-iii (rev. ed. 2012).
155. *Id.* at 81.
156. Brian Leiter, *Why Tolerate Religion?*, 25 CONST. COMMENT. 1, 25 (2009).

agrees.[157] But Leiter would limit both religious and secular claims of conscientious objection to general law to instances where there is no harm to the public order or the interests of others.[158]

Similarly, Christopher Eisgruber and Lawrence Sager would reserve "special constitutional solicitude" for religious faith only when equality principles demand a focus on likely discrimination because of "its vulnerability to hostility and neglect."[159] Otherwise, they say, "we have no constitutional reason to treat religion as deserving special benefits or as subject to special disabilities."[160] Speaking from a similar perspective, Steven Gey argues that broadly defined religious liberty protections are unnecessary given the protection of "religious ideas and expression" by freedom of speech, and improper in how they "prefer religiously motivated behavior over nonreligious behavior."[161]

Bracketing the normative question and turning to the question of application of legal texts, the Free Exercise Clause and parallel religious liberty statutes by their very terms grant constitutional protection to "religious" exercise.[162] The Supreme Court long ago emphasized that "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion."[163] Interpreting the term "religious exercise" in RLUIPA, one court said that the claim must not be "purely personal, political, ideological, or secular."[164] In *Cutter v. Wilkinson*,[165] the Supreme Court unanimously reaffirmed that government-provided religious accommodations or exemptions did not violate the Establishment Clause and did not need to provide parallel protections to secular persons or entities.[166]

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157. LEITER, *supra* note 154, at 92.

158. *Id.* at 21.

159. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 52 (2007).

160. *Id.*

161. *See* Steven G. Gey, *Why is Religion Special? Reconsidering the Accommodation of Religion Under the Religious Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 166–67 (1990).

162. *See* McConnell, *supra* note 150, at 717 (saying that "favoritism toward religion" is "inherent in the very text of the First Amendment"); *see also* KOPPELMAN, *supra* note 59, at 42 (noting that religious liberty statutes, such as the Religious Freedom Reformation Act, "pervasively single out religion for special treatment in the law"). *But see* Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 270 (2021) (contending free exercise should be interpreted to cover "liberty of conscience" so as to create "a rebuttable presumption of unconstitutionality against law and policies that substantially burden people's most profound beliefs and practices").

163. Thomas v. Review Bd. of Ind. Emp., 450 U.S. 707, 713 (1981).

164. Hale v. Fed. Bureau of Prisons, No. 14-cv-00245-MSK-MJW, 2015 WL 5719649, at *7 (D. Colo. Sep. 30, 2015).

165. 544 U.S. 709 (2005).

166. *Id.* at 724–26.

As Mark Rienzi writes, whatever the debate on whether religious liberty benefits a free society, "[t]he historical premise of American religious liberty . . . has always been . . . that religion is special and valuable."[167]

As a matter of established law, then, we might expect that a free exercise claimant who was unable to ground a claim into a recognizable religious framework would not fare well. Indeed, as discussed above, a substantial majority of the observations of unaffiliated claimants in our dataset were affirmatively secular, atheist, or dubiously religious in nature. With that in mind, a markedly lower success rate for the nonreligious in Free Exercise/Accommodation claims might be anticipated as simply the standard application of religious liberty law. Nelson Tebbe, although regretfully,[168] anticipated this state of affairs, writing that "[a]t a time when Americans are, on some accounts, converging around tolerance for virtually all religious people, nonbelievers stand virtually alone."[169]

And as noted above and shown in Figure 9, that is the reality. In our study of free exercise cases in the federal courts for 2006–2015, of all claimant categories that were significantly associated with the dependent variables, the No Religious Affiliation category had one of the lowest predicted success rates. Our result is consistent with that found in an empirical study by Meredith Abrams of RFRA decisions in the federal district courts for 2014–2018.[170] She also found that secular litigants "fared poorly compared to litigants of other religions," succeeding at a rate of only 14% compared to an overall success rate around 50%.[171]

F. The Troubling Evidence of Judicial Favoritism Toward Coreligionists

In the recent past, the religious background of judges has been significantly correlated with outcomes in free exercise decisions. Indeed, for the 1986–1995 period, we reported that "religious affiliation variables—both those of judges and of claimants—were the most consistently significant influences on judicial votes in the religious freedom cases included in our study."[172] When religious claimants sought accommodation for religious exercise, we found that Jewish judges and judges from Christian denominations outside of the Catholic and Mainline Protestant traditions were significantly more likely to approve of such judicially ordered accommodations.[173]

By the 1996–2005 period, no religious background variable for judges was significantly associated, positively or negatively, with the outcome for Free

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167. Mark L. Rienzi, *The Case for Religious Exemptions—Whether Religion is Special or Not*, 127 HARV. L. REV. 1395, 1407 (2014) (book review).

168. Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1115, 1127–28 (2011) (suggesting that "when courts ask whether something counts as religion in a particular doctrinal and factual context they are really asking whether it should be protected" and arguing for a "polyvalent method" of different values which sometimes will extend Free Exercise protection to nonbelievers and sometimes not).

169. *Id.* at 1117.

170. Meredith Abrams, *Empirical Analysis of Religious Freedom Restoration Act Cases in the Federal District Courts Since Hobby Lobby*, 4 COLUM. HUM. RTS. REV. ONLINE 1, 14–16 (2019).

171. *Id.* at 19.

172. Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 17, at 501–02.

173. *Id.* at 502, 556.

Exercise/Accommodation claims.[174] Likewise, as shown earlier in Table 2, for our current period of study, 2006–2015, none of the religious background variables for judges emerged as statistically significant.

This failure to find a correlation between a judge's religion and a free exercise outcome is consistent with that of other recent empirical studies. Sepehr Shahshahani and Lawrence Liu adapted data from our prior stages of study and extended it forward in their study of religious liberty decisions in the federal circuits, combining both Free Exercise and Establishment Clause cases, across a 30-year period from 1986 to 2015.[175] While Jewish judges were significantly associated with outcomes overall (such as being more likely to accept challenges to government interaction with religion), they found "that the entire effect of Jewishness comes through [Establishment Clause] cases."[176]

But while not finding any tendency for judges of a particular background to vote in a particular way on free exercise cases, we did discover a connection between coreligionist judges and claimants. As in our past empirical studies, we crafted a variable to measure whether judges were more likely to look with favor upon a claim by a fellow believer in the same religious tradition. This "Religious Correlation" variable was coded as "1" if the judge shared the same religious affiliation as the claimant in a Free Exercise/Accommodation case. We exercised caution in coding this variable, applying it only if both the judge and the claimant were Jewish, Catholic, or otherwise shared an identical denominational affiliation.[177]

Of the 2,847 observations included in our Free Exercise/Accommodation study for 2006–2015, 111 instances (or 3.8%) involved a judge of the same religious affiliation as a claimant. As shown in Figure 10, for 2006 to 2015, holding all other independent variables constant at their means, the predicted probability that a religious claimant would succeed in presenting a Religious Free Exercise/Accommodation claim when the judge shared the same religious identity was 53.7%, while all other religious claimants succeeded at a rate of 37.2%.[178] This is a margin of more than 16%.

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174. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 243.

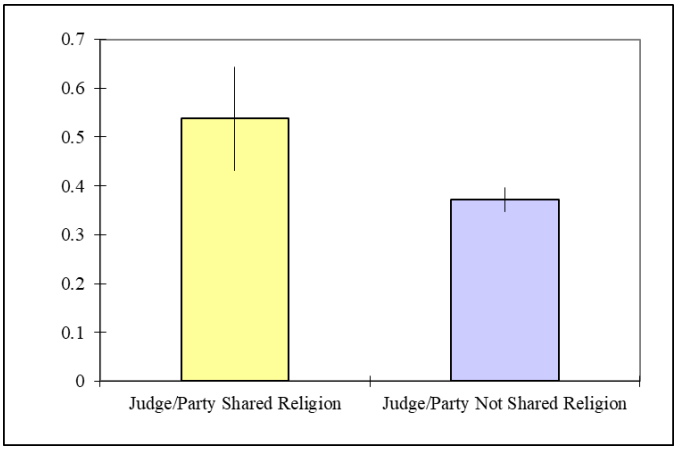
175. Sepehr Shahshahani & Lawrence J. Liu, *Religion and Judging on the Federal Courts of Appeals*, 14 J. EMPIRICAL LEGAL STUD. 716, 720 (2017).

176. *Id.* at 730.

177. We coded only for quite specific correlation, such as Catholic to Catholic or United Methodist to United Methodist and not by general categories, such as Mainline to Mainline (unless the same denomination) or Christian generally. As an exception, a Jewish judge was correlated to a Jewish claimant regardless of whether Orthodox, Reform, Conservative, etc. on the theory that the most important affinity here was that of Jewish minority religion.

178. Within the 95% confidence interval, the success rate for claimants whose religious identity correlated with the judge could be between 43.1% and 64.4%, while the rate for other religious claimants could be between 34.7% and 39.7%.

Figure 10. 2006–2015: Predicted Probability that a Claimant Will Succeed on a Religious Free Exercise/Accommodation Claim, by Correlation in Religion Between the Claimant and the Judge



Notably, the overwhelming majority of the instances where we coded for Religious Correction consisted of Catholic claimants and judges (74 of the 111 instances or 66.7%), followed by Jews (30 or 27.0%), and then a small number of Mainline Protestants (2), Baptists (3), and Mormons (2). One intriguing possibility reexamines the failure of Catholic claimants overall to be at a statistically significant disadvantage in making free exercise claims for this period. Could it be that any deficit for Catholics elsewhere is offset by an upturn for Catholic claimants who appear before Catholic judges?

It is an understatement to say that this result is disturbing and cuts sharply against our general suggestion that adjudication of religious liberty claims may be moving toward equilibrium. As Matthew Dahl, Devan Patel, and Matthew Hall write, "judges voting to advance the interests of their coreligionists—but not claimants who belong to different religions—would have been a pattern of behavior deeply in tension with the judicial norms of fairness and impartiality."[179]

We might expect a judge's worldview, including that perspective formed by religious belief, to influence adjudication on the margins in cases where the law does not set clear parameters. But no ideal of impartiality and equality among religious claimants could allow for a judge to show favoritism to parties that share the same religious background. Religious nepotism is unsettling.

We approach this finding with caution, however, both because it has not emerged in another recent study in a parallel context and because it directly contradicts our own findings in the last period of our study.

First, Dahl, Patel, and Hall conducted a study of private Title VII cases in which plaintiffs alleged employment discrimination on the basis of religion, focusing on the

179. Dahl, Patel, & Hall, *supra* note 55, at 762.

federal courts of appeals between 2000 and 2020.[180] Their study provided no support for "the popular perception that Christian judges are distinctly dogmatic."[181] They found "no evidence that Christian or Evangelical judges were more likely than non-Christian or non-Evangelical judges to vote in favor of claimants in general or coreligionist claimants in Title VII cases.[182] Pointing in the opposite direction, the only statistically significant finding was that Evangelicals were less likely to rule in favor of Evangelical claimants in Title VII cases.[183]

Second, in our study of 1996–2005 decisions, we did find a correlation between judges and claimants of the same religion to be significant.[184] Interestingly, for that period, the association pointed in a *negative* direction, that is, judges appeared more likely to rule against a claimant who shared the same religious affiliation. By contrast, for 2006–2015, the shared religion variable is not only significant at the 99% probability level but is positive. Our finding for free exercise cases in that prior period is more consistent with that of Dahl, Patel, and Hall—that any coreligionist interaction is not to the advantage of the claimant of the same faith.

In sum, the evidence of a coreligionist bias, as troubling as it is, remains uneven and contradictory. Further research is warranted.

III. CONTEXT AS DECISIVE: CASE TYPE AS THE DRIVING FORCE IN FREE EXERCISE CASES

A. Coding of Case Types

As Donald Songer and Susan Tabrizi explain, "integrated models will be incompletely specified unless they include the particular case facts that are most relevant for the type of cases examined."[185] Case-type factors serve as control variables to ensure that any correlation discovered between religious or other variables and the dependent variable is not an "artifact" of some correlation between these variables and a particular type of case.[186] Moreover, as we discuss further below, case types presumably should be the driving factors in a regime of free exercise claims that approaches equilibrium, by focusing judicial attention on the balance between the religious claim for accommodation and the opposing governmental interest.

Accordingly, for each Free Exercise/Accommodation observation, we included a coding according to its case type, defined in terms of the factual elements of the case or its subject matter. For 2006–2015, after collapsing together certain categories owing to

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180. *Id.* at 751–52.
181. *Id.* at 744.
182. *Id.* at 761.
183. *Id.*
184. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 243.
185. 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, 511 (1999).
186. *Id.* at 517 (explaining 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").

small cell counts, this coding was used to create the following 12 Case-Type dummy variables:

REGULATION: Cases involving health, safety, or other regulation of private activity (including licensing), other than regulation of educational activities, accounted for 7.5% (or 214) of the 2,847 observations in free exercise cases.

PUBLIC EDUCATION (Elementary): Cases involving public education at the elementary level, including issues involving instruction and religious meetings or distribution of literature in schools by students, accounted for 1.6% (or 46) of the observations.

PUBLIC EDUCATION (Secondary and Higher): Cases involving public education at the secondary or higher education levels accounted for 4.4% (or 126) of the observations.

PRIVATE EDUCATION: Cases involving regulation of private education at the elementary, secondary, or higher education level, thus excluding any cases involving regulation that was not directed at educational matters or selection of instructors, accounted for 1.5% (or 42) of the judicial participations.

RELIGIOUS MEETINGS: Cases involving religious meetings (other than in school), including in public facilities, accounted for 2.2% (or 62) of the observations.

RELIGIOUS EXPRESSION: Cases involving religious expression or solicitation (other than in school), including religious expression on public property, accounted for 6.6% (or 189) of the observations.

ZONING: Cases involving zoning disputes, typically for religiously affiliated property uses, accounted for 8.3% (or 235) of the observations.

PRISONER: Cases involving free exercise of religion claims by convicted criminals incarcerated in state or federal correctional facilities, that is, claims involving prison rules that affect religious practice and not challenges to the underlying criminal conviction, accounted for 44.7% (or 1272) of the observations.

EMPLOYMENT DISCRIMINATION (Government): Cases involving claims of discrimination in employment by government employers on the basis of religion accounted for 12.2% (or 347) of the observations.

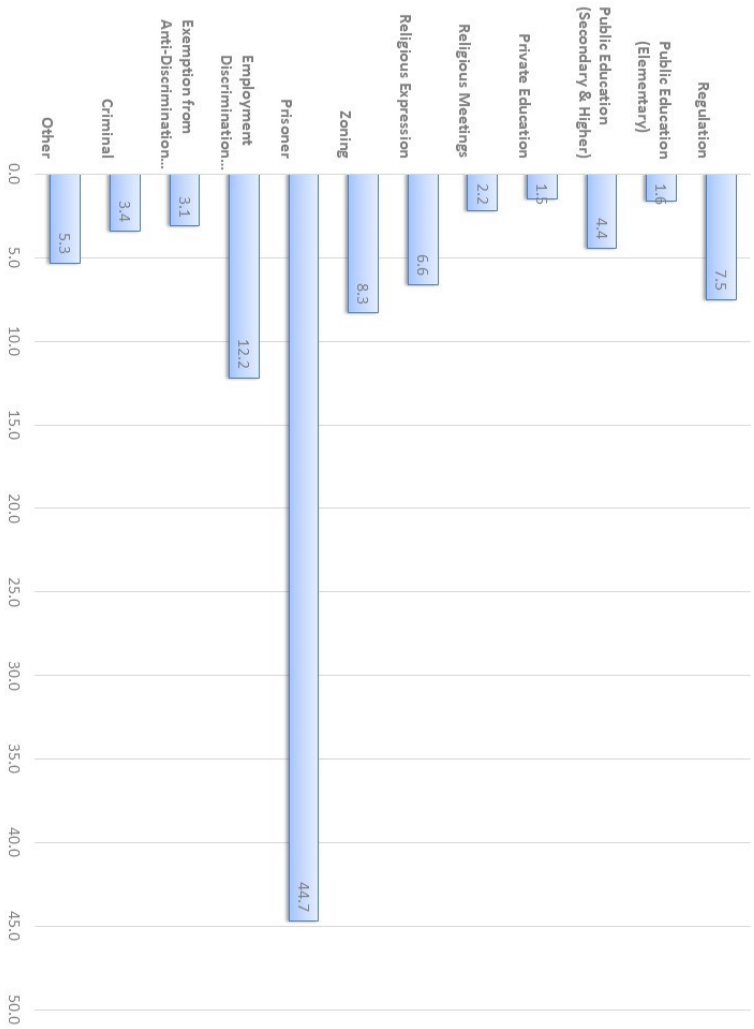
EXEMPTION FROM ANTI-DISCRIMINATION LAWS: Cases involving claims that an entity asserting a religious affiliation was exempt from laws prohibiting discrimination in employment accounted for 3.1% (or 88) of the observations.

CRIMINAL: Cases involving religious defenses raised to charges of criminal misconduct or other issues arising in a criminal or sentencing proceeding (other than in matters covered by the other categories, such as regulation of private activity) accounted for 3.4% (or 97) of the observations.

OTHER: Other cases raising free exercise of religion claims accounted for 5.3% (or 151) of the observations.

We selected OTHER as the reference variable, as it appeared to be the most general category and thus the one against which other types of cases could be most profitably compared.

Figure 11. Case Types as Percentage of Observations, Federal Courts, 2006–2015



B. The Remarkable Robustness of Significant Case-Type Variables

If none of these Case-Type variables had proven to be significant, that would have implied an error in selecting the appropriate control variables. What is even more remarkable here is the breadth of Case-Type variables that achieved significance in this third period of study.

For the first period of our study, 1986–1995, three of our then-eight Case-Type variables, or somewhat more than one-third, had a significant correlation with outcome in

free exercise cases.[187] Two of those Case-Type variables—Religious Expression and Criminal—remain significant in our most recent study.

For the second period of our study, 1996–2005, the number of significant Case-Type variables increased to nearly half; specifically five of our then-eleven variables.[188] Of those, Public Education (Secondary and Higher), Private Education, Religious Expression, Exemption from Anti-Discrimination Laws, and Criminal have also proved significant into this new period of study.

For 2006–2015, as shown earlier in Table 2, eight of our twelve Case-Type variables—two-thirds of this category of variables[189]—achieve statistical significance. Those eight variables are Public Education (Secondary and Higher), Private Education, Religious Meetings, Religious Expression, Zoning, Prisoner, Exemption from Anti-Discrimination Laws, and Criminal.

All eight of these Case-Type variables were robustly significant in both of our models. And six of these variables were significant at the 99% probability level, enhancing our confidence in the reality of the correlation with outcome in free exercise cases.

What is most important here is the consistency and breadth of the significance of these Case-Type variables. The evidence that case category is driving the outcome in Free Exercise/Accommodation cases[190] dovetails with the evolving religious doctrine to move toward equilibrium among diverse religious claimants.[191]

C. Significant Case Categories Showcase Contextual Analysis that Advances Equilibrium Among Religions

Even after the Supreme Court formally downgraded the Free Exercise Clause to a protection against unequally imposed burdens on religious believers and entities in *Employment Division v. Smith*,[192] courts repeatedly return to contextual evaluation of the vital substance of a religious claim colliding against a governmental interest. As Mark Movsesian wrote recently of religious liberty claims during the pandemic, "whatever formal test they have applied, courts have approached the problem in essentially the same way, through intuition and balancing. *Smith* has failed to prevent judicial assessment of pros and cons, as critics long predicted it would."[193]

While *Smith* directed that free exercise claims could not prevail against a generally applicable law, the question of "general applicability has always depended on judicial line drawing."[194] By evaluating whether a law is being equally applied to both religious and nonreligious institutions, a court necessarily must appreciate the nature of

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187. Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 17, at 555.
188. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 242–43.
189. And note that the Other Case Type was omitted as the reference variable.
190. *See infra* Part III.D.
191. *See infra* Part III.C.
192. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 885–90 (1990).
193. Mark L. Movsesian, *State of the Field Essay: Law, Religion, and the Covid Crisis*, 37 J.L. & RELIGION (forthcoming 2022) (on file with St. John's Law Scholarship Repository).
194. *Id.* (manuscript at 11).

the religious claim on its own terms and whether the government's calibration of the law to different contexts has imposed a comparable disadvantage to the religious believer.

In a statutory religious liberty decision rendered just before our period of study, in 2005, the Supreme Court emphasized that "[c]ontext matters" when deciding whether to allow a government interest to override the religious claimant's assertion of an undue burden on religious practices.[195] In another statutory religious liberty decision right at the beginning of our period of study, in 2006, the Supreme Court focused attention on the specific impact of a religious exemption to particular religious claimants, saying the Court must "look[] beyond broadly formulated interests" and instead "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants."[196] In other words, as the Supreme Court explained in a later decision, the courts should "look to the marginal interest" in enforcing the government's interest.[197]

In other words, adjudication of a free exercise case requires balancing government power against religious practice rights. And this remains true whether the case is evaluated in terms of whether a law genuinely has equal application to comparable religious and nonreligious practices or, more directly, by balancing the sincerely religious claim against a purportedly compelling governmental interest. As John Witte writes: "At the heart of any First Amendment free exercise case is a conflict between the exercise of governmental power and the exercise of a private party's religion."[198]

This is where the remarkably comprehensive and robust significance of the Case-Type variables dovetails with doctrine to advance the equilibrium of religious liberty for diverse religions. Rather than the case turning on noncontextual and perhaps implicitly biased views of a particular religious claim, the contextual approach demands a deeper dive into the nature of the religious claim and a fine-tuned assessment of the government's claim of an overriding public interest. We would expect, then, that some contexts are more likely to pose particularly troubling invasions of the government into private religious behavior, while others are more likely to implicate a compelling public interest in preventing harmful behavior.

Douglas Laycock and Thomas Berg anticipate and welcome this evolution of the balancing approach for religious liberty claims, saying that "[o]ver time, courts can use their experience with cases to develop distinctive rules for categories of cases, much as they have developed categorical rules for different free-speech areas like defamation or incitement of illegal conduct."[199]

In sum, in an ideal religious liberty doctrinal regime, the balance between accommodating religious exercise and upholding important government purposes will shift with the character of the dispute defined by these conflicting interests. Our

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195. *See* Cutter v. Wilkinson, 544 U.S. 709, 723 (2005).

196. Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418, 431 (2006).

197. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 727 (2014).

198. WITTE, *supra* note 58, at 118.

199. Douglas Laycock & Thomas C. Berg, Protecting Free Exercise Under Smith and After Smith 21 (July 5, 2021) (unpublished manuscript) (on file with the University of Virginia School of Law).

encouraging results suggest that the driving force in deciding religious liberty decisions is increasingly the contextual background to the case.

D. Evidence Regarding Certain Specific Case Types

1. Prisoner Cases

As we said in our first foray into the empirical study of free exercise claims for 1986–1996, we had initially been concerned that inclusion of convicted criminals now incarcerated in prison "might distort the outcome because we hypothesized that antipathy to demands by prisoners for accommodation or special treatment on account of religion would result in a significantly lower success rate."[200] Then, as now, Prisoner cases accounted for a large segment of our free exercise cases. For 2006–2015, claims by prisoners accounted for 44.7% of our observations, nearly four times as many as any other Case Type category.[201]

But, as we've found consistently throughout our studies, Prisoner cases simply are not disfavored in the federal courts compared to other types of cases. In 1986–1996, prisoners succeeded in their claims at a rate of 40.2%, compared to the overall free exercise success rate of 35.6%.[202] In 1996–2005, the prisoner success rate was 33.0%, only slightly below the overall success rate of 35.5%.[203]

As shown in Figure 12, for 2006 to 2015, holding all other independent variables constant at their means, the predicted probability that a Prisoner claimant would succeed in presenting a Religious Free Exercise/Accommodation claim to an individual judge was 46.8%, while claimants in other Case Types succeeded at a rate of 31.1%.[204] For this period, Prisoner was an advantaged case category for success.

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200. Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 17, at 561.

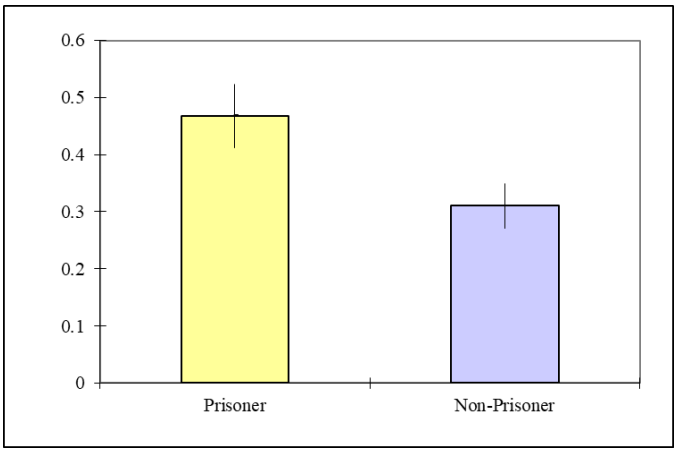
201. *See supra* Part III.A; *see also* Goodrich & Busick, *supra* note 133, at 360 (finding that 33% of the free exercise cases they explored in the Eighth Circuit were prisoner cases).

202. Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 17, at 561.

203. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 273.

204. Within the 95% confidence interval, the success rate for Prisoner claimants could be between 41.2% and 52.3%, while the rate for claimants in other Case-Types could be between 27.1% and 35.0%.

Figure 12. 2006–2015: Predicted Probability that a Prisoner Claimant Will Succeed on a Religious Free Exercise/Accommodation Claim



For these reasons, we renew our earlier conclusion that "the general judicial response to claims by prisoners," which now includes not only published but unpublished digested cases, "was not measurably more hostile."[205] In studying the ebb and flow of free exercise claims in the federal courts, prisoner claims are not outside of the mainstream and negatively atypical—indeed, they now appear to be the opposite.

2. Exemption from Anti-Discrimination Laws

As shown earlier,[206] for 2006–2015, the predicted probability that a religious claimant seeking an exemption from an anti-discrimination law would succeed was 87.2%, while claimants raising other Free Exercise/Accommodation claims succeeded at a rate of 36.0%. We found a similarly significant and high rate of success in the Exemption from Anti-Discrimination Laws variable in our study of Free Exercise cases for 1996–2005.[207]

As discussed earlier,[208] this remarkable and increasing rate of success is firmly grounded in the Supreme Court's 2012 decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*[209] In that decision, the Supreme Court ruled unanimously that the First Amendment guarantees the right of religious organizations to choose their own ministers without second-guessing by courts in the form of adjudicating employment discrimination cases.

3. Religious Meetings and Religious Expression

These two Case-Type variables—Religious Meetings and Religious Expression—are somewhat parallel as both involve religious ideas and communication of those ideas, either among fellow believers or to the public.

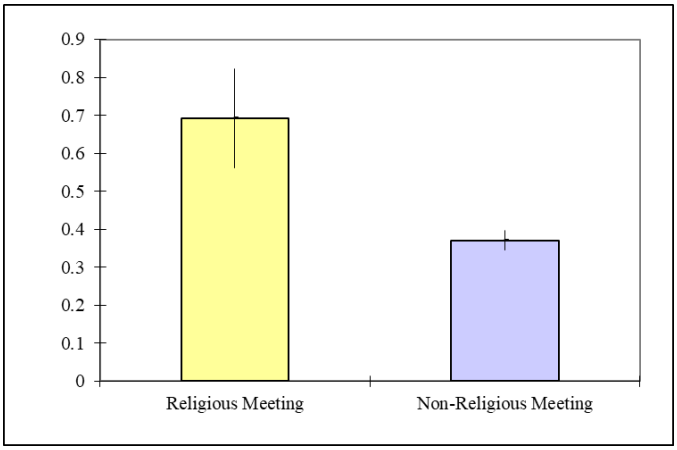
205. *See* Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 17, at 561.
206. *See supra* Figure 4.
207. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 267–68.
208. *See supra* Part II.D.
209. 132 S. Ct. 694, 705–10 (2012).

Religious Expression as a Case-Type variable has been the most consistently significant variable in our study of 30 years of Free Exercise decisions in the federal courts. For each ten-year period, Religious Expression has been significant at the 99% probability level and always in the positive direction of enhanced success rates.[210]

As one of us has written previously, "[b]ecause freedom of speech is one of the most highly venerated, and vigorously protected, of constitutional rights, being subject to infringement only for the most compelling of reasons, claims of religious expression ought to be among the strongest religious liberty claims on the merits."[211]

As shown in Figure 13, for 2006–2015, holding all other independent variables constant at their means, the predicted probability that a claimant would succeed in presenting a Free Exercise/Accommodation claim based on a Religious Meeting request was 69.2%, while claimants in other Case Types succeeded at a rate of 37.6%.[212]

Figure 13. 2006–2015: Predicted Probability that a Claimant in a Religious Meetings Case Will Succeed on a Religious Free Exercise/Accommodation Claim



As shown in Figure 14, for 2006–2015, holding all other independent variables constant at their means, the predicted probability that a claimant would succeed in presenting a Free Exercise/Accommodation claim asserting rights of

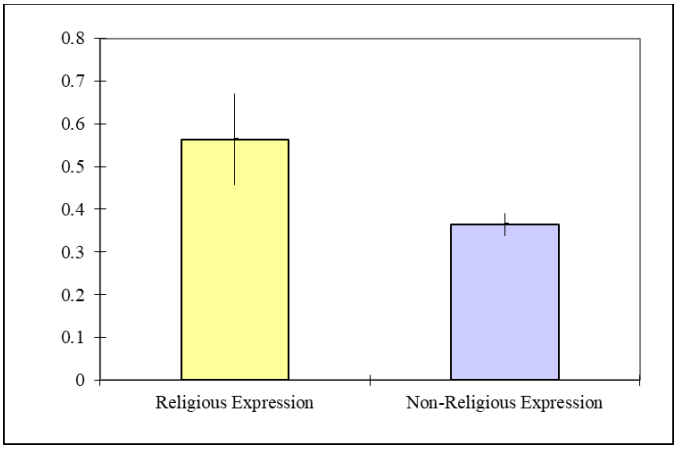
210. *See* Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 242; Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 17, at 561.

211. Sisk, *Traditional Religions*, *supra* note 18, at 1049.

212. Within the 95% confidence interval, the success rate for claimants in Religious Meeting cases could be between 56.3% and 82.2%, while the rate for claimants in other Case Types could be between 34.5% and 39.6%.

Religious Expression was 56.4%, while claimants in other Case Types succeeded at a rate of 36.5%.[213]

Figure 14. 2006–2015: Predicted Probability that a Claimant in a Religious Expression Case Will Succeed on a Religious Free Exercise/Accommodation Claim



In light of the higher rate of success in these free-speech-related Case Types, there has been a strategic response by claimants that dates back to the Supreme Court's 1990 decision in *Employment Division v. Smith*.[214] In *Smith*, the Court appeared to erase the Free Exercise Clause as a stand-alone basis for challenging the impact of general laws on religious practices. Religious liberty claimants filing suit after *Smith* would have been strategically wise to reframe claims to assert a violation of freedom of speech.

Indeed, we found evidence of this strategic adaptation in our study of religious liberty decisions from that period. For the period just before *Smith*, free speech claims were raised in only 12.9% of the lower federal court religious liberty cases that we studied.[215] The proportion of such cases adding expressive rights claims grew to 28.7% immediately after *Smith*.[216]

Times have changed, but the more powerful persuasive effect of invoking freedom of speech remains even as Free Exercise and related claims have revived. Congress responded to *Smith* three years later by enacting the Religious Freedom Restoration Act,[217] which remains in effect against the federal government. Moreover, as discussed earlier,[218] notwithstanding *Smith*, the balancing of pros and cons under the Free

213. Within the 95% confidence interval, the success rate for claimants in Religious Expression cases could be between 45.8% and 67.0%, while the rate for claimants in other Case Types could be between 33.8% and 39.1%.

214. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990).

215. Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 17, at 570.

216. *Id.*

217. 42 U.S.C. §§ 2000bb–2000bb-4.

218. *See supra* Part III.C.

Exercise Clause has not faded away. Indeed, James Brent found in his empirical study of that period surrounding *Smith* that, while the federal courts of appeals "became significantly less receptive to free exercise claims following the *Smith* decision,"[219] after the passage of RFRA, "the winning percentage of free exercise claimants rose again" to the same level as before *Smith*.[220]

For 2006–2015, religious liberty claims that invoked freedom of speech had fallen back to 21.7% of cases, while free exercise claims were presented in the substantial majority of such cases at 60.2%, with RFRA and related statutory claims accounting for 44.8% of the cases. Moreover, while freedom of speech claims maintained a higher rate of success at 36.2%, free exercise claims still reached a success rate of 29.8% and statutory religious claims achieved success at a rate of 37.8%.

But, as shown immediately above, when an expressive right is at the core of the case, as when religious believers seek a right to meet on public property or engage in religious speech in a public setting, the prospect of success for claimants climbs ever higher. Here too, the explicitly expressive context of the Case Type appears to be driving the outcome in religious liberty decisions.

4. Criminal

Further confirming the context-contingent nature of free exercise claim success for 2006–2015 is the significant variable for Criminal cases. As with the significance of this same variable in the earlier 1986–1995 period,[221] the variable continues to point in the expected negative direction. Thus, Case-Type variables tell the story, not only of enhanced success rates in several contexts but also when the context depresses the likelihood of success.

As shown in Figure 15, for 2006–2015, holding all other independent variables constant at their means, the predicted probability that a claimant would succeed in presenting a Free Exercise/Accommodation claim as part of the defense in a Criminal case was 20.1%, while claimants in other Case Types succeeded at a rate of 38.2%.[222]

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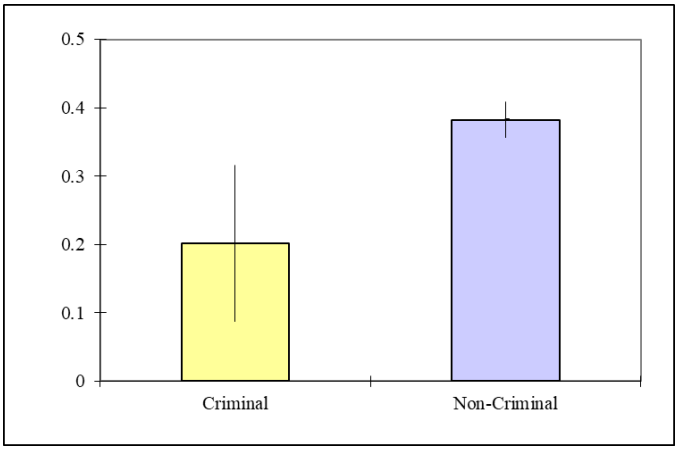
219. James C. Brent, *An Agent and Two Principals: U.S. Court of Appeals Responses to* Employment Division, Department of Human Resources v. Smith *and the Religious Freedom Restoration Act*, 27 AM. POL.Q. 236, 254 (1999).

220. *Id.* at 250.

221. Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 17, at 555.

222. Within the 95% confidence interval, the success rate for claimants in Criminal cases could be between 8.7% and 31.6%, while the rate for claimants in other Case Types could be between 35.6% and 41.8%.

Figure 15. 2006–2015: Predicted Probability that a Claimant in a Criminal Case Will Succeed on a Religious Free Exercise/Accommodation Claim



That claims for exemption from general criminal prohibitions on behavior are negatively associated with the dependent variable, that is, less likely to succeed, is unsurprising. In the criminal context, especially when a violent crime is involved (as was often true in the cases in our dataset), the government's interests are exceptionally likely to be perceived as compelling. Cases coded as Criminal included matters such as use of a criminal defendant's religious writings or prayer journals as evidence of criminal conspiracy, religious motivation behind a conspiracy to commit a terrorist attack, and even claimed religious justification for violent attacks on those who departed from religious expectations.

IV. JUDGE BACKGROUND VARIABLES: PARTY AND SENIORITY

Among the numerous judicial background variables we explored in our study of Free Exercise cases for 2006–2015, only one—Seniority—emerged as statistically significant.[223] One other nonsignificant variable—Party of Appointing President—deserves attention and is discussed first,[224] because of the public attention drawn to the partisan divide in the courts and other recent scholarly work that suggests the partisan infection has invaded the Free Exercise realm.

Notably, other background variables that were not significant influences for this 2006–2015 period include judge religion, sex, race, American Bar Association rating, attending an elite law school, and prior employment (in the military or government and as a state or local judge or law professor).

A. Party of Appointing President

In our empirical examination of three successive decades of religious liberty decisions, the party of the president that appointed the federal judge has never

223. *See infra* Part IV.B.
224. *See infra* Part IV.A.

emerged as significantly associated with the outcome in free exercise cases. In sharp contrast, in our study of Establishment Clause decisions, Party of Appointing President has been a powerful influence on outcomes.[225] Indeed, ideological influences on Establishment Clause decisions have persisted into the latest period of our study, 2006–2015, although the partisan disparity appears to be systematically decreasing.[226] But never have we found any evidence of a partisan influence in those judicial rulings on the Free Exercise Clause or related statutory protections of religious practice.

In sum, in our extended empirical investigation of 30 years of religious liberty decisions, party has been a significant and substantial factor in understanding judicial resolution of Church-versus-State disputes about interaction between government and religion. But party has played no role in appreciating judicial review of claims by religious believers and organizations for accommodation of religious exercise.

Nor has that pattern been broken by this study of the 2006–2015 period. For free exercise observations for the period discussed in this Article, the Party-of-Appointing-President variable remains far away from statistical significance or even marginal significance. Likewise, Sepehr Shahshahani and Lawrence Liu in their study of 30 years of religious liberty decisions up to 2015 found that Party of Appointing President was significant for judge voting in Establishment Clause cases[227] but not in free exercise cases.[228]

And even if we were to set aside the question of confidence by statistical significance, no partisan divide on Free Exercise/Accommodation outcomes is implied in our data.

As an illustration, even though the variable does not achieve formal statistical significance, we generated a probability prediction for Party of Appointing President for free exercise cases for 2006–2015, holding all other independent variables constant at their means. The predicted probability that a claimant would succeed in presenting a Free Exercise/Accommodation claim before a judge appointed by a Republican president was 38.3%, while claimants succeeded before a judge appointed by a Democratic president at a rate of 37.2%.[229]

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225. 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, 1216 (2012).

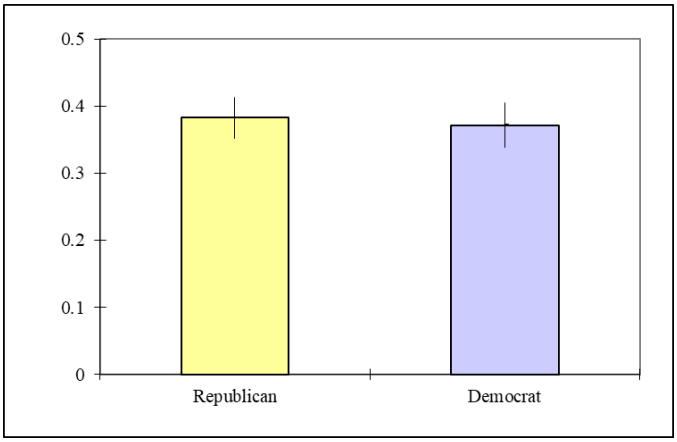
226. *See* Gregory C. Sisk & Michael Heise, *Cracks in the Wall: The Persistent Influence of Ideology in Establishment Clause Decisions*, 54 ARIZ. ST. L.J. 625, 629 (2022).

227. Shahshahani & Liu, *supra* note 175, at 731.

228. *Id.* at 734.

229. Within the 95% confidence interval, the success rate for claimants before judges appointed by a Republican president could be between 35.2% and 41.4%, while the rate for claimants before a judge appointed by a Democratic president could be between 33.8% and 40.5%.

Figure 16. 2006–2015: Predicted Probability that a Claimant Will Succeed on a Religious Free Exercise/Accommodation Claim by Judge's Party of Appointing President



In sum, even at the raw frequency level, the partisan difference in free exercise cases for 2006–2015 is a negligible 1%.

Nonetheless, a recently published article reported that an enormous partisan gap of a nearly 50-percentage-point margin has opened in free exercise cases before the federal appellate courts.[230] Zalman Rothschild reviewed free exercise decisions from 2016 to 2020, focusing on a single independent variable in comparing outcomes in these cases between Republican- and Democratic-appointed judges.[231] He found that Democratic-appointed judges accepted free exercise accommodation claims at only a 7% rate, compared to a 56% rate for Republican-appointed judges.[232]

Two explanations suggest themselves for the apparent inconsistency between our empirical finding of no significant partisan divide for 1986–2015 and Rothschild's report on a highly partisan influence for rulings in Free Exercise cases for 2016–2020.

First, the Rothschild article looks only to raw frequencies, examining only Party of Appointing President for a judge and comparing that single variable to outcomes in free exercise cases. The study does not include a fully specified model for empirical analysis, such as a set of independent variables for case types, claimant religion, or judge background variables beyond party. Thus, we cannot know for certain whether the apparent partisan disparity masks the influence of confounding unmeasured variables. The absence of multivariate controls may distort Rothschild's results in other ways as well.

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230. Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. 1067, 1081–82 (2022).

231. *Id.*

232. *Id.*

Second, a substantial partisan divide may have opened quickly and quite recently, emerging only in free exercise decisions in the lower federal courts that were rendered after the period of our study. The size of the partisan disparity reported by Rothschild for post-2016 certainly demands further exploration and would seem unlikely to be explained solely by omitted variables in an unspecified model. Moreover, as Mark Movsesian observes, free exercise rights were in unusually dynamic evolution during that period which covers the beginning of the COVID-19 pandemic. As he explains, the pandemic law "story is not one of affinity but division."[233] He refers to the sharp disagreements on the Supreme Court in cases where claimants resisted COVID-19 restrictions on worship gatherings as "reflect[ing] a cultural and partisan divide respecting religion and religious freedom."[234] Indeed, Rothschild found the partisan polarization particularly striking in COVID-19 cases, where he reports that two-thirds of Republican-appointed federal judges ruled in favor of religious claimants while not a single Democratic-appointed federal judge did.[235]

And there is other evidence that recent developments may be exacerbating a partisan divide among federal judges that could infect free exercise cases as well. While finding that federal appellate judges do not frequently gather in partisan en banc cohorts, Neal Devin and Allison Larsen reported that the Trump era had produced a "very striking" "uptick" in partisan splits and reversals in en banc rulings.[236]

In the coming years, as the decade of 2016–2025 closes and we extend our research into a fourth decade, we plan to conduct a thorough empirical study of free exercise decisions in this still unfolding contemporary period.

Notably, however, even if a partisan divide is emerging on free exercise cases, it does not necessarily undermine the possibility that an equilibrium is within reach on comparative success among religious groups. To be sure, a substantial partisan influence on free exercise cases would be as troubling as that which we report and discuss on Establishment Clause cases. Nonetheless, progress may still be within reach if judges are treating all religious claimants with equivalence, even if the general openness to free exercise accommodations is the subject of ideological variation.

B. Seniority

The conventional hypothesis is that extended seniority on the bench "test[s] hardening not of the biological arteries [as would age] but rather of the bureaucratic judicial arteries."[237] Our prior findings about the influence of length of judicial tenure on religious liberty decisions have been mixed. For 1986–1995, we found some evidence that with more time on the bench, a judge was more likely to overturn the decisions of the

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233. Movsesian, *supra* note 193 (manuscript at 14).

234. *Id.*

235. Rothschild, *supra* note 230, at 1083.

236. Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1380 (2021).

237. Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 499 (1975) (finding, however, little relationship between judicial experience and judicial rulings).

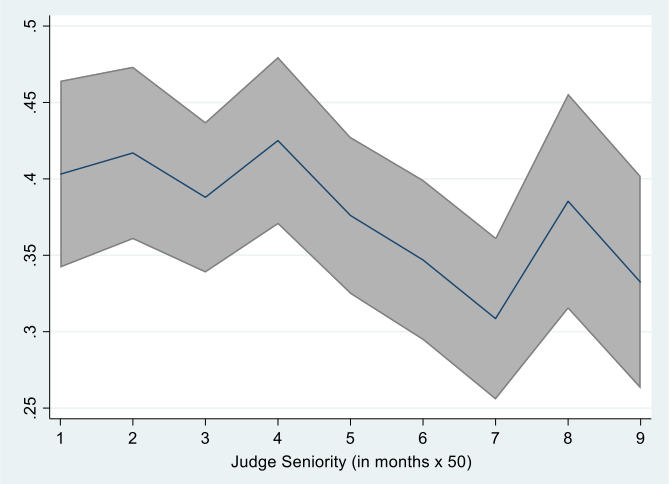
political branches of government, such as in challenges to governmental refusal to accommodate religious practices.[238] But for 1996–2005, judges with greater seniority were more likely to defer to the choices of government over a free exercise claimant in the particular context of school cases.[239] However, we were uncertain about that result, concerned that a control variable might have distorted the result.[240]

Now for 2006 to 2015 we again find that Seniority emerges as significant, and in the same direction as we found previously for free exercise cases involving education.

The factor of Seniority on the federal bench was measured for our study as the number of months from the date of appointment to the date of the judge's judicial participation, thus separately coded for each individual judge by each individual case. The Seniority variable ranged from a judge with more than 50 years' experience (619 months) to a judge in her first month of judicial decision-making. The mean period of Seniority for the judges in our free exercise observations was 209.5 months, or just under 17.5 years.

Seniority is statistically significant and negative, meaning that judges' rate of approval of free exercise claims declined as time on the federal bench increased. In Figure 17, for 2006 to 2015, holding all other independent variables constant at their means, we predict the probability of a positive vote by judges in a line reflecting this continuous variable.

Figure 17. 2006–2015: Predicted Probability of a Positive Vote by Judge on Free Exercise Clause Claim as a Function of Judge Seniority (in 50-month bins)



NOTES: The values on the x-axis (1–9) represent individual bins of judge months in groups of 50. That is, "1" includes judge months ranging from 1–49; "2" judge

238. Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 17, at 516.

239. Michael Heise & Gregory C. Sisk, *Religion, Schools, and Judicial Decision Making: An Empirical Perspective*, 79 U. CHI. L. REV. 185, 209 (2012).

240. *Id.* at 210.

months ranging from 50–99, and so forth. The final marker, "9," however, reflects judge months of 400 and greater.

As another illustration of this Seniority effect, we calculated (without multivariate controls) the rate of approval of free exercise claims for two cohorts, one with the lowest level of Seniority and one with the highest, which just coincidentally happened to each involve 335 judicial participations. Judges with five years or less time on the bench voted in favor of free exercise claims at a rate of 41.2%. Judges with 30 years or more experience voted for free exercise claims at a rate of 35.5%. This margin of more than five percentage points is not terribly large. Rather, as Figure 17 also shows, the slope of decline by Seniority is gradual.

CONCLUSION

Nearly 80 years ago, Justice Hugo Black, writing for a majority of the Supreme Court, proclaimed that the Free Exercise Clause of the First Amendment means that government "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."[241] This is what we mean by free exercise equilibrium, that the blessings of religious liberty would be experienced evenly by those from all walks of faith.

Our latest empirical study of religious liberty decisions in the federal courts, 2006–2015, offers some reason to hope that we are approaching equilibrium. During this period, the substantial majority of those seeking accommodation for religious beliefs, from a wide variety of religions including Catholics, Muslims, Reform Jews, Seventh-day Adventists, and a number of minority religions did not experience a significant advantage or disadvantage in the federal courts. Supreme Court decisions strengthening free exercise doctrine and focusing the judicial inquiry on individual attributes rather than stereotypes may be bringing greater equality into the process. And the powerful significance of Case-Type variables suggests that case categories are properly driving outcomes.

Although the promised land may be in sight, we are not yet there. Significant advantages (for Native Americans and Buddhists) and disadvantages (for Orthodox Jews and Rastafarians) for a small number of claimants demonstrate that work remains to be done. And the troubling indication that judges may look more favorably on claims by coreligionists belies any pretense that impartial adjudication has been fully achieved.

Still, there is concrete evidence that change is not only coming but may already be unfolding. As we've written previously, "[s]ubordination of religious conscience to the dictates of the state, the preferences of the mainstream culture, or the stereotypes fostered by fear, in the name of some policy goal, societal convenience, or comfort to the fearful is the antithesis of religious liberty."[242]

Andrew Koppelman optimistically pronounces religious liberty in America as a "spectacular achievement," in which "a growing proliferation of remarkably

241. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).
242. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 19, at 291.

different religious factions live together in peace and even some harmony."[243] Through the rise of cultural tolerance, a deepening understanding of the sincere beliefs of others, and conscientious judicial attention to religious claims and countering implicit bias, the courts may be moving us closer to that ideal of robust and widely enjoyed religious liberty.

243. KOPPELMAN, *supra* note 59, at 166.