

1-1-2008

# Can the states increase religious freedom if they try? : judicial and legislative effects on religious actor success in the state courts.

David, Claborn

*University of Massachusetts Amherst*

Follow this and additional works at: [http://scholarworks.umass.edu/dissertations\\_1](http://scholarworks.umass.edu/dissertations_1)

## Recommended Citation

Claborn, David,, "Can the states increase religious freedom if they try? : judicial and legislative effects on religious actor success in the state courts." (2008). *Doctoral Dissertations 1896 - February 2014*. 2425.

[http://scholarworks.umass.edu/dissertations\\_1/2425](http://scholarworks.umass.edu/dissertations_1/2425)

This Open Access Dissertation is brought to you for free and open access by the Dissertations and Theses at ScholarWorks@UMass Amherst. It has been accepted for inclusion in Doctoral Dissertations 1896 - February 2014 by an authorized administrator of ScholarWorks@UMass Amherst. For more information, please contact [scholarworks@library.umass.edu](mailto:scholarworks@library.umass.edu).

\*

UMASS/AMHERST

\*



312066 0336 5621 3



University of  
Massachusetts  
Amherst

L I B R A R Y





Digitized by the Internet Archive  
in 2015

<https://archive.org/details/canstatesincreas00clab>







This is an authorized facsimile, made from the microfilm master copy of the original dissertation or master thesis published by UMI.

The bibliographic information for this thesis is contained in UMI's Dissertation Abstracts database, the only central source for accessing almost every doctoral dissertation accepted in North America since 1861.

**UMI**<sup>™</sup> Dissertation  
Services

From:ProQuest  
...MPANY

300 North Zeeb Road  
P O. Box 1346  
Ann Arbor, Michigan 48106-1346 USA

800 521 0600      734.761 4700  
web [www.il.proquest.com](http://www.il.proquest.com)





CAN THE STATES INCREASE RELIGIOUS FREEDOM IF THEY TRY?  
JUDICIAL AND LEGISLATIVE EFFECTS  
ON RELIGIOUS ACTOR SUCCESS  
IN THE STATE COURTS

A Dissertation Presented

by

DAVID CLABORN

Submitted to the Graduate School of the  
University of Massachusetts Amherst in partial fulfillment  
of the requirements for the degree of

DOCTOR OF PHILOSOPHY

February 2008

Department of Political Science

UMI Number: 3315477

### INFORMATION TO USERS

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleed-through, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.



---

UMI Microform 3315477  
Copyright 2008 by ProQuest LLC  
All rights reserved. This microform edition is protected against  
unauthorized copying under Title 17, United States Code.

---

ProQuest LLC  
789 East Eisenhower Parkway  
P.O. Box 1346  
Ann Arbor, MI 48106-1346

©Copyright by David Claborn 2008

All Rights Reserved

CAN THE STATES INCREASE RELIGIOUS FREEDOM IF THEY TRY?  
JUDICIAL AND LEGISLATIVE EFFECTS  
ON RELIGIOUS ACTOR SUCCESS IN THE STATE COURTS

A Dissertation Presented

by

DAVID CLABORN

Approved as to style and content by:

---

Sheldon Goldman, Chair

---

Vincent Moscardelli, Member

---

N.J. Demerath, III, Member

---

John A. Hird, Department Head  
Department of Political Science

CAN THE STATES INCREASE RELIGIOUS FREEDOM IF THEY TRY?  
JUDICIAL AND LEGISLATIVE EFFECTS  
ON RELIGIOUS ACTOR SUCCESS IN THE STATE COURTS

A Dissertation Presented

by

DAVID CLABORN

Approved as to style and content by:



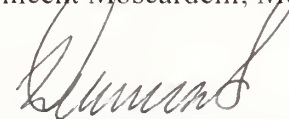
---

Sheldon Goldman, Chair



---

Vincent Moscardelli, Member



---

N.J. Demerath, III, Member



---

John A. Hird, Department Head  
Department of Political Science



## ACKNOWLEDGMENTS

I want to thank my advisor Sheldon Goldman for all the time and advice he provided throughout the dissertation. His guidance helped me avoid an immature project early on, and helped the mature project out the door. Yet his gentle and graceful style kept it from feeling burdensome. The harsh words on the dense prose that I so deserve, I never received, because he compassionately separated the constructive from the simple criticism. For all the hard work and support: Thank you, Shelly!

Vincent Moscardelli provided guidance on the methodology of the research, but more than that, was throughout graduate school a wonderfully honest and accessible advisor. Vin courageously and constructively tells it as he sees it instead of avoiding those tougher comments, which are too often taken personally, at the cost of maturing. He saw the dynamics and research design of the project more clearly than even I did, it seemed, and showed me how to keep it simple and less cluttered than it would have been. Thank you, Vin!

N.J. Demerath III was more supportive, provided more counsel, and generally gave more of himself than an out-of-department committee member should be able to do. His good humor and nature, and his comments made our talks fun and the dissertation certainly better. Thank you, Jay!

There are not many graduate students who can gush about their committees, but I am one of those lucky few. Thank you, gentlemen.

At my new home in Olivet Nazarene University, Fran Reed took time out of her busy schedule and life to offer guidance as well as the proverbial thumb-screws. The helpful pressure of knowing that she was coming over at certain times to see some



progress produced many words and adaptations that otherwise would not have been written. Thanks so much, Fran!

And appropriately last in this list is the person who gave the most, by far. She never uttered a discouraging word in the years of graduate school. She never entertained the discouragement that came with the troughs, yet always whole-heartedly celebrated the peaks. She patiently and supportively gave of herself so I could finish this degree. I do not know how I can provide the same model of love for her over the next several decades, but so look forward to trying. To my wife Heather: thank you so very much.

CAN THE STATES INCREASE RELIGIOUS FREEDOM IF THEY TRY?  
JUDICIAL AND LEGISLATIVE EFFECTS ON RELIGIOUS ACTOR SUCCESS  
IN THE STATE COURTS

FEBRUARY 2008

DAVID CLABORN, B.A., UNIVERSITY OF NORTH TEXAS

Ph.D., UNIVERSITY OF MASSACHUSETTS AMHERST

Directed by: Professor Sheldon Goldman

In the shadow of a 15 year federal battle between the Courts and Congress over how much protection is afforded religious behavior, more than half of the states have declared the highest level of protection either through a Religious Freedom Restoration Act (RFRA), or through a court decision. This study finds the results of the states' attempts by calculating how often actors seeking protection for a religious act win the judge's vote. The study's date range is the eight years following the last volley in the federal battle *City of Boerne v. Flores*: 1998-2005. The unit of analysis is each judge vote, 3,254 in all. And the research question is if and under what conditions are these institutional attempts actually helping religious actors win more judge votes?

To make sure the effects of the institutional attempts are independent of other factors, as well as to conduct exploratory research on how other factors affect religious freedom, several controls will be used. Those controls are specifically: characteristics about the judge and county, characteristics about the religious claimant and case, and characteristics about the legal opinion. The results of the study show: 1) States appear to protect religious actors more than federal courts with a 44% favorable vote-rate in the state courts. But 2) neither legislative nor judicial attempts affect religious success, most evidence shows. Judicial attempts can find some significantly positive results in specific models. 3) The most explanatory predictor is the way constitutional language is used in the opinion.

# CONTENTS

	Page
ACKNOWLEDGMENTS .....	iv
ABSTRACT.....	vi
LIST OF TABLES .....	xi
LIST OF FIGURES .....	xiii
CHAPTER	
1. INTRODUCTION .....	1
Literature Review.....	5
Research Questions.....	8
Control Variables .....	12
Judge & Community Variables.....	12
Claimant Characteristic Variables .....	17
Legal Reasoning Variables .....	20
Data Sources .....	22
Case Selection.....	23
Derived Cases .....	26
Chapter Outline.....	30
2. THE DEPENDENT VARIABLE: RELIGIOUS FREEDOM AS RELIGIOUS ACTOR SUCCESS IN STATE COURTS.....	31
Definition .....	31
Characteristics of the Dependent Variable .....	31
History .....	32
Summary of the Empirical Analysis.....	34
Success Rates .....	34
Time and Religious Freedom.....	36
Number of Religious Claimants and Religious Freedom .....	36
3. INSTITUTIONAL ATTEMPTS TO INCREASE RELIGIOUS FREEDOM .....	39

Introduction .....	39
Set One: The Basic Dummy Variable.....	40
Judicial .....	40
Legislative .....	43
Set Two: The Scalar Variables .....	43
Judicial .....	43
Legislative.....	48
Standardizing the Two Scaled Versions .....	54
Adding an Executive Branch Indicator.....	55
Set Three: Time-Series Variables .....	58
Results of These Variables.....	59
Discussion of the “Unclear” Category.....	62
4. THE CONTROL VARIABLES: JUDGE AND COMMUNITY, CLAIMANT, AND LEGAL VARIABLES .....	67
A Note on Multicollinearity.....	68
Judge and Community Variables .....	70
County Party Vote for 2000, 2004.....	70
Judge Politics .....	74
Collecting the Judge’s Political Party.....	75
Deriving an Ideological Tendency from State Judicial Selection Methods.....	76
Gubernatorial and Legislative Appointing Systems .....	81
Merit Selection System .....	87
Nonpartisan Elections .....	89
Partisan Selection System.....	92
Missing Information.....	93
Analysis.....	94
Metro-Area Religious Adherence Rates .....	98
Metro-Area Religious Homogeneity Index .....	103
Conclusions for the Judge and Community Variables.....	107
Claimant Variables.....	107

Popularity of the Religion Seeking Protection.....	107
Deviant Behavior .....	117
Prisoner Cases.....	123
Economic Order Cases.....	125
Conclusions Drawn from Analyzing the Claimant Variables.....	129
Legal Reasoning Variables .....	130
Free Exercise Clause.....	132
Establishment Clause.....	138
Free Speech Clause .....	143
Conclusion of the Legal Reasoning Variables.....	145
Collected Variables Not Included in the Model .....	147
Judge Gender .....	147
Judge Religious Tradition .....	149
Claimant Gender .....	151
Claimant Size.....	151
Judicial Selection System .....	153
States .....	155
Region .....	157
Levels of Courts.....	160
Education, Public and Private .....	162
Government Employee .....	163
Conclusions on the Control Variables .....	164
5. MODEL ANALYSIS.....	166
Collinearity Diagnostics.....	166
The Results.....	167
The Loglinear Logit Model.....	167
The Partial Correlation.....	170
The Logistic Regression .....	177
Conclusion .....	182
6. CONCLUSION.....	183
Inter- and Intra-Branch Power Sharing.....	184
Left-Right or Center-Periphery Variance .....	184
Applying Directly to the Literature.....	185
Implications of the Research.....	189

APPENDICES

A. LIST OF HYPOTHESES ..... 190  
B. COMPLETE LIST OF DENOMINATIONS IN RELIGIOUS TRADITION ..... 191  
BIBLIOGRAPHY ..... 195

## LIST OF TABLES

Page

Table

1. Comparison of Federal and State Religious Freedom Voting Success Rates.....	35
2. Scaled Judicial Variable.....	47
3. Scaled Judicial Variable Category Successful Vote-Rates.....	47
4. Comparison Of Features Within The State-RFRAs.....	52
5. State RFRA Coding .....	53
6. Scaled Legislative Variable Vote-Rates .....	54
7. Integrated, Scaled Protectiveness Variable.....	56
8. Crosstabulation of Voting and Scaled Protectiveness .....	61
9. Category -2 States and Their Pro-Religious Vote-Rates .....	63
10. Institutional Attempt States, Scaled by Degree of Attempt.....	65
11. Search for Multicollinearity between Increased Scrutiny.....	68
12. County Voting and Religious Freedom .....	72
13. State Judicial Selection Systems and Coding Judge Party Identification .....	79
14. Analysis of Missing & Available Judge Party ID Data for Possible Bias.....	94
15. Judge PAJID Score Characteristics .....	97
16. Metro Adherent-Rate Characteristics, from Lowest to Highest .....	101
17. Metro-Area Religious Adherent Rate by Geography .....	102
18. Religious Homogeneous to Heterogeneous Areas.....	104
19. Religious Homogeneity and Increased Scrutiny Voting Results.....	105
20. Metro-Area Homogeneity Index by Geography .....	106
21. Characteristics of the Religious Tradition of Claimant .....	110

22. Claimant-Area Religious Agreement Success Rates, in Ten Equally Sized Groups.....	114
23. Claimant-Area Religious Agreement.....	116
24. Free Exercise of Religion Reference, Selected Characteristics .....	135
25. Comparison and Relationship of Favorable Vote Rates in Opinions Mentioning the Establishment and Free Exercise of Religion.....	140
26. Establishment Issue Raised Votes, Selected Characteristics .....	142
27. Characteristics of Female Judges.....	148
28. Judge Religious Tradition Characteristics .....	150
29. Judicial Selection System, Select Correlations.....	155
30. Characteristics of Geography.....	160
31. Collinearity Diagnostics for Judge & Community Variables.....	167
32. Loglinear Logit Model Results .....	168
33. Partial Correlation Version of Model .....	171
34. Partial Correlation Version of the Model.....	172
35. Correlations for Only the Cases Considered In the Model.....	173
36. Correlation Scores for Cases Excluded from the Final Model .....	173
37. Comparison of Means for Selected Variables .....	174
38. Partial Correlation of Time-Series Institutional Variables .....	177
39. Logistic Regression of Model, Stepwise Method .....	179
40. Predicted and Observed Cases, Logistic Regression .....	179



## LIST OF FIGURES

	Page
Figure	
1. List of Variables and Predicted Directions .....	9
2. All Variables in the Dataset .....	67
3. Largest Denominations Within Each Religious Tradition, 2000.....	109
4. Comparison of Increased Religious Freedom and Actual Protective Voting.....	175

## CHAPTER 1

### INTRODUCTION

In 1990, the U.S. Supreme Court accepted the case of two former drug treatment employees who were dismissed from their privately run drug treatment center for using a hallucinatory drug during a Native American religious ritual. Alfred Smith and Galen Black then sought unemployment benefits from Oregon, but Oregon denied the benefits claiming the loss of their jobs was for a legitimate reason. Smith and Black claimed that their drug use was protected under the Free Exercise of Religion Clause of the U.S. Constitution. The issue in the case was whether Oregon's policy could infringe on religious behavior because the state had a compelling government interest, and therefore the plaintiffs were not entitled to unemployment compensation. Oregon would have to prove that it had such a compelling interest and that the policy was the least intrusive way of administering that policy. This test that Oregon would have to satisfy is referred to as "strict scrutiny", and it is the most stringent standard of review a state must satisfy when defending a law that allegedly infringes on one's rights.<sup>1</sup>

Early in *Employment Division v. Smith*, The Supreme Court granted defendants Smith and Black their wish and recognized the controlling law as the first words in the U.S. Bill of Rights: "Congress shall pass no law respecting an establishment of religion nor the free exercise thereof...". But whether Oregon persuaded the Court that it had a compelling interest will never be known, because the Supreme Court apparently understood decades of precedent on religious liberty in a new way: "The only decisions

---

<sup>1</sup> Despite the severe language, religious litigants succeeded in Free Exercise claims around one-third of the time or less. Adamczyk, Wybraniec, and Finke (2004, 248) and Arnold (1997, 151-52) show this. An even more surprising estimate of a 12% Free Exercise success-rate comes from Forren (2001, 139 ff.) The disparity between the two is discussed in the chapter on the dependent variable religious freedom.

in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other Constitutional protections....” Just how persuasive governments had to be when infringing the rights of the religious was lowered by Justice Scalia’s opinion for the 5-4 majority. The standard of review, in simple terms, was lowered. And Justice Scalia did this without expressly overturning the stronger understanding of religious freedom that emerged from several decisions over more than fifty years, that came fully to fruition in *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972). In *Smith*, as quoted above, the Court made clear that if the religious act in question was not accompanied by another civil right (free speech or parental rights, for example), then the government needed to show simply that the legislature had a rational interest in passing the law (referred to as the rational basis test, the lowest of the three standards of review), rather than a compelling interest and with a tailored alternative. Scalia’s opinion summarizes key previous religious liberty cases before *Smith*, pointing out that in each, more than simply one religious behavior was at issue. He calls this presence of more than one civil right a “hybrid” claim. That, he writes, is when states will have to satisfy a compelling interest test.

An outcry from the right, left, and middle energized Congress to pass the Religious Freedom Restoration Act (RFRA) three years later.<sup>2</sup> The law was passed unanimously in the House and 97-0 in the Senate, and with language that left the clear impression that

---

<sup>2</sup> The introduction to Crane (1998, 236) cites fourteen articles criticizing the decision “textually, historically, legally, morally, socially, and politically” all before the 1993 Congressional response.

Congress was letting the Supreme Court know it had made a mistake.<sup>3</sup> But the Supreme Court struck down RFRA as an unconstitutional encroachment on the power of the Supreme Court to apply the standard of review it deems appropriate in constitutional cases. This case, *City of Boerne v. Flores* was handed down four years after the federal RFRA, and had the effect of leaving the lower standard of review in place for the fifty states in terms of federal constitutional law.<sup>4</sup>

The conventional understanding of First Amendment Free Exercise jurisprudence in the U.S. thus means only having to show that a law which burdens a religious actor is reasonable, and does not discriminate against the religious. And unless there is a hybrid, or an accompanying constitutional claim, the federal court can adjudicate from that point forward.<sup>5</sup> But this federal decrease in the standard of review does not necessarily mean a decrease in religious liberty, as 99.7% of all court cases are not federal cases.<sup>6</sup> They are state cases concerning state constitutional and statutory law. And researchers have not yet studied the state cases to determine if state and local governments are accepting the U.S. Supreme Court's policy that burdens religious actors more than in the past.

---

<sup>3</sup> The very title of the act implies the U.S. Supreme Court had taken away something that needed to be "restored." And if the implication was not enough, the law stated "in *Employment Division v. Smith*, 494 US 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 USCS § 2000bb (a)(4)

<sup>4</sup> Although to be clear, *City of Boerne v. Flores*, 521 US 507 (1997) has no effect on federal territories as recent case law has shown RFRA to be a valid statutory increase in religious liberty. See *Christians v. Crystal Evangelical Free Church*, 141 F.3d 854 (1998), and the U.S. Supreme Court allowing the ruling to stand at 525 US 811 (1998).

The most recent case upholding RFRA is *Gonzales v. O Centro Espirita* 546 US 418 (2006), decided February 21, 2006.

<sup>5</sup> Before 2004's *Locke v. Davey*, the disclaimer would have read, "unless there is a hybrid claim or the law is discriminatory on its face." But because of this ruling in Washington, where a religious actor challenged a law that forbids a public benefit offered to everyone except those seeking a religious degree, the disclaimer arguably grows smaller.

<sup>6</sup> Stumpf and Culver (1992, 2), and Carp and Stidham (1996, 133).

Surprisingly, more than half of the states seem to be rejecting a rational basis test, and are voluntarily returning to the older standard that allows them less latitude.

Specifically, thirteen state legislatures have passed their own state-RFRA which restores the strict scrutiny standard of review.<sup>7</sup> Another thirteen state supreme courts have issued rulings clarifying that their state will judge religious infractions under their state constitutions using strict scrutiny.<sup>8</sup> Three more states effectively have a strict standard by ignoring that *Smith* ever happened.<sup>9</sup> And state courts in California and Maine are allowing pre-*Smith* standards to continue, but explicitly reserve the ability to change that standard until the issue seems more “settled”.<sup>10</sup> But even with these institutional efforts, the question of whether these policies are effective is unanswered. Do these pro-religious freedom court precedents really result in more religious actor success? The results of this model show that they do. Do state RFRA result in higher success rates for plaintiffs in free exercise cases?<sup>11</sup> The results will show that they do not. By looking into the state-level religious freedom cases, this study will be able to describe the facets of what may be the new arena for religious freedom decisions in the nation.

Before this study, the results of the new religious freedom policies for the nation simply assume what is occurring in the thirty or so states that have a strict or heightened

---

<sup>7</sup> State legislatures have passed RFRA in AZ, CT, FL, ID, IL, MO, NM, OK, PA, RI, SC, TX. AL passed an amendment to its state constitution.

<sup>8</sup> Judicial rulings make clear that these states will use strict scrutiny: AK, IN, MA, MI, MN, OH, WI, VT. It is very likely that the following states will use strict scrutiny, although the legal language leaves some uncertainty: KY, MS, NY, and WA.

<sup>9</sup> NC, MT, and KS cited *Smith* and yet applied the stronger pre-*Smith* standard of review in their interpretation of their state constitutions.

<sup>10</sup> Taken from *Catholic Charities, Inc. v. Super. Ct.*, 85 P.3d 67, 90-91 (Cal. 2004) (finding state law unsettled and reserving resolution of the issue).

<sup>11</sup> Note: the words “Free Exercise” are capitalized when referring to the U.S. Constitutional civil right, whereas state level “free exercise” clauses are not capitalized.

scrutiny test, and which twenty (by default) have a rational-basis test.<sup>12</sup> This study seeks to systematically test that assumption. It will do so by showing that religious litigants are not winning a larger percentage of their cases in most increased scrutiny contexts.

### Literature Review

Previous research in this area supports two broad findings: empirical studies have shown that *Smith* matters, although some scholars conclude that *Smith* hurt religious actors and others conclude that religious actors do not succeed enough for a decrease in success rates to be of consequence. Secondly, state cases are where the variation in free exercise jurisprudence will (or should) occur more and more. This review of literature will detail these findings further.

The first of the two broadly supported areas is that the *Smith* line of cases altered how much protection is afforded someone exercising his or her religion. Both the rate of cases brought and won by religious actors has decreased in federal courts.

The most conclusive evidence that *Smith* results in less protection for religious actors is the drop-off in the rate of cases brought and cases won by those religious actors. The literature is clear on this at the federal level.

James Brent found in 1999 that rulings in favor of religious actors, and the number of those cases brought were depressed after *Smith*, and increased after RFRA. He revisited

---

<sup>12</sup> The numbers here are unclear because the legal reasoning in some of these landmark cases is unclear. See Laycock (2004) for a full discussion of the ambiguity. Thirty is a generous estimate, with a more conservative estimate of perhaps twenty-five. Brief coverage of the method of classifying states for the model is covered in the methodology section of this chapter.

the analysis in 2003 to find if the increase held in the shadow of the U.S. Supreme Court overruling RFRA in *City of Boerne v. Flores* (1997), and as he predicted, it did not.<sup>13</sup>

Adamczyk, Wybraniec & Finke (2004) found essentially the same thing, adding that their “analysis reveals that the consequences of the *Smith* decision were swift and immediate. The percentage of favorable decisions for federal Free Exercise cases dropped from over 39% to less than 29% following *Smith*” but then “returned to over 45% after RFRA was passed.”<sup>14</sup>

In his 2001 dissertation, John Forren made perhaps the strongest empirical claim that *Smith* mattered when he found that federal and state courts using *Smith* as the controlling case ruled in favor of the religious claimant only one time out of seventy.<sup>15</sup>

Robert Drinan speculates on the effect of this in that once governments do not have to satisfy the compelling interest test, religious actors are less likely to even bring suit. And the drop-off rate will be unknowable because “at some local level, zoning commissions will quietly deny access to Jewish temples, controversial denominations or Catholic schools. Appeals will not be taken nor will there be any public outcry.”<sup>16</sup>

More support for this point comes from the fact that religious legal interest groups are abandoning the Free Exercise clause altogether and instead opting for the established strict scrutiny in the Free Speech clause. Stephen Brown’s *Trumping Religion* details the movement of Christian legal groups that have been defending their actions against Establishment of Religion claims, and moving toward the more successful strategy of claiming a minority status. More specifically, this Christian legal strategy finds an

---

<sup>13</sup> Brent, 1999, 2003.

<sup>14</sup> Adamczyk, Wybraniec, Finke, 2004, 248.

<sup>15</sup> Forren, 2001, 238.

<sup>16</sup> Drinan, 1999.

opportunity for legal wins when local and state governments exclude religious groups from benefits to avoid an Establishment problem. They argue this exclusion is viewpoint discrimination –a free speech violation. Brown shows that the successful Christian legal strategy was to virtually abandon the religious clauses (both the defense of an Establishment claim as well as asserting a Free Exercise claim) and call religious acts, like worship and funding for evangelical newsletters, a Free Speech public forum issue. “In terms of substantive victories, the free speech strategy of New Christian Right lawyers has been far more successful than previous arguments that focused on the religion clauses alone.” (Brown, 144)

The second broad area of agreement in the literature supports the assertion that state Courts are now where religious actors can, should, and will seek the court’s protection of their religious freedom.

Although the federal religious freedom cases will continue (and will continue to grab more attention) scholars see that the nation’s religious freedom policy can and is shaped in the state courts, barring a federal *Smith* overruling.

Dan Crane’s *Beyond RFRA: Free Exercise of Religion Comes of Age In The State Courts* showed only one year after *City of Boerne* that the state legislatures and courts were taking their role in constructing religious freedom policy seriously. Six state supreme courts had ruled that religious freedom will be kept at the highest scrutiny by 1998, and Rhode Island actually had a RFRA on the books in 1993, making the father of American religious liberty Roger Williams’ home state the first to enact such legislation.

John Forren’s (2001) study showed 343 state religious freedom cases relied on state precedent and law rather than on *Smith*. It should be noted that Forren ends up claiming



that *Smith's* ambiguities allow federal courts to still hold governments to a strict scrutiny as often as they had before. This view is somewhat contrary to the presupposition of this study, but not contradictory. To Forren, states have become *an* important venue for religious freedom, if not *the most* important venue.

Gary Gildin argues in multiple articles (2004, 2000) for a renewed push for religious liberty in the states, although he does lament the loss of a centralized arena that the federal courts played. Richard Schragger also agrees that the local and state governments are now logical arenas for Free Exercise cases to be decided, but unlike Gildin finds this to be the proper arena.<sup>17</sup>

### Research Questions

This study hopes to find out how state attempts to affect religious freedom in the state courts have fared in terms of judicial voting behavior. To answer that larger research question with much precision means controlling for other factors that could interfere with the relationships between judge votes and state judicial and legislative attempts to increase religious freedom.

The control variables considered are: county-level Presidential vote, state judge ideology, metro-area religious adherence rates, metro-area religious homogeneity, popularity of the religion seeking protection, deviant drug or sexual behavior seeking protection, prisoner asking for protection, economic impact of the case, free exercise of religion language used in the opinion, establishment of religion clause language used in

---

<sup>17</sup> RFRA's, whether national or statewide, are less-than optimal "centralized blanket" "religion-protecting legislative accommodations" which staunch the diversity of the nation's religions. This in turn gets in the way of the competitive pitting of faction against faction, perhaps allowing religion a greater influence than the system can handle. Schragger, 2004, 1819.

the opinion, and free speech clause language used in the opinion. The relationships of these control variables to religious freedom are predicted and explored at length in the study.

Put another way, the model this study constructs is:

**Figure 1 List of Variables and Predicted Directions**

Dependent Variable: Judge Votes for Religious Actors	Predicted Direction Of Relationship with Religious Freedom
<b>Independent Variables</b>	
1) State legislative attempts to better protect religious liberty	+
2) State judicial precedents to better protect religious liberty	+
<b>Independent Control Variables</b>	
3) County-level Republican presidential vote	-
4) State judge liberalness	+
5) Metro-area religious adherence rate	+
6) Metro-area religious homogeneity	-
7) Popularity of religion seeking protection	-
8) Deviant drug or sexual behavior seeking protection	-
9) Prisoner asking for protection	-
10) Economic impact cases	-
11) Free Exercise of Religion used in legal reasoning	+
12) Establishment Clause used in legal reasoning	-
13) Free Speech used in legal reasoning	+

The *dependent variable* is the judge’s vote protecting or not protecting the claim of the religious litigant(s), and is referred to broadly as religious freedom. This probability of a religious actor winning the vote can tell us if the states are protecting religious freedom more or less than the federal courts. The probability of Free Exercise wins on the federal level has been widely studied and established, as covered in the literature review, and to be discussed further in the next chapter. But a simple comparison of the two is a fundamental reason this study is interesting as no study has yet compiled a state level empirical analysis.

The dependent variable, a vote for the religious freedom claim, in the end will be the product of a logit model. This model is an appropriate way to look for multivariate

relationships in a dataset when the dependent variable is binary, such as it is here. A logit model presents a dependent variable as the probability of success overall, and each independent variable coefficient can be transformed and interpreted as the probability of observing a success on the dependent variable. Each variable's beta, and resulting Wald statistic, shows the direction and strength of the relationship to religious freedom. If a linear regression were used on such a pool of data, serious inference problems would result.<sup>18</sup>

The study began conceptually with two main independent variables: the political and legal efforts to increase religious freedom. If the state legislature has tightened the standard of review to a variant of strict scrutiny via a RFRA (Religious Freedom Restoration Act), it was coded with a 1 in the legislative variable, and if the state court system signaled a return to strict scrutiny, it was coded with a 1 in the judicial variable. If not these variables were coded 0. But because these simple variables proved generally insignificant, variables capturing more complexity of the institutional attempt, both legislatively and judicially, were constructed. Closer readings of the legal language in the judicial attempt states, and tallies of the qualifications in the RFRA states allowed a scaled variable to be created. That variable is explained further in the third chapter.

To find out the independent effect of both RFRA's and judicial decisions, other variables are used as controls. Does religious freedom instead coincide with a more religious area, a more conservative county, or the political leaning of the judge, for example? Or are religious freedom cases better explained by the claimant being a

---

<sup>18</sup> Guidance with logit modeling comes primarily from Aldrich (1984), Boorah (2002). Nixon, David C. "Appendix B: Probit and Logit" in Contemplating Courts. Ed. Lee Epstein, CQ Press: Washington D.C., 1995, were good introductions. Allison, Paul David. 1999. "Logistic Regression Using the SAS System: Theory and Application." SAS Publishing. pp. 1-2

prisoner, or from a minor religion, or asking for their land or taxes back, or protection of something “deviant”? Does the mention of the state or federal free speech, free exercise of religion or establishment clause correlate with certain results?

*Hypothesis 1:* States with RFRA result in more judicial votes favoring religious freedom than states without RFRA.

The first independent variable, tests the hypothesis that states with RFRA will result in more judicial votes for religious freedom than those states without RFRA. Twelve states have passed RFRA: Arizona, Idaho, New Mexico, Missouri, Texas, Oklahoma, Illinois, Alabama (constitutional amendment), South Carolina, Florida, Connecticut, and Rhode Island. There is a tendency for the RFRA passed later to have certain exceptions as to what will receive strict scrutiny. For example, the Missouri RFRA, passed in 2004, says that infringements on religious acts cannot be “unduly restrictive considering the relevant circumstances” rather than the *Sherbert* wording, “least intrusive alternative.”<sup>19</sup> Missouri also lays out several acts that cannot be the subject of a free exercise claim, such as causing physical injury to another person, possessing an otherwise illegal firearm, failing to provide child-support and the like. The interpretation of this variable will also allow us to see if the RFRA passed later that are generally less protective show lower religious freedom success rates. The predicted direction of the RFRA variable is positive, meaning that I hypothesize that states with RFRA protect religious litigants more. However, Drinan (1999) hints at a complication with that prediction. If people seeking protection for their religious act reside in a lower scrutiny state, there may be a sharp decrease in the number of cases brought, which could mean an even higher success

---

<sup>19</sup> *Sherbert v. Verner*, 374 US 398 (1963).

rate in these states. This incentive structure may keep the weaker cases from being factored into the success rate in lower scrutiny states. This will be considered when the results of this study are analyzed and discussed.

*Hypothesis 2:* State court precedent providing for the use of strict scrutiny or the equivalent protecting religious freedom result in more judicial votes favoring religious freedom than states without such precedent.

The second independent variable tests the hypothesis that states with strict scrutiny or the equivalent affect judicial behavior. Eighteen states have a form of judicial strict scrutiny: Arkansas, California, Indiana, Kansas, Kentucky, Massachusetts, Maine, Michigan, Minnesota, Montana, Nebraska, New York, North Carolina, Ohio, Vermont, Washington, Wisconsin and Tennessee. But as with the RFRA variable, a simple binary variable may not capture enough of the variance. Five states simply ignore previous precedent or are explicitly waiting for a better time to address the issue of scrutiny in a religious freedom decision.<sup>20</sup> This study will therefore attempt a scaled variable which incorporates the difference from the strong to weak strict scrutiny states.

## Control Variables

### Judge & Community Variables

*Hypothesis 3:* County-level Republican presidential voting is associated with less favorable religious freedom votes for religious actors than County-level Democratic Presidential voting.

Beginning with the control variables, the third independent variable is each county's Republican vote, standardized. More specifically, it is how much more or less than the

---

<sup>20</sup> The complexity of this list is covered more in Laycock (2004, 211-212.)

national average an area voted for the winner of the Presidential elections of 2000 and 2004. Those two values are then averaged.

This variable will capture the partisan tilt or political context of the geographical area in which the judge's court is located. Predicting the direction of this variable's relationship to religious freedom was not immediately clear because of the bipartisan nature of the law passed. Support for RFRA in Congress was vastly bipartisan, with a 97-0 vote in the Senate, and a unanimous vote in the House of Representatives. Liberal constituencies work towards the protection of minorities, including all religious minorities, while conservative constituencies hear the pleas of religious conservatives, yet, at bottom, religious liberty is a civil liberty and liberal Democratic constituencies are more sympathetic to civil liberties than are Republican conservative constituencies.<sup>21</sup> The variance of the issue was originally proposed as a minority versus majority difference where a status-quo upheld the sovereignty of laws over the claims of minorities on the left and right tails.<sup>22</sup> But as the evidence mounted, this majoritarian theory captured less of the variance than did the simple partisan construction.

The coding for this variable is as follows: The value of "county Presidential vote" is the county Republican vote minus the national average Presidential vote in 2000 and 2004, in percentage points, to the thousandth of a point. The predicted direction of the relationship with religious freedom is negative, as Democratic voting is hypothesized as being correlated with protectiveness more than Republican voting.

---

<sup>21</sup> Sociologist of religion Christian Smith (1998) has done work on a theory of religious tension with the status quo in this work with his "Subcultural Identity Theory."

<sup>22</sup> Marci Hamilton is an example of one voicing this perspective. Most recently in her 2005 book *God v. the Gavel*, she asserts that Congress abdicates its responsibility by passing RFRA, in part because Congress is institutionally better situated to investigate when exemptions to laws should be offered, rather than courts.

*Hypothesis 4:* More liberal judges will vote more in support of religious freedom than more conservative judges.

The fourth independent variable is a measure of each state judge's ideology. Religious freedom is a civil liberty, and judicial behavior research has shown Democratic judges to be more sympathetic to civil liberties than Republican judges, but because the vote on the bill was unanimous, a prediction for Democrats to be more protective is not likely to capture ideology's effect. A better measure than party identification is used. This measure seeks to capture the effect of a judge's ideology on her religious freedom vote. The description of the variable in chapter four will elaborate. The hypothesis, then, is that ideologically liberal judges will be more protective of religious freedom than ideologically conservative judges.

*Hypothesis 5:* Judges whose courts are in high religious adherence areas will support religious freedom claims more than judges from lower religious adherence areas.

The fifth independent variable is the religious adherence rate for the standard metropolitan statistical area (SMSA). This variable will capture any effect an area's churchgoing-ness might have on religious freedom. It is likely that the trial judges and the appellate judges of the state either came from, or live in the area the court is in. But apart from the likelihood of a strong correlation between judge and county religious activity, I believe there is a case to be made regarding a context's influence on those within it. In a recent federal judge voting pattern study the authors observed:

“...to our knowledge this [contextual/community] dimension has not previously been explored in research on judicial decision-making. One of the reasons for that neglect may be that, while correlating the judge's own religious affiliation to his or her decisions may seem intuitive,

suggesting a connection between aggregate data about a community collectively and individual-level judicial decisions naturally raises questions.[ ] However, given that the religiosity of and religious demographics in an area may exert a structural effect on a community and everyone living and working therein, because ‘social context influences human behavior,’[ ] an investigation of the possible association indeed is sensible. Because judges as human actors and social beings live and work in a particular social milieu, the religious context or atmosphere of that community may influence a judge’s perception of legal claims that implicate religion or that involve appeals to religious adherence.”<sup>23</sup>

I predict the relationship between adherent rate and vote for the religious freedom claim is positive. It might be argued that religious minorities seek protection from governmental policies, but the adherence rate largely reflects the religious majority who put those policies into place, and therefore there should be a negative relationship. But that intuitive answer inflates the difference between the average religious claimant and the churchgoer, as well as proximity between the churchgoer and policy-maker. It has been shown at the federal level that the adherence rate is positively associated with religious freedom protective rulings.<sup>24</sup> This is apparently because more churchgoers identify and sympathize with religious claimants, including minority religious claimants, rather than with the secular authorities. I will note here that the predicted performance of the variable is less important than the fact that the variable is controlling for an adherence-rate effect in the model testing for significance of legislative and judicial increases in religious freedom.

---

<sup>23</sup> Sisk, Heisse, and Morriss, 2004, 585. The empty brackets denote footnotes taken out of this cite. Both cites were to Jeffrey W. Dwyer, Leslie L. Clarke & Michael K. Miller. 1990. “The Effects of Religious Concentration and Affiliation on County Cancer Mortality Rates.” *Journal of Health & Social Behavior*. (31) 185, 197.

<sup>24</sup> Sisk, Heisse, and Morriss, 2004, 589-90.



The rate of adherents for each county is drawn from the data collected by the Glenmary Research Center.<sup>25</sup> The data are basically church membership and attendance for each religious body, in each county, each decade, since 1980.<sup>26</sup> The religion of the adherent is not taken into account in this variable.

*Hypothesis 6:* The more religiously diverse the area in which the judge sits, the greater the likelihood the judge will support the religious freedom claim.

The sixth independent variable is a religious density index for the SMSA. This variable will capture any effect a religiously homogeneous or heterogeneous area might have on religious freedom. Like the adherent rate, the effect will come through the correlation between judges and the area that produced them, as well as the affect a community has on the outcome of a case.

The prediction of the variable, like the above, posits that heterogeneous areas are more likely to tolerate and protect religious freedom than religiously homogeneous areas. Research on the subject shows that in the homogenous areas judges were more likely to rule against religious symbols in public spaces.<sup>27</sup>

---

<sup>25</sup> Glenmary, 2002

<sup>26</sup> Adherent is paraphrased here from Glenmary (2002): All members, including full members, their children and the estimated number of other participants who are not considered members. If unavailable, I will estimate the number of adherents from the known number of members. (The Glenmary estimation procedure computes what percentage of the county's population a group's membership comprises. This percentage is applied to the counties population for those under age 14. The membership total and percentage of children under 14 are added together for the estimated adherent table. This procedure was done for 67 groups.)

Further defining: The Catholic Church and some other denominations define an adherent as one that has been baptized. Other denominations define adherents as all members; including full members, their children, and the estimated number of other participants who are not considered members but are baptized but not confirmed or eligible for communion but regularly attend services and other functions sponsored by the church.

<sup>27</sup> Sisk, Heisse, and Morriss, 2004, 591.

The measure of religious density used is called a Herfindahl index, and it tells the odds that any two random people selected will come from the same religious tradition. Originally constructed as a way of measuring business firm density, Innaccone (1991), and Ellison, Burr and McCall (1997) use the index with the Glenmary data to measure the density of religious affiliations. The Herfindahl index formula is:  $H_j = \sum S_{ij}^2$  where H is the odds of two random people from the same religious tradition meeting, S is an individual religious denomination divided by the total number of churchgoers within the area of analysis, “j”, and “i” is the index of summation.

The Herfindahl index ranges from 100 –perfect homogeneity to 0 –perfect heterogeneity. The predicted direction then is negative. This posits that the lack of diversity in an area will result in a lower tolerance for minority faiths. And the more judges and their communities come into contact with other faiths, the more likely it is that those faiths will find protection from infringing laws.

### Claimant Characteristic Variables

*Hypothesis 7:* Religious freedom claimants from minority religions will meet with less success than those from majority religions.

The seventh independent variable is whether the religious actor seeking protection is from a minority religion or majority religion. This variable will control for effects associated with discrimination against minority religions. The predicted pattern is that the farther from the mainstream the religion is, the less likely it is to win its case,<sup>28</sup> but

---

<sup>28</sup> Minority religious litigants (defined in the study as Protestant sects and cults but without further clarification) make-up 18% of church goers yet account for 62% of Free Exercise cases, and significantly, had a winning percentage of roughly half of Mainline Protestants. Adamczyk, Wybraniec, and Finke 2004, 245-246.

the opposite does have some support in the most recent study as minority religions at the lower federal level won at a higher rate than both Baptists or Catholics.<sup>29</sup> The value of this variable will be the metro-area level popularity of the religious tradition to which the claimant belongs. Notice that religious tradition is not a simple denominational coding. It is instead a categorization of denominations into families, to be explained further in chapter four. The eight religious traditions are: Mainline Protestants, Evangelical Protestants, Black Protestants, Catholics, Jewish, Liberal Non-traditional (i.e. Unitarian, United Church of Christ), Conservative Non-traditional (i.e. Jehovah's Witnesses, Church of Latter Day Saints), and Other (i.e. Muslims, Buddhists).

*Hypothesis 8:* Religious freedom claims based on sexual or illicit drug usage will be less likely to be supported than those that are not.

The eighth independent variable is deviancy. This variable tries to capture what happens to those who seek protection for an act that is outside of society's mores. The predicted direction is negative. Deviance here will be limited to sexual or illicit drug issues, and the discussion in the fourth chapter will further define the variable. The variable is a dummy variable, coded 1 if it is a deviant case, and 0 if not.

*Hypothesis 9:* Religious freedom claims of prisoners are less likely to be supported than claims from non-prisoners.

The ninth independent variable is whether the claimant is a prisoner or not. This variable will capture the difference in success rate between free citizens and prisoners. Studies have shown that in the past that prisoners lose more religious freedom cases than

---

<sup>29</sup> Sisk, 2005.

average.<sup>30</sup> One might question the inclusion of prisoners in the model to begin with because of its bias –it is certain to bring the success-rate down because prisoners have fewer freedoms than non-prisoners. But the flaw in this is equating what prisoners want and what non-prisoners want. Prisoners ask for name-changes, prayer meetings and the ability to grow a beard –things readily available to the public. So there is no conceptual reason for prisoners to have a lower success rate. That they do, even after the lowered expectations, is understudied.

Those seeking religious freedoms who are incarcerated are coded 1, all others are coded 0.

*Hypothesis 10:* Religious freedom claims that do not require public resources (tax money or land usage) are more likely to be supported than those that do.

The tenth independent variable is whether the religious claimant is seeking the government's tax monies or land. The argument here is that if offering protection to a religious act does not cost the political entity any of its tax base or finite land, protection is more likely to be offered.<sup>31</sup> Claiming that tax and land use cases comprise the costly cases to a government and all others are only symbolic is reductionistic, and clearly is no way to think through legal issues in this area. But in a study which uses a statistical model, tax and land use cases do represent a different category of case than what can be uttered on the podium at a high school graduation or whether religious rhetoric biased a jury. This variable will capture the difference between rulings on infinite resources

---

<sup>30</sup> Lupu, 1998.

<sup>31</sup> Eric Mazur (1999) makes this argument more thoroughly than others, but the more well-known is Mark Tushnet's 1988 *Red, White and Blue: A Critical Analysis of Constitutional Law*. Harvard Univ. Press.

versus those on finite resources by coding cases which are based on taxes or land usage 1, and the others 0.

### Legal Reasoning Variables

*Hypothesis 11:* When the religious freedom claim is recognized by the judge to concern free exercise of religion, it is more likely to be supported than if it is not.

*Hypothesis 12:* When the religious freedom claim is recognized by the judge to concern the separation of church and state (an establishment clause), that claim is less likely to be supported by the judge than if the separation of church and state is not involved.

The eleventh, twelfth and thirteenth variables capture constitutional legal reasoning in the case, and predict that it is used in patterned ways. If the judge mentions the state or federal right to free exercise of religion, I predict the religious actor is more likely to receive the protection than if the right was not brought up. This is because the judge has already granted the religious actor something desired –the standard by which the question will be answered. Once a question is understood as an issue of a civil liberty, it is more likely the judge will grant that protection than if a civil liberties issue is not recognized.

Likewise, if the Justice reasons that a case is a separation of church and state question, I predict that protection for the act is less likely to occur. This is because disestablishment clauses often prevent governments from granting religious actor requests because they may appear to be preferential in comparison to other religions, or they may appear to advance the religion in question, or they may entangle the state in an area deemed off-limits by the state or U.S. Constitution.

The argument behind both of those predictions is not unlike a common reading of the two religion clauses themselves. That reading understands the two clauses to be in tension. Establishment clauses forbid governmental policies which benefit religion, but free exercise clauses protect religious action, which itself benefits religion. Judges then

get to make the decision of who gets the benefit claimants seek: the religious claimants or their opponents. These variables posit a correlation between the legal basis for the ruling and who won.

*Hypothesis 13:* When the religious freedom claim is coupled with a free speech claim it is more likely to be supported than if it is not.

The third legal reasoning variable and thirteenth variable overall is a dummy variable for whether the claimant is making a free speech claim along with a claim for the protection for the religious act. This strategy of coupling (or solely using) the Free Speech Clause is a phenomenon largely caused by the decrease in the protective power of the Free Exercise Clause after *Smith*, and introduction of hybrid cases. If the act in question can be understood as a symbolic free speech claim (a civil right that is protected with a higher standard of review) then it makes sense that the claimant would try to get his or her case deemed a free speech case. Stephen Brown's *Trumping Religion* details this legal strategy among the religious.<sup>32</sup> His work shows persuasively that if a case is considered a Free Speech issue, the probability of a win increases sharply. Examples of such U.S. Supreme Court cases are *Agostini v. Felton*, *Lanib's Chapel v. Center Moriches*, and *Rosenberger v. U. Va.*<sup>33</sup> where excluding the religious from public forum benefits is deemed unconstitutional viewpoint discrimination.

Free speech cases are coded 1, free exercise cases are coded 1, and establishment cases are coded 1, with all others 0, predicting a positive relationship in the first two, and a negative in the last.

---

<sup>32</sup> Brown 2002. See also Brownstein (1999).

<sup>33</sup> 521 US 203 (1997), 508 US 384 (1993), and 515 US 819 (1995), respectively.

## Data Sources

Assembling the dataset of hundreds of religious actor cases was facilitated by the use of the Religion Case Reporter (RCR), a digest which daily combs through local, state and national religion cases via both Westlaw and Lexis-Nexis.<sup>34</sup> Religious case digests go back to 1963, and this current digest is the sole digest after Campbell University's *Religious Freedom Reporter* ceased printing the same year (1998) Martin Fisch began his *Religion Case Reporter*.<sup>35</sup> The search string he uses each day to continue work on the digest is proprietary, but with more than 1,600 topics of cases, it is likely that the search errs on the side of breadth. Supplemental LEXIS searches and following the cited line of cases within RCR cited cases resulted in very few additions to the dataset.

The cases are selected from the eight years during 1998 through 2005, beginning in the first full year after *Boerne v. Flores*. States which went to strict scrutiny during that time can be analyzed for an effect before and after that change. The model will account for that change and include cases from pre-RFRA or judicial increase states in the appropriate manner. For the twenty or so states which are either under a rational basis test or the prevailing test is not clear, the whole of their free exercise cases will be reviewed going back to 1998.

A further word on the predictions is necessary. The study is asking whether a state legislature restoring strong religious freedom will matter, or whether a state supreme court restoring a high bar to clear for infringing on religious freedom will matter. Some

---

<sup>34</sup> Other researchers using the Religion Case Reporter include Rebecca French (2003)

<sup>35</sup> Found at [www.paradigmpub.com](http://www.paradigmpub.com)

studies essentially gamble on higher significance scores, and soothe the sometime loss of that gamble by stating that insignificance is still a finding. It strikes me that this study is interesting with either outcome. If state institutions trying to increase religious freedom are unsuccessful, then it begs the question of if not them, what could increase religious freedom? Is religious freedom simply a random occurrence in courts across the nation? If on the other hand, the state institutions are successful and religious freedom in those states is more protected, what are the contours of that success?

### Case Selection

The rules governing case selection are laid out here, and following that is the discussion of how the study determined that a religious freedom issue was involved.

This study analyzed 3,254 judge votes in 1,230 religious freedom cases.

The unit of analysis is each judge's vote in a dispute when someone asks the court for protection of a religious act. Regardless of the stated issue or controlling law, whether it is state or federal constitutional or state statutory, civil or criminal law, the case selection criterion is whether an actor asks the court for protection of a religious act.

This study includes more than explicitly free exercise decisions, and does so for three reasons. The first is because state opinions are, as reproduced in LEXIS-NEXIS, may employ loose usage of religious freedom language. Thus being too rigid, it may fail to capture the full scope of the data available for testing.

The second reason, related to the first, is that constitutional law and statutory laws are especially hard to untangle in this area, and this is compounded by a lack of standardization and clarity among state opinions.



The third and most important reason this study is not confined to formal free exercise of religion decisions is due to an incentive judges have to base decisions which deny religious actors protection on bases other than the constitutional right to free exercise of religion. For example, if a judge has reached the decision that a Catholic diocese must turn over documents for investigation into a criminal matter, the judicial opinion explaining that will be much easier to write if the primary bases are criminal rules of evidence rather than the right of religious organizations to be left alone.

A problem with gathering case data that explicitly deal with free exercise issues is that the judicial opinion is the only data source that is available at every court level of this study. For a federal study, litigant briefs and amicus curiae briefs would be useful in determining whether free exercise issues have been raised. But because party briefs are not, for the most part, available in state cases, and because interest groups understand that a state amicus brief has one-fiftieth of the jurisdictional range of a federal amicus brief, state-level amicus briefs are also largely absent.

To ensure that all relevant cases are included in the dataset, if a religious act is detected from the fact pattern in the opinion, I include that case and assume that the religious claimant asked for protection.

The cases selected for inclusion are thus those where a religious issue is explicit or implicit. Examples of implicit religious claims include:

- 1) Preemptory strikes are used on potential jurors because of their identified religious tradition.<sup>36</sup>

---

<sup>36</sup> *People v. Martin*, 64 Cal. App. 4th 378 (1998), Upheld.

- 2) There are 34 cases where either the judge, the prosecutor or the defense attorney use religious language on the public record and it is the subject of an appeal.<sup>37</sup> There are also three cases where a judge acts religiously outside of the court, writing editorials or letters to editors, and his or her neutrality was questioned.<sup>38</sup> If the appeals of these cases are construed as government officials seeking protection for their words in court, they are selected for coding here, even though the primary issue is better understood as an establishment one. Once we leave the realm of legal reasoning and allow fact patterns to decide which cases are to be studied, accepting all the cases drawn in by a widely cast net means keeping all cases where someone seeks protection for a religious act.<sup>39</sup> See numbers 4) and 5) below for further clarification of this rule.
- 3) Jurors stricken during voir dire because their religious belief or simply their denomination was cited as conflicting with their role as jurors are selected here, even though the specific juror-to-be is not the one bringing the case. In all fifty-eight of these votes, it is the defense or prosecution attempting to have a decision against their clients reversed. But nonetheless, it falls squarely under the case selection method of this study, “an actor seeking protection for a religious act.” Note that narrowing the selection to those who performed the act, or “seeking protection for *their* act” would complicate the selection system in all cases of religious groups. Or put another way,

---

<sup>37</sup> In three cases where it was brought up, defense counsel was upbraided for using religious language in the same manner as a judge or prosecutor.

<sup>38</sup> In these 37 cases, the religious act was protected 26 times, giving them a high win-rate of 70%.

<sup>39</sup> For example, Alabama Supreme Court Justice Roy Moore was sued for beginning court sessions with a prayer. Since he was the party rather than the court, for example, the case was coded. 711 So. 2d 952 (1998)

this study seeks to illuminate how often the courts protect religious behavior overall, rather than a specific person's religious behavior.

Examples of cases which were not included:

- 1) If the actor seeking protection is a state or local government rather than an individual.
- 2) If the actor seeking protection is an individual clearly representing a government. An Attorney General being named as the party in an establishment case is an example of this.
- 3) If both parties could seek protection for a religious act, the case was excluded. For example, when members of a church are suing each other for control of the congregation or building.
- 4) If the judge explicitly states no religious issue was raised, the assumption of a religious issue must be dropped, and so these cases were not coded.
- 5) Churches seeking property through adverse possession.<sup>40</sup>
- 6) If there are two religious acts to be protected, both equally important and distinct, and the court grants one but not the other, there is no easy way to code the outcome of that vote, so the case is not selected for coding.

### Derived Cases

As I coded cases I noticed that most of the data I was drawing from each case were also available for the decisions which led up to the appellate case I was reading. The

---

<sup>40</sup> *Fulkerson v. Van Buren*, 60 Ark. App. 257 (1998) is an example of a church claiming squatters' rights. But, the inverse is a case that is coded: *Walsh v. St. Mary's Church*, 248 A.D.2d 792 (1998) where a church cemetery may be taken by adverse possession, the church asked for the court to protect its free exercise insulation from the state and the state's rules governing real estate, to no avail.

outcomes, the judge, the decision date, the parties, the county –almost all of this information was given in the first few paragraphs of the opinion. I collected these data. The pertinent information for the cases that came before the one I was reading that were not available were the legal reasoning variables (whether the judge relied on free exercise, establishment or free speech clauses). Religious tradition of the claimant stayed the same, as did the essential facts of the case, and most importantly, whether the lower courts ruled for or against the religious actor.

A total of 538 cases were derived from the eventual appeal which was published in LEXIS.<sup>41</sup> So these derived cases a) add a generous portion to the dataset, and more importantly b) allow analysis of the lowest level of courts, which is effectively impossible without them.

When an opinion was from an administrative court, tax court or zoning board decision, no case was inferred. Only the three levels of state judicial courts were coded: Court of Last Resort (or Supreme Court), Intermediate Appellate, or Trial/District Court.

Cases were selected only from 1998 until 2005, but derived cases go back almost six years to February 1992. There are 258 judge votes that fall before 1998, and are used in the descriptive analysis. Only cases from 1998 until 2005 are used in the model, as they are the cases which fall after states were clearly allowed to afford less religious freedom.

I see two benefits, and two questionable effects from using the method just described to assemble the dataset.

---

<sup>41</sup> Those 538 cases make up 44% of all the cases. But since the 538 derived cases are generally lower courts with smaller judge panels (mainly one judge), only 696 judge votes are cast in these derived cases. Which makes the derived votes 21.4% of the overall judicial participations.

The first benefit is the obvious increase in information. Without the derived votes, the range of this study would be forced to change from state courts to “state appellate and courts of last resort”, thus leaving easily available information unanalyzed.

The second benefit is as a correction to the appellate bias that occurs when one has to rely on LEXIS-NEXIS and case digests. Furthermore, it is more accurate to note that the study is not of religious actor success in the state courts, but rather, religious actor success for cases published in LEXIS-NEXIS. By deriving cases, all three levels of state courts are represented and can be analyzed with much more confidence than if this study simply took what the online legal databases gave. I do note below how the shape of state cases are distorted by this method.

There are two issues connected to these inferred cases that may bias the data. The first is the possibility that deriving cases means oversampling from judges or states more likely to lay out the case history. But this is unlikely as appellate opinions in general typically detail the case history. Indeed, it is embedded in America’s legal culture, so this possible bias seems very unlikely. A look at the derived cases by state confirms this. I calculated each state’s percentage of the overall cases, and compared that to the state’s percentage of overall derived cases to find that no state varied by more than a couple of overall percentage points. New York has 7.3% of the overall cases, and is the most overrepresented of the derived cases with 9.6% of them, for a difference of 2.3% overall percentage points. Washington state is the most underrepresented as its 5.7% share of overall cases drops to 3.3% of inferred cases. 48 of the states did not vary by a full percentage point. So it appears that there is no state inflation or depression of derived cases and votes worthy of attention.

A second concern is that this method of data collection will introduce a bias toward cases more likely to be appealed. Three hypothetical examples of this type of bias are a) those funded by rich claimants with no financial incentive to stop appealing, b) cases which appear to be good political vehicles and are funded by interest groups, and c) cases seen by prosecutors as good policy vehicles. Although this issue is legitimate, it is hard to imagine any substantive bent this bias would cause regarding the goals of the study. Wealthy litigants are likely to tilt more conservative on economic issues, but that is not so clear for social issues, and since a simple partisan difference does not appear to explain much of the difference in perspectives on religious freedom anyway, this possible bias seems benign. Interest groups exist on both sides of the political spectrum, as well as representing majoritarian or minoritarian interests. And a concern with how state attorneys general bias the sample is mitigated by the fact that state attorneys general do not have the discretion to appeal cases that the U.S. Solicitor General does.<sup>42</sup> This is related to the fact that attorneys general “normally argue cases before the state supreme court only when a state agency is involved in the case.”<sup>43</sup> This means there are weaker norms in the states to pursue politically advantageous policies via their attorneys general.

The benefits of 1) increased data, and 2) greater representation of courts of general jurisdiction appear to outweigh the negative aspects of 3) possible demographic bias, or 4) bias toward the more “appealable” cases.

---

<sup>42</sup> Carp and Stidham, 1996, 109.

<sup>43</sup> Ibid

## Chapter Outline

Chapter Two undertakes the explanation of the dependent variable, the judge's vote for the religious freedom claim. A brief history of both constitutional and statutory religious freedom is followed by some descriptive statistics drawn from the cases. I will discuss the federal win rate and cumulative state win rate in this chapter.

The third chapter focuses on the legislative and judicial independent variables. In the legislative, I will mainly describe differences among the twelve state laws. A pattern to the RFRAs weakening religious freedom will be addressed here. That is, the earlier RFRAs in Rhode Island and Connecticut were without disclaimers, but more and more disclaimers showed up until the last two states that adopted the rule (Pennsylvania, then Missouri) qualified the increased scrutiny when religious freedom claims are made in more than a dozen ways. Whether other differences among the states play a role in those qualifications, and how this pattern will be dealt with in the model are also discussed.

In the judicial variable, I will discuss how most of these states are intentionally raising the religious freedom bar, but a couple are waiting for the issue to settle more, and still others have not clearly addressed the national Supreme Court's jurisprudence at all. Explaining the contours of the twenty states that have increased scrutiny on laws infringing religious acts, and then taking that explanation and operationalizing the variable will be goal of the chapter.

The fourth chapter details the three other sets of control variables: the judge and context variables, the claimant variables, and the legal reasoning variables. The fifth chapter runs and analyzes the model. The sixth chapter concludes the study.

## CHAPTER 2

### THE DEPENDENT VARIABLE: RELIGIOUS FREEDOM AS RELIGIOUS ACTOR SUCCESS IN STATE COURTS

#### Definition

The goal of this study is to shed light on how religious freedom is faring in the state courts, and a simple calculation of how often religious litigants get or do not get protection for their religious act is the backbone of the answer here.

But using the outcomes of only those cases deemed free exercise of religion cases has drawbacks. One being that a judge is the one who declares whether a case is a religious freedom case, not some objective criteria. Another is that state level free exercise of religion cases are specifically flagged as such.<sup>44</sup> Determining whether the subjective judge even meant for the case to be understood as a religious freedom case can take a deep reading, and even then disagreement on whether it is a religious freedom case or not is still going to occur.

Because of these reasons, religious freedom here is not limited by judges or any legal reasoning within the opinion. Instead, the fact pattern of cases will be used to find *actors seeking protection for what they claim are religious acts. Each vote in these cases is the unit of analysis for this study.* If the actor has enough patience, energy and money to make it into a courtroom in his or her quest for protection of a behavior they see as religious, this study is curious about the outcome.

#### Characteristics of the Dependent Variable

This definition has the benefit of 1) avoiding any judge bias that may exist in the recognition of what constitutes a religion and if the act is worthy of protection as

---

<sup>44</sup> Headnotes, offered in all federal decisions, are offered in only a very small minority of state cases.



religious. 2) Avoiding the very subjective work of deeming a case a religious freedom case. Some subjectivity still exists in asking if the facts of a case present an actor seeking protection for a claimed religious act, but that subjectivity is much less. And 3) standardizing effects of judge quality, level of court jurisdictional differences, and legal differences (statutory versus constitutional.)

Two costs of this approach are 1) accumulating the cases with a unique method. But as detailed in the previous chapter, the Religious Case Reporter has made this collection possible. And 2), which in hindsight has proven very expensive, is the lack of comparison to the existing literature. Conclusions drawn here will be on cases with religious actors, rather than on the standard actors in religious freedom decisions.

### History

A brief look at the legal and sociological definition of religion serves as support for not wading into the decision to determine one faith as being religious and not others.

In sociology, a definition of religion that is neutral and fairly settled states that it is any system of beliefs and practices concerned with ultimate meaning and that assumes the existence of the supernatural. This came after decades of definitions that were too narrow and without enough variance (religion as monotheistic, or religion as even exclusively Christian,) <sup>45</sup> or too broad (including Marxism, or “secular humanism”.) <sup>46</sup>

In case law, the first instance of trying to define religion, or better, to limit others from claiming it when the court disagreed, was in *Davis v. Beason* <sup>47</sup> (1890). It likewise began as a monotheistic, suspiciously Protestant-looking definition, and because of

---

<sup>45</sup> Wybraniec, 1998, 71.

<sup>46</sup> Stark and Bainbridge, 1985, 3-8.

<sup>47</sup> 133 U.S. 333

qualifications and what is likely prose born out of the difficulty Justice Field found after committing to defining religion, the clarification goes on for pages and cannot here be quoted.

Although the courts have clarified that the 1890 description is no longer controlling, they still leave us with only an impression of what religion means, and that ambiguity is explicit: “The Supreme Court has never established a comprehensive test for determining the ‘delicate question’ of what constitutes a religious belief for purposes of the First Amendment”.<sup>48</sup>

Increasing diversity in the U.S. in the 20<sup>th</sup> century meant the assumption of a personal, singular God laid out in *Davis* would give way in religious freedom issues brought by Hindus, Buddhists and others. That diversity would find its limit in 1968, in *U.S. v. Kuch*,<sup>49</sup> as the Neo-American Church, whose church key is a bottle opener and whose motto is “Victory Over Horseshit”, was denied the same tax immunities as other religious traditions.

*Kuch* came in between two Vietnam conscientious objector cases, the first of which held that “while the ‘truth’ of a belief is not open to question, there remains the significant question whether it is ‘truly held.’” The defendant in *U.S. v. Seeger*<sup>50</sup> (1965) was “without a belief in God, except in the remotest sense,” yet the Court granted his request for a religiously based statutory exemption from fighting due to the religious-like sincerity he felt for his ethical standards. *Seeger* was upheld five years later in *U.S. v.*

---

<sup>48</sup> *Smith v. Bd of Commissioners* 827 F.2d 684 (1987)

<sup>49</sup> 288 F. Supp 439 (D.C. 1968)

<sup>50</sup> 380 U.S. 163

*Welsh*<sup>51</sup> (1970), despite Welsh's complete removal of any doubt that he was an atheist, which *Seeger* left open. Outside of the conscientious objector statute, a New Jersey school district offering classes on the Science of Creative Intelligence/Transcendental Meditation (SCI/TM) was ruled an unconstitutional advancement of religion despite the denial of being religious.<sup>52</sup> The latest word on what religion means in courts may be in *Smith v. Board of Commissioners*<sup>53</sup> (1987) as the plaintiffs sought an establishment ruling against textbook companies which advanced "the religions of secularism, humanism, evolution, materialism, agnosticism, atheism, and others" to no avail.<sup>54</sup>

Political research on this topic has not come up with a unique understanding of religion and simply borrows from law and/or sociology.

This study's generous take-the-claimant-at-their-word method on the definition of religion appears to be unique in studies of this type.

### Summary of the Empirical Analysis

The unit of analysis used in the model is each judge's vote, and there were 3,254 of them. 1,458 votes were for the religious actor versus 1,796 against, making the chance of a religious freedom vote 44.8%.

### Success Rates

One of the most important conclusions the study can offer is the simple success rate of the 1,230 cases: 45%.<sup>55</sup> The success rate over the same period for specifically Free

---

<sup>51</sup> 398 U.S. 333

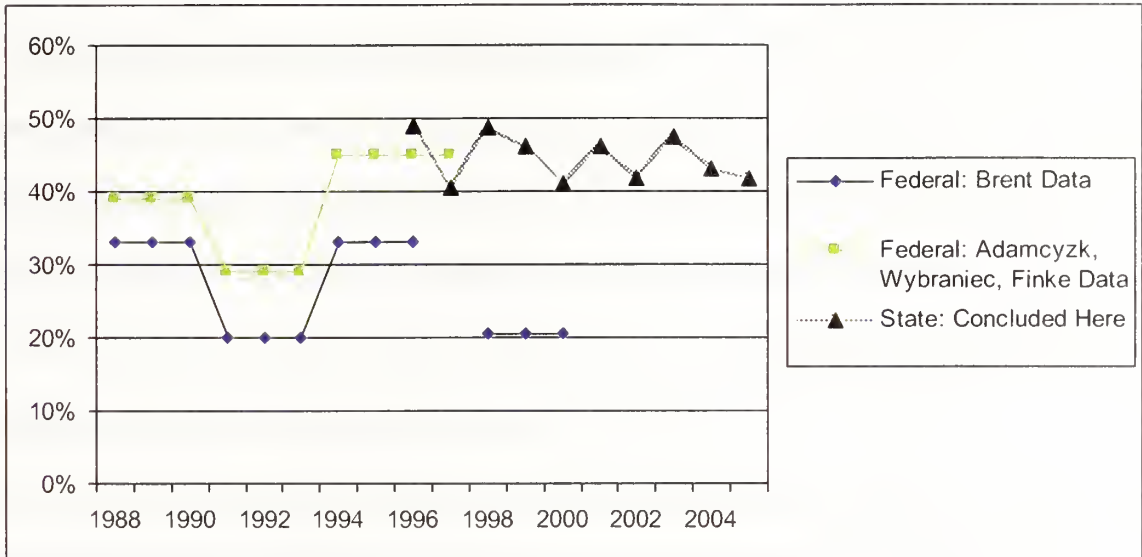
<sup>52</sup> *Malnak v. Yogi*, 592 F.2d 197 (3<sup>rd</sup> Cir. 1979)

<sup>53</sup> 827 F.2d 684 (11<sup>th</sup> Cir. 1987)

<sup>54</sup> In general, see McConnell, Garvey and Berg (2002).

Exercise of Religion federal cases is shown in the graph below. Note that the comparison is not exact since the state cases here are not limited to Free Exercise of Religion cases.

**Table 1 Comparison of Federal and State Religious Freedom Voting Success Rates**



Brent (2003, 558) specifically finds that the success rate prior to *Smith* was “approximately one third of all” Free Exercise claims, and that 1993-1997, the years between RFRA and *Boerne* saw a “return to pre-*Smith* rates.”

The difference between the Brent and Adamczyk, Wybraniec and Finke studies has to do with Brent only collecting U.S. Court of Appeals cases versus all federal cases for the other. But different search strings and coding play a role as well.

The successful vote rate of this study looks more like the Adamczyk, Wybraniec and Finke data, but if in these data we take a look at only the cases when the Free Exercise clause was mentioned as part of the reasoning, the success rate drops to 35% in 1,339 votes, which splits the difference between the two studies.

The counter-intuitive nature of the drop in success for religious actors when the judge uses Free Exercise language is discussed more in the model analysis.

<sup>55</sup> The remarkable similarity between the vote-rate and the successful case rate (44.8% and 45%) comes from the fact that very few judges dissent (only 3.5% of the overall case dataset) which is not a unique finding for religious issue cases, as consensus generally prevails on state courts.

## Time and Religious Freedom

There is no significant linear pattern to the overall date range and vote outcome.<sup>56</sup>

This outcome is somewhat surprising when one considers that over the time period several states enacted legislation and issued rulings attempting to enhance religious protection. It seems logical that a positive correlation would result. But perhaps the lack of significance and negative direction occur because the institutional attempt can also occur in the other direction (precedent accepting the rational basis standard or RFRA's voted down or vetoed.)

September 11, 2001 marks a possibly interesting moment for religious actors in court, and the moment does not disappoint. Pre-9/11, the success rate is 46% in 1,975 votes, and post-9/11, the rate drops to 42%, and the dip is significant at the .05 level. But the shallow perception of what causes this dip –Muslims losing cases –is not supported. In fact, Muslims and other minority religions in an Other Religion category see their success rate more than double. 15% favorable vote-rate in 248 votes prior to the terrorist attacks, and a 35% favorable vote-rate in 164 votes after the attacks, an increase that is significant at the .001 level. And the reduction in cases for the Other religious category is exactly the same rate as the overall data from pre- to post-9/11.

## Number of Religious Claimants and Religious Freedom

Women fared a full 25% better than men as religious claimants, and the increase is significant at the .05 level. It is speculation, but that difference could be due to societal perceptions of women as more vulnerable and hence, in need of more protection. But no

---

<sup>56</sup> The direction of the correlation score, though, is -.033, and approaches significance with a p value of .062.

support is found for this speculation as controlling for Republican voting does not alter those findings, nor does controlling for cases in the South.

When analyzing this variable, though, I noticed a pattern occurring with the missing claimant-gender data. That data had a success rate that was very significant and very much higher than the parties that were coded with a gender. The commonality among the missing data were that there were too many claimants to give it a male, female or “male & female” coding, which occurred with three or fewer claimants. In other words, the uncoded claimants were too large to code in that way. All of this is best understood as the size of the claimant(s) having an effect.

When the religious party was small enough to have a coded claimant gender, the chance of success was 33%. Claimants with no coded gender (because they were churches or organizations mainly, although in two cases the judge never referred to the sex of the claimant) won 59% of the votes cast. With around half of the votes in both categories, this sharp decline in protection is significant at the  $p < .001$  level.

The easiest explanation for that decline is the likelihood that financial resources and interest group assistance are more abundant when the size of the group or size of the issue are reflected in a larger pool of religious actors. Nonetheless, that a single litigant can leap into a category which wins 78% more by seeking out likeminded litigants is an important finding from the study.

The several insignificant variables included the level of court, whether there was a dissent in the case, whether the case was an appeal, unpublished, or a derived case, and how many judges heard the case.

The relationship of the model variables with the dependent variable religious freedom will be detailed as they are discussed.

## CHAPTER 3

### INSTITUTIONAL ATTEMPTS TO INCREASE RELIGIOUS FREEDOM

As mentioned in the introduction, there are two ways states are attempting to increase religious exercise rights: legislatively through a state- or mini-RFRA, and judicially via precedent. This chapter constructs three sets of variables. The first set is referred to as the *basic* variables, and are dummy variables for either increased scrutiny or not.

The second set captures how much the states actually wanted to increase religious freedom in a *scalar* variable. Delving into the elements of the state RFRA and decisions shows quite a bit of variance within them, which enables this more nuanced, complex version that does significantly capture more variance.

The third set of strict scrutiny variables focuses on the difference the increase made by coding pre- and post-institutional moves. It was necessary to have this *time-series* set because the previous two versions are not able to adequately focus on what happens in specific contexts before and after an increase. But it was necessary to have the previous two because this focused version has too much missing data for the models to run.

#### Introduction

It is interesting to those who do not follow the courts that the story does not end with *Boerne*. That the states can seemingly thwart the intentions of the U.S. Supreme Court is of particular interest. Part of this is because those non-court-followers forget that states can increase civil liberties when the federal government elects not to. And a second part of it is that the press has done a poor job of covering the story of half the nation's states attempting to increase religious freedom, probably due in part to the difficulty of telling



the story in the usual way.<sup>57</sup> This topic of judicial federalism and legal tests are not in great demand from readers, and it asks for prior knowledge that understandably scares away reporters and editors (because it scares away readers, that is).

The states did not subvert a national policy of decreasing religious freedom, per se. They instead chose not to accept a federal grant of power. That power being that the U.S. Supreme Court will not require states to justify injuries to religious actors with the strongest test (unless religious liberty is coupled with another civil liberty, creating a hybrid right). What the states are doing is now clearly seen as offering more civil liberties under their own statutes and constitutions than the U.S. Supreme Court mandates under federal constitutional law.

### Set One: The Basic Dummy Variables

#### Judicial

States which offer more protective civil liberties judicially do so by interpreting the state constitution as requiring the strict standard crafted in *Sherbert*. Like the state-RFRAs, these decisions have a conceptual starting point with *Smith*, because before then a strict scrutiny ruling would be redundant, although there were several states that expressly clarified that their constitution was in agreement with the federal standard on religious freedom. Unlike the state-RFRAs though, state court rulings can either choose to address the issue explicitly (Vermont clarified that their constitution “protects religious liberty to the same extent that the Religious Freedom Restoration Act restricts

---

<sup>57</sup> Even the best reporters and sources tend to gloss over the issue rather than inform. See 6/27/97 “Religious Freedom, Still at Risk” *New York Times*, editorial, Section A, p.28; Column 1. And Linda Greenhouse’s 7/15/97 “Laws Are Urged to Protect Religion” *New York Times*, Section A, p.15, Column 1; National Desk.

governmental interference with free exercise...”), or more likely, with some reservation. States can use the known language “compelling interest”, or they can alter it as Massachusetts did in using “sufficiently compelling to justify”<sup>58</sup> or as Alaska did in using “state interests of the highest order.”<sup>59</sup> And so where legislatures aim to mirror RFRA, the less deliberative and more insulated courts tend to take a more nuanced way to increasing religious freedom.

The basic judicial dummy variable is a collection of the states that researchers in this field list as those increasing scrutiny, although there is some disagreement. The preeminent scholar on this topic, Douglas Laycock sees 10 states’ courts as having increased the standard of review, along with 5 more states which likely have signaled an increase.<sup>60</sup> Three more scholars have done work in this area: Gary Gildin lists eleven states overall, James Hanson lists only six states.<sup>61</sup> The difference between the scholars is not explained by time, as all the researchers published in 2004, although one case decided in 2004 is missed on one of the three lists.<sup>62</sup>

The simple dummy variable is constituted by the following. The five states noted by all three scholars are MN, OH, WA, WI, and MA.<sup>63</sup> MI, AK, and NY were mentioned by

---

<sup>58</sup> *Massachusetts Attorney General v. Desilets*, 636 N.E.2d 233 (1994)

<sup>59</sup> *Larson v. Cooper*, 90 P.3d 125 (2004)

<sup>60</sup> See Laycock (2005), Hanson (2004), and Crane (1998)

<sup>61</sup> See Gildin (2004), Hanson (2004), and Crane (1998)

<sup>62</sup> Alaska’s *Larson v. Cooper*, 90 P.3d 125 (2004)

<sup>63</sup> *People v. DeJonge*, 501 N.W.2d 127 (Mich. 1993); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000); *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992) (en bane); *State v. Miller*, 549 N.W.2d 235 (Wis. 1996); *Attorney Gen. v. Disilets*, 636 N.E.2d 233 (Mass. 1994) for Laycock and Hanson, but *Society of Jesus of New England v. Boston Landmarks Comm’n*, 564 N.E. 2d 571 (Mass. 1990) listed for Gildin.

two of the scholars.<sup>64</sup> VT and IN were only mentioned by Laycock, yet the language from the cases is compelling.<sup>65</sup> Gildin cites MT, NC, and KS, as does Laycock with some reservations, but not enough to justify leaving them out of the basic variable.<sup>66</sup>

CA and ME have signaled that they used a strict standard in a single case at hand, but are reserving the final standard on the issue until the law is more settled nationally, and so they will not be considered as more protective in this simple variable. Nor will KY, MS, and TN, although each of them had their courts interpret their state laws as mandating a strict standard of review prior to *Smith*: 1979, 1985, and 1975, respectively. This is because KY and MS have not clarified the law in the decades since, and Tennessee has accepted the more lax standard offered by *Smith* without explicitly overturning the previous lower court language.<sup>67</sup>

Thirteen states, therefore, are in the simple increased scrutiny variable: AK, IN, KS, MA, MI, MN, MT, NC, NY, OH, VT, WA, and WI.

---

<sup>64</sup> *People v. DeJonge*, 501 N.W.2d 127 (Mich. 1993) listed by Hanson, *McCready v. Hoffins*, 586 N.W.2d 723, 729 (Mich. 1998) (compelling interest), by Laycock. *Swanner v. Anchorage Equal Rights Comm'n* 874 P. 2d 274 (Alaska 1994) listed by Gildin, and *Larson v. Cooper*, 90 P.3d 125, 131 & n.31 (Alaska 2004) listed by Laycock. *Rourke v. N.Y. State Dep't of Corr. Servs.*, 603 N.Y.S.2d 647, 649-50 (N.Y. Sup. Ct. 1993) ("least restrictive compelling-interest test"), aff'd, 615 N.Y.S.2d 470, 472-73 (N.Y. App. Div. 1994) ("legitimate state interest which outweighs the negative impact upon his religious freedom") listed by both Laycock (2004) and Gildin (2004).

<sup>65</sup> *Hunt v. Hunt*, 648 A.2d 843, 852-53 (Vt. 1994) ("The Vermont Constitution protects religious liberty to the same extent that the Religious Freedom Restoration Act restricts governmental interference with free exercise."); *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443, 445-51 (Ind. 2001) (specifically overturning the trial court's use of the rational basis test and protecting the religious actor, although not formulating the test that governs.)

<sup>66</sup> MT, NC, KS "follow[] more protective precedents and simply ignore[] *Smith*" (Laycock, 2004, 212). "See *State v. Evans*, 796 P.2d 178 (Kan. App. 1990); *St. John's Lutheran Church v. State Comp. Ins. Fund*, 830 P.2d 1271 (Mont. 1992); *In re Browning*, 476 N.E.2d 465 (N.C. App. 1996)"

<sup>67</sup> *Tennessee v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 762 (Tenn. App. 2001) (Tennessee's protection of religious exercise "is the same as that provided by the Free Exercise Clause of the First Amendment.")

## Legislative

States passing a RFRA are doing it in exactly the same way the Congress did it in 1993. They take the exact language from the protective Warren Court ruling in *Sherbert v. Verner* (“compelling state interest” and “least intrusive alternative”) and they statutorily create a standard which *Smith* said the U.S. Constitution did not require. Might the state supreme courts rule that these acts are unconstitutional breaches of the state’s separation of powers? Possibly, but it is not likely. It depends on each state’s constitutional provisions on legislative abilities to craft legal standards. But more than that, it would be a unique ruling: remember that *Smith* was not a separation of powers decision, it instead was an issue of the Congressional ability to require states to follow the strictest scrutiny. It was a fourteenth amendment question about federalism, not an issue of the constitution’s articles.

The initial information regarding which of the states had passed restoration acts and their construction, effective dates and operation was drawn from a few general sources.<sup>68</sup> States are all coded as 0 until they pass a RFRA, at which point they are coded 1.

### Set Two: The Scalar Variables

#### Judicial

The vagaries of these decisions make the attempt at ordinal level measurement worthy. This section will discuss the levels of protection offered by precedent, and then order the states accordingly.

---

<sup>68</sup> Porto (2005), Laycock (2005), Crane (1998), and NCSL (2000) LEXIS searches in state codes and laws were used to complete the information for this variable.

There are eight states that are *clearly* adjudicating religious freedom cases with strict scrutiny of the law: AK, IN, MA, MI, MN, OH, VT, and WI.<sup>69</sup> In all of these states, the court of last resort has explicitly addressed the federal decreased standards and explicitly indicated a return to the compelling interest standard with the least restrictive alternative.

There are four states that are likely holding themselves to a strict standard, but the legal precedent is *less clear* because it has not confronted *Smith* explicitly, or has lower court rulings which are contradictory and not yet clarified: KY, MS, NY, and WA.

Two states, CA, and VA, are considered the *least clear* because they have not discussed the federal leniency of *Smith* and they have not clarified contradictory lower court decisions. California has recognized the lower court conflict recently, but even in the recognition, chooses not to resolve it. In the same case the supreme court chooses to rule with strict scrutiny, as it has before, but chooses the standard almost incidentally. “In a case that truly required us to do so, we should not hesitate to exercise our responsibility and final authority to declare the scope and proper interpretation of the California Constitution's free exercise clause. (Cal. Const., art. I, § 4.) Here, however, we need not do so.” “...In other words, we apply strict scrutiny.”<sup>70</sup>

The Virginia intermediate appellate courts have multiple times used compelling interest reasoning but the Supreme Court has not yet recognized or rejected that standard.

---

<sup>69</sup> See Laycock (2005) and Crane (1998). These articles provided two major sources of information for state level free exercise doctrine.

<sup>70</sup> *Catholic Charities of Sacramento v. The Superior Court of Sacramento County, Department of Managed Health*, 85 P.3d 67, 91 (2004).

Six states are clearly not strict scrutiny states according to their own reasoning, but do afford religious actors an intermediate or heightened level of protection:<sup>71</sup> AR, KS, NC, NE, ME, MT.

On the opposite end of the spectrum are four states who have made clear via precedent that they will judge free exercise of religion cases with only a rational basis standard: IA, NH, OR, TN.<sup>72</sup>

Which leaves fourteen states that leave it *unclear* how religious actors are to be treated in their courts (minus the known RFRA states to be discussed below): AR, CO, DE, GA, HI, LA, ND, NJ, NV, MD, SD, UT, WV, WY.<sup>73</sup>

There are three updates for 2005. First, the Arkansas Court of Appeals relied heavily on the most protective federal case *Sherbert v. Verner*, but never explicitly detailed the state's acceptance of the compelling interest standard with least restrictive alternative when ruling for the unemployment compensation of a Sabbatarian in *Guaranteed Auto Finance, Inc. v. Director*,<sup>74</sup> The lack of explicitness, but reliance on the bellwether case

---

<sup>71</sup> Heightened scrutiny is a standard found in between the lower rational basis test (is the regulation rational and legitimately administered) and the strict scrutiny test (is the regulation compelled, and has it been narrowly tailored.) Heightened scrutiny asks if the regulation in question is important and furthered by substantially related means.

<sup>72</sup> *Hope Evangelical Lutheran Church v. IA Dep't of Revenue*, 463 N.W.2d 76, (Iowa 1990). "The Free Exercise clause therefore does not require this state to grant the appellant an exemption from its generally-applicable sales and use tax." *In re Petition of Smith*, 652 A.2d 154, 160-61 (N.H. 1994). Oregon got the controversy started by denying Galen Smith's unemployment claim in 1990, and upheld that denial and rational basis in *Meltebeke v. Bureau of Labor*, 903 P.2d 351, Oregon 1995. *State v. Loudon*, 857 S.W.2d 878, 882-83 (Tenn. Crim. App. 1993) (applying the Smith standard as synonymous with its *Pack* standard), and see also *Tennessee v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 762 (Tenn. App. 2001).

<sup>73</sup> Note that this list is not produced by my research as much as by my listing the states left after the previously mentioned legal scholars' groupings for increased and decreased states.

<sup>74</sup> 2005 Ark. App. LEXIS 600 In the preformatted pagination, p. 7 "The Supreme Court in *Sherbert* held that the lower court's ruling denying [\*7] the claimant benefits forced 'her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.' 374 U.S. at 404. Additionally, our opinion in *Haig* cites to *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 67 L. Ed. 2d 624, 101 S. Ct. 1425 (1981), where the Supreme Court, relying on *Sherbert*, held that the denial of unemployment-compensation benefits violated the claimant's First Amendment right to the free exercise of

moves Arkansas one column into the heightened category, but not fully into the strict scrutiny categories.

Second, Nebraska, which was considered a heightened scrutiny state, clearly accepted the rational basis standard in a March 2005 decision on religious exemptions to immunizations.<sup>75</sup> “Free exercise of religion does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability” and those laws “need not be justified by a compelling governmental interest”. Nebraska is therefore moved two columns and understood as a rational-basis state from April through the end of the dataset.

The third update involves Washington state shifting one column to a less clear category because of language in *Washington v. Gonzalez*. “Mr. Gonzalez does not argue Washington’s Constitution affords greater protection than the United States Constitution.” Although the language does not negate a strict scrutiny, it casts doubt on that by stating that it will not be offered since it was not brought up.<sup>76</sup>

---

religion. In that case, the Court stated that ‘where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.’ *Thomas*, 450 U.S. at 717-18.”

<sup>75</sup> *Douglas County v. Anaya*, 269 Neb. 552, 561

<sup>76</sup> 2005 Wash. App. LEXIS 614, 621-22

**Table 2 Scaled Judicial Variable**

Coding & Category	Clear Strict Scrutiny	Less Clear Strict Scrutiny	Least Clear Strict Scrutiny	At Least Heightened Scrutiny	Unclear	Rational Basis
	4	3	2	1	0	-1
States	AK	KY	CA	AR	CO	IA
	AL	MS	VA	KS	DE	NE
	IN	NY		NC	GA	NH
	MA	WA		ME	HI	OR
	MI			MT	LA	
	MN				ND	
	OH				NJ	
	WI				NV	
	VT				MD	
					SD	
					TN	
					UT	
					WV	
				WY		

If the states are ordered in the following way, then we have an ordinal level representation of state supreme court respect for religious freedom, which I posit will capture more of the variance than the simple dichotomy found in the basic version.

Table 3 shows the favorable vote-rates in each category.

**Table 3 Scaled Judicial Variable Category Successful Vote-Rates**

States Scaled by Degree of Judicial Increase	Mean Religious Actor Case Outcome	N
Rational Basis	.22	165
Unclear	.47	1412
Least Protective Judicial Increase	.42	236
Least Clear Strict Scrutiny	.43	215
Less Clear Strict Scrutiny	.45	546
Most Protective Judicial Increase	.47	680
Total	.45	3254

The states that have made clear through their court system that they are accepting the federal lower standard are clearly ruling at lower rates. And the categories of judicially increased states climb in steps from the least to the most protective. The outliers are the Unclear states, which rule as protectively as the most protective increased states. But



because they are “unclear”, and there were no expectations for their behavior, the scaled judicial variable appears to capture much of the variance it attempted to capture.

Because there is a clear category of states which have accepted the lax standard to act as a foil against the states which have increased the standard, a variable which codes the Unclear states as missing can give the study a clearer idea of how the judicial policies affect outcomes.<sup>77</sup> A quick analysis of this variable shows that it is in the predicted direction (as the variable with the Unclears coded 0), but unlike the full Scaled Judicial variable, this one is significant at the .001 level, with a correlation score of .09.

A fuller consideration of the role of the Unclear category in these variables comes at the integration of these scaled variables in the latter half of this chapter.

### Legislative

The state RFRA look extremely similar because they all were derived from the act passed by Congress. Even Connecticut’s and Rhode Island’s restoration acts, which were passed only months after the Congressional RFRA, and years before *Boerne* would make them noteworthy, use exactly the same legal language and triggers as the national law.

Two years after *Boerne* struck the national RFRA, five states had passed their own RFRA. Two more state RFRA were passed the following year, meaning more than half of the acts were passed within three years of *Boerne*.

Like in the judicial description above, I will detail how a basic version of the RFRA variable is constructed, then I will attempt a more informative scalar version based on the

---

<sup>77</sup> The same cannot be created for the legislative variables as the No Legislation category serves as the reference category, and measures the proximity of the legislatively increased states to the non-legislatively increased states.

differences in the state RFRA's and what they say about the state's willingness to protect religious freedoms.

Taking a look at these derivative laws, one sees several recurring legal themes. These recurring themes are laid out here, and following their description is the chart that moves the states to more or less protective categories based on these points.

1. *"Substantial" Burden?* The earlier two RFRA's along with Alabama's constitutional amendment refer to a burden of religious exercise as the subject. The U.S. RFRA and all later RFRA's instead referred to a "substantial" burden as the injury. Idaho and Arizona go further and state "'substantially burdened' is intended solely to ensure that this chapter is not triggered by trivial, technical or de minimis infractions."<sup>78</sup> For coding purposes, AL, RI and CT all not using the limiting term are considered more protective. Use of "substantial" or "substantially" is considered the norm, and the Idaho and Arizona clarification that the term is meant to reduce possible claims puts them in a less protective category.

2. *"Sincere" Religious Exercise?* Akin to the use of "substantial", two states limit the religious exercise to only those that are sincere.

3. *"Compulsory or Central" Religious Exercise?* Of the seven times religious acts are described as "compulsory or central to a larger system of beliefs", it is to broaden the protection offered. For example, from Arizona's act, "'Exercise of Religion' means the ability to act or refusal to act in a manner substantially motivated by a religious belief, whether or not the exercise is compulsory or central to a larger system of religious

---

<sup>78</sup> Idaho Code §73-402 (5), and the Arizona statute: A.R.S. §41-1493.01 E.

belief.” In the six positive occurrences of this concept, the phrasing is exactly the same. In the one limiting use of the concept, Pennsylvania defines a substantial burden as, in part denying activities “which are fundamental to the person’s religion.”<sup>79</sup>

4. *Range of Applicability.* Although the phrasing differs, in ten of the laws, the list of governmental bodies the law covers is seemingly exhaustive. In two, Texas and Pennsylvania, there is an explicit exemption for the courts. In the Texas act, once a remedy or punishment is given by the courts, that remedy or punishment is not then subject to the least restrictive alternative.<sup>80</sup> The Pennsylvania act goes further. “This act shall not apply to actions of the courts of this Commonwealth or to any rules of procedure or to common law adopted by the courts of this Commonwealth.”<sup>81</sup> Texas and Pennsylvania are therefore penalized in the chart which follows.

5. *Attorney’s Fees.* Pennsylvania is the one state to forbid reimbursement of attorney’s fees, unless “the actions of the agency were dilatory, obdurate or vexatious.”<sup>82</sup> The six other states mentioning attorney’s fees do so to compel payment of them if the government is shown to be at fault. And further, in four of the six acts the reverse is not true: the government will not be reimbursed if the religious actor does not succeed in making the case. Forbidding reimbursed fees is coded a minus, the absence of language is not coded, mandating fees to claimant is one plus, and mandating fees to claimant, yet not if claimant loses is two pluses.

6. *Notification and Remedy Limitation.* Two states lay out a series of procedural steps one must go through before bringing suit. Those two states are Texas and

---

<sup>79</sup> Pennsylvania Statutes 71 §2403 (3)

<sup>80</sup> Tex. Civ. Prac. & Rem. Code §110.003 (c)

<sup>81</sup> 71 §2406 (a)

<sup>82</sup> *ibid.* §2405 (4)(f)

Pennsylvania. The general procedure is a written notification to the offending body and one (PA) or two (TX) months time to allow for a remedy from that body. Both states offer exceptions to this limitation. Although codifying the procedure is beneficial in a number of ways, taking the decision out of the hands of the judge is a limit on the protection offered religious actors.

7. *Statute of Limitations.* Only one state adds a statute of limitations to their act. Texas disallows claims older than one year, and it will be considered a less protective RFRA because of this clause.

8. *Waived Immunity.* Two states add an explicit statement waiving the immunity public officials may rely on in cases against them in the official capacity. Most states (eight) simply include in the definition of the government “officials, and those acting under color of state law.” Two states seemingly hold onto the immunity by not including single individuals in their definition of government. I consider those states less protective, and the states offering an explicit clause revoking immunity to be more protective.

9. *Other limiting Clauses.* There are several unique clauses in five of the laws that limit the protection offered. Those limits are grouped into issue areas, rather than taken singly, and each issue area limitation will count singly against the RFRA. So for example, PA gives a separate clause to limiting the effect of its RFRA on motor vehicle licensing, motor vehicle registration, financial responsibility for vehicle accidents, and others. All of these will be grouped into a traffic issue area and counted as one limitation Pennsylvania wrote into its law.

Note that the assumption here that all limiting and protection clauses are equal and interchangeable is admittedly reductionistic. But the general idea of comparing derivative laws by how many limits and protections they have written into them is conceptually sound.

**Table 4 Comparison Of Features Within The State-RFRAs**

	→ Chronological flow of Acts →											
	RI '93	CT '93	FL '98	IL '98	SC '99	AZ '99	TX '99	OK '00	NM '00	ID '01	PA '02	MO '04
"Substantial" burden?	+	+				-				-		
"Sincere" religious act?							-				-	
Religious act "compulsory or central"?			+	+		+	+			+	-	+
Range of Applicability							-				-	
Attorney's Fees			+	+	+	+	+			+	-	
Notification and Remedy Limitation							-				-	
Statute of Limitations							-					
Waived Immunity						-	+		+	-		
Other limiting clauses				<sup>83</sup>	<sup>84</sup>		<sup>85</sup>	<sup>86</sup>			<sup>87</sup>	<sup>88</sup>

<sup>83</sup> Illinois has one additional limitation. The O'Hare Expansion exemption means airport construction is not liable for any cemetery based claims. §775 ILCS 35/30

<sup>84</sup> South Carolina's act does not affect inmates, meaning they are still governed by separate law.

<sup>85</sup> Texas has two additional limits to its law: a) post-trial remedies are no longer open to suit, b) pecuniary damages capped at \$10,000

<sup>86</sup> Oklahoma specifies that their act does not authorize "same sex marriages, civil unions, or the equivalent thereof."

<sup>87</sup> Pennsylvania has nine additional limits: a) no court can award monetary damages, b) correctional facilities use a "reasonably related to legitimate penological interests" test, c) Act does not apply to drug offenses, d) traffic offenses, e) health care licensing, f) health and safety regulations in public buildings, g) health care facilities regulations, h) construction codes, or i) requirement to report abuse.

<sup>88</sup> Missouri has five additional limitations: a) "least restrictive alternative" in all other RFRAs changes to "not unduly restrictive". B) Act does not protect causing physical harm. c) possession of illegal weapons, d) not paying child support, or failing "to provide health care for a child suffering from life-threatening condition." E) Inmates are subject to "legitimate penological interests", but are protected insofar as an opportunity to pray, reasonable access to clergy, reasonable dietary requests, use of religious materials not violent or profane."

The logic of Table 5 assumes that the minimalist laws of RI and CT, which allow courts plenty of latitude in deciding how to craft religious freedom, are neither more or less protective and that the grants of specific protection are better.

The ordering of the state RFRAs and the distance between them is:

**Table 5 State RFRA Coding**

RFRA Limiters	1	0	-1	-2		-4	-5												-14
States	AL FL	CT IL RI	AZ ID SC	NM OK		TX	MO												PA
Coding	16	15	14	13		11	10												1

The coding should be interpreted as steps above legislatively doing nothing. PA, with the most limited RFRA, still enacted a restoration act.

Alabama, because it is a constitutional amendment and thus takes 3/5ths majorities in each of its two houses of its legislature, as well as a passed referendum, is placed in the most protective RFRA.

Notice from both Tables 5 and 6 that there is a clear tendency for the state RFRA's passed later to have more limitations written into them. The last two written, make up the two least protective. The first four written make up the four most protective.

This correlation with time is fairly clear, but it is not unrelated noise that will throw off the analysis. It is part of the explanation for weaker RFRA's. In other words, that states slower to restore liberty are also more likely to write limiting clauses is clear, and trying to factor out that precondition might distort the analysis. Unfortunately, this study

cannot go into the details of how the eager and reluctant states drafted the legislation, and what effect time had on that legislation. As passage of state restoration acts tapers off, though, that study grows more likely.

Table 6 displays the pro-religious actor vote-rate in these RFRA categories shows less-than-clear results of the variable.

**Table 6 Scaled Legislative Variable Vote-Rates**

States Scaled by Degree of Legislative Increase	Proportion of Votes Favoring the Religious Actor	N
No Legislation	.44	2386
Least Protective RFRA	.51	152
10	.52	86
11	.41	123
13	.63	41
14	.29	84
15	.51	204
Most Protective RFRA	.42	178
Total	.45	3254

The correlation between protectiveness and votes favoring the religious actor are in the predicted positive direction (perhaps unexpectedly after a look at table 6), but it is not significantly positive.

#### Standardizing the Two Scaled Versions

If we assume that judicial and legislative methods of increasing religious freedom are conceptually equally effective, then the two variables can be standardized.

Superimposing the legislative and judicial orderings of states onto a single figure means simply collapsing the sixteen RFRA categories into the four judicial scrutiny categories.

1	0	-1	-2		-4	-5								-14
---	---	----	----	--	----	----	--	--	--	--	--	--	--	-----

Clearly Strict Scrutiny	Less Clear Strict Scrutiny	Least Clear Strict Scrutiny	At least Heightened Scrutiny	Unclear	Rational Basis
-------------------------	----------------------------	-----------------------------	------------------------------	---------	----------------

The nine most protective state RFRA's then fall into line with the most protective state supreme courts. Texas and Missouri, because of their several limitations are grouped with the less state supreme courts, and Pennsylvania ends up in the least increased category.

Adding an Executive Branch Indicator

One last factor that can illuminate this scaling of states into more or less protective categories is whether the state’s executive branch has acted in a public way on this matter.<sup>89</sup> The ready-made example of this is filing an amicus brief for one of the sides in the watershed case of *Boerne*, and nineteen states did this. Six states filed in support of upholding RFRA,<sup>90</sup> and thirteen filed in favor of overturning.<sup>91</sup> States which filed for upholding RFRA move one column in the direction of more religious freedom, and those filing against move one column away, or to the right.

These three indicators (judicial, legislative, and executive) are only loose and imperfect indicators of the state branch’s support for religious freedom.

---

<sup>89</sup> “Executive branch” here is used somewhat loosely, as the Virginia amicus brief was filed by the state legislature.

<sup>90</sup> CT, MA, MD, NY, VA, TX.

<sup>91</sup> AZ, CO, DE, FL, HI, ID, OH, MI, NV, NH, NC, OK, PA. Notice that five of these thirteen states eventually passed their own restoration act. Two had their supreme court interpret an increased religious freedom after their amici brief, and one had ruled the same before their amici brief. Eight of the thirteen states supporting an overturning of RFRA are now considered more protective of religious freedom than not.



**Table 7 Integrated, Scaled Protectiveness Variable**

Const'l Amendment Level	Most Increased Religious Freedom	More Increased Religious Freedom	Less Increased Religious Freedom	Least Increased Religious Freedom	Unclear	Rational Basis
AL	AK	AZ	CA	AR	GA	DE
CT	IL	FL		CO	MD	HI
MA	IN	ID		KS	NC	IA
	NY	KY		ME	ND	LA
	MN	MI		MT	NJ	NE
	NM	MO		UT	PA	NH
	RI	MS			SD	NV
	SC	OH			TN	OR
	TX	OK			WV	
	VT	WA			WY	
	WI	VA				
3	2	1	0	-1	-2	-3

The last row represents the coded value in this scaled variable.

Four states in the graph have been moved. Colorado and Utah moved one column to the left because both states have passed laws which protect the religious use of land.<sup>92</sup> Michigan and Louisiana were moved one column to the right because they both considered restoration acts and did not pass them because of a lack of democratic support.<sup>93</sup> One might question putting LA and MI in the last column because they did not pass a bill, but consider again that the federal law was passed *unanimously* in both the federal House and Senate. The distance between those two states and an imagined mean then warrants at least a one column correction.

The District of Columbia, not discussed above, is coded in the data as having a legislative attempt at increasing religious freedom in September of 2000 when the U.S. Congress passed the Religious Land Use and Institutionalized Person Act (RLIUPA).

<sup>92</sup> Colo. Rev. Stat. 29-1-1201 (2005) effective date Aug. 2, 2000, and Utah Code Ann. § 63-90b-101 et seq (2006) effective date May 2, 2005.

<sup>93</sup> Maryland and Louisiana considered acts in their legislatures and after some consideration, did not pass the act. This differs from other states which passed restoration acts yet had them vetoed, as in California and Illinois. Note that in the Illinois case the veto was overridden, and California's Supreme Court intimated that it would rule in a way consistent with the act Governor Gray Davis vetoed. See Runyon, Cheryl, Kelly Anders, and Susan Parnas Frederick. December, 2000. "Religious Land Use—State and Federal Legislation." NCSL State Legislative Report. Analysis of State Actions on Important Issues. 25 (14)

RLIUPA is a more constitutionally sound version of RFRA as its reach is clearly delineated and its jurisdiction over federal lands and statutory acts is without dispute. Further, it is recognized by federal courts as avoiding common pitfalls.<sup>94</sup> Because of that delineation, though, DC resides with CA in the Less Protective Category and is coded 0 after passage (and -3 before).

Note that because of different criteria for the simple increased variable, the scaled institutional variable, and the integrated variable that states can be coded in what looks like contradictory categories. NC is an example of that. The scholars agreed that the NC courts are attempting to clarify a strict scrutiny standard, if barely. The criterion for the scaled judicial variable, though, put NC outside of strict scrutiny and into a heightened scrutiny category. And finally the integrated variable which considered NC's amicus brief for overturning RFRA moved it one column away from religious freedom, putting it in the unclear column. The state court system is attempting to exert power, as is the executive branch. VA is another example of a silent supreme court stopping it from being coded as increased in the simple variable, but a willing executive and lower court system place it in the "more increased religious freedom" category. All of these can coexist. The coding hopes to capture the real interplay between the branches, and if the simple variable looks incongruous to the scaled variable, then it may be a sign of the messiness of the institutional situation.

Unintentionally, table 7 is balanced with 25 states in the more increased columns, and 25 states in the less increased columns. But because states are coded as "unclear" prior to

---

<sup>94</sup> *Cutter v. Wilkenson*, 544 U.S. 709 (2005) RLIUPA does not violate the Establishment clause, but the Congressional ability to enact RLIUPA has not here been answered. See Zietlow, Rebecca. 2006. *Enforcing Equality: Congress, the Constitution, and the Protection of Individual Rights*. NYU Press. p.5

passing a RFRA or issuing a precedent, the average context from which a vote was cast is -.15, and the histogram from this variable is severely bimodal.

### Set Three: Time-Series Variables

This third set of variables for the institutional attempts to increase religious freedom is the *time-series* set.<sup>95</sup> They are created to get at some of the variance with more precision than the other two sets of variables. The other two sets do not speak as directly to the research question as these variables can. For example, we can see from them that judicially increased protection states are more protective than non-judicially increased protection states, but not whether those states that increased scrutiny judicially actually changed after they did. As it turns out, if you focus solely on the judicially increased states and the states that were to join those judicial states, to keep the example going, that they did not get any more protective at all, if a simple comparison of vote-rates is to be the measure.

That brings the question of why this time-series construction was not the primary construction for the study. The answer is because these variables have too much missing data. There are only 341 votes cast in states that will eventually pass a RFRA, and 370 votes cast in states that will have strict scrutiny handed down by the state supreme court. Both forms of logit models in SPSS exclude missing data from the model “listwise” or “modelwise” rather than “pairwise”<sup>96</sup>, which means a loss of too much information not to

---

<sup>95</sup> Note that “time-series” here is used loosely and is not referring to the more sophisticated autoregressive models often associated with that term. Even the question of what causes the move to increase cannot be addressed here due to the size of the project. This set will simply compare the before and after performances of increasing states.

<sup>96</sup> This will be covered more in the last chapter of the dissertation.

have the broader versions above, even if they cloud the pre-increased picture. To be sure, the other two variables do incorporate the pre- and post-increase effects in their analysis. But this specific signal is much weaker there, and this construction clears away some noise from that signal.

All states which have at least one vote before and after their increase in scrutiny make up the pool of data. There is a judicial specific, a legislative specific, and an overall variable with this construction. Also created were time-series scaled variables, which are simply the scaled variables limited to those states which have at least one vote before and after increasing scrutiny.

There are 678 votes from states before increasing scrutiny, and 723 votes after increasing.

The judicial states included here are: AK, AR, CA, IN, MI, and OH. There are 337 votes before the precedent, and 243 after.

The legislative states included here are: AL, AZ, FL, ID, IL, MI, NM, OK, SC, and TX. CT and RI have no votes prior to their unique RFRA. There are 341 votes before passing the RFRA, and 569 after.

### Results of These Variables

In a second important finding from the dissertation, neither the basic constructions nor the scaled single variable correlate with winning in a statistically significant way, or even in the predicted direction. The time-series variables did show significance, and it was in the wrong direction. And it bears repeating here that instead of a letdown, this is very interesting in the wider understanding of the topic: states that try to increase

religious freedom find that judges rule in favor of religious actors no more than in states that are explicitly not trying.

Performing as predicted is the scaled judicial variable with the unclear category coded as missing.

The time-series variables show that pre-judicially increased protection states had a favorable vote-rate of 48% before, and 44% after. The legislative states had a favorable vote-rate of 53% before, and 41% after passing a RFRA. This puts the overall favorable vote-rate for states prior to increasing scrutiny at 50%, and after increasing scrutiny at 42%. And with 1,401 votes, the odds of this  $-.086$  correlation score being random are  $.001$ . The effect of changing from dummy to scaled variables does not mitigate the drop.

On the most basic level, before controlling for socio-legal factors, the overall basic variable, the basic legislative variable, the overall scaled variable, and all the time series variables failed to show that they matter to religious actor success, at least in the way they had hoped.

Focusing more on the single scaled variable, compare the two most protective and two least protective classifications and the results still hold true: a success rate of 45.2% in 976 votes in the most protective versus a success rate of 46% in 1,404 votes in the least protective.

**Table 8 Crosstabulation of Voting and Scaled Protectiveness**

			Religious Actor Case Outcome		Total
			Lost	Won	
Integrated, Scaled Variable	-3	Count	168	69	237
		% within Integrated, Scaled Variable	70.9%	29.1%	100.0%
	-2	Count	592	575	1167
		% within Integrated, Scaled Variable	50.7%	49.3%	100.0%
	-1	Count	106	75	181
		% within Integrated, Scaled Variable	58.6%	41.4%	100.0%
	0	Count	44	32	76
		% within Integrated, Scaled Variable	57.9%	42.1%	100.0%
	1	Count	351	266	617
		% within Integrated, Scaled Variable	56.9%	43.1%	100.0%
	2	Count	464	355	819
		% within Integrated, Scaled Variable	56.7%	43.3%	100.0%
	3	Count	71	86	157
		% within Integrated, Scaled Variable	45.2%	54.8%	100.0%
Total		Count	1796	1458	3254
		% within Integrated, Scaled Variable	55.2%	44.8%	100.0%

The predicted linear pattern does not show up, but the scaled variable is capturing some behavior that is not random.<sup>97</sup> The -3 states show vote-rates significantly below average, and the 3 states show vote-rates significantly above, as predicted.<sup>98</sup> -1, 0, 1, and 2 states all show the steady climb in vote-rates predicted, even if they do not occur at significant rates. And if in fact, when I control for the category which appears to buck the results, all directional signs are in the predicted direction. That category, as in the judicial section above, is the -2 states.

#### Discussion of the “Unclear” Category

The -2 category has 40% more votes than the second most populated category, and has a favorable vote-rate significantly higher than the average (.067\*\*\*). This is not as surprising as it may appear, as conceptually the category is better understood as the “unclear” states rather than the second-to-least protective states, although that distinction is lost in the coding.

An analysis of the states in the category show that the states that go on to increase their scrutiny have an above average pro-religion vote-rate:

---

<sup>97</sup> Chi-square and Likelihood ratio tests show a significance of  $p < .001$ , supporting a nonparametric pattern to the data.

<sup>98</sup> -.088\*\*\*, and .045\*\* correlation scores, respectively.

**Table 9 Category -2 States and Their Pro-Religious Vote-Rates**  
 States Ranked by Vote-Rates,  
 and States that will later increase their scrutiny are in bold face

State's 2 letter abbreviation	Religious Actor Case Outcome	Votes
<b>ID</b>	<b>1.00</b>	<b>4</b>
<b>OK</b>	<b>.92</b>	<b>12</b>
MD	.88	34
<b>NM</b>	<b>.67</b>	<b>9</b>
<b>TX</b>	<b>.64</b>	<b>36</b>
<b>IL</b>	<b>.63</b>	<b>16</b>
<b>MO</b>	<b>.62</b>	<b>61</b>
<b>CO</b>	<b>.61</b>	<b>33</b>
ND	.61	23
WV	.57	14
GA	.56	80
NJ	.54	99
<b>FL</b>	<b>.53</b>	<b>15</b>
<b>NC</b>	<b>.53</b>	<b>60</b>
<b>CA</b>	<b>.52</b>	<b>166</b>
<b>MI</b>	<b>.52</b>	<b>21</b>
<b>PA</b>	<b>.51</b>	<b>152</b>
<b>IN</b>	<b>.49</b>	<b>35</b>
<b>AL</b>	<b>.42</b>	<b>12</b>
<b>OH</b>	<b>.40</b>	<b>99</b>
WY	.36	11
<b>AK</b>	<b>.33</b>	<b>12</b>
<b>KS</b>	<b>.32</b>	<b>31</b>
<b>AZ</b>	<b>.20</b>	<b>25</b>
<b>NE</b>	<b>.14</b>	<b>44</b>
<b>TN</b>	<b>.14</b>	<b>36</b>
<b>SC</b>	<b>.13</b>	<b>15</b>
SD	.08	12
Total	.49	1167



894 of the 1,167 votes are cast by judges in states that will increase scrutiny before 2005, and the win rate from those states in this category is 47%. But it is also below the 2 category average, which means the truly unclear states are more protective than the states that will later declare themselves more protective. These states which have not signaled a more or less protective policy vote to protect religious actors 57% of the time in 273 votes. That many votes would make this group of unclear states larger than four of the scaled categories, and the 57% favorable vote-rate would make it the most protective category.

When these unclear states are controlled in the analysis, correlation scores for the simple variable gain the predicted direction (which they did not have before), and the scaled variable gains significance at the .05 level (with a correlation score of .035).

These unclear states do not strengthen or weaken the predicted institutional performance as much as they add another dimension. When states attempt to increase religious freedom, they protect more than the states which decide against increasing religious freedom. But the institutionally clear states fare worse than the states which do not have a clear policy.

Even though it is somewhat post hoc, it is conceptually sound to code these institutionally ambiguous states as missing from a variable that hopes to capture the effects of institutional ability, as was done in the judicial variable. As in there, the referent for this variable will not be harmed by bracketing off these unclear votes and allowing the votes from the states which have accepted the rational basis test to serve as the reference category for the institutionally increased state votes. Therefore the scaled variable was altered to not include the 273 votes from the eight states without an institutionally clear direction.

To summarize the scaled institutional variable: it takes into account 1) the legal language in judicial attempt states, 2) legislative expansions or limiters of protection in the RFRA states, and 3) no longer includes the states which have chosen not to act via their governmental institutions.

This new variable is a significant predictor of a positive vote with a correlation score of .037\*. A comparison of means shows that the variable is performing more predictably as well:

**Table 10 Institutional Attempt States, Scaled by Degree of Attempt Does Not Include Institutionally Ambiguous States**

	Religious Actor Case Outcome	N
Least Protective	.29	237
-2	.46	865
-1	.45	210
0	.42	76
1	.43	617
2	.43	819
Most Protective	.55	157
Total	.44	2981

The -2 category is still a default category where states are placed before their institutional attempt. Seeing the results of voting with these pre-institutional attempt votes taken out of the table is simply a matter of deleting the -2 category.

Does this creation of a meaningful variable negate the simple outcome that institutional attempts appear to be ineffective? Not realistically. That a variable can be created with a predictable direction and modest significance and strength should not lead one to the conclusion that institutions matter. The battle to get to this point may be more telling.

The higher sophistication and controls in the model will be able to shed more light on whether the institutional move caused the higher success rates, or if the states in the higher categories were sociologically or politically predisposed to vote for more protection regardless of the category they were put in.

A description of how this variable relates to the control variables will be handled in the next chapter as each control variable is discussed.

## CHAPTER 4

### THE CONTROL VARIABLES: JUDGE AND COMMUNITY, CLAIMANT, AND LEGAL VARIABLES

This chapter details the construction and basic descriptive results from each control variable, as well as other information that was gathered.

The following is a list of all the information collected for the dataset.

**Figure 2 All Variables in the Dataset**

#### ***Case Characteristics***

1. Name and citation
2. Date
3. Level of Court
4. Whether it was an appeal
5. Whether it was published
6. Whether the entry was derived from another case
7. If the religious actor won the vote

#### ***Claimant Characteristics***

8. Claimant gender
9. Number of Claimants
10. Religious tradition of claimant
11. Claimant-area religious tradition percentage agreement

#### ***Issue Characteristics***

12. Drug related
13. Sex related
14. Private education
15. Public education
16. Tax
17. Land use
18. Cost of Claim
19. Government employee
20. Free speech raised
21. Establishment clause raised
22. Free exercise of religion clause raised

#### ***Judge Characteristics***

23. Judge Name
24. Judge Gender
25. Judge Race
26. Judge political party identification
27. Judge ideology score
28. Judge religious tradition
29. Dissenting votes
30. Size of the majority

#### ***State***

31. State institutional response toward religious freedom
32. Method of increased religious freedom, if appropriate
33. Scaled value of institutional attempt to increase religious freedom

#### ***Geographic Characteristics***

34. Region of the country
35. (3 classifications)
36. Metro-area
37. Metro-area population
38. Metro-area religious traditions totals
39. Metro-area religious adherents totals
40. Metro-area religious adherent-rate
41. Metro-area religious homogeneity rate
42. County population
43. County Adherents totals
44. County Adherent-rate
45. County Homogeneity rate

#### ***Political Characteristics***

46. County Vote totals for W. Bush, Gore and Kerry in 2000 and 2004
47. County Rate of Vote for W. Bush in 2000 and 2004
48. Normalized Presidential Vote Rate 2000, 2004
49. County Political Majority – Judge Agreement

## A Note On Multicollinearity

Before beginning the description of each control variable, I will note that multicollinearity with the institutional variables appears in some of the control variables, and even seems to be embraced! But that is not the case. Significant results abound, which is in part due to having 3,254 iterations of a social phenomenon. Sometimes the correlation values reach above .25, but generally they stay below .1, which seems acceptable. But the transparency is an effort to get beyond the figures and to allow the simpler descriptions to create the impressions that the reader will take into the model analysis and away from the study.

**Table 11 Search for Multicollinearity between Increased Scrutiny and Judge & Community Variables**

		County Vote (Repub.)	Judge Politics (Liberal)	Metro-area Adherent-Rate	Metro-Area Homogeneity
Increased Scrutiny	Pearson Correlation	-.147**	.299**	.039*	.051**
	N	3254	2387	3254	3254
RFRA Increased Scrutiny	Pearson Correlation	.097**	-.093**	.039*	.054**
	N	3254	2387	3254	3254
Judicially Increased Scrutiny	Pearson Correlation	-.228**	.373**	.009	.010
	N	3254	2387	3254	3254
Scaled RFRA Increased Scrutiny	Pearson Correlation	.174**	-.159**	.020	.051**
	N	3254	2387	3254	3254
Scaled Judicially Increased Scrutiny	Pearson Correlation	-.263**	.304**	-.041*	-.004
	N	3254	2387	3254	3254
Scaled Judicially Increased Scrutiny, w/o Unclear States	Pearson Correlation	-.231**	.238**	.215**	.162**
	N	1842	1447	1842	1842
Integrated, Scaled Increased Scrutiny	Pearson Correlation	-.233**	.299**	.225**	.262**
	N	3254	2387	3254	3254
Integrated, Scaled Increased Scrutiny, No Institutionally Ambiguous States	Pearson Correlation	-.233**	.317**	.297**	.269**
	N	2981	2195	2981	2981

\*\* Correlation is significant at the 0.01 level (2-tailed).

\* Correlation is significant at the 0.05 level (2-tailed).

In table 11 are the “Judge and Community Variables”, which are the most sensitive when it comes to collinearity with the institutional independent variables as these are the only variables that could be endogenous, or could generate those institutional variables. For example, liberal judges could be the reason state courts declare strict scrutiny, or many Republican counties could be driving the RFRA’s. The other control variables (types of cases, types of language used in cases, claimant characteristics) can not bear that explanatory weight. So it is with these four that special consideration was given in the form of 1) diagnostics such as a) variance inflation factor tests, b) the use of Eigenvalues and condition indices, c) watching for low tolerances for each variable, and d) variance proportions. 2) A focus on whether the goodness-of-fit tests or other coefficients alter in inordinately large ways as these variables are added and dropped, 3) sensitivity to the significance or goodness-of-fit test scores with different models (scores which jump around with small changes can be a sign of more serious multicollinearity), 4) consider altering the model to use a conditional stepwise method which will drop variables which are not adding enough to the explanation (and which will likely cure some of the redundancy), and 5) simply keeping track of the performance of variables in the descriptive chapters and making sure they have a similar effect within the model.<sup>99</sup>

The best way to go about solving multicollinearity or endogeneity is by adding strategic cases or constructing external variables that would break the multicollinearity.

That is a true statement, and it makes me think of a line from Jim Bouton’s Ball Four:

"Going over hitters is something you do before each series, and before we went against the mighty Angels, Sal Maglie had a great hint for one of their weak hitters Vic Davalillo. 'Knock him down,

---

<sup>99</sup> See Hosmer and Lemeshow (2000)

then put the next three pitches knee-high on the outside corner, boom, boom, boom, and you've got him.'

"Everybody laughed. If you could throw three pitches, boom, boom, boom, knee-high on the outside corner, you wouldn't have to knock anybody down. It's rather like telling somebody if he'd just slam home those ninety-foot puts he'd win the tournament easily."<sup>100</sup>

Which is to take the scenic route to writing that the silver bullet cases or variables never materialized, and the fear of redundancy still exists. So dealing with it is a function of performing the diagnostics above and swallowing that it will not be cured, but the irritating symptoms can likely be kept to a minimum.

### Judge and Community Variables

#### County Party Vote for 2000, 2004

*Hypothesis 3:* County-level Republican presidential voting is associated with less favorable religious freedom votes for religious actors than County-level Democratic Presidential voting.

Each county's distance from the average national vote is what this variable is capturing rather than each county's partisan tilt. Since the national RFRA in 1993 was fully bipartisan, the variance here was originally posed as a center and periphery issue, or between the status quo and those on the extreme left and right. So construction of that original variable was a matter of averaging the deviation from the national presidential votes in 2000 and 2004, and having that number be an absolute number by squaring it and then taking its own square root.<sup>101</sup>

---

<sup>100</sup> Bouton, Jim. 1970. *Ball Four: My Life and Hard Times Throwing the Knuckleball in the Big Leagues*. New York: World Publishing Co.

<sup>101</sup> The construction of the variable for the model is the absolute number. Some of the descriptive discussion still takes into account the variable before the negative or positive sign is taken away, thus allowing the study to explore the difference between Republican areas and Democratic areas.

Although that construction of the variable did perform in significant and largely predicted minoritarian ways (the exception was that legislative RFRA's are more majoritarian than even the states which did not attempt an increase) the variable which kept the partisan distinction performed better. And coming to the partisan variable was not a matter of fishing for results or happening to see more significance there. It instead was seeing the culminating evidence that left-leaning politics was the friendlier context for religious litigants.

So the county Presidential vote variable was constructed by averaging the votes in 2000 and 2004 and allowing the national average for the two years (51.5% Republican) and more Republican than average counties are coded as each point above that average, as well as less Republican than average (read Democratic) counties are coded as their point value below that average. So for example, San Francisco county is coded -33, as their Presidential votes for both elections averaged out to be around 18.5% for the eventual President, or 33 points more Democratic.<sup>102</sup> Utah county, UT, voted 37 points more Republican than the nation, and so is coded with a positive 37.

## Results

The variable shows less than 10% of the counties in the nation are represented in this study: 282 of the 3,077. Because of the disproportionate number of state capital counties counted due to state supreme (which are less Republican areas, although not more populated, interestingly), the variable has an average vote against President W. Bush rather than for him. The values specifically are 58% of the vote against him in 2000 and

---

<sup>102</sup> The most Democratic area was the District of Columbia with 39 and 41 points more Democratic than the rest of the nation.



56% in 2004, compared to the popular vote total of 49% and 52%, respectively. To be sure, it is the national popular vote that is used as a benchmark in the variable.

Does county voting correlate with a judge's vote for religious freedom? The answer is yes, and in the predicted direction.

**Table 12 County Voting and Religious Freedom**

County Vote Variable, cut into 20% Categories	Successful Vote Rate	<i>N</i>
Most Democratic Quintile	.53	677
2nd Quintile	.45	638
3rd Quintile	.42	640
4th Quintile	.46	692
Most Republican Quintile	.38	607
Total	.45	3254

Is county politics related to whether or not the state has attempted to increase religious freedom, and the method used? Yes, and in line with the predicted Democratic-friendly theory. Increased Counties were 8 percentage points more Democratic than the average Presidential vote, and in the non-institutional increase contexts, the average was only 4 percentage points lower than average. (Remember that the overall dataset has an average of 6% more Democratic.)

The method of increasing actually matters more than the increase itself, though. Judicial attempt states are 10 percentage points more Democratic than the rest of the dataset (which means 16 percentage points more liberal than the national average), while Legislative states are more majoritarian at 3.6 percentage points more Democratic.

The integrated scaled institutional variable also correlates significantly and negatively with majoritarian voting. The two most protective categories are 11 and 19 points more Democratic, while the two least protective categories are 6 and 3 points more

Democratic.<sup>103</sup> But these conclusions are not clearly supportive of the theory. This is discussed further below under “Conclusions”.

Republican voting also correlated positively with the time-series institutional variables, and this is most likely due to some heavily democratic states having both judicial and RFRA policies in place earlier .

Did protective voting differ in these institutional contexts? Yes, the data support the theory. I compared the average county-vote in each institutional context (no institutional attempt, an attempt, legislative attempt, judicial attempt, seven scaled categories of protectiveness) broken up into both wins and losses. That makes 12 opportunities to see if the more favorable context was also the more minoritarian. All 12 supported the theory.

Republican counties tend to be in states with judicial selection systems closer to the voter (partisan and nonpartisan elections) than Democratic counties, which tend to be in states with gubernatorial or legislative appointment systems and merit-based systems.<sup>104</sup>

Population and Republican voting are negatively correlated. This is true for metro-areas:  $-.41^{***}$ , but also at the county level:  $-.2^{***}$ . Against the conventional wisdom, the rate of religious adherents is negatively correlated with Republican voting:  $-.2^{***}$ . This remains true even after controlling for the Northeast:  $-.08^{**}$ .

## Conclusions

Do the data solely support the notion that a pro-religious freedom attitude is therefore more Democratic and less Republican? No. Two points complicate an easy assessment.

---

<sup>103</sup> The significance of all of the county-voting and institutional attempt associations is at the .001 level.

<sup>104</sup> Correlation scores are .07\* and .07\* for the Republican, electoral judicial selection systems, and  $-.16^{***}$  and  $-.19^{***}$  for the Democratic, more insulated judicial selection systems.

One, the legislative attempt to increase religious freedom is occurring in more Republican areas than the areas that do not attempt an increase at all. Two, the integrated scaled variable is showing the shape of the data: parabolic rather than linear. The most protective category is more Democratic, but the least protective category is at the average. The most Republican septile in this scale from -3 to 3 is at -1, or in the middle. Although the patterns do lean toward a left-leaning predilection toward religious freedom, the pattern is clearly not linear.

### Judge Politics

*Hypothesis 4:* More liberal judges will vote more in support of religious freedom than more conservative judges.

This variable captures and controls for the judge's political leanings. It does so by using a measure of judge ideology derived from judge preferences (past votes, party identification and media account) and state ideology at the time of the judge's ascension. This measure, referred to as PAJID for party adjusted ideological measure, is a scaled measure of the most conservative judges at 0 to the most liberal at 100.<sup>105</sup> This measure was an easy choice over simple political party identification because a) it is much more informative, and b) because it standardizes what this study wants to capture across the fifty states. A simple political party identification is a good measure of ideology within states: Democrats are vastly more liberal than Republicans in limited areas, but a Texas Democrat is not more liberal than a New England Republican. PAJID nationalizes the measure.

---

<sup>105</sup> Brace, Langer and Hall, 2000.

An inconvenience and possible issue with using PAJID scores are that they are only available for court of last resort judges, and around two-thirds of the dataset are judges beneath that level. So after a painstaking collection of party identification among the intermediate appellate and district level courts, the decision was made to extrapolate a PAJID based on the state and party ID. When a judge party identification was known, his or her state's PAJID average for that party was assigned to the judge. The average was taken from the whole PAJID database, which includes virtually all of the judge-years from each state's supreme court from 1970 to 2005, which has 12,785 cases.

### Collecting the Judge's Political Party

Collection of this information was a large task and began in hard copy, continued to online sources when needed, then judicial selection systems were used if the previous two were not fruitful. The sources were searched in this order: Lists of state judge characteristics provided by Donald Songer and Rorie Spill Solberg.<sup>106</sup> Serial sources included, in order: The American Bench, CQ Judicial Staff Directory<sup>107</sup>, LEXIS searches in both the specific state sources, as well as a legal news search. If those sources did not turn up a judge's party identification, a search string was typed into Google with the full name of the judge (with and without the middle initial), the state name, "judge AND (Democrat OR Republican)".<sup>108</sup> If this search turned up more than a few pages of results,

---

<sup>106</sup> Both authors generously provided the datasets which produced Songer and Tabrizi (1999) and Bratton and Spill (2002).

<sup>107</sup> This annual source is more than a simple telephone directory. It lists party identification, oftentimes when the American Bench does not. It also regularly lists when service began, and when it expires, undergraduate and law schools and graduating years, appointing governors, if appropriate, and oftentimes more.

<sup>108</sup> To be sure, the search for judge John D. Doe in Massachusetts looks like the following: ("John Doe" OR "John D. Doe") Massachusetts judge (Democrat OR Republican)

which was often the case with common names, I cut off my search at the fourth full page of results.

Political contributions of or to judges came next, from one of two sites: The Center for Responsive Politics, or The Institute on Money in State Politics.<sup>109</sup> If they had donated more than two hundred dollars to solely one of the political parties or solely to bellwether party organizations (Chambers' of Commerce were Republican and Unions were Democratic), I coded them as identifying with that party.

Deriving a party identification from the judicial selection system of several states is possible, but is a much more complex undertaking than it sounds (and that it has been treated in the literature) not just because of the differences in selection systems, but perhaps mainly because of the differences among similar selection systems. A lengthy discussion of these complexities and how party identification was taken from each individual state follows.

### Deriving an Ideological Tendency from State Judicial Selection Methods

There are five different ways states can pick judges: partisan election, nonpartisan election, gubernatorial appointment, legislative appointment, or via a Merit based system.

The American Judicature Society counts half of the states and D.C. as having a *merit based system*, which, in effect, means having a judicial nominating commission which has some insulation from partisan patronage. The amount of insulation differs widely. Some states allow the Governor to appoint the whole nominating commission, and even

---

<sup>109</sup> The source for federal contributions was the website for The Center for Responsive Politics, [www.opensecrets.org](http://www.opensecrets.org). The source for state-level political contributions was the website for The Institute on Money in State Politics, [www.followthemoney.org](http://www.followthemoney.org).

then not having to choose the nominees it recommends.<sup>110</sup> Other states mandate that their nominating commission have party balance, regional balance, gender and racial proportionality, and in Montana, even industry representation.

*Gubernatorial and Legislative Appointment systems* are largely misnomers as four of the five states which employ it also allow another branch or commission a veto power over the choice.<sup>111</sup> And the fifth, Virginia, has recently written senatorial courtesy into the senate rules, and is further beginning to include local citizen nominating commissions, and a newly created joint judicial advisory committee.<sup>112</sup> So objectively, *no* states only allow their governor or legislature to pick judges. But governors often make interim appointments, and that ability is taken into consideration below.

*Nonpartisan and Partisan elections* are the methods for the twenty one remaining states –eight partisan elections, and thirteen nonpartisan. The seeming clarity of those labels evaporates as one digs further into selection systems. Alabama has partisan elections yet goes to some lengths to hide the parties of lower court judges. And on the other side, Michigan and other nonpartisan states have their judges begin their campaigns at the party's state convention.<sup>113</sup>

There seems to be a strange independence of being able to find a judge's party identification and the selection system of the state. Data can be hard to find in partisan

---

<sup>110</sup> GA, MN, ND, and WI all allow the governor to ignore the nominating commission, and the judges are not confirmed by the legislature. This begs the question of whether "merit" describes the basis for judicial selection in these states.

<sup>111</sup> These four states are: CA, ME, NJ, and NH. Note that South Carolina is often put into this category, but because a judicial merit selection commission plays a large and structured role in the selection of judges in the legislature, I label SC as a merit based state.

<sup>112</sup> <http://www.ajs.org/js/VA.htm>

<sup>113</sup> Idaho, Minnesota and Washington also have explicit partisan electioneering, and Mississippi continues to have clear issue advocacy in their judicial elections, all despite have a judicial selection system in place which tries to insulate the judges from partisanship.

election states (less than 20% of lower court judges are identifiable in Illinois and Michigan), and easy to find in states which, at least nominally, try to distance the judiciary from partisanship (more than half of the merit states had 3/4<sup>ths</sup> of their judges identifiable, and seven of them had 90% or more identifiable.) This could be a function of differences in reporters, or simply a lack of legal/political reporting, as well as a difference in the legal etiquette (or adherence to the etiquette) of a state.<sup>114</sup> Nonetheless, it is noteworthy and hints to the larger findings of this study: states which try to achieve a political goal may not be any more successful than the states which do *not* try, or even have the opposite goals.

All of the above is written to introduce the chart below. Judges with unknown party identifications selected in a system which allows ideological influence, be it merit based or not, will be coded as the ideology of the institution doing the choosing –governor, legislature, or nominating commission.

Whether a selection system allows ideology enough influence is, as constructed here, simply a search for more than 50% of the decision making power. For example, when governors can appoint a majority of the nominating commission, and there are no other checks on that power, that is considered as enough influence to allow the Governor's party to substitute for the judge's. If there was legislative confirmation of that pick, in this example, then the state slips back into the category for which party identification is not implied, unless the Governor and legislature are of the same party.

---

<sup>114</sup> In a phone conversation with a legal reporter in New Jersey, which has a Gubernatorial appointing system, the reporter was fearful of the reaction he would face from the clerks at the Supreme Court building if he relayed appellate judge parties to others.

**Table 13 State Judicial Selection Systems and Coding Judge Party Identification**

State	Selection Method	Considerations	Party Derived From Selection Method?
Alaska	Merit System	Minority of nominating commission appointed by governor and legislature, and constitutional language forbids political considerations	No
Arizona	Merit System	Nominating Commission and nominees may not have more than 60% majority of one party	No
Colorado	Merit System	Nominating commission may not have more than a bare partisan majority	No
Connecticut	Merit System	Nominating commission has party equality and Senate confirmation	No
Delaware	Merit System	Constitutional Clause mandates partisan balance in state courts	No
District of Columbia	Merit System	U.S. President picks from nominating commission list of 3 names, with Senate confirmation	No
Hawaii	Merit System	Governor chooses from nominating commission list, with senate confirmation	No
Idaho	Nonpartisan Election	Governor fills vacancies with choice from partisan controlled nominating commission list (the de facto method of judicial selection)	No
Indiana	Merit System	Governor appoints a minority of nominating commission and is confined to their list. Gubernatorial appointment for lower court.	Appeals: No Trial: Yes
Iowa	Merit System	Governor appoints a minority of nominating commission and is confined to their list	No
Kansas	Merit System	Governor appoints a minority of nominating commission and is confined to their list	No
Kentucky	Nonpartisan Election	Governor chooses from nominating commission list to fill vacancy	No
Mississippi	Nonpartisan election		No
Missouri	Merit System	Governor appoints a minority of nominating commission and is confined to their list. Gubernatorial appointment fills vacancies at circuit level	Appeals: No Trial: Yes, appointment
Nebraska	Merit System	Governor appoints a minority of nominating commission and is confined to their list	No
Nevada	Nonpartisan elections		No
New Jersey	Gubernatorial Appointment	Ideological balance and senatorial courtesy control, de facto	No
New Mexico	Merit System	Nominating commission may not have partisan majority	No
New York	Merit System	Governor appoints a minority of nominating commission, and needs senate confirmation	No
North Dakota	Nonpartisan election		No
Oklahoma	Merit System	Nominating commission may not have a partisan majority	No



Rhode Island	Merit System	Governor chooses from nominating commission list. <sup>115</sup>	No
South Dakota	Merit System	Nominating commission must not have more than a bare majority among its partisan members	No
Tennessee	Merit System	Legislature appoints a nominating commission from lists provided by legal organizations and Bar	No
Utah	Merit System	Nominating commission is vastly appointed by governor, but cannot appoint more than a bare majority, and needs legislature confirmation	No
Vermont	Merit System	Nominating commission, with senate confirmation	No
Virginia	Legislative Appointment	Local party structure and state senators' appoint, legislature confirms with deference to senatorial courtesy.	No
Wyoming	Merit System	Governor chooses from nominating commission list	No
Alabama	Partisan Election	Governor fills vacancy without check.	Yes, appointments
Arkansas	Nonpartisan election	Governor fills vacancy without check	Yes, appointments
California	Gubernatorial Appointment	Governor, with three-member commission on judicial appointments confirmation	Yes
Florida	Merit System	Majority of nominating commission is chosen by governor, with no legislature confirmation	Yes
Georgia	Nonpartisan Election	Governor fills vacancies with advice from nominating commission (the de facto method of judicial selection)	Yes, appointments
Illinois	Partisan election		Yes
Louisiana	Partisan election		Yes
Maine	Gubernatorial Appointment	Governor appointment unless 2/3rds of senate vetos	Yes
Maryland	Merit System	Majority of nominating commission appointed by governor, with senate confirmation	Yes, if agreement
Massachusetts	Merit System	Governor may accept advice from nominating commission, Governor's Council confirms	Yes
Michigan	Partisan election	Governor fills vacancies with advice from nominating commission	Yes, appointments
Minnesota	Nonpartisan election	Governor fills vacancies with advice from nominating commission	Yes, appointment
Montana	Nonpartisan election	Governor appoints a majority of nominating commission, which fills vacancies with senate confirmation	Yes, if agreement
New Hampshire	Merit System	Governor nominates, and elected "Executive Council" appoints	Yes
North Carolina	Nonpartisan election	Governor fills vacancies without check	Yes, appointment
Ohio	Partisan election	Governor fills vacancies without check	Yes, appointment
Oregon	Nonpartisan election	Governor fills vacancies without check	Yes, appointment
Pennsylvania	Partisan election		Yes
South Carolina	Legislative Appointment	A legislatively composed Judicial Merit Selection Commission offers candidates	Yes

<sup>115</sup> Prior to 1994, judicial selection was made by Gubernatorial appointment with no realistic check against that power. Judges selected under that method will have an unknown political party substituted with that of the Governor.

		for a voter before the whole legislature.	
Texas	Partisan Election	Governor fills vacancy with senate confirmation	Yes, appointment, if agreement
Washington	Nonpartisan election	Governor fills vacancies without check	Yes, appointment
West Virginia	Partisan election	Governor fills vacancies without check	Yes, appointment
Wisconsin	Nonpartisan election	Governor fills vacancies without check	Yes, appointment

## Gubernatorial And Legislative Appointing Systems

Party identification for judges can be taken from the appointing governor or legislature in appropriate states: California, Maine<sup>116</sup>, New Hampshire, South Carolina and Virginia. New Jersey judges, although appointed by the governor, will not take his or her party for reasons spelled out below in state specific comments. The earliest appointing Governor for the judge will be the one dictating the party assigned to the judge. This is because that is where the most discretion exists for the governor, and when the closest correlation between the governor and judge ideology exists. Later reappointments of already sitting judges has less discretion, or a certain inertia which limits the influence of the chooser.

California has a gubernatorial appointive selection system tempered by a veto ability vested in a nominating committee. That committee is composed of the state's chief justice, the attorney general, and the senior presiding justice of the court of appeal of the affected appellate district.<sup>117</sup> Defenders of the California system might quibble with the descriptor "gubernatorial appointive system" rather than "merit system", but The Book of the States makes the same distinction.<sup>118</sup> State Supreme Court Justices Joyce Kennard and Janice Brown are two examples of Justices logged as the party of the appointing

---

<sup>116</sup> Independent party Governors Angus King or James Longley offer no information for this decision.

<sup>117</sup> [http://www.ajs.org/js/CA\\_methods.htm](http://www.ajs.org/js/CA_methods.htm)

<sup>118</sup> Published by the Council of State Governments, volume 37, 2005.

governor (Governors George Deukmejian and Pete Wilson, in this case) because of the lack of official voter enrollment data.

California voters amended the constitution to prohibit partisan labels in nonpartisan office holder elections (judgeships, mainly) but that provision was stricken by the federal Ninth circuit court four years after it was passed, in 1990.<sup>119</sup> Since then, studies have shown that financing judicial elections in this state which attempts to limit political influence in those elections has sharply increased. No campaign finance laws are in place for judicial elections. That these elections in California are comparatively competitive, relying on a link between the appointing governor's party and judge's party is therefore sound.

An empirical test of this method of assigning a political party shows that the appointing governor is a fine proxy for political self identification. There are 40 instances in the CQ Judicial Staff directory which list both a party identification and an appointing governor for the judges of the 2005 California Court of Appeals. The party of the judge and appointing governor were in agreement 37 times, for a 92.5% agreement rate. There are 105 judges on those appeals courts, yet information on either appointing governor or on party identification were available on only 88 of them. The judges lean Republican by more than 2 to 1 at 67.8%, and when a party was given that tilt is stronger, at 78%. Only one self-identified Democrat was appointed by a Republican. This leads to the conclusion that using the appointing governor, even with California's merit based controls in place, is a fine proxy.

---

<sup>119</sup> *Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990)

New Hampshire has a partisan elected, yet independent executive council which has the ability to confirm appointments.<sup>120</sup>

New Jersey's governor's choice goes through a senate confirmation, and further, is governed by state-senatorial courtesy, which is rare in states.<sup>121</sup> New Jersey also has a custom of partisan or philosophical balance for all of the state courts, despite the party of the appointing governor. So when the governor makes an appointment, instead of allowing his or her party to be the prime factor, the party or philosophy of the departing Justice seems to be the determining factor.<sup>122</sup> The NJ supreme court has a balance of three liberals and three conservatives, along with a Chief Justice that aligns with the ideology of the appointing governor.<sup>123</sup> For all of these reasons, appointing party will not be used in determining a judge's political tendency.

Virginia is the last state which selects judges by the legislature without another branch's check. Party members at the local levels vet candidates and make recommendations to a joint committee of the state house and senate. The legislature allows candidates to pass through from there without much deliberation ("locality courtesy"). For this reason, the legislative majority cannot be used to infer which direction a judge tilts.

---

<sup>120</sup> [http://www.ajs.org/js/NH\\_methods.htm](http://www.ajs.org/js/NH_methods.htm), and information for a majority of the executive council: <http://www.nh.gov/council/>, and <http://www.nh.gov/council/councilors.html>. Luckily, the one judge from New Hampshire in the dataset had party agreement between the governor and executive council.

<sup>121</sup> [http://www.ajs.org/js/NJ\\_methods.htm](http://www.ajs.org/js/NJ_methods.htm). The New Jersey State Bar Association's official statement of the judicial selection system and recommended reform of senatorial courtesy: [http://www.njsba.com/activities\\_index.ctm?fuseaction=judicial\\_selection](http://www.njsba.com/activities_index.ctm?fuseaction=judicial_selection)

<sup>122</sup> New Jersey State Collections Librarian Deborah Mercer recommended a newspaper article as an example and explanation of this unofficial judicial selection bias. Tom Hester's "Politics Blocks Efforts to Fill Judge Vacancies" *The Star-Ledger*. May 8, 1994. News Section, Final Edition.

<sup>123</sup> <http://www.ajs.org/js/NJ.htm>

If the legislature is not in session, the governor appoints to fill vacancies, which are then subject to a vote at the next legislative session.<sup>124</sup> This ability to reject gubernatorial appointments is a large enough check so that the governor's party will not be used as a proxy for the unknown judge's party. But if there is party agreement in both houses of the legislature, majority party will proxy for judge party identification when it is otherwise not known.

## Merit Selection Systems

### Party Identification Not Taken From Selection System

Twenty-one of twenty-five states with merit systems select judges in such a way that party cannot be taken from the appointment.

#### States

Alaska, like many or most merit selection states, tries to keep a judge's political leaning insulated. So, for example, Alaska has an online site for the judicial council which makes selections. Ideology and political leaning are, not surprisingly, missing from the information available on each judge.

Alaska's system goes further than simply making it difficult to find a judge's political party. For the judge to be retained from one six-year cycle to the next, he or she must fill out a questionnaire with questions such as "during your most recent term as a judge, have you: ... c) held office in any political party? ... e) held any other local state or federal office?" Although Alaska does not explicitly prohibit political activity (seventeen states

---

<sup>124</sup> [http://www.ajs.org.js/VA\\_methods.htm](http://www.ajs.org.js/VA_methods.htm)

do<sup>125</sup>), a likely and intended result of this line of questioning is to dampen judges' partisan activity.

Arizona statutorily forbids a judicial nominating committee from nominating more than 60% judges from the same political party.<sup>126</sup>

Colorado judicial selection consists of the governor's choice from among the candidates selected by a nominating committee, which is limited to having a majority of no larger than one on the 14 member committee, plus the chief justice. Colorado has passed statutes which limit a judge's use of campaign language, campaign activity, and even knowledge of where their funding came from.<sup>127</sup>

The Connecticut judicial selection system has a nominating committee, which is limited to an equal number of Democrats and Republicans, provides the governor a list from which s/he chooses a nominee, and the legislature confirms.

The District of Columbia has its judges appointed by the President of the United States from a list of three given by the nominating commission, which bears little direct relationship to that President as s/he appoints only one member of the seven. The senate also confirms the choice.

Missouri's commission, the original merit system, has controls for geographical dispersion, lawyer and non-lawyer status, and political minority and majority controls built into its membership.<sup>128</sup> But circuit court judges are appointed by the governor

---

<sup>125</sup> AL, CT, HI, IN, KS, KY, MD, MN, MO, NE, NV, NM, NY, ND, OK, TN, and WY.

<sup>126</sup> This comes from the American Judicature Society's site on the judicial selection method of Arizona: [http://www.ajs.org/js/AZ\\_methods.htm](http://www.ajs.org/js/AZ_methods.htm).

<sup>127</sup> [http://www.ajs.org/js/CO\\_elections.htm](http://www.ajs.org/js/CO_elections.htm)

<sup>128</sup> [http://www.ajs.org/js/MO\\_methods.htm](http://www.ajs.org/js/MO_methods.htm)

without check (except in four counties<sup>129</sup>), so lower court judges, if appointed, and if no other source identifies a judge party, the governor's party will substitute.

Nebraska's thirty-three nominating commissions (one for each district in the state) limit the ability of the governor in the number of appointees to each commission, the party makeup of those members, and in forcing a decision from the list of at least two names they submit to him or her.<sup>130</sup>

New Mexico's nominating commission must equally represent the two major parties of the state, and the governor appoints only a minority of the commission. But at the next general election after appointment, the judge must win reelection via a partisan election, and after that, all elections are nonpartisan. If the judge is unopposed, he or she must win at least 57% of the vote.<sup>131</sup>

New York has one of the more insulated merit systems, as there are party controls, geographic controls, and membership appointed by the executive, judiciary and legislature. Judges go through the process again at the end of their terms rather than a retention election. But to be considered by the nominating commission, judges must win seats in lower level courts, which means partisan elections.<sup>132</sup>

Rhode Island's is the most recent merit-based judicial selection system, passed after some judicial scandals in the early 1990s. The governor now appoints a minority of the nominating commission, and has the pick confirmed by both the state House and Senate.

---

<sup>129</sup> Clay, Jackson, Platte and St. Louis counties use judicial nominating commissions unique to each county, with enough controls to prohibit using the governor's party as a proxy.

<sup>130</sup> [http://www.ajs.org/js/NE\\_methods.htm](http://www.ajs.org/js/NE_methods.htm)

<sup>131</sup> [http://www.ajs.org/js/NM\\_methods.htm](http://www.ajs.org/js/NM_methods.htm)

<sup>132</sup> [http://www.ajs.org/js/NY\\_methods.htm](http://www.ajs.org/js/NY_methods.htm)

Unless the legislature and governor appointed before the change to a merit selection system in 1994, and have party agreement, party will not be taken.

Utah's governor appoints 7 of the 8 members on the judicial nominating commission, but s/he is restricted from appointing more than 4 from the same party. And further, the senate confirms the governor's choice from the nominating commission's list. So no substitution is used for a missing judge's party identification.<sup>133</sup>

Vermont's merit selection system disperses partisan sway in a number of ways, one of which is allowing all the attorneys licensed to practice in Vermont a vote on the membership of the judicial nominating commission. The governor only picks two of the eleven members, and the senate confirms the choice.<sup>134</sup>

## Merit Selection Systems

### Party ID Taken from Appointing Gov. or Legislature

There are four states which have selection systems in place that do control for purely partisan based appointments, but appointing governor or legislature have enough influence over judicial appointments to make use of the information when searching for judge's party identification.

### States

Florida chooses to have a nominating commission for each jurisdiction. One state-wide committee for the Florida Supreme Court, a commission for each of the five appellate districts, and a commission for each of the twenty judicial districts, making 26 nominating commissions in all. But all nine members of each of those commissions are

---

<sup>133</sup> [http://www.ajs.org/js/UT\\_methods.htm](http://www.ajs.org/js/UT_methods.htm)

<sup>134</sup> [http://www.ajs.org/js/VT\\_methods.htm](http://www.ajs.org/js/VT_methods.htm)



determined by the governor. That power is limited by the Florida Bar offering a list from which four of the members of each commission are drawn, but there are no further restrictions. The governor chooses the judge from the list provided by the nominating commission.<sup>135</sup>

Florida passed a diversity requirement in 1991, requiring these commissions to have at least a one-third make up of gender, ethnic or racial minorities. A federal district court struck the law as an equal protection violation in 1995.<sup>136</sup>

Although Florida tried to limit the campaigning of judges for their retention elections, the federal courts struck rules which governed a limit on the time spent raising and spending, airing views on disputed legal and political issues, and direct public associations with the political parties.<sup>137</sup>

Massachusetts has a selection system which is considered a merit system, but the governor is not bound to choose from the list provided by the nominating commission, and the whole membership of that commission is appointed by him or her, and serves solely at his or her pleasure. The Governor's Council, a geographically disbursed elected board has a confirmation power once the governor has made a choice, but this limitation is not strong enough to alter the likelihood that judges will generally align with the governor's political preferences.<sup>138</sup>

---

<sup>135</sup> [http://www.ajs.org/js/FL\\_elections.htm](http://www.ajs.org/js/FL_elections.htm)

<sup>136</sup> *Mallory v. Harkness*, 895 F.Supp. 1556 (S.D. Fla. 1995).

<sup>137</sup> *American Civil Liberties Union v. The Florida Bar*, 744 F.Supp. 1094 (N.D. Fla. 1990), *Zeller v. The Florida Bar and the Florida Judicial Qualifications Commission*, 909 F.Supp. 1518 (N.D. Fla. 1995), and *Concerned Democrats of Florida v. Reno*, 458 F.Supp. 60 (S.D. Fla. 1978), respectively.

<sup>138</sup> [http://www.ajs.org/js/MA\\_methods.htm](http://www.ajs.org/js/MA_methods.htm) See also the official website of the Governor's Council found on the mass.gov website.

Maryland's merit based system includes a nominating commission of thirteen, nine of which are selected by the incoming governor, although that pick is subject to senate confirmation.

Whether South Carolina has a merit selection system or not is a matter of some disagreement as the state would claim that it does, but most experts disagree.<sup>139</sup> The legislature votes on the three or fewer candidates offered by a Judicial Merit Selection Commission. The ten member commission has its members chosen by the Speaker of the House (5 members appointed), President Pro Tempore of the senate (3) and the chair of the senate judiciary committee (2 appointed.) Six of the ten must be from the current legislature.

#### Nonpartisan Elections

Thirteen states overall use nonpartisan elections. Six of them do not allow any information to be drawn regarding judge party ID, but seven fill vacancies in such a way which does allow party ID to be substituted.

Georgia fills all judicial vacancies via a gubernatorial choice from a nominating commission list. But a) that commission is populated by the governor with no restrictions on its membership, b) there is no limit or quota for the quantity of names on the list, and c) the governor is not bound to pick from this list.<sup>140</sup> Because there are no controls in place regarding partisan influence, judges chosen by this method will be coded as the party of the appointing governor. But having written that, denoting judges chosen by Zell Miller and Roy Barnes as Democrats over a recent twelve year span is

---

<sup>139</sup> Both *The Book of the States*, and The American Judicature Society says it makes appointments by legislature

likely to be a poor indicator of ideology when compared with other states. This is an example where the power of PAJID over party identification is clear.

Kentucky uses nonpartisan elections as its judicial selection system, but when a vacancy arises, the governor picks a replacement from a list of three names provided by a nominating commission. The nominating commission is made up of seven members, four of whom are appointed by the governor, and the remaining three being the Chief Justice and two lawyers picked by the state bar.<sup>141</sup>

Although Michigan judicial elections are nonpartisan at each level, supreme court nominees come from the party conventions.<sup>142</sup> The State Bar of Michigan offers a ranked list of candidates for vacancies, but the governor is not limited in choosing from the list in filling the vacancy.

Minnesota fills vacancies by gubernatorial appointment. Although a commission on judicial selection offers a list of three to five names, the governor is not bound by this list. And the commission is solely for the district courts, rather than appellate or supreme court, although some governors have asked for advice on those two levels as well.<sup>143</sup> But because the governor appears to have limitless institutional power when filling vacancies, the party of the appointing governor will substitute for the judge when other not available. Reform Party Governor Jesse Ventura will not be a basis for any classification.

Mississippi changed from partisan elections of judicial candidates in 1994 to nonpartisan elections. The change did little to alter one of the most competitive states for judicial seats. Laws prohibiting the parties from donating to or endorsing a judicial

---

<sup>140</sup> [http://www.ajs.org/js/GA\\_methods.htm](http://www.ajs.org/js/GA_methods.htm)

<sup>141</sup> [http://www.ajs.org/js/KY\\_methods.htm](http://www.ajs.org/js/KY_methods.htm)

<sup>142</sup> [http://www.ajs.org/js/MI\\_methods.htm](http://www.ajs.org/js/MI_methods.htm)

<sup>143</sup> [http://www.ajs.org/js/MN\\_methods.htm](http://www.ajs.org/js/MN_methods.htm)

candidate were overturned in 2002, but campaign financing laws governing judicial elections remains largely intact.

Montana fills vacancies with a gubernatorial pick from a list of three to five names provided by a nominating commission, and then confirmed by the senate. The governor names a simple majority of the seven member commission, but because of other limitations<sup>144</sup>, party will serve as a proxy only when the party of the governor controls the legislature.

North Dakota fills vacancies via a nominating commission appointed in equal parts by the Chief Judge, Governor, and President of the state bar. The governor's choice is constrained to picking from the list, calling a special election, or reconvening the commission for another list. Therefore the governor's party will not substitute for judge party identification in appointments.<sup>145</sup>

Ohio allows the parties to nominate, support and fund judicial candidates before the nonpartisan elections. Filling vacancies is solely left to the Governor, without check. Though past governors have picked from a small list provided by the leadership of both parties from the court's locality.<sup>146</sup> This presumably ensures smoother transitions from appointment to election.

Oregon has nonpartisan elections, but they also allow the governor to fill vacancies without any checks, so likeminded judges have an incentive to retire after an election, allowing the governor to appoint their replacement, which is in fact common.

---

<sup>144</sup> Interestingly, the governor must appoint four people from various "industries, businesses or professions". [http://www.ajs.org/js/MT\\_methods.htm](http://www.ajs.org/js/MT_methods.htm)

<sup>145</sup> [http://www.ajs.org/js/ND\\_methods.htm](http://www.ajs.org/js/ND_methods.htm)

<sup>146</sup> [http://www.ajs.org/js/OH\\_methods.htm](http://www.ajs.org/js/OH_methods.htm)

Washington's nonpartisan elections often look no different than partisan elections with issue advocacy and financing coming from ideologically predictable sources. When vacancies arise, the governor appoints a judge to sit until the next general election. Since there are no controls on that choice, gubernatorial party will substitute for appointed judges.

Wisconsin's governor fills vacancies with the help of a nominating commission s/he populates, but by which s/he's not bound. Appointments also stay in office until the next retention election without another justice running.<sup>147</sup> So appointing governor party will substitute for unknown judge party identification.

#### Partisan Selection System

Eight states use partisan elections, and interestingly, these states have more protective procedures in place to limit the influence of voters when filling vacancies. For example, Pennsylvania has two-thirds senate confirmation, Louisiana calls a special election, Illinois has their Supreme Court fill the vacancy, and Texas has a simple majority senate confirmation.

North Carolina was a partisan election state until recently: 1996 for limited jurisdictions, 2001 for general jurisdictional courts, 2002 for intermediate appellate courts. The state is the first to move to voluntary public financed judicial elections. Because the governor can fill vacancies without a check, appointed judges whose party cannot otherwise be determined will be coded with the party of the governor.

---

<sup>147</sup> [http://www.ajs.org.js/WI\\_methods.htm](http://www.ajs.org.js/WI_methods.htm)

Pennsylvania fills vacancies with a gubernatorial-chosen nominee whose confirmation requires a super majority of two-thirds of the Senate, thus gubernatorial appointing party will not count as a proxy for judge party identification.<sup>148</sup>

Texas fills vacancies by gubernatorial appointment with senate confirmation.<sup>149</sup> When the party of the governor and that which controls the senate is the same, it will be used to substitute for the party of the judge if it is unknown.

When the CQ Judicial Staff Directory mentions a judge's "service beginning" in November or January of a given year, and there is no other information to go on, it will be assumed the judge was elected. Both dates are offered in the directory for judges who were elected, when crosschecked against The American Bench. This is a helpful assumption because if service begins in others months, and no other relevant information is available, it will be assumed the judge was appointed to a vacancy, and party can thus be determined if no other information is available.

### Missing Information

The missing data do have a relationship to political culture and selection system. In states that take the judicial insulation from politics seriously, as in Missouri, the press releases from the state, the reporting on cases and judges themselves are shorn of any reference to their politics. This means that party identification could be coded for judges responsible for only 13 of the 86 votes cast by Missouri judges. Yet other states with merit systems do not have the same political culture, and so party ID is easier to come by (e.g. New York with 87% party known). Some states with partisan elections, strikingly,

---

<sup>148</sup> [http://www.ajs.org/js/PA\\_methods.htm](http://www.ajs.org/js/PA_methods.htm)

<sup>149</sup> [http://www.ajs.org/js/TX\\_elections.htm](http://www.ajs.org/js/TX_elections.htm)

have a Missouri like hesitancy to talk about the direct connection between the party and the judges (New Jersey with just over a third known), while other states with partisan-controls in place still flaunt it (Mississippi with almost three-quarters known).

In the model, missing data in the Judge Politics variable appears to be slightly correlated with the more insulated selection system, as is expected. See table 14 below. But with the average deviation being 0.6 percentage points for the five categories, the difference appears to be one that will not bias inferences drawn from the data with Judge Politics coded.

**Table 14 Analysis of Missing & Available Judge Party ID Data for Possible Bias**

Type of Judicial Selection System	N for the Dataset Overall	% of Overall N	N where Judge Ideology is Collected	% of Collected N	N where Judge Ideology is Not Collected	% of Missing N	% of National Population
Partisan election	760	23.4%	568	23.8%	192	22.8%	27.6%
Gov or Leg Appointment	515	15.8%	403	16.9%	112	13.3%	22.3%
Nonpartisan election	642	19.7%	459	19.2%	183	21.7%	14.5%
Combined Merit	813	25.0%	592	24.8%	221	26.2%	22.9%
Merit	524	16.1%	365	15.3%	135	16.0%	12.8%
Total	3254	100.0%	2387	100.0%	843	100.0%	100.0%

The last column is an interesting for comparing how many people live under each judicial selection system and how many judge votes are cast. Since the collection of state cases here is putatively claimed to be the population rather than a sample of a population, that there is a large difference between the last column and proportions in the study does not question the integrity of the dataset.

### Analysis

After all that, the end result is that just under three-quarters of the votes cast in this model can be coded. 2,381 votes from 1,380 judges were associated with a party, leaving 873 votes from 506 judges without a reliable association.

56% of the judges self identify as Democrats<sup>150</sup>, and the average PAJID score for the overall model is 50.05.<sup>151</sup> The average PAJID scores for district courts at 51.5, for intermediate appellate courts at 50.3, and for courts of last resort the average PAJID is 49.5. But since Democratic party identification is significantly higher at the COLR (59%) than at the intermediate or district level (53% and 54%), the PAJID differences are likely sullied by the derived numbers assigned to lower court judges based on their party identification.

Justifying the amount of energy spent on the construction of this variable, it captures more of the variance in religious freedom than the simple judge party identification does. Judge politics has a .05 correlation score in the liberal direction, significant at the .001 level.

Judge Politics and the state's attempt to increase religious freedom are positively and significantly correlated as well. The average PAJID score in states which attempt the increase is 54.6, and in the states which do not attempt an increase, the average PAJID is 43.5.<sup>152</sup> Eleven PAJID points is larger than the middle quintile of the spread.

States which attempt to increase via the judicial branch have significantly more liberal judges (PAJID score of 58), and states which go through RFRAs have significantly more conservative judges (46). States which do not attempt to increase religious freedom at all have the most conservative judges (43). And the scalar version of

---

<sup>150</sup> The national average Democratic party identification for state trial judges was reported in 1980 to be 55% by John Paul Ryan. *American Trial Judges: Their Work Styles and Performance*. New York: Free Press. Chapter 1 and Appendix B, as cited in (Stumpf 1998, 156)

<sup>151</sup> The PAJID score mean for the supreme court justices is 49.62, and the mean for those scores extrapolated from parties is 50.42

<sup>152</sup> This difference is significant at the .001 level.



institutional protectiveness continues to corroborate the positive relationship between judge liberalness and institutional response to religious freedom: .299\*\*\*.

The clarity of direction in those results may lead to an oversimplified interpretation, though. Is conservatism at home in the no-attempt states, while liberalism at home in the increased scrutiny states, with RFRA states as the middle? A linear interpretation of the interplay between Judge Politics and states increasing scrutiny may yield a cleaner relationship where one likely does not exist.

The overall time-series institutional variable which correlated with conservative counties also shows a tilt toward more conservative judges by 2 PAJID points, and with a date range of the last 1990s to the mid-2000s, an era where Republican voting was high; this is not surprising.

**Table 15 Judge PAJID Score Characteristics**

0 (Most Conservative) to 100 (Most Liberal)

	Mean Judge PAJID	N
Winning Votes	51.3	1058
Losing Votes	49.0	1329
No Institutional Increase	43.6	993
Institutional Attempt to Increase Religious Freedom	54.7	1394
Legislatively Increased	46.4	427
Judicially Increased	58.3	967
Rational Basis States	46.4	178
Prior to Institutional Decrease or Increase	44.1	574
Least Protective Increased States	46.9	157
Level 0 Protection States	51.3	43
Level 1 Protection States	45.8	449
Level 2 Protection States	56.2	669
Most Protective States	73.0	125
Total	50.3	2195
Male	49.4	1819
Female	52.2	564
Conservative Non-Traditional Judges	10.1	21
Evangelical Protestant Judges	37.7	56
Mainline Protestant Judges	45.2	186
Black Protestant Judges	35.1	13
Catholic Judges	56.5	210
Jewish Judges	65.6	60
West Coast	56.5	352
Mississippi Valley	33.3	375
Interior	45.2	670
South Atlantic	37.6	303
Northeast	66.1	687
Total	50.0	2387

Other interesting findings here include a very strong pattern of judge religious tradition and PAJID scores in expected directions. Conservative non-trationals (mainly Mormons here) showed the strongest tendency to be more conservative with a correlation score of  $-.46$ , followed by Evangelical Protestants at  $-.27$ , and Mainline Protestants following at  $-.219$ . Black Protestant judges, perhaps surprisingly because of a strong tendency of African Americans to identify as Democrats, show a conservative correlation

with PAJID at -.13. Catholics and Jewish judges, again surprisingly, have the same strength and liberal direction of correlation with PAJID at .324 and .329, respectively. All of these relationships are significant at the  $p < .001$  level except Black Protestants who are significant at the  $p < .01$  level.<sup>153</sup>

### Metro-Area Religious Adherence Rate

*Hypothesis 5:* Judges whose courts are in high religious adherence areas will support religious freedom claims more than judges from lower religious adherence areas.

The objective of this variable is to understand the effect, if any, a metropolitan area's church attendance and membership has on religious freedom, and to control that effect in the model. No research has been done on the relationship of religious freedom to religious adherence rates prior to now.

The variable is a simple ratio of each metropolitan area's religious adherents and the population of that metro area.<sup>154</sup>

The number of adherents comes from the Glenmary Research Center's publication, *Religious Congregations & Membership in the United States 2000*. The Glenmary data come from a "report containing statistics for 149 religious bodies, providing information on the number of their congregations within each region, state, and county of the United States. Where available, also included are actual membership figures (as defined by the

---

<sup>153</sup> There are 68 Evangelical Protestant judges, 198 Mainline Protestant judges, 13 Black Protestant judges, 210 Catholic judges, 60 Jewish judges, and 21 Conservative Non-Traditional judges.

<sup>154</sup> Information on metropolitan areas comes from both the Glenmary data as well as the U.S. Census website, found at [www.census.gov](http://www.census.gov).

religious body), total adherents, and average attendance.”<sup>155</sup> It is a questionnaire based data collection with statistical extrapolations for select religious traditions.<sup>156</sup>

Adherent is defined by Glenmary as “all members, including their children and the estimated number of other participants who are not considered members; for example, the ‘baptized,’ ‘those not confirmed,’ ‘those not eligible for communion,’ ‘those regularly attending services,’ and the like.”<sup>157</sup> Adherent is a better unit of analysis than church membership because membership is not a standardized concept. Baptism, for example, can be symbolic or it can be the definition of membership itself. Asking denominations to report back on total adherents standardizes the concept. Glenmary extrapolates from information on the questionnaire. So for example when a denomination reports only membership, and it is a denomination which only counts adults, Glenmary takes a county based child-rate and extrapolates how many adherents the church has.

What I refer to here as a “metro area” is formally the metropolitan statistical area (MSA) derived from the 1990 census, to better fit the Glenmary data, defined as an urbanized area with 50,000 or more inhabitants. Metropolitan Divisions, or nested metropolitan areas within metropolitan areas, are not analyzed in this study.<sup>158</sup> There

---

<sup>155</sup> Glenmary 2002, vii.

<sup>156</sup> The Glenmary data note a bias in their collection which is likely to undercount historically African American denominations. Those five denominations, along with 136 other identifiable denominations did not participate in the study. These 141 denominations total an estimated population of 31,040,360, or more than 10.2% of the population in 1990.

<sup>157</sup> Glenmary 2002, xv.

<sup>158</sup> Standard definitions of metropolitan areas were first issued in 1949 by the then Bureau of the Budget (predecessor of OMB), under the designation "standard metropolitan area" (SMA). The term was changed to "standard metropolitan statistical area" (SMSA) in 1959, and to "metropolitan statistical area" (MSA) in 1983. The term "metropolitan area" (MA) was adopted in 1990 and referred collectively to metropolitan statistical areas (MSAs), consolidated metropolitan statistical areas (CMSAs), and primary metropolitan statistical areas (PMSAs). The term "core based statistical area" (CBSA) became effective in 2000 and refers collectively to metropolitan and micropolitan statistical areas. This is taken from the U.S. Census website's "About Metropolitan and Micropolitan Statistical Areas", <http://www.census.gov/population/www.estimates/aboutmetro.html>

were 361 metro areas in the 1990 census. The units of analysis for Glenmary, and the smallest geographic units for metro areas, are counties.

For areas that do not fall in metro-areas, which occurs around 8% of the time, the ratio for the county will be used.

Since much of this data was transcribed by hand, reliability tests were needed to catch errors. That test is a comparison of the variable to each metro area's constituting counties' adherence rates. So for example, the Chicago metro area's adherence rate (the constructed variable with possible errors) was compared to the sixteen counties which comprise this metro area, as defined by the census. By creating a repeating formula for subtracting the SMA rate from the county rate for each case, I could then sort by that difference, and analyze the top and bottom 100 cases or so to make sure they were transcribed correctly and are diverse counties rather than mistakes.

## Results

The results of this collection show that adherence rates around the nation range from a low of 22.5% to a high of 93% and have a mean of 49.6%. When the vote occurs in an area which is not a metro area (247 votes in 115 cases) the county's adherent rate is used in lieu of the metro area. The county adherence rate looks very much like the metro rate in range, but is 2 percentage points higher in average. The adherent rate for the nation as a whole is 56.8%, so the metro areas and counties involved in this study tend to fall in the areas with fewer adherents. That is related to the locations of supreme (and oftentimes intermediate appellate) courts in state capitols, and those state capitols having unique demographics that correlate with lower adherence rates. The data appear to support this explanation as adherent rates decrease for courts located at the capital.

The relationship of adherent rates to religious freedom is positive and significant: .055 and  $p < .01$ . The relationship of adherent rates to states' attempts to increase religious freedom is also positive and significant (.04\*).

The interaction between the institutional attempts and winning votes is also positive and significant. Adherent rates are higher than average in 1) legislatively and 2) judicially increased winning contexts, and 3) in 10 of 14 possible contexts in the scaled institutional variable.

In short, the more religious an area is, the more favorable the courts tend to be.

**Table 16 Metro Adherent-Rate Characteristics, from Lowest to Highest**

Metro Adherent-Rate, cut into 20% Categories		Favorable Vote Rate	Percentage of Votes from All Increased Scrutiny Contexts	Percentage of Votes from Legislative Attempt Contexts	Percentage of Votes from Judicial Attempt Contexts	Judge PAJID 0 (Conserv.) -100 (Liberal)	Percentage of County Voting for George W. Bush in '04
Lowest Adh-Rate	Mean	.43	.52	.13	.39	49.9	.42
	N	690	690	690	690	551	690
2nd Quintile	Mean	.44	.53	.20	.32	49.5	.43
	N	614	614	614	614	472	614
3rd Quintile	Mean	.39	.39	.14	.24	40.5	.49
	N	665	665	665	665	426	665
4th Quintile	Mean	.47	.75	.24	.52	52.8	.43
	N	662	662	662	662	489	662
Highest Adh-Rate	Mean	.50	.55	.16	.39	56.9	.41
	N	623	623	623	623	449	623
Total	Mean	.45	.55	.17	.37	50.0	.44
	N	3254	3254	3254	3254	2387	3254

Judge Politics shows a significant relationship that appears to be parametric. The positive correlation score (.09) means that it tilts toward higher adherence rates with more liberal judge vote on a religious actor, but moderate adherence rates are better seen as the pole for conservative judges, rather than the lowest adherence rates.

And county presidential party also shows a parabolic shape. It has a negative relationship to Republican voting, but support for Candidate W. Bush was lowest in the metro areas with the least and most adherents, and rose as those rates moderated.

It does bear repeating that Republican voting does not have a linear, or even positive relationship with the rate of adherents in an area. This is not contradictory to one of the more referred to statistics in Presidential elections over the last few elections –that church-going correlates strongly with Republican voting; but it certainly seems contrary to it.

The same pattern occurs at the county level with adherent rates: very significant and comparatively strong Democratic correlations with the more religious areas. The most likely explanation for this relationship is the evidence correcting a stereotype that the South or Southwest is the most religious areas of the country. In fact the Catholic Northeast has the highest adherent-rate if you parcel the nation into the South, the North and the West. Further, if you categorize the nation into the more political geographic mix, you find the Catholic Northeast still is quite a bit higher than the rest of the nation.

**Table 17 Metro-Area Religious Adherent Rate by Geography**

Political Geography	Metro-Adherent-Rate	N
West Coast	.385	442
Mississippi Valley	.521	500
Interior	.496	1014
South Atlantic	.414	346
Northeast	.562	952
Total	.496	3254

It is worth noting here that the Glenmary data do make statistical adjustments for nominal and/or non-practicing Catholics, so that they are not considered adherents in their data.

## Metro-Area Religious Homogeneity Index

*Hypothesis 6:* The more religiously diverse the area in which the judge sits, the greater the likelihood the judge will support the religious freedom claim.

Similar to the last variable in that it predicts that an area's religious make-up will have an effect on religious freedom, this variable will capture how religiously diverse an area is. The prediction for that relationship is for religious freedom to find more friendly treatment in more diverse areas. But to be clear, the research here is fairly exploratory, and the study holds that religious diversity in an area will matter, more than it holds that it will matter in a negative and linear way.

The method I used to construct the variable was to take the population of each religion (or "religious tradition", explained in the next variable) and calculate the odds of two random people being from the same tradition. That calculation is called a Herfindahl Index, and it was first used in business research measuring area industries for monopolies. Herfindahl indexes range from perfect homogeneity at 1, to perfect heterogeneity at 0. The index is a sum of the squared adherent-rates of the religious traditions. More specifically it is  $H_j = \sum S_{ij}^2$  where  $S$  is the specific religious tradition divided by area  $j$ 's adherent population ( $i$  is the index of summation.)

The reference category, or the denominator, is the population of adherents rather than the whole population. So in other words, the interpretation of the index will be the odds of two random people chosen from the area's adherents, not the area as a whole. This is done with the attempt to control for the multicollinearity that could exist between this measure and the adherent rate without this control in place.

### Results



In the most diverse counties and metropolitan areas, the odds of randomly selecting two people that are either Mainline or Evangelical Protestants, Catholic, Orthodox or Other are about 1 in 4. Compare that against Provo, Utah where those odds are 96%. Provo has 325,000 Mormons and only 7,000 other adherents from all other faiths. Provo is so homogeneous that if you counted their 37,000 non-adherents as a religious grouping, the area would still be in the top five most homogeneous areas.

The variable has a positive skew, and a mean of .417.

**Table 18 Religious Homogeneous to Heterogeneous Areas**

<b>Metro area or County</b>	<b>Herfindahl Score</b>
Metro Provo, UT	.96
Franklin County, LA	.87
Lawrence County, MS	.84
Clinton County, NY	.78
Metro Salt Lake City, UT	.75
<i>mean</i>	.42
Metro Missoula, MT	.27
Whitman County, WA	.27
Coconino County, AZ	.27
Metro Anchorage, AK	.26
Ravalli County, MT	.25
Washakie County, WY	.25

How does religious homogeneity relate to religious freedom? The answer is positively and significantly, with a correlation score of .06 and the pattern unmistakable with  $p < .001$ . Winning contexts had around 1¼ percentage point more homogeneity than losing context.

State institutional response sees a similar relationship, positive and significant (.01 level), and increased states show around a percentage point more homogeneity than states that do not attempt an increase. The institution used mattered, as legislatively increased states were 1.8 percentage points above the no-attempt states, which is significant, and

judicially increased states were .7 of a point above the no-attempt states, which was not significant.

The scaled increased scrutiny variables are significant, but do not appear to be linear. Only the integrated, scaled single variable shows a progression toward more homogeneity as the protection from the state increases.<sup>159</sup> The Herfindahl score of the 157 votes cast in the most protective category of states is .56, and that average is higher than the 90<sup>th</sup> percentile in the spread of Herfindahl scores.

Increased scrutiny contexts saw voting stay with the positive pattern. Judicially increased contexts looked the simplest, with lower success rates jump rise sharply in the last quintile which gave it its positive correlation. Legislative context voting rates varied by homogeneity quintile, but without much reason. Put the two together and the parabola shows up again. Higher success rates at the most heterogeneous and homogeneous religious contexts, and average-to-low scores in the middle.

**Table 19 Religious Homogeneity and Increased Scrutiny Voting Results**

Metro Religious Herfindahl Index		Non-Increased States	Increased Scrutiny States	Judicially Increased States	Legislatively Increased States
Most Heterogeneous Quintile	Vote-Rate	.43	.45	.44	.49
	N	378	293	213	80
2nd Quintile	Vote-Rate	.39	.40	.44	.27
	N	283	383	300	83
3rd Quintile	Vote-Rate	.52	.44	.45	.44
	N	281	386	208	178
4th Quintile	Vote-Rate	.45	.41	.42	.38
	N	293	334	215	119
Most Homogeneous Quintile	Vote-Rate	.45	.53	.52	.56
	N	283	385	276	109
Total	Vote-Rate	.45	.45	.465	.43
	N	1473	1781	1212	569

<sup>159</sup> .262 correlation score, and p<.001.

Like in the adherent-rate, table 19 shows a parabolic pattern with the least and most homogeneous areas having more votes occur in increased contexts. The most homogeneous areas have the most increased scrutiny contexts. There are negative patterns between homogeneity and majoritarian (or Republican) voting, which likely has something to do with the effect of the Catholic Northeast's most homogeneous rate in the nation outweighing the other areas.

**Table 20 Metro-Area Homogeneity Index by Geography**

Political Geography	Herfindahl Rate	N
West Coast	.36	442
Mississippi Valley	.38	500
Interior	.40	1014
South Atlantic	.37	346
Northeast	.48	952
Total	.417	3254

Both the strength and significance of the patterns for favorable voting in the integrated institutional variable decrease when the effect of the Northeast is controlled in a partial correlation, but they are still a significant  $-.06^*$ .

Although it is speculative and this study is not the place to answer the question fully, another possible answer as to why homogeneity correlates positively with religious freedom rather than religious diversity could be the feeling of security religious traditions would feel as they make up larger proportions of an area. If that security did in fact exist, offering religious exemptions to policy would be less threatening to the religious order than in more heterogeneous or competitive environments.

Note that a correlation score between this homogeneity index and the metro adherent rate shows that multicollinearity is likely going to be an issue in the model. There is no

conceptual reason that the rate of adherents and the religious diversity of an area should be so strongly correlated: .485\*\*\*.

### Conclusions for the Judge and Community Variables

The predictions held true as county politics and left leaning judges were more protective of religious actors. Religious adherence supported the prediction here as higher rates led to more protectiveness. And religious homogeneity defied the prediction as it was the context for more protectiveness, not heterogeneity.

### Claimant Variables

#### Popularity of the Religion Seeking Protection

*Hypothesis 7:* Religious freedom claimants from minority religions will meet with less success than those from majority religions.

This variable will control for the effect on religious freedom due to the religion of the litigant and the religious tradition of the surrounding area. The actual coding and construction of this variable comes after a lengthy discussion.

This variable was originally conceived as simply a coding for the claimant's denomination or maybe a dummy variable for whether the claimant was in a minority (on the national level) religion or not. The dummy variable gives away too much information, and the denominational variable is beholden to American denominations which have evolved enough as to make the quantity and diversity of that variable too great for it to convey enough meaning.

Constructing a middle way between the dizzying array of Protestant denominations and a way of understanding their proximity to and from the status quo has been an area of

interest in sociology for years. But since the field has yet to crown one classification as the standard, this study chooses an ordering laid out by Steensland in 1999<sup>160</sup> and referred to as “religious traditions.” The Steensland classification lays out eight large groupings of similar believers, with denomination being only one of several indicators of who is going into which group. So a Baptist that is evangelical and reads the Bible with a literalist understand is grouped with likeminded Lutherans, and Lutherans and Baptists that are neither evangelical nor fundamentalist are grouped elsewhere as well. The eight religious traditions are: Evangelical Protestant, Mainline Protestant, Black Protestant, Catholic, Jewish, Conservative Non-Traditional (CNT, and Mormons are an example), Liberal Non-Traditional (LNT, and Unitarians are an example) and an Other category, which includes Buddhists, Native Americans, Muslims, and others.

The benefits of this type of ordering, to be sure, are bringing the quantity of categories into a manageable number, and having a sophisticated method for classifying believers.

---

<sup>160</sup> Steensland and et al., (2000) has the list of all the denominations and how they are classified, reproduced here in Appendix B.

**Figure 3 Largest Denominations Within Each Religious Tradition, 2000**

<b>Mainline Protestant</b>	<b>Evangelical Protestant</b>
United Methodist Evangelical Lutheran Presbyterian Church, USA Episcopal Church American Baptist Churches in the US United Church of Christ	Southern Baptist Assembly of God Lutheran Church –Missouri Synod Churches of Christ Christian Churches Independent, Non-Charismatic
<b>Black Protestant</b>	<b>Other</b>
Church of God in Christ National Baptist Convention, USA National Baptist Convention of America African Methodist Episcopal Church Progressive National Baptist Convention	Jewish Muslim Baha'i Native American Pagan
<b>Liberal Non-Traditional</b>	<b>Conservative Non-Traditional</b>
Unitarian, Universalist United Church, Unity Church New Birth Christianity National Spiritualist Assoc. of Churches New age Spirituality	Church of Latter Day Saints Jehovah's Witnesses Christian Scientists Christadelphians LDS –Reorganized

This construction of the variable had some exceptions. More than one coding of religious traditions was possible in eleven cases. In nine of those cases, a parent of a religious tradition is asking the state to stop the other parent from teaching or educating the children in a different religious tradition. The parent asking the state or city to stay out of the matter gets coded as the party seeking religious freedom. Or to be more clear, the coding in these cases is of the litigant seeking to teach or raise a child in a religious way, rather than the litigant asking the state to stop that religious behavior.

The description of this construction of the variable follows. Evangelicals were the most litigious religious tradition with almost a third of all the known religious litigants.<sup>161</sup> Catholics were the subjects of almost a quarter of the votes, followed by the Other category with 13%, Conservative Non-Traditional with 8%, Mainline Protestants with

---

<sup>161</sup> Most unclassified traditions were simply not mentioned in the case, but some were left blank because more than one tradition was asking for protection, as in a case where multiple churches were fighting the placement of a landfill. *Robertson v. City of High Point*, 129 N.C. App. 88 (1996)

7.6%, Jewish with 4.2%, Black Protestants with 3.3%, and Liberal Non-Traditionals with only 16 votes cast in their cases were the fewest, and .5% of the database.

**Table 21 Characteristics of the Religious Tradition of Claimant**

	Judge Votes	Percentage of the dataset's known religious traditions	Proportion of the Nation's Religious Adherents <sup>a</sup>	Religious Freedom Success Rate
CNT	265	10.0	3.4%	43%
EP	849	32.0	23.0%	41%***
MP	247	9.3	18.6%	64%***
BP <sup>†</sup>	108	4.1	12.0%	49%
Catholic	620	23.4	35.0%	57%***
Jewish	137	5.2	2.3%	57%
LNT <sup>†</sup>	16	.6	1.0%	75%**
Other	412	15.5	1.3%	23%***
Total	2654	100.0		45.6%
Total, with missing	3254			44.8%

\*\* Significant at the  $p < .01$  level.

\*\*\* Significant at the  $p < .001$  level.

<sup>a</sup> (Finke and Scheitle 2005) Glenmary puts the number of uncounted or non-adherents at around 50% of the nation, so a column showing a simple percentage of the nation of each religious tradition would not be comparable to the other columns.

<sup>†</sup> Inferences suffer from a small sample size for both LNT and BP. Specifically, determining whether a claimant was from a historically black protestant denomination was difficult and largely relied on the denominational name mentioned in the opinion, which did not occur with enough regularity to make this estimate less reliable. So the accuracy of the Black Protestant votes is such that inferences should only be drawn with care.

Changing the unit of analysis from votes to cases shows only a nominal difference. Each tradition's ratio of cases at the highest, middle and lowest levels of court appears similar. The cases missing a claimant's religious tradition, though, appear to be moderately overrepresented in the courts of last resort. A fact that is explained by the selection method of inferring cases. If the COLR case mentioned the tradition, the inferred cases inherited that tradition. If the COLR case does not mention the tradition, and the root cases are not published, they also missed the information.

Notice the traditions that are over- and under-represented. Mainline Protestants are litigants only about half of the time their national proportion suggests. Catholics and Liberal non-traditional denominations also appear in court at lower rates than their population suggest. On the other hand, Evangelicals appear in court about 50% more often than their population suggests, Jewish litigants 100+% more, Conservative non-traditionals about 300% more often, and Other Religious actors appear in court 15 times

more often than their proportion of the nation, and all four of those rates are significant increases.

Recent research on lower federal court decisions sheds some surprising light on this dynamic by showing that Catholics and Baptists succeed at lower rates than minor faiths.<sup>162</sup> That is worth repeating: minority faiths won more often than the popular faiths in the Sisk sample. The authors surmised that judges “may be more fearful of the cumulative effects of accommodating claims for accommodation by mainstream or near-mainstream religionists” rather than fearing the social effect from a minority religion. This is an interesting finding, and should be untangled from the general drift of research which supports the conventional understanding that minorities do not fare as well.<sup>163</sup>

For the population of state cases shown in Table 23 (second below), the success rate column does not support these findings as Catholics and Mainline Protestants fare much better than average. Perhaps more tellingly, the Other Religious category fares vastly worse than others. If the Muslims are disaggregated from the Other category, they show a 30% successful vote-rate, leaving the remaining Buddhists, pagans, Native Americans, and other believers with a 21% favorable vote-rate.

But in line with the Sisk findings, Evangelicals do fare worse than average. And generally the more conservative faiths on the spectrum fare worse. If you order the religious traditions in the following ad hoc ranking from conservative to liberal: CNT, EP, MP, BP, Catholic, Jewish, LNT, then the favorable vote-rate is negatively correlated with a score of .132, and significant at the .001 level. If Black Protestants mark the center, the three more conservative traditions win 45% of their votes, and the three

---

<sup>162</sup> Sisk, 2005.

<sup>163</sup> See Brent (1999) and Lupu (1998)



traditions to the left of it win 58% of their votes. Even more supportive of the argument is the fact that the win rate on the right is heavily bolstered by Mainline Protestants, which is largely not understood as a conservative group.

Geography matters in this question of whether majority/minority status affects the initial step of bringing the case. To be clear, do the religious traditions bring more cases when they are a minority in an area or when they are in the majority? Evangelicals find their two highest favorable vote-rates in the two regions where they are the most prevalent: the South and Midwest; while the Northwest is both their least populated area and area of least success.<sup>164</sup>

Catholics have more than a third of their votes come from the Northeast, their most populated region, and also find their success rate above their (and its) average. Their lowest success-rate comes in the South, where there is also a dearth of Catholics.

Jewish actors are vastly centered in the Northeast, and that is where they find their highest success rate (61%). In their three least populated regions, they find their three smallest success-rates.<sup>165</sup>

Mainline Protestants, on the other hand, do not see these same regional patterns, and instead actually show something like the opposite. They show a higher success rate among their three lowest populated regions than they do in their most populated region.<sup>166</sup>

---

<sup>164</sup> 40% of Evangelicals reside in the South, 24% in the Midwest, and the proportion of favorable votes are 47% and 49%, respectively. Only 4% of Evangelicals are in the Northwest, and they win 29% of the time there.

<sup>165</sup> 40% success rate, albeit with only 35 votes.

<sup>166</sup> A third of MPs reside in the Midwest, yet receive less than 50% favorable votes there, while only 20% of MPs live scattered throughout California, the Northwest and Southwest, and their favorable vote-rate among those regions is 69%. The most noteworthy region for Mainline Protestants is the Northeast, where they won 96% of 76 votes cast in 25 cases. These results are significant at the .001 level.

But this majoritarian-favored pattern does seem stronger than not. When the religious traditions are summed, the Northwest has the fewest adherents of these six regions, and also has the lowest success rate. The Northeast has the most adherents, and also has the highest success rate.<sup>167</sup> True to the pattern, the Midwest is second in both adherents and success rate, and the Southwest represents both the middle point for adherents and success rate of religious actors.

All of which leads to a more rigorous testing of the question of whether more popular religions get better treatment. A variable was created for the percentage agreement between the claimant and metro area, or county if not in a metro area. This new variable is constructed by collapsing CNT and EP, MP and BP, LNT Jewish and Other, to make them comparable to the religious tradition data available for metro areas and counties, which are limited to only four religious traditions: EP, MP, Catholic and Other.<sup>168</sup> The created variable has a mean of 28.7% agreement, but is skewed toward less agreement with a median of 24% agreement and with a full quarter of the votes on claimants with less than 10% agreement.

This variable supports the assertion that popular religions do indeed receive more favorable treatment. The correlation between agreement and favorable vote-rate is positive, .12 and clearly a pattern ( $p < .001$ ). A comparison of vote outcomes shows that protective votes occur in contexts with an average of 32% agreement between claimant

---

<sup>167</sup> Of the 952 votes cast in the Northeast, 51% were for the religious actor. Of the 2,302 votes cast elsewhere, 42% were for the religious actor. That 9 percentage point difference represents an increase of more than 20% over the non-Northeast areas. Also supportive of the point, the two religious traditions that do not find a higher success rate in the Northeast are Evangelicals and Conservative Non-Traditionals –two traditions that are not very well represented in the region.

<sup>168</sup> Although the Glenmary data explicitly accept the Steensland classification of religious traditions ([http://www.thecarda.com/mapsReports/RCMS\\_Notes.asp](http://www.thecarda.com/mapsReports/RCMS_Notes.asp)) on a metro- and county-level, the full eight families of religions are not available.

and area, while votes against the religious actor occur in contexts of 26% agreement.

This variable then is the control variable for capturing the effect of claimant's faith in the study. Table 25 below reports this significant finding.

**Table 22 Claimant-Area Religious Agreement Success Rates, in Ten Equally Sized Groups**

Claimant-Area Religious Agreement	Favorable Vote Rate	N
Least Claimant-Area Agreement	.24	270
2nd Least Claimant-Area Agreement	.34	266
3rd decile	.51	278
4th decile	.47	318
5th decile	.42	211
6th decile	.54	263
7th decile	.41	288
8th decile	.52	235
9th Most Agreement decile	.53	265
Most Claimant-Area Agreement	.57	265
Total	.45	2659

Factoring in whether the state attempted to increase religious freedom shows claimant-area agreement was highest when states made a legislative attempt (or majoritarian), less agreement when there was no attempt, and the least amount of agreement when the attempt was judicial (or minoritarian), 34% to 29.7% to 25% respectively. The inverse of that phrasing may be more telling: a lower rate of minority religious actors are showing up in court in the states which have increased religious freedom through the statehouse than in the judicially increased states, and that is even less than the states which attempt no increase at all.

Winning in the institutionally grouped states follows the same pattern: winning contexts have higher agreement than losing ones.

Factoring in level of court shows that lower courts are more likely to have agreement-favoring votes, and this is not surprising as lower courts have less insulation from public

pressure and less accomplished judges. All three levels of courts show more favorable votes when agreement is higher, and less agreement when the vote is lost.

Factoring in geography, all regions show the same pattern, with the Pacific Rim showing the least favorability for popular faiths (2.4 points difference between agreement in votes won versus lost) and the South showing the most (10 points difference).\*\*\* Although interestingly, the state of California does not show the pattern among wins and losses, but has a higher overall agreement than every region at 35%.

**Table 23 Claimant-Area Religious Agreement**

Context of Judge Vote		Claimant-Area Religious Agreement	Claimant-Area Religious Agreement in Winning Contexts	Claimant-Area Religious Agreement in Losing Contexts
Legislative Attempt	Mean	34%	40%	29%
	N	478	221	257
Neither Attempt	Mean	30%	34%	26%
	N	1161	509	652
Judicial Attempt	Mean	25%	26%	24%
	N	1020	479	541
Supreme Court	Mean	29%	32%	26%
	N	878	385	493
Intermediate Appellate	Mean	28%	32%	25%
	N	1304	587	717
District or Trial	Mean	30%	34%	26%
	N	477	237	240
CA	Mean	35%	34%	36%
	N	115	49	66
Northwest	Mean	30%	34%	28%
	N	350	121	229
Southwest	Mean	32%	37%	28%
	N	255	111	144
South w/o TX	Mean	31%	37%	28%
	N	432	170	262
Midwest	Mean	27%	31%	24%
	N	700	332	368
Northeast	Mean	26%	29%	23%
	N	807	426	381
Total	Mean	29%	32%	26%
	N	2659	1209	1450

The pattern does not hold at the national level, though, where the simple religious traditions are the unit of analysis. Catholics were the tradition with the most agreement with their area by far at 50.2%, and not surprisingly, LNT at 6%, along with both Jewish and Other Religious at 10.5% had the least agreement. Yet Jewish and LNT claimants

won at higher rates than Catholics. Mainline Protestants won almost two-thirds of their votes, yet had only average agreement with their area.

But the Other Religious category's least agreement and lowest success rate should not be overlooked, and drives most of the patterned variance in this variable.

Judge's religious tradition, comfortingly, does not show any overt favoritism or bias with claimant religious tradition.

In conclusion, claimant religious tradition is much less explanatory when the claimant's context is not considered. The level of agreement between the two appears to explain a large amount of the variance in the data. It positively correlates with appearing in the court as well as receiving the favorable vote. This is true in each level of court and in each geographic region, and in all three institutional contexts: legislative, judicial, and the no attempt states.

### Deviant Behavior

*Hypothesis 8:* Religious freedom claims based on sexual or illicit drug usage will be less likely to be supported than those that are not.

The objective of this variable is to control for and understand the predicted dampening affect on the likelihood of winning the vote when asking the court to protect something that is against societal mores. Deviancy is limited to sexual or drug related acts. It is logical that someone asking for protection of an already celebrated right, like the freedom to express one's beliefs, will get a friendlier treatment in court than, for example, someone asking for protection of hallucinatory or polygamous rites.

The method of constructing this variable involves further defining deviancy as the use of schedule I controlled substances, or sexual acts which are either illegal or largely seen

as immoral in public opinion polling. The variable is a dummy variable where a deviant act is coded 1 and its absence is coded 0.

Clarifying examples of deviant behavior include:

All claims of sexual abuse.

Sexual relationships occurring with one's counselor, even if consenting.

Gay and lesbian relationships which are the subject of a case. Although I note here that while acceptance of gays is increasing, a majority of Americans still see it as deviance.<sup>169</sup>

Sex outside of an existing marriage. Claims of adultery satisfy what this variable hopes to capture, which again is an act society deems unacceptable. While the frequency of broken marriage vows is clearly an issue, 90.7% of the nation classifies extramarital sex as "always" or "almost always wrong".<sup>170</sup>

Cohabitation or sex between unmarried people (of legal age) is not coded as deviant here because attitudes about it are such that a majority (62.4%) believe it is "sometimes wrong" or "not wrong at all".<sup>171</sup>

Alcohol was not considered deviant here.

## Results

Deviancy was coded in 852 votes in the dataset, or 26%, which is much higher than was expected. The higher than expected number of votes is not explained by a large proportion of these cases occurring at Supreme Court levels with larger panels of judging

---

<sup>169</sup> In the 2004 General Social Survey, 60.3% of respondents answered that same sex sexual relations are "always" or "almost always wrong", compared to 29.7% answering "not at all wrong". This variable is a simple inference from public opinion and should not be construed as anything more.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

and hence more votes. In fact, the cases were decided significantly more at the lower levels.<sup>172</sup>

That more than a quarter of the votes are deviant instead appears to be inflated by the large number of sex abuse claims brought against the Catholic Church over this time span. Indeed, 92.5% of the deviant cases were coded that way because of sexual reasons, versus the 7.5% which are drug related.<sup>173</sup>

It bears repeating. Almost a quarter of the votes (24.2%) in this dataset on religious freedom involve cases concerning actors accused of a deviant sexual act.

The cases for this variable are populated by males mostly, as they received 85% of the deviant case votes, which is significantly higher level than the overall rate of males in the dataset which is 81%\*.

Even more surprising than the large number of deviancy cases may be the outcome: deviancy was correlated with an increased success rate, not a depressed success rate. Religious actors in these cases enjoyed a 53% favorable vote-rate versus non-deviants' 43% success rate, a pattern significant at the .001 level. This boost in win-rate is not true of the drug related deviancy, as they received favorable votes only 22% of the time, which is half of the non-drug related case rate. So it is the 55.5% favorable vote-rate of the sexually deviant cases that buoys the high deviancy rate.

One explanation for this is that during the increased number of cases brought against churches regarding sexual abuse, litigants' and the publics' sense of outrage may have

---

<sup>172</sup> 24% of votes are at supreme courts, 27% at the Intermediate Appellate, and 30% of deviant cases at the district court. This linear pattern is significant at the .05 level.

<sup>173</sup> And in those drug related cases, only four of the 64 votes came from religious traditions that were not from the Other category. Those four votes came in one case on a medicinal marijuana plea brought by a Messianic Jew. *Minnesota v. Pederson*, 679 N.W.2d 368, 5/18/04



fostered an overreach on their legal claims. But the application of law in a court and the direct effect public outrage can have legislatively are two different things. That outrage can motivate actors to spend the money to initiate cases with excellent social or political arguments, but without a good legal argument. Regardless of the explanation, this is the description of the state cases regarding religious actors.

The two institutional variables are significantly correlated with deviancy in the predicted direction: states which have attempted to increase religious freedom find more deviancy cases being brought.<sup>174</sup> But this is deceiving, as the sexual cases are inflated enough to raise the overall rate to significance in the positive direction even though the drug related cases are slightly depressed in the increased states, if not significantly.

The success rate in the increased states was another ambivalent point of comparison: higher win-rates in these states for the sexual cases, and significantly lower rates for the drug cases even in these increased states. Sexual cases had a successful vote-rate of 57% in institutional states, and 53% in the no-attempt states. Drug related cases had an 11% success rate in 38 votes in the increased states, and a more-than-tripled successful vote-rate in the no-attempt states (38%, albeit in 26 votes.) In the sexual cases, judicial states were most protective, legislative around average protection, and no attempt states had the lowest success rate. The drug cases did not have enough iterations to support a comment on these classifications.

The actors in both types of deviant cases were patterned. Only Liberal Non-Traditionals were not significantly correlated with deviant cases. Jewish, Black

---

<sup>174</sup> The correlation score is .07, which is significant at the .001 level. But this is wholly driven by the sexual deviant cases (21% of no-attempt state votes, and 27% of increased attempt votes), as the drug deviancy cases are not brought significantly more or less.

Protestants, Evangelical Protestants, CNTs, and Other religious all were negatively correlated with sexual deviancy.<sup>175</sup> Mainline Protestants had a positive correlation score of .147 and Catholics a positive score of .325, one of the highest scores of any relationship in the model. Other religious actors were the only tradition positively related to drug deviancy.

Catholics were the actor subject to a deviance vote 44% of the time, and those actors received protective votes 61%\* of the time. Mainline Protestants were the most protected religious tradition with a protective vote-rate of 68.5%\*\* in 127 votes. The Other category was again the least protected, and by a significant margin, winning only 25% of the votes cast in their cases. But this pattern has more to do with the Other religious category being effectively the only category for the drug use cases, which made up more than two-thirds of their votes in this deviant category.

Liberal judges vote to protect the subjects of these deviant cases more than conservative judges. The average Judge Politics score for a winning vote is 53, and the average score for a vote against is 45. Eight PAJID points is enough to cover the middle 20% of the dispersion of the variable, to give the reader an idea of that gap.

Judge gender, judge religious tradition and area partisanship all show no significant relationships with deviancy

The geography variables show that where there were more deviant cases, the win-rate was higher. The Midwest and West and the nation's interior all show higher rates of deviant cases than their population suggests, along with a higher win-rate. The South shows depressed numbers of cases and an overall depressed success-rate. The Northeast,

---

<sup>175</sup> All but CNTs had their negative correlation score over 1, and the significance for all of them was at the .001 level.

with its large population of Catholics, the largest plurality of these cases, shows a strangely depressed number of cases but a higher win-rate.

Deviant cases tended to win in areas with higher adherent rates and with a more homogenous religious makeup, which was the general pattern for those two variables, but counter-intuitive for this morally loaded variable. This would seem to be the Catholic effect, but strangely, controlling for Catholic claimants does not support that theory –it is still positive and significant, and in fact grows more positive and significant.

Instead, the only significant denominational explanation that can be supported by the data is that evangelical areas had negative correlations for both cases heard and success-rates, which serves to bolster the adherent rate and Herfindahl effects elsewhere. But even that is not enough for a full explanation.

An important conclusion for this variable is that deviancy here is really two forces at work, each very unique and not easily coupled together. One version of deviancy had inflated appearances in the increased religious freedom states, and higher success rates. The other was the mirror image of that. Both effects should be held constant for the model.

But the larger conclusion as to why sexual deviancy performed the way it did is left with the speculation that began the description of these results: sensational aspects of clergy sex cases do not make for good legal arguments, and in fact can make a not-guilty verdict more likely.

Claimant religious tradition, judge characteristics, and the religious contours of the immediate area all showed significant patterns as well.

## Prisoner Cases

*Hypothesis 9:* Religious freedom claims of prisoners are less likely to be supported than claims from non-prisoners.

The objective of this variable is to control for and understand the effect that being a prisoner has on the chance of winning a religious freedom issue. The variable is a simple dummy variable where being incarcerated is coded 1 and not being incarcerated is coded 0. Here are the clarifying disclaimers: Those on probation are not considered prisoners, nor are those who are being prosecuted for an act committed while they were free, even if they are now in prison.<sup>176</sup> The trial for the crime that put the claimant in jail is not considered a prisoner case, as they were free when they committed it. If convicted at the trial phase, the appeal is not considered a prisoner case, minus two exceptions. The first exception is if a new and reasonably independent issue arises in the appeal<sup>177</sup>, and a second exception is for separate sentencing trials that occur in capital cases.<sup>178</sup>

Research done in 1999 found that although federal prisoner cases increased with the passing of the federal RFRA, they did not keep up with the rise of overall civil liberties cases from the same period.<sup>179</sup>

### Results

291 votes, or 9% of the dataset, are prisoner cases. As expected and as supported in other research showing that prisoners win at lower rates, their favorable vote-rate here is 16%. That is around a third of the overall favorable vote-rate for the dataset.

---

<sup>176</sup> *Hawai'i v. Adler*, 2005 Haw. LEXIS 425, while incarcerated, the claimant made the case that his cannabis usage prior to being arrested was religious is not here considered a prisoner case.

<sup>177</sup> An example is *Williams v. State of Mississippi*, 2000 Miss. App. LEXIS 236, where a drug possession conviction appeal has the prosecutor ask the accused if he is Muslim, perhaps to introduce bias. The appeal of that stricken question was considered a prisoner case.

<sup>178</sup> *New Mexico v. Clark*, 128 N.M. 119

<sup>179</sup> Berg, 1999.

The prisoners are vastly (96.5%) men, even more so than the 81.4% rate the database has, and the difference is significant at the .001 level. The rate of women incarcerated in the states is around 5%, so these numbers are not over representative.<sup>180</sup>

Prisoner cases appear in increased scrutiny states almost 2 to 1 over non-increased states, and the increased state proportion is driven by the judicial states with more than 70% of the increase state cases.

Do higher success rates follow the more hospitable judicial states? Yes, judicially increased states protect the religious petitioners 24% of the time, legislative states protect them 18% of the time, and no-attempt states protect them 5.6% of the time.

The difference between the increased and not-increased scrutiny states is highly significant, and possibly even understated. Not only are prisoners quadrupling their odds when moving to an increased state court, but it stands to reason that the not-increased state cases are the theoretically stronger cases since fewer are being brought to court.<sup>181</sup>

The integrated increased religious freedom variable clarifies the correlation. In the four categories of least protective states, prisoners won 8% of their votes. In the 3 most protective categories, they won 22% of their votes. All of these relationships are significant at the highest levels.

Of the known religious traditions, the Other religious category was overrepresented by close to a factor of four, with 59% of the prisoner cases, despite having only 15% of the overall votes. Every other religious tradition was underrepresented, due to inflation of the Other Religious category. But interestingly, and against the prediction, the Other

---

<sup>180</sup> *Statistical Abstract of the United States*. 116<sup>th</sup> Edition. "No. 351. State Prison Inmates – Selected Characteristics: 1986 and 1991", p. 219

<sup>181</sup> This comment makes a number of assumptions, such as religious prisoners are normally distributed and there is a winnowing factor to cases brought. Both of which are logical assumptions.

religious actors received higher than the average favorable votes: 21%. Evangelicals, the second most likely religious tradition for claimants in the prisoner cases had the highest success rate at 26%. Between those two traditions, 40 of the 45 overall pro-prisoner votes occurred.

Judge gender, race, and religious tradition all do not show any significant patterns with prisoner cases, but judge politics does correlate with vote outcome on prisoner cases with a correlation score of .261, which is significant at the .001 level.

Geography also showed significant correlations with the prisoner votes. Using a North, South, West scheme, the South voted 40% more than their dataset votes/population would suggest, and have favorable vote-rate less than half of the average: 7%. Or if one uses a geographical classification with more categories, the Southwest, South and Midwest grab 57% of the votes, and vote to protect the prisoners at 8%. Those are all significant at the .001 level.

The conclusions of these results are that prisoners receive substantially less protection for their religious behavior, but that a) liberal judges, b) states which have attempted to increase religious freedom judicially and c) the Atlantic coast and Pacific Northwest have higher rates of favorable votes than judges not in these categories.

### Economic Order Cases

*Hypothesis 10:* Religious freedom claims that do not require public resources (tax money or land usage) are more likely to be supported than those that do.

The objective of this variable is to control for and understand the effect of cases which ask the courts to award either money or land to the religious actor. The argument

is that awarding a religious actor a symbolic win, without any financial impact on the state or city, is more likely to occur than the financially costly court case.

The money based decisions exclusively concerned the property tax exemption given to houses of worship. The land decisions were more difficult, as there are several types of land use cases which are rightly seen as having no cost to the state. The coding rule is then 1 for land use cases which bear cost to the state, all others 0. Examples of cases coded as these economic impact cases include: all tax exemptions, all zoning regulations, suits brought against churches for material and specific damages (i.e. not punitive) stemming from their ownership of land, adverse possession (squatter's rights) cases, and two cases about the safety codes of churches (fire sprinklers) were considered.<sup>182</sup>

Examples of cases not included in this variable are: questions of variances on steeples, variances to historic preservation ordinances, cemeteries (if no damages are sought), sign regulations, codes regulating proselytizing and free speech areas, and landlords' rights.

## Results

The variable has 606 economic impact votes, which make up 19% of the dataset, and fall in 233 cases. 547 of the votes come in land use cases, and 322 come in tax cases, which leave 263 votes overlapping.

The effect on the dependent variable of these cases was not to decrease it, as predicted. Religious actors did not receive significantly different favorable votes in the

---

<sup>182</sup> In *Peace Lutheran Church and Academy v. Village of Sussex*, 2001 WI App 139 (2001) the Village pressed for fire sprinklers in a new parochial school for the safety of the inhabitants, but also to reduce the Village's vulnerability to suits if a catastrophe were to occur.

overall economic impact cases (44%), or in land use cases (46%).<sup>183</sup> But in tax cases, the success rate actually rose to 50%, which was significant at the .05 level. That effect though evaporates when instead of looking at votes, the unit of analysis is cases won and lost: 49% of cases won in tax contexts in 123 cases.

When the actual cost of the case was mentioned in the opinion (which occurred in only 102 votes cast in 41 cases<sup>184</sup>) there was a non-linear pattern of the lower and higher priced cases winning at around 50% and cases seeking a middle value between \$5,000 and \$40,000 winning at lower rates.<sup>185</sup>

The Institutional variables do show that these economic impact cases are brought more in the states which attempt to raise religious freedom, but the effect is driven solely by the land use cases in legislatively increased states, which also show a negative correlation on protective voting. Judicially increased states and tax cases show no significant patterns in appearance or success of votes cast.

Votes in more expensive cases correlated with the states attempting an increase in religious freedom with the moderately strong .234 score. But that relationship, like others here, is driven wholly by the method: judicially attempted states heard the more expensive claims and voted at higher favorable rates for those claims.<sup>186</sup>

Men, who already make up more than 80% of the claimants with a known gender, tend to make up even more litigants in these economic impact cases. But the more

---

<sup>183</sup> When economic impact and specifically land use votes are aggregated back to whole cases, the results do not change: 44% and 46% cases won, respectively.

<sup>184</sup> The cost variable is a categorical variable where <\$5000 is coded 1, \$5,000-\$40,000 is coded 2 and >\$40,000 is coded 3.

<sup>185</sup> A parametric correlation of .208, significant at the .05 level is also supported by an Eta<sup>2</sup> which is five times higher than the R<sup>2</sup>, .129 to .025.

<sup>186</sup> And even though this is with only 102 votes, it is enough for the pattern to emerge and be corroborated with significance at the .01 level.



interesting conclusion that has been mentioned above can be drawn here as well: when the religious actors are a small group of three or less, the win rate is much lower than when the gender could not be collected because of a larger size of the group. This claimant size effect is discussed in the last section of this chapter. But here, single or smaller groups receive protective votes 14.5% of the time in these economic impact cases, and religious groups without a coded gender (generally because the litigant was a church or large group) succeeded more than three times better at 48%.

Claimant religious tradition was significantly patterned as Mainline and Evangelical Protestants were positively correlated, and the rest of the religious traditions (minus Jewish claimants) negatively correlated, all at the .001 level. Evangelicals also distinctly brought the lower cost cases and Jewish claimants brought the higher priced claims. But no significant difference in favorable vote-rate showed up among the traditions.

Judge race, gender, and religious tradition all failed to show an effect when considered in these economic votes. Judge Politics, as is clearly becoming a pattern, did show the pattern of more liberal judges hearing more and voting more protectively for the religious claimant.<sup>187</sup> The liberal judges here appear to be more classically liberal (valuing private property over regulation) than liberal in a contemporary sense.

Geography also had a patterned look: there is a strong Northeast-ward tilt to the hearing and pro-religious voting in economic impact cases. Simplifying the nation into a South, North, West scheme, the North has correlation scores over .1 for the economic impact variables, as well as cost. The West has scores lower than -.1 for all of the same

---

<sup>187</sup> Correlation score of .09,  $p < .001$ , for Judge Politics and Economic Impact votes. That correlation is driven almost wholly by the 208 votes at the state supreme court level, as their correlation is .179,  $p < .001$  and lower level judges show no significant correlation.

variables, and both the West and North are significant at the .001 level. The South has moderated, but still negative correlations for the same. The North's favorable vote-rate is 52%, the South is 33% and the West is 26%.

The population based variables show that these cases tend to occur in the less populated, less religious, but more religiously homogeneous areas, which vote more Republican.

The conclusions drawn from an analysis of the variable are a) the prediction was not true as there was little to no difference in success even though these cases impose a clear material cost on the polity. B) These cases were brought more and won more by the religious traditions which are closer to a nationwide status quo and which tilt rightward when compared to other religious traditions. C) Politically left leaning judges at the higher levels of courts ruled more favorably, and since the cases arose more in the Northern states, and in the increased religious freedom states (both of which positively and strongly correlate with liberal judges), they had the opportunity to hear more. Although that opportunity is tempered by d) the tendency for these cases to be brought outside of more populated and Democratic areas.

#### Conclusions Drawn from Analyzing the Claimant Variables

All four of the variables have significant patterns that would likely have a dulling or distorting effect in the model if not controlled. Specifically, controlling the Prisoner and Claimant-Area Agreement effects allows the more protective votes in judicial states to be seen. Controlling the economic impact votes makes sure the lack of protection in legislative states is known. Deviancy controls help make interpretations of claimant

religious tradition easier to read as these strange Catholic and Mainline Protestant effects will be bracketed off to the side.

So to briefly sum up those larger effects, the patterns for minority religious traditions largely were as predicted once the variable was tied to local context. The deviancy variable appears to be driven by the sexual scandals that have wracked the Catholic and other churches for the last decade or more. The drug related votes performed very differently from the sexually related votes, and make for an uneasy fit. The prisoner variable largely performed as predicted: lower success rates overall, and the Other religious actors are the subject of more than half the votes, yet those actors win more than average. And the economic impact cases show regional, judge and claimant size patterns to land use and tax cases, but no overall tendency to vote for religious actors less even when they ask for tangible public resources.

For all four variables, 1) the institutional attempts of the states were significantly correlated with the judicial more protective than the legislative states, 2) more liberal judges were more protective, 3) geographic region of the country was very significant, if in idiosyncratic ways, 4) claimant religious tradition was patterned, and judge religious tradition was not.

### Legal Reasoning Variables

The legal reasoning variables are an attempt to capture the possible judge bias behind the study's case-selection method. When judges mention the separation of church and state, are they priming the reader for a denial of a free exercise issue? Does a judge's

mentioning of free speech correlate with civil libertarian rights versus governmental license? These three variables will answer those questions.

Unfortunately, coding these variables with the precision that would differentiate a free speech decision, for example, from decisions which are not formally considered a free speech case proved unworkable. The two ways of attempting the legal differentiation of what law controls the decision were a) reading and citing the judge's logic, or b) using the fact patterns to determine the type of religious liberty case.

The fact pattern path meant looking for civil liberties groups as litigants and then coding that case as a likely establishment issue, or looking for governments as parties without civil liberties groups and coding these cases as likely Free Exercise cases. The issue with this was that the Alabama ACLU was the only civil liberties group in the data, leaving too little variance to continue using this method.

Taking it straight from the opinion proved too difficult because of the number of cases and lack of clarity in state decisions. The vast majority of state opinions do not clarify in headnotes which laws are controlling, and divining how important the several legal points made were to the case was simply outside of my abilities. And since this is a large N study with more than 500 cases individually read and coded, a second attempt is unrealistic. So although this study would be more valuable if these legal variables had been more accurately coded, with the limitations inherent in reading a trial opinion from an Iowa judge, for example, the variables as constructed must suffice.

## Free Exercise Clause

*Hypothesis 11:* When the religious freedom claim is recognized by the judge to concentrate free exercise of religion, it is more likely to be supported than if it is not.

The objective of this variable is to control for and understand the effect of the judge using state or U.S. Free Exercise Clause language in the case. If the judge recognizes a religious freedom question in the case, and that the Free Exercise clause has some power in answering that question, it is predicted to be more likely that the religious actor is going to be protected than if the religious liberty was not brought up at all. The framing of the foundations for the opinion foreshadow the outcome.

In a dataset of actors in court seeking protection for their religious act, you expect to see plenty of cases where the free exercise clause is brought up. And that holds true here as 1,212 votes (in 26% of opinions) were on cases where that clause, or an equivalent concept, was mentioned.<sup>188</sup> But in more opinions (1,340 votes, 30.4% of opinions), it was not explicit. The missing data account for 702 votes, which makes up 44% of the cases.

The prediction for the variable does not hold true, and in fact, the opposite does. Once constitutionally based religious freedom is explicit in a case, the likelihood of a negative vote approaches two times higher than the favorable vote. The favorable vote-rate for cases with religious freedom explicitly mentioned is 35%, versus a 58% win rate for cases without mention of a constitutionally protected civil liberty.

---

<sup>188</sup> The phrasings that were coded as mentionings are “First Amendment rights to Freedom of Religion”, “The First Amendment rights of the” actor, or a “Constitutional Right of Religious Freedom”. Phrasings that were coded as both Establishment and Free Exercise of Religion are “Freedom of Religion”, “First Amendment to the U.S. Constitution”, “Religion Clauses of the Constitution”, “Religious Liberty”, or “Ecclesiastical Abstention”. Capitalization was not a consideration.

One possible explanation for this is that the states, like the federal courts, tend to vote down claims that rely on the Free Exercise clause rather than more current statutes or laws. Imagine the amount of comfort judges would feel with legal arguments resting on current statutes and codes, versus the comfort most judges would feel upholding a legal argument made with only a less popular clause in a hundred-plus year old state civil liberty clause. It is not too much of a stretch to imagine that the pure Free Exercise arguments are legal arguments that judges rarely deal with, seem archaic and anti-democratic, and therefore tilt toward the legal arguments that are less grandiose. The Free Speech clause strategy itself is based on exactly this: the notion that the Free Exercise clause is not protective, so aim legal arguments toward areas that are more respected or controlling. Or in other words, because judges are less likely to grant religious exemptions, phrase the argument as one of viewpoint discrimination. Judges probably feel more comfortable striking laws which regulate expression rather than striking regulations which incidentally infringe one's supposed religious behavior.

States which institutionally attempt to increase religious freedom bring up the free exercise rights more often, as is expected. And that is wholly driven by the judicial attempt states rather than the legislative attempt states.<sup>189</sup> Success is also higher in institutional states, and more specifically so within the judicially attempted states.<sup>190</sup>

The occurrence pattern is pronounced in the time-series sets of variables, but the success does not follow. RFRA states bring up this language 15 percentage points more after passage, and precedent states 16 percentage points more after the case is handed

---

<sup>189</sup> 23% of Free Exercise mentionings occur in Judicial states, 20% occurs in no-attempt states, and at half that rate, 10% of Free Exercise mentionings occur in the legislative states.  $P < .001$

<sup>190</sup> 37% win rate in judicially attempted states, 35% in legislatively attempted states, and 32% in no attempt states. That pattern is significant at the .001 level.

down, to 55% and 58%, respectively. But in the judicial states the success rate drops from 40% to 32%. And worse, the RFRA time-series sees the rate go from 61% in 89 votes to 36% in 216 votes. The smaller number of votes in this analysis makes the outcomes less precise, but the significance of the direction and strength is clear at the .001 level.

The claimants tilt toward being in the Other religious tradition, which prompts attention toward the possible spurious drag on the success rate that can cause. Free Exercise was mentioned in a startling 89% of the votes when the subject was an Other religious tradition actor. The next highest rate came with Mainline Protestants at 48%, while Evangelicals and Conservative Non Traditional were also in the 40s. Catholics had the lowest mention rate at 28%.

And further, Other religious actors won 24% of these votes, which is the lowest rate among the religious traditions. See table 24 below, for details.

**Table 24 Free Exercise of Religion Reference, Selected Characteristics**

	Rates at which Free Exercise Issue was Raised	Protective Vote-Rates in these cases	N	Pearson Correlation Score
No Attempt State	.47	.31	506	
Increased Scrutiny	.57	.37	834	.100***
Legislative Attempt	.54	.35	255	
Judicial Attempt	.58	.37	579	.092***
Pre-RFRA	.40	.52	89	
Post-RFRA	.55	.33	216	
Pre-Precedent	.42	.30	94	
Post-Precedent	.58	.35	121	
Male Litigants	.58	.23	634	
Female Litigants	.46	.30	99	-.09**
Conservative Non-Traditional	.49	.37	94	
Evangelical Protestant	.53	.35	347	
Mainline Protestant	.45	.70	83	-.050*
Black Protestant	.28	.60	25	-.103***
Catholic	.39	.41	182	-.156***
Jewish	.42	.47	45	-.050*
Other Religious Category	.89	.24	300	.321***
Not Tax Related	.56	.35	1298	
Tax Related	.17	.24	42	-.238***
Not Related to Land Use	.55	.35	1180	
Land Use Related	.39	.34	160	-.118***
West Coast	.61	.26	205	.064**
MS Valley	.60	.27	247	.067**
Interior	.55	.37	423	
South Atlantic	.40	.26	106	-.088***
Metroliner	.47	.45	359	-.074***
SMA Adherent Rate			1340	-.039*
Claimant-Area Religious Agreement			1084	-.104***
TOTAL	.53		2552	

\* Correlation is significant at the .05 level (2-tailed).

\*\* Correlation is significant at the .01 level (2-tailed)

\*\*\* Correlation is significant at the .001 level (2-tailed).

Insignificant correlation results not shown, nor are the redundant correlation scores of both sides of a dummy variable.



These votes correlate positively with drug related issues (.09\*\*\*), and negatively with tax issues (-.24\*\*\*) and land use (-.12\*\*\*) issues.

Liberal judges did not vote in more free exercise cases, but did vote for them more.

There is a positive correlation between these free exercise cases and the judge's vote being a dissent. That may be because a dissenting vote is a safe time for a judge to favor a civil liberty. In other words, the civil liberty can be cherished without actually allowing the religious actor to trump a policy.

The votes in these cases are occurring more in the West and Midwest, and less so in the South and Northeast. Yet the votes are more favorable toward religious actors in the Northeast, and less favorable in the West, and all four of those correlations are significant at the .01 level.

Free exercise cases also find more favorable votes in more populated areas\* and areas with higher adherent rates\*\*\* and more religious homogeneity\*\*\*. And there is a clear Democratic county tilt toward being more protective of religious actors with positive correlations with votes for Gore in 2000, Kerry in 2004, and negative correlations with votes for W. Bush in 2000, 2004, and rates of Republican voting in 2000 and 2004, all significant at the .001 level.

After seeing the heightened amount of more significant and stronger than usual correlations in the free exercise variable, I decided to run a logistic regression with it as the dependent variable for some direction in seeing which of the predictors were stronger once the effects were all considered at once. It was run as a forward, conditional, stepwise logit model which essentially picks the strongest predictor from the list of variables one at a time until the variables left are no longer adding explanatory power.

And the result of that analysis showed similar results: 1) the poor results of the Other religious actors, 2) the poor showing of female claimants,<sup>191</sup> 3) the poor showing of tax related votes, 4) the smaller but clearer boost from metro adherent rate, 5) the tendency for these votes to be against religious actors,<sup>192</sup> and others.

These findings tend to support the impressionistic reason offered for why protective constitutional language would lead to dismal results for religious actors. When a judge is faced with a case regarding the payment of taxes, and one side relies more heavily on common tax code language and notions of individual responsibility while the other side uses “Congress shall make no law respecting the establishment of religion nor the free exercise thereof,” the results do seem more logical.

In conclusion, special consideration is warranted with this variable as there appears to be many more relationships with the controls and main independent variables than with other independent variables. Since the appearance of free exercise language predicts less protection rather than more, the appearance of it with the lesser protected single claimants and Other Religious actors makes sense. As does its lack of appearing in the more protective Northeast and with liberal judges, even though those liberal judges still vote more protectively when they do use it in the opinion. Although judges in the increased religious freedom states do hear more of these cases and may vote more favorably for these religious actors, they still vote significantly less in favor of religious freedom claims compared to the overall dataset average.

---

<sup>191</sup> Not specifically detailed here. The analysis of claimant gender did not strike me as powerful as the model found.

<sup>192</sup> The dependent variable Religious Freedom was used as a predictor variable, that is.

## Establishment Clause

*Hypothesis 12:* When the religious freedom claim is recognized by the judge to concern the separation of church and state (an establishment clause), that claim is less likely to be supported by the judge than if the separation of church and state is not involved.

The objective of this variable is to control for and understand the effect of the judge using the state or U.S. [Dis]establishment Clause in the case. Citing the clause which separates church and state<sup>193</sup> was predicted to be a bad omen for the religious actor. The prediction was based on the logic of a judge choosing a clause to justify a case; if the clause is the one which limits religions' range instead of the one which protects religious acts, the judge was more likely to be establishing why the religious actor did not get his or her vote. Yet as in the Free Exercise variable, the prediction was wrong.

Establishment issues are raised in more than a quarter (26.7%, 868 votes) of the dataset, and 52% of the time the case does not raise an establishment issue, while the remaining 21% are missing due to being derived, and inaccessible. This is as one would expect from a dataset of votes from cases where actors seek protection for a religious act: 6% free expression related, around half free exercise related, and around a quarter establishment clause related.

And to complete the consistent pattern on these legal reasoning variables, it also does not behave as the prediction suggests, correlating with, not against, religious actor success, and clearly so as the pattern is significant at the .001 level. When an

---

<sup>193</sup> Phrases which were coded for this variable include "establishment of religion", "separation of church and state", and phrases that I found clearly alluded to the inability of governments to intrude in religious spheres: "Excessive entanglement", "ecclesiastical question", and "ministerial exception" or synonymous phrases. And the phrasings which were coded both, again are: "Freedom of Religion", "First Amendment to the U.S. Constitution", "Religion Clauses of the Constitution", "Religious Liberty", and "Ecclesiastical Abstention".

establishment issue is raised, the religious actor gets the favorable vote 56% of the time, and all other votes in the dataset with these removed come out at a 40% success-rate. That means a religious actor seeing that the establishment clause was used in their opinion can expect their probability for success to increase by 40%.

One large reason that the prediction did not hold here is because this language was vastly used in the sexual abuse cases, which were weaker legal cases than average.

When states attempt to increase religious freedom, establishment language is less likely to be used, and this is as the prediction suggests (states supporting the individual religious act are less likely to bring up a constraint on their ability to affect regulation.) Once establishment language is mentioned, the institutional states show the following familiar pattern: Judicially increased states are significantly more likely to protect the actor (61%\* favorable vote-rate), legislatively increased states are significantly less likely to protect the actor (47%\*\*), and no attempt states show no significant difference.

The same pattern appears in the time-series variable: establishment language used less after increase, and voting less protective in legislative states after, yet more protective in judicial states after.

Claimants again tend to be more male than usual, and be Mainline Protestant, and tend not to be Evangelicals or from the Other religious category (but when it was an actor from the Other category, the vote correlated with less protection: -.107\*\*).

Establishment issues arose more in 1) the sexually deviant cases, which makes substantive sense as the questions there often involve when and how a government can go about the case. They arose more 2) when there was a dissent in the case, and a same logic from above is used here: there is an incentive to use constitutional language in

dissents since a dissent is not affecting public policy. It is a safe place to use the grandiose legal reasoning that judges rarely get to use. Establishment language arose more 3) in opinions written by judges from more conservative religious traditions<sup>194</sup>, and this makes indirect sense as conservative judges vote with less libertarian sympathies, and this language was predicted to be an escape for exactly those situations. And establishment language arose in 4) more populated areas, higher religious adherent rate areas,\* religiously homogenous areas\*, more Democratic areas\*\*, and favorable votes followed\*.

Establishment issues also arose more when the free exercise language was used. It is worth pausing here. How is it that two variables performing strongly in the opposite direction from the predictions, and performing in opposite directions, can positively correlate with one another? The factual answer to that is easy: when the clauses appear alone, their effect is more intense than when they appear together. Even though they appear together more often.

**Table 25 Comparison and Relationship of Favorable Vote Rates in Opinions Mentioning the Establishment and Free Exercise of Religion**

		Favorable Vote Rate	N
Not Establishment	Not Free Exercise	.54	914
	Free Exercise	.24	773
	Total	.40	1687
Establishment	Not Free Exercise	.70	298
	Free Exercise	.49	567
	Total	.56	865
Total	Not Free Exercise	.58	1212
	Free Exercise	.35	1340
	Total	.46	2552

---

<sup>194</sup> Conservative Non-Traditional, Evangelical and Black Protestant judges used Establishment language more than the average of 34% of the time for opinions when the judge's religious tradition was known. 73% of CNT opinions, 42% of Evangelical Protestant opinions, and 53% of Black Protestant opinions contained separation language, 22, 67, and 17 votes, respectively.

The substantive answer to the question is more elusive. And since this variable is both semi-exploratory, as well as simply a control variable for the states-increasing-scrutiny study variables, the separate study that this interaction effect demands cannot be performed here.

Establishment language tended not to be raised in the economic impact cases (and unfavorable votes followed when it did) which is unexpected as the tax abatements and zoning claims have separatist notions at their core.

As in the other legal language variables, judges in the Northeast used this language less, but still voted protectively when it was used.\*\*

Similar to the other legal variables, winning positively correlated with the demographic variables the Northeast, religious homogeneity, county population and religious adherent rates, but less so than with the other two legal reasoning variables.

And like most variables, larger claimant groups, and metro-area religious agreement were winning contexts here as well. These cases were more likely to be protective in sexual deviance votes (and this makes sense as it is mainly the separation of church and state which the Catholic cases relied upon) and with liberal judges casting the vote.

**Table 26 Establishment Issue Raised Votes, Selected Characteristics**

	Rate at which Establishment Issue is Raised	Establishment Issue Vote-Rate	N	Pearson Correlation Score
No Attempt	.37	.56	406	
Attempt to Increase Religious Freedom	.31	.56	462	
Legislative Attempt	.29	.47	139	
Judicial Attempt	.32	.61	323	
Not Tax Related	.36	.58	831	
Tax Related	.15	.30	37	
Not Related to Land Use	.39	.58	829	
Land Use Related	.10	.31	39	
Not Sexual	.31	.53	615	
Sexual	.42	.64	253	
Not Drug Related	.34	.57	845	
Drug Related	.46	.22	23	
CNT	.41	.49	78	
EP	.22	.57	146	
MP	.52	.73	97	
Catholic	.35	.54	163	
Other	.24	.42	81	
Judge Politics			2052	
Claimant-Area Religious Agreement			2054	
SMA Herfindahl Index			2558	.048*
County Politics			2558	-.089***
TOTAL	.34	.56	868	
N	2558			

Thus as with the other legal reasoning variables, the basis for constructing the variable proved to be questionable as it did not behave in the predicted way. When bringing up the separation of church and state, religious actors found more protection than when the opinion brought up the very right of citizens to behave religiously. But the prediction may have had some traction as establishment language was more likely to be used in states that did not attempt to increase religious freedom. And once it was used, the judicially increased states again showed the protective tendencies and the legislative states again showed a lack of protection.

## Free Speech Clause

*Hypothesis 13:* When the religious freedom claim is coupled with a free speech claim it is more likely to be supported than if it is not.

The objective of this variable is to control for and understand the effect of the judge using the state or U.S. Free Speech Clause in the case. As mentioned in the introduction, a weakened Free Exercise clause has meant religious actors are searching for successes with different civil rights claims that courts continue to uphold with rigor. So if the judge cites a free speech clause as controlling some aspect of the case, a more protective ruling is hypothesized.

The variable was constructed by coding the case 1 if any reference to free speech rights (not just the religious actor's) were mentioned in the case. A substantial number, if not most of the cases here, had expression rights mentioned in the many precedential decisions which are used to support the legal opinion. These can be binding cases within the opinion, or can also simply hope to be persuasive on other points but not binding, also called *obiter dicta*.

The almost 700 derived cases were not coded either way because the information was inaccessible.

Free speech rights were coded as present or not present in more than  $\frac{3}{4}$  of the votes, and were coded as an affirmative mention in only 6% of those instances (151 votes). For those seeking support for the Christian interest group strategy of using the free speech clause more, once prisoners and the tangible economic cases are set aside (because those were not considered in the theory), that six percent grows to eight.



The outcome of these free speech cases does not support or contradict the prediction, as they show no significant pattern, but they are negatively correlated with winning the vote.

Within states that attempt to increase religious freedom, free speech is brought up less than in no-attempt states, and this decrease is significant at the highest level. Breaking the increased attempt states down to legislative and judicial components finds that both retain the pattern, and significantly.<sup>195</sup> Vote rates within this categorization of states, though, do not show any significant differences.

Free speech tends to be mentioned in cases with single claimants rather than groups, but as is the pattern uncovered here, groups tend to win votes at a much higher rate in these cases than single claimants: 59% to 37%. And that difference is significant at the .001 level.

Evidence of a free speech based Christian legal strategy does find some support in the fact that evangelicals make up 48 of the 86 votes when free speech is mentioned and when the claimant religion is known. And further, the favorable vote for the evangelicals is 50% . That makes a pattern which is significant at the .001 level.

Free speech was significantly more likely to be the subject of a more conservative judge's vote,<sup>196</sup> but it is the more liberal judge that votes more favorably in these free speech cases, although not to a significant degree.

---

<sup>195</sup> -.117 correlation score between Free Speech and State Attempt,  $p < .001$ , in 2,555 votes. The scores drop to -.07 for the legislative variable and the judicial variable, and the scaled versions also show a negative and significant relationship with a -.08 score, all significant at the  $p < .001$  level.

<sup>196</sup> This effect is limited to the original PAJID scores, which are at the supreme court level. The score is -.08, and is significant at the .01 level.

The regional pattern, which is closely related to those judge patterns, adds to the explanation by showing the use of free speech language as a very significant negative correlation with the Northeast. Or in the simple North-South-West scheme, free speech language is related to the regions in this way: the North is  $-.05^{***}$ , the West is  $.08^{**}$ , and the South is negative, but not significantly.

And also like the above pattern, the Northeast is significantly more likely to vote for the religious actors in those cases: 68% of the time they did, versus 37% for all the other regions.<sup>197</sup>

The broader conclusion of the Free Speech Raised variable is that it is not likely to capture any significant pattern of religious actors relying on this aforementioned more-respected civil liberty post *Smith-Boerne* rather than using the more immediate Free Exercise clause. There is not a large number of (judge recognized) attempts, nor is the surface level success rate any better than normal, and it is brought up more in single claimant cases rather than larger claimant groups, which is contrary to what one would expect from an interest group strategy. So at this point there is no support for the hypothesis here that when the freedom of expression is mentioned in the opinion, the religious actor's claim is more likely to be supported than if it were not brought up.

### Conclusion of the Legal Reasoning Variables

The predictions on all three legal opinion-based variables were unsupported. Or better, the simple predictions failed all three times to capture the complex effect that

---

<sup>197</sup> This pattern was significant at the .01 level. Although with only 17 successes in 25 votes in the Northeast, small sample size disclaimers apply here.

occurred when free speech, free exercise and establishment issues were written into the opinion.

Speculating once again on why all three variables did not behave according to the logic laid out, it often appeared that the language in these cases was used when describing other cases that were used for support of the case at hand. And one would be tempted to write off the variables as so indirect and filled with noise as to be useless.

But if that is true, what about the amount of significant patterns found throughout the variables? What about the fact that liberal judges and judges from the Northeast hear significantly fewer of these cases laden with civil liberties rhetoric, and then vote significantly more protective? What about larger claimant groups appearing in significantly fewer, and winning the vote in significantly more? What about these votes significantly occurring more in Democratic areas, or (for two of the three) in more populated, religious and religiously homogenous areas?

It appears that these three variables are capturing a tendency for judges to speak to the grander issues raised by a religiously motivated act. This is supported by judicially increased state judges using the language more, and voting most protectively. Along with that, there is a tendency for some to stay away from that grander speech, like larger (and perhaps by extension, better funded and more legally strategic) claimant groups, and the litigants who simply want to keep a tax exemption or zoning variance.<sup>198</sup> And further, the advantage gained from higher metro-claimant religious tradition agreement is not apparent in these cases. All of this is support for the theory that the judge is voting with a keener sense of holding biases in check.

---

<sup>198</sup> There are negative relationships between all three legal variables and both economic impact variables, for six iterations in all, and all are significant at the .001 level.

## Collected Variables Not Included In The Model

### Judge Gender

Gender was drawn generally from the first name of the judge. When the first name was not clear or available, further searching was done via the same sources used in the party identification variable: Songer and Spill Solberg lists, CQ Judicial Staff Directory, American Bench, Lexis search in the state source, and a Google search.

78% of judges in the data were male, and only 2% of judges were missing a gender coding. Women do not significantly differ from men in a simple voting comparison.<sup>199</sup>

Women judges do appear significantly more in the institutionally increased states compared to the no-attempt states, 25% to 19% respectively.<sup>200</sup> Probing that difference further finds that it is the judicially increased states that drives the pattern, as women make up 26% of the judges there versus the insignificantly different 23% in Legislative states. And even further, the scaled version of the institutionally increased states introduced above further supports this pattern, showing the lowest protection category to have the lowest rate of female judges, the second lowest protective category to have the second lowest rate, and the highest protective category to have the highest rate of women judges (minus the category with only 28 votes cast).

---

<sup>199</sup> The literature on female judge voting is not in accord. Some of the latest work is finding that when controlled for party and region, women judges may vote slightly to the left in obscenity and death penalty cases. See Songer, Donald R. and Kelley A. Crews-Meye. 2000. "Does Judge Gender Matter? Decision Making in State Supreme Courts." *Social Science Quarterly*. 81 (3): 750-762

<sup>200</sup> Correlation score of .07,  $p < .001$

Women tend to adjudicate at the higher appellate levels of the court systems,<sup>201</sup> and tend to self-identify with the Democratic party, and be more liberal.<sup>202</sup> And again, the voting patterns that emerge in this simple description are not significantly different from male judge voting patterns.

Regions are quite patterned as 31% of the judges on the West Coast are female, and the lowest rate in the Midwest at 17.6%, both significant at the .001 level.

**Table 27 Characteristics of Female Judges**

	Proportion of Female Judges	N
In States Which Have Not Increased Religious Freedom	19%	1447
In Increased Religious Freedom States	25%	1730
In Judicially Increased States	26%	1182
In Legislatively Increased States	23%	548
In First Scaled Category "Most Protective"	32%	155
In "More Protective"	22%	839
In Unclear States	20%	1129
In Last Scaled Category "Rational Basis States"	16%	236
In Courts of Last Resort	26%	1179
In Intermediate Appellate Court	20%	1523
In Trial or District Court	17%	475
Republican	20%	1023
Democrat	27%	1324
In California	31%	191
In the Northwest	25%	371
In the Southwest	25%	288
In the South	19%	573
In the Midwest	18%	823
In the Northeast	24%	931
Overall	22%	3177

<sup>201</sup> -.08 correlation score with court level (1 highest, 3 lowest), p<.001.

<sup>202</sup> .07 and .06 correlation scores, p<.001. Female judges have 3 more PAJID points, on average, which is significant at the .01 level.

## Judge Religious Tradition

Judge religious tradition was originally to be a control in the model. Although collection of this information is more difficult than it used to be,<sup>203</sup> 712 identifications were coded.

The information that was collected was done so through the same avenues as the judge's political identification. When a religious identification was found, a 1 was coded in that religious tradition, and a zero was coded in the 7 other traditions.<sup>204</sup>

456 of the 712 positive identifications come from the second level of courts, 96 from the lowest level, and 160 from the highest state court.

The most interesting finding from this variable is just how much a judge's religion appears not to differentiate him or her from other judges. When the judges are lined up in the ad hoc conservative to liberal faith system ordering mentioned in the judge politics section above (CNT, EP, MP, BP, Catholic, Jewish, LNT, Other), the correlation with protective voting is not significant, and not even pointed in the predictable direction (-.056, .134 sig.).

When judges vote on a member of their own religious tradition, the outcome was a 49.6% success rate in 123 votes, which is not significant. When specific issue areas are

---

<sup>203</sup> A librarian at the National Center for State Courts attributed the decreasing availability of that information to a general reluctance to publicize one's religion after September 11, 2001. Speculating further, it also seems likely that the declining social or public benefits of belonging to a denomination since the middle of the 20<sup>th</sup> century could contribute to the decrease. Not only was atheism more shunned then than now, but publicizing one's religious affiliation served as a social networking tool in more ways than commonly seen today. See Robert Wuthnow's *The Restructuring of American Religion: Society and Faith Since World War II* New Jersey: Princeton University Press. 1988.

<sup>204</sup> An exception to the rule is when Liberal Non-Traditional judges were coded as 0 in CNT and Evangelical categories, but left missing in all others. This is because more liberal belief systems are more likely to have believers who claim multiple systems.

correlated with this lineup, favorable voting is positively correlated with a known religious identification, but not significantly so.

**Table 28 Judge Religious Tradition Characteristics**

		Conservative Non-traditional Judge	Evangelical Protestant Judge	Mainline Protestant Judge	Black Protestant Judge	Catholic Judge	Jewish Judge	Liberal Non-traditional Judge	Other Religious Tradition Judge
Judge's Pro-Vote-Rate	Mean	.64	.45	.43	.67	.43	.32	.50	.50
	N	22	84	255	18	247	74	4	8
No Attempt	Mean	.20	.50	.03	.18	.08	.07	.00	.02
	N	315	315	316	315	315	315	315	316
Increased Scrutiny States	Mean	.10	.30	.02	.48	.13	.00	.01	.01
	N	396	392	392	392	392	396	396	392
Legislative Attempt	Mean	.16	.31	.03	.38	.18	.01	.01	.00
	N	121	120	120	120	120	121	121	120
Judicial Attempt	Mean	.07	.29	.01	.53	.10	.00	.01	.01
	N	275	272	272	272	272	275	275	272
TOTAL	Mean	.14	.38	.03	.35	.10	.03	.01	.01
	N	711	707	708	707	707	711	711	708

The N of "Judge's Pro-Vote-Rate" is limited to only that religious tradition, while the N of the other rows is the number of all judges with a religious identification. The TOTAL rows are not uniform because coding for Liberal Non-Traditional was not exclusive. See footnote 204 above.

The judges are roughly evenly split between the increased scrutiny states and others, 56% to 44%, which fits almost perfectly the amount of votes cast that occur in the increased scrutiny states versus the others, 55% to 45%.

The religious judges in the increased contexts do not vote inordinately more or less protective than the non-religious identified judges.

It should be noted that when judge religious traditions are singled out and examined, significant differences can be found. But since those differences appear to regress to the mean with more votes, this analysis of all of the judges' religious traditions ends up showing similarities more than differences.

## Claimant Gender

The gender of the religious actor was collected and coded 1 for females, males 0.

When the religious actor(s) was a church or organization or too numerous, no gender was coded. Since coding multiple actors presents statistical difficulties, and since there were only 19 vote contexts that fit this description, those cases were discarded for this variable.

Only 17% of the known gender votes were cast with women as claimants, and with around half of the data unknown on the gender variable, only 8% of the database is a known vote on a woman claimant.

Women claimants tended to not be the subject of a vote on a deviancy case, prisoner case, or any of the three legal language cases. Women tended to win more often than men, and tended to show up in the increased scrutiny states more often. Women claimants had a negative correlation with the West Coast, and a positive correlation with the Northeast. And women claimants saw no bump in the successful vote-rate from women judges.

## Claimant Size

During the data collection, claimant size actually was not coded. But during the analysis, it appeared to be a meaningful way of understanding some of the patterns that were emerging. Since claimant gender was collected only when there were three or fewer claimants, a claimant size variable which codes larger than three claimants 1, and smaller numbers of claimants 0 was constructed.



Claimant groups conveniently come close to halving the data, with 53% of votes on groups with less than three claimants, and 47% on groups with more than three. The vast majority of larger groups were churches.

One of the most interesting findings of the study is that groups with more than three claimants won 58% of their votes, while groups of three or fewer won 33% ( $p < .001$ ).

This phenomenon occurs slightly more in the increased scrutiny states, but is wholly driven by the legislative states rather than the judicial, as the judicial states see less of the phenomenon than average. And further, the scaled judicial variable sees a negative correlation at a significant level.

Institutional context does not make a significant difference to voting here: 57%, 57%, 58% for no-increase contexts, legislative, and judicial contexts, respectively. But the smaller claimant size does show a significant pattern to voting and context. 34%, 26%, 35% are the rates from no-increase, legislative and judicially increased contexts, respectively. Which makes a recurring difference (a less protective scenario in the legislatively increased states) that is significant at the .05 level.

Also related to claimant size is the amount of metro-claimant religious agreement. Larger claimant groups are the subject of votes in contexts of more agreement (32%) than smaller groups (26%). This relationship, though, might be slightly tautological though as claimant size is directly tied to a church being the claimant, and area agreement is also a function of churches. And significant relationships between a claimant religious tradition and claimant size have this same tautological possibility. Yet the results show what would likely be predicted: Catholics, Mainliners and LNT tend to go to court in larger

groups, and tend to win more. CNTs and Other religious believers tend to go singly, and to lose the vote more often, and the correlations for these are very strong.<sup>205</sup>

There are strong correlations between liberal judges and claimant size,<sup>206</sup> but the related regional correlations are significant as well, and likely covary here. Weaker patterns of correlating with Democratic areas show up at the .05 level.

### Judicial Selection System

Research on judicial selection systems has shown that they are realistically not very meaningful to case outcomes.<sup>207</sup> But the data here present an opportunity to see if on religious matters the theoretical, if not supported, differences among the systems show some variance. The five general methods for choosing judges in the states, ordered from most democratic to least are: partisan elections, gubernatorial or legislative appointment, nonpartisan elections, combined appointment with merit selection, and a solely merit selection system.

To briefly describe the variable, votes appear to be close to normally distributed among the selection systems with Combined Merit systems owning the highest percentage of votes with 25%, and the formalized Gubernatorial and/or Legislative Appointment systems with the smallest amount at 16%.

In this model, judicial selection systems could be expected to allow more majoritarian outcomes in states with the more democratic selection systems. Majoritarian outcomes

---

<sup>205</sup> CNT: -.146, Other Religious Tradition: -.340, Mainline Protestant: .137, Catholic: .285. All significant at the .001 level. LNT: .066, p<.01.

<sup>206</sup> .133, p<.001 correlation with Judge Politics. And the regional score are .09, p<.001 for the North, -.07, p<.001 for the South, and -.05, p<.01 for the West.

<sup>207</sup> See Harry Stumpf's excellent judicial selection system literature review in chapter five in his *American Judicial Politics*. 2<sup>nd</sup> Ed. 1998. NJ: Prentice Hall.

can look either like the vote upholding local policy against a religious exemption, or it could be higher levels of area-claimant religious agreement in winning votes versus losing votes.

The first hypothesis regarding majoritarian outcomes gets some support here as the only two selection systems which show a significant ( $p < .05$ ) pattern are partisan and nonpartisan elections, and both of them are negatively correlated with pro-religious freedom voting.

The second hypothesis regarding more area-claimant religious agreement in the systems more open to democratic pressure finds support as well. The most majoritarian system has the highest level of agreement, the second-most majoritarian has the second highest agreement, and two of the following three systems show the same pattern with only the most insulated system (Merit) breaking the pattern by having around an average amount of agreement. This overall pattern is significant at the .001 level.

Another way of corroborating this hypothesis of judicial selection system allowing more or less local control is by looking at the judges themselves in their systems. If the judge's religious tradition looks more like the area religious tradition in the more democratic system, then that is considered support for this hypothesis.

Expected patterns here do not emerge. As table 29 below shows, there are significant patterns, but the three relationships are in the opposite direction than the prediction: less agreement among the political appointment and more agreement among the merit systems.

**Table 29 Judicial Selection System, Select Correlations**

Type of Judicial Selection System	Protective Vote Rate	State Institutional Attempt To Restore Religious Freedom			Claimant-Area Religious Tradition Agreement	% of County Agreeing with Judge Party ID
		Attempted Religious Freedom Restoration	Legislative Attempt	Judicial Attempt		
Partisan election	.47*	.52***	.32***	.20***	.32*	.52
Gubernatorial or Legislative Appointment	.46	.21***	.03***	.18***	.32**	.45***
Nonpartisan election	.41*	.72***	.00***	.72***	.27*	.52
Combined Merit	.43	.68***	.24***	.44***	.25***	.54**
Merit	.48	.50*	.22**	.28***	.29	.56***
Total	.45	.55	.17	.37	.29	.52

\*\*\* Correlation is significant at the .001 level (2-tailed).

\*\* Correlation is significant at the 0.01 level (2-tailed).

\* Correlation is significant at the 0.05 level (2-tailed).

### States

Do the institutional responses of states correlate with each state’s favorable voting records? The answer is no. If you look at all the votes in the states prior to their institutional attempt to increase, and compare those votes to the votes that come after the state hopes to increase religious freedom, not only is there is not an increase in protection, there is a decrease. And further, the decrease is significant at the .01 level.

This information is largely covered in the time-series version of the institutional variables.

States that will eventually try to increase religious freedom have a 50% winning percentage in 678 votes before the institutional attempt, and a 42% vote-rate in the 723 votes after the attempt.

A closer look shows that most of that variance is due to the legislative states rather than the judicially increased ones. Before passing a state RFRA, those states (and DC) voted for religious actors 53% of the time, and after passage, 41% of the time. Judicially

increased states had a 48% winning vote percentage before the more protective landmark case was handed down, and a 44% vote-rate after.

One possible emerging reason for the legislative decrease which is three times larger may be an antagonism that exists between the judicial and legislative branches like that which existed at the federal level. The language used in the national RFRA in 1993 was unwisely harsh toward the *Smith* decision, and the judicial response to that harsh language in *Boerne* was itself overreaching.<sup>208</sup>

A second possibility is that the state RFRAs are covered in the local media not as increases in civil liberties, but instead as opportunities for sensationalism. Stories about religious minorities trumping democratic policy are likely to sell more newspapers and stop more channel surfers than will stories about a strengthened religious liberty. And if this is so, state courts, with less insulation from democratic majorities, are more likely to see a negative effect due to that reporting which makes the law unpopular.

This second possibility can get support by looking at the states with a judicial selection system that is more democratic, and seeing if that is where the effect came from. When legislative state success rates were compared to the judicial state success rates within each selection system, the result is no support for the hypothesis. Legislative states find most of their variance in the states with merit selection systems rather than partisan elections or gubernatorial/legislative systems.<sup>209</sup> RFRA states with the more democratic judicial selection system, prior to passage, protected religious actors 49% of

---

<sup>208</sup> As evidenced by the effective nullification of the separation of powers language in the decision. The remaining effect of *Boerne* is solely in the relationship between states and federal government.

<sup>209</sup> To be sure, this assumption here is not that merit systems are immune to democratic pressure, but that they are more immune to the pressure that would come from a grassroots unease that this media tendency would provoke.

the time. After passage, those same states protected religious actors 42% of the time. But the RFRA states with merit systems saw a larger decrease in protection: from a 57% protective vote-rate to 44%, and in 154 and 311 votes, respectively, the difference is significant.

Judicial states vote without any significant effect from the selection system in this matter.

### Region

The fifty political geographical variables will be used where appropriate, but understanding geographical patterns through larger regions can highlight tendencies that might be lost with 50 units. So creation of several variables based on regions of the country was done for exploratory purposes. Three sets of regional variables were created. The first is a simple North, South, West classification. The North and South are separated in the same way they were during the Civil War but with Oklahoma added, and the line separating them from the West goes North on the West side of Texas and Kansas, and the East side of Nebraska, North and South Dakota. See the map below.



A second set of geographical variables separates the nation into six regions: the Northeast, the South, the Midwest, the Southwest, the Northwest which includes Alaska and Hawaii, and California.



The third set of geographical variables attempts to capture the political differences better than the two previous. The five regions created here by Michael Barone in an introduction for the 1998 *Almanac of American Politics*<sup>210</sup> are the *Metroliner* Northeast (Barone's creative term to add Pennsylvania, New Jersey and Maryland to the Northeast), the *South Atlantic*, the *Mississippi Valley* stretching from Louisiana and Alabama to Minnesota to Ohio, the *Interior* which stretches from Texas to Idaho and includes Alaska, and the *Pacific Rim* which also includes Hawaii. Each region encompasses around a sixth of the population except the Mississippi Valley which has around a third of the nation's population, and each region also has a political underpinning which justifies the grouping. Metroliners are the base of the Democratic party, and the South Atlantic is deeply religious, anti-union, and growing. The Mississippi Valley is largely the ballast of the nation with a populist flavor in both Democratic and Republican voters. The interior is driven by "local interests over federal control". The Pacific Rim is "the homeland of America's computer creativity and its connection with the surging East Asian economies", and also a less tradition-laden view of Republicanism embodied by Ronald Reagan.

---

<sup>210</sup> Barone 1997, which was adapted from Barone's and Grant Ujifusa's introduction to the *1998 Almanac of American Politics*. I reference the *National Journal* version. Barone puts "up-state New York" into the Mississippi Valley region, but separating states was not done in this study.



Population is not well represented, as the Interior and Northeast each have around 30% of the votes in this dataset. The Northeast has a population 275% higher than California, for a specific example. But with those differences in mind, the rates statistics from these more socially and politically congruous groupings can perhaps capture more of the tendencies sought after in the analysis.



**Table 30 Characteristics of Geography**

	Favorable Vote Rate	Judge PAJID, 0 (Cons.) -100 (Liberal)	Chances a Vote Occurs Under an Institutional Attempt To Increase Religious Freedom	Scaled Institutional Protective Rate -3 (Least) to 3 (Most Protective)	Average Context Religious Adherent- Rate	Average Context Religious Homogeneity Rate 0 (hetero.) - 100 (homogeneity)
Pacific Rim	.40	56.4**	.40**	-1.04**	0.39**	0.06**
MS Valley	.37**	33.3**	.40**	-.83**	0.52**	0.12**
Interior	.45	45.1**	.52	.00**	0.50**	0.10**
South Atlantic	.43	37.6**	.62**	-.43**	0.41**	0.06**
Metroliner	.51**	66.0**	.68**	.61**	0.56**	0.16**
Average	.45	50.0	.54	-.13	0.50	0.11
South	.43	35.5**	.45**	-.48**	0.48**	0.10**
West	.40**	47.6**	.37**	-1.17**	0.44**	0.09**
North	.48**	58.7**	.67**	.51**	0.53**	0.13**
Average	.45	50.0	.54	-.13	0.50	0.11
California	.47	53.4*	.15**	-1.70**	0.43**	0.09**
Northwest	.34**	51.5	.60*	-.79**	0.42**	0.07**
Southwest	.45	31.2**	.43**	-.26	0.52**	0.14**
South	.42	36.1**	.39**	-.72**	0.46**	0.10**
Midwest	.44	47.2**	.59**	.11**	0.49**	0.09**
Northeast	.51**	66.0**	.68**	.61**	0.56**	0.16**
Average	.45	50.0	.54	-.13	0.50	0.11

\*\* Correlation is significant at the 0.01 level (2-tailed).

\* Correlation is significant at the 0.05 level (2-tailed).

It would be difficult to overestimate the importance or explanatory power of geography in this dataset (and that goes for social research in general, as well.)

### Levels of Courts

The three levels of courts recognized here are the court of last resort, the intermediate appellate court, and the trial or district court, coded 1, 2, and 3 respectively.

The votes are not distributed normally, with 36% in the supreme courts, 47% in the intermediate appellate courts, and 17% in the lowest court. Within the lowest level, 87%

of the votes were derived from parent cases, leaving 70 votes (and 70 cases, since each case had one judge) that were original.

The lowest level voted for the religious actor more, with a 48% success rate versus the 43% at level two, and 46% at level one, but the difference is not significant.

The institutional variables show a significant and strange pattern with the level of court: the intermediate appellate level is the more institutionally protective level. 48% of supreme court votes and 49% of lower court votes occur in institutionally increased contexts, but the intermediate appellate votes occur in these contexts significantly more often at 61% of the time.<sup>211</sup> This likely has to do with the dates of the intermediate appellate courts being a bit later than the COLR, and much later than the district court votes. And with time comes more adoptions of increased scrutiny.

It is the legislatively increased states that account for most of the difference as it is their appellate courts which have a doubled increased-scrutiny rate compared to the other levels of courts. Judicial states also show an increase in level 2 cases over levels 3 and 1, but not significantly.

And yet the voting in those intermediate appellate contexts is less protective with a 43% vote-rate, for a difference that is significant at the .05 level. And again it is the legislatively increased states that drive the outcome. Their favorable vote-rate at the intermediate appellate level of 39% drags down the overall, as the judicial states vote at 45% which leaves the average at 43%.

Claimant characteristics show several significant correlations with level of court. There is a negative relationship between claimant size and level of court, with

---

<sup>211</sup> That 25% increase is significant at the .001 level, one-tailed test.

significance at both the lowest level and highest.<sup>212</sup> This is likely a function of the higher success rate of larger claimant groups. Once a claimant is satisfied with the decision, they do not pursue it further, and if they are a larger group with presumably better counsel, they are not taken further by the opposing side as much.

Votes on prisoners and sexual deviancy are resolved at lower levels and votes on taxes, higher priced issues, and establishment issues appear significantly more at the highest level.

It is counter-intuitive that supreme court decisions occur in less populated contexts than both intermediate appellate and trial court decisions, and by a factor larger than two. This is due to Albany being the capital of New York, and Springfield of Illinois, and Sacramento of California, among others. And since more populated areas are also the areas with higher adherent-rates, supreme court decisions occur in less religious areas as well. And yet supreme court decisions still occur in Democratic leaning areas.<sup>213</sup>

#### Education, Public and Private

The dataset includes a variable on whether the vote was education related, and if so, whether it was a public or private education question. These data were collected because many of the U.S. Supreme Court religious liberty (if establishment clause specific) cases have been at this intersection of private faith and public institution.

Around half of the education cases coded here were of a) non-custodial parents adjudicating their responsibility for private school bills, b) school responsibility for sexual abuse cases, or c) teacher free exercise rights and other individually based cases.

---

<sup>212</sup> The correlation between claimant size and trial/district courts is .05\*\*, and between claimant size and the supreme court is -.07\*\*\*.

<sup>213</sup> -.10\*\*\* correlation with County W. Bush Vote Rate 2000, as well as 2004.

The other half does capture the church state nexus that was expected: financial responsibility for shared resource programs between city and religious body, ability to regulate school inoculation, unemployment and labor law policies, and more.

338 of the 3,254 votes were education related, and 82% of them concerned a private school, 38% involved public schools, leaving 69 votes regarding both.

The votes tilting positive for overall education cases, negative for public education cases and positive for private education cases, yet neither are significant.

The states in which these occurred were not significantly patterned overall, but some pattern exists in the interaction. Private education cases occur more in states which attempt to increase religious freedom,<sup>214</sup> and voting is consistently more protective in these same states, even after considering the method of increase.<sup>215</sup>

#### Government Employee

Because there seemed to be plenty of cases of governmental employees seeking protection for an act, I created a variable and began coding for it. In the end, 377 votes were cast on questions regarding public employees. The employees in question were primarily jurors and prosecutors, and other actors were judges, teachers, and police officers, a fireman and a city councilor. The prosecutor and juror cases were mainly about the propriety of a Biblical reading or preemptory strikes for religious reasons. Teachers were kept solely in the public education variable.

The favorable vote-rate in these cases was 53%, which is significantly higher than average. These cases, like the education cases, also strongly tended to occur in the states

---

<sup>214</sup> Correlation scores of .05\*\*, -.05\*\* and .04\*, respectively.

<sup>215</sup> Success rate of private education related religious actor in Legislative states: 34%, in Judicial states: 43% and in No attempt states; 62%. The three of these are significant at the .05 level with 56, 102 and 116 votes, respectively.

which have not attempted to increase religious freedom. And also like the education cases, the protective vote-rates were higher in those non-increase states.<sup>216</sup>

Judges who voted on these cases tended to be more conservative, and more conservative judges offered more protection to these actors.<sup>217</sup>

The cases occur more in higher population areas and Democratic areas, and in the South and in California.<sup>218</sup> And California and the South were significantly more protective (59% and 68% successful vote-rates, respectively), but the Northeast, where the cases appeared at significantly lower rates, also receive significantly lower protection (41% vote-rate, versus their average 51%, and the overall average of 45%.)

### Conclusions On The Control Variables

The Judge and Community variables are clearly the strongest and clearest of the control variables. Their effect is straight-forward: left-leaning counties, liberal judges, more adherents and more religious homogeneity all provide a more hospitable context for a religious litigant. However, left-leaning politics does have an ambiguous relationship with the attempt to increase religious freedom (legislatively increased states tend to be more Republican.)

The Claimant and Case Characteristic variables should be handled individually. The Claimant-Area Religious Agreement variable appears strong, and has a curvilinear shape of being highest and lowest in the increased states (legislatively and judicially increased,

---

<sup>216</sup> The favorable vote-rate for the “rational basis” and “static state” categories was 61% in 243 votes, versus the vote-rate for the two most protective categories at 26.5% in 64 votes.

<sup>217</sup> PAJID average for these votes is 6.5 points more conservative than overall average in these 328 votes, and winning PAJID average is 2+ points more conservative than the PAJID average votes against the religious actor. Both significant at the .001 level.

<sup>218</sup> All four contexts have increased appearances, significant at the .001 level

respectively), and average in the no-attempt states. The Prisoner variable is predictably a low winner, but very responsive to the increased states.

The Deviancy variable, though, is ambivalent. Sexual issues appear to be difficult convictions to get, and drug related deviancy are tough winners (but getting outside of pro-religious freedom states can more-than-triple your chances.) And the Economic Impact variable simply does not appear to have the effect one might reason it would.

The Legal Reasoning variables all performed against expectations. Separation of church and state was generally not used as a rationale in votes against, and free exercise and speech were not used as a rationale in votes for religious actors. Instead, the clear patterns appear to be pointing to a seriousness or gravity of the issue lessening the effect of other predictors. When judges use constitutional language and lines of precedent, other usual sociological explanatory factors lose much of their strength.

In the next chapter, the model laid out in the preceding pages is run and analyzed.

## CHAPTER 5

### MODEL ANALYSIS

To clarify a common issue in modeling, a logit model differs from a logistic regression only very slightly (if at all, actually.<sup>219</sup>) The difference, to be exact, is in the two ways of expressing the outcome. If in interpreting the model one refers to the logit coefficient, then it is a logit model. If instead the coefficients are transformed into probabilities, then it is thought of as a logistic regression.<sup>220</sup> This slight difference is inflated by different perceptions of the models among researchers<sup>221</sup>, and a difference in the software. SPSS, for instance, has two different places for the two models. Logistic regressions are located under the Regressions menu option, and Logit is located under the Loglinear option. And the different limitations and outputs of each tend to play to the differences in perceptions.<sup>222</sup> And all of this occurs while statisticians wonder what all the hullabaloo is about.<sup>223</sup>

#### Collinearity Diagnostics

The software package used for this study (SPSS) has multicollinearity diagnostics, although for regressions that were located only in the linear regression menu option. So

---

<sup>219</sup> The two Wikipedia entries on logit and logistic regression are, as of this writing, being questioned as redundant. [http://cn.wikipedia.org/wiki/Talk:Logistic\\_regression](http://cn.wikipedia.org/wiki/Talk:Logistic_regression)

<sup>220</sup> Liao, Tim Futing. *Interpreting Probability Models: Logit, Probit, and Other Generalized Linear Models*. Sage Publishing. Number 101. 1994 p.11-12

<sup>221</sup> Pampel 2000. The difference between researchers who are drawn to the certainty offered by crosstab and ANOVA based models versus the realism offered by continuous outcomes of linear regressions.

<sup>222</sup> SPSS limits the number of independent variables to 10 in logit models, but is unlimited in logistic models. And further, in logit models continuous variables have to be entered in a different way and are handled differently than in the logistic regression.

<sup>223</sup> Liao (1994) goes on to couple the terms together and refer to them both as logit for the rest of the book. P.12

although these come from that option, the statistics closely approximate the same tolerance and value inflation factor test scores that would result in the logistic regression. Multicollinearity here is going to be multicollinearity there, in other words.

**Table 31 Collinearity Diagnostics for Judge & Community Variables**

	Collinearity Statistics	
	Tolerance	VIF
Claimant-Area Religious Agreement	.917	1.091
Judge Politics	.979	1.022
Metro-Area Adherent Rate	.987	1.013
Metro-Area Herfindhal Index	.986	1.014
County Voting	.982	1.019

a Predictors in the Model: (Constant), Religious Actor Vote Outcome, Land Use, Deviant Drug, Prisoner, Free Exercise Issue Raised, Deviant Sexual, Establishment Issue Raised, Taxes

b Dependent Variable: Integrated, Scaled Variable with Amici Adjustment

The values all look good, here. Claimant-Area Religious Agreement has the lowest tolerance, yet is still offering more than 90% of a new explanation.

The Eigenvalues and corresponding Condition Index do show that there is redundancy on two variables entered into the model once all 14 are entered. And as the model is run as the appropriate logistical regression, a stepwise method of regressing that will address these redundancies will be chosen as a way of insulating the model from the ill-effects.<sup>224</sup>

## The Results

### The Loglinear Logit Model

The logit model shows that the model is indeed explaining enough of the variance to be considered a “well-fitting” model, as the Pearson Chi-square and Likelihood Ratios are insignificant.

---

<sup>224</sup> Looking ahead to the model that will eventually be the fruit of the study, the Eigenvalues and Condition Index and Variance Proportions all indicate low/acceptable levels of collinearity.



The two measures of association, entropy and concentration, show that the model accounts for .164 and .190 of the dispersion, respectively. These measures are similar to a linear regression's  $R^2$  statistic.

The parameters in the model which are significant at the .05 level listed below.

**Table 32 Loglinear Logit Model Results**

<b>Parameter Estimates</b>				
Parameter	Estimate or logit	Std. Error	Z	Sig.
[ReligProtected = 1] * ClaimantReligAgreement	-1.394	.685	-2.036	.042
[ReligProtected = 1] * CountyVoteRepublican	-3.418	1.486	-2.300	.021
[ReligProtected = 0] * [EstablishmentCIMentioned = 0]	.976	.174	5.624	.000
[ReligProtected = 0] * [FreeExerciseMentioned = 0]	-1.450	.156	-9.286	.000
[ReligProtected = 0] * MetroAdherentRate	9.459	2.942	3.215	.001
[ReligProtected = 1] * MetroAdherentRate	9.003	1.996	4.512	.000
[ReligProtected = 0] * [JudicialScaled = -1]	1.426	.437	3.259	.001
[ReligProtected = 0] * [JudicialScaled = 1]	.908	.327	2.774	.006
[ReligProtected = 0] * [LegisIncrease = 0]	.426	.181	2.346	.019
[ReligProtected = 0] * MetroHerfindahlIndex	-13.429	4.246	-3.162	.002
[ReligProtected = 0]	2.117	1.306	1.621	.105

Model: Multinomial Logit

Design: Constant + ReligProtected + ReligProtected \* ClaimantReligAgreement + ReligProtected \* CountyVoteRepublican + ReligProtected \* Deviantbehavior + ReligProtected \* EstablishmentCIMentioned + ReligProtected \* FreeExerciseMentioned + ReligProtected \* Prisoner + ReligProtected \* MetroAdherentRate + ReligProtected \* MetroHerfindahlIndex + ReligProtected \* JudgePolitics + ReligProtected \* JudicialScaled + ReligProtected \* LegisIncrease

Note: There were four variables with values that were percentages which had to be transformed into whole numbers for the more intuitive coefficient to be interpretable in the model. Those four variables were Claimant-Area Religious Agreement, Metro-Area Adherent-Rate, Metro-Area Herfindahl Index (homogeneity measure), and County Majoritarianess (effectively the Republican vote-rate). The transformation was simply multiplying each by 100 to turn the percentage into a whole number.

Writing directly on the research question, two of the 12 possible parameters for the Scaled Judicial Variable do have a significant effect even after controlling for all the other influences. Specifically, when a vote is cast in the least protective judicial context, the odds of an unprotective vote increase by log odds ratio of 1.43, or better, by a factor of 4.26. So the win-rate, as was detailed in the descriptive chapters, drops from 55% generally to 19% in the judicially declared rational basis category, all things being equal.<sup>225</sup> Likewise, the “least protective judicial increase” category increases the odds of

---

<sup>225</sup> 19% is transformation of the 4.26 odds to a probability.

an unprotective vote by the log odds ratio of .908, which puts the odds at 2.48, which lowers the probability of a win to 28.5%, all things equal. And lastly, no legislative increased scrutiny means an increase in the odds of an unprotective vote of 1.53.

The parameter with the largest effect on the model occurs when Free Exercise is not mentioned in unprotective cases, as measured by the Z-score. An interpretation of that parameter is when Free Exercise is not mentioned, the odds of an unprotective vote decrease by a factor of 1.45. Despite the double negative and suggestion of a lack of an effect, the model shows this vacuum-like effect to be the strongest in the model. The lack of establishment language in the vote's opinion increases the odds of an unprotective vote, and is the second most influential parameter in the model. See Table 25 for a simpler visual of this effect.

When both languages appear in a decision, the effect is somewhat. It is only when they occur separately that the strong positive and negative effects occur.

In the logit model, five of the seven significant parameters occur with covariates (continuous variables) rather than factors (discrete variables.) Covariate interpretation is at a disadvantage in loglinear logit models as the specific values of each cell are a) arithmetic means calculated by the software, which b) means that the shape or variance of the variable is altered, and c) is not transparent in the results, so the distortions are not open to analysis. Thus, the parameters for covariates are better used as controls on the main factor variables studied rather than as independent variables in their own rights.<sup>226</sup>

---

<sup>226</sup> Help on this interpretation was received from G. David Garson's excellent "Quantitative Research in Public Administration" class website, <http://www2.chass.ncsu.edu/garson/pa765/logit.htm>.

## The Partial Correlation

A partial correlation is the second method for seeing the direction and strength of relationship between two variables (religious freedom and state attempt to increase that) after controlling for the effect of other variables (all of the control variables.)<sup>227</sup>

The following tables 33 and 34 are the results of the correlations, in a truncated form, which shows columns only for the dependent variable, state attempt to increase, legislative attempt, and judicial attempt.

The first table below is the controlled correlation with missing information excluded only from each pair of variables being correlated. The three correlation scores in bold type, centered at the bottom of the table, are answers to the research question. When all of the variables discussed in this dissertation are controlled, the legislative, judicial and integrated, scaled version of the attempt to increase scrutiny all failed to reach significance.

---

<sup>227</sup> The control method is by determining which variance is predicted by the control variable on each correlated variables, and extracting those predicted values. Hays 1994, 675.

**Table 33 Partial Correlation Version of Model**  
Missing Cases Excluded Pairwise

Control Variables		D.V. Favorable Vote Outcome	Legislative Attempt at Increasing Religious Freedom	Judicial Attempt at Increasing Religious Freedom
none	DEP. VARIABLE Favorable Vote Outcome	1.000	-.016	.013
	Legislative Attempt at Increasing Rel. Freedom	-.016	1.000	-.355(**)
	Judicial Attempt at Increasing Religious Freedom	.013	-.355(**)	1.000
	Integrated, Scaled Increased Scrutiny	.035	.343(**)	.518(**)
	Claimant-Metro Religious Agreement	.142(**)	.109(**)	-.128(**)
	Deviant Act was Sexual	.121(**)	.025	.051(**)
	Deviant Act was Drug Related	-.065(**)	.011	.005
	Claimant is a Prisoner	-.181(**)	.012	.048(**)
	Case is Related to Taxes	.037(*)	.026	.000
	Case is Related to Land Use	.006	.059(**)	.002
	Free Speech Mentioned	-.019	-.069(**)	-.067(**)
	Establishment Issue Raised	.156(**)	-.048(*)	-.024
	Free Exercise Issue Raised	-.233(**)	.012	.092(**)
	Judge Politics (Liberal)	.062(**)	-.093(**)	.373(**)
	Metro-Area Adherent Rate	.055(**)	.039(*)	.009
	Metro-Area Homogeneity Index	.060(**)	.054(**)	.010
County Vote (Republican)	-.087(**)	.097(**)	-.228(**)	
Control Variables				
Claimant-Area Religious Agreement & Act was Sexually Deviant & Act was Drug Related Deviant & Claimant was Prisoner & Taxes were Sought & Land Use was Issue & Free Speech Language Raised & Establishment Language Raised & Free Exercise Language Raised & Judge Politics & Metro-Area Adherent Rate & Metro-Area Homogeneity Index & County Vote Normalized, Rep+ and Dem-	DEPENDENT VARIABLE Favorable Vote Outcome	1.000	-.006	.023
	Legislative Attempt at Increasing Religious Freedom	<b>-.006</b>	1.000	-.346(**)
	Judicial Attempt at Increasing Religious Freedom	<b>.023</b>	-.346(**)	1.000
	Integrated, Scaled Increased Scrutiny Variable with Amici Adjustment	<b>.041</b>	.413(**)	.469(**)

\*\* Correlation is significant at 0.01 level

\* Correlation is significant at 0.05 level

Table 33, though, treated missing data differently than the two logit models do.

Missing information in the above model excluded the immediate pair if one of the cells of information was missing, but did not exclude the whole case, as the logit models do. The two ways of dealing with missing data are referred to here as pairwise and casewise

exclusions. And in SPSS, the only model of the three that offers a choice on how to deal with missing data is the correlation. So table 34 below shows the partial correlation with the other way of excluding data.

**Table 34 Partial Correlation Version of the Model**  
Missing Cases Excluded Listwise

Control Variables		Favorable Vote Outcome
Claimant-Area Religious Agreement & Act was Sexually Deviant & Act was Drug Related Deviant & Claimant was Prisoner & Taxes were Sought & Land Use was Issue & Free Speech Language Raised & Establishment Language Raised & Free Exercise Language Raised & Judge Politics & Metro-Area Adherent Rate & Metro-Area Homogeneity Index & County Vote Normalized, Rep+ and Dem-	Legislative Attempt at Increasing Religious Freedom	.058(*)
	Judicial Attempt at Increasing Religious Freedom	.086(**)
	Integrated, Scaled Increased Scrutiny Variable with Amici Adjustment	.155(***)

\*\*\* Correlation is significant at 0.001 level

\*\* Correlation is significant at 0.01 level

\* Correlation is significant at 0.05 level

Prior to accounting for the effects of judges and contexts and case types (the “pairwise” table 33), there is no significant pattern to religious freedom and states that try to increase it, even when categorized into judicial and legislative states, and even after accounting for lesser attempts at increasing. After accounting for the effects of judges, contexts, case types, legal language and all other variables, three of the four correlations are significant and in the predicted direction. Legislative is weaker than judicially attempted states, as the descriptive parts of the study clearly showed. The scaled version of the institutional attempt is strongest.

Why the large difference between the two? The very conclusion of the study hangs on the answer to that question.

The “complete information” partial correlation did not consider information unless each variable is coded for every variable chosen, so only half of the dataset was

considered. If a simple correlation is run with only the 1,612 votes that the partial correlation considered for the control variables, the correlations show the same strength and direction.

**Table 35 Correlations for Only the Cases Considered In the Model**

	DEPENDENT VARIABLE Favorable Vote Outcome
Increased Scrutiny	.076(**)
Legislative Attempt at Increasing Religious Freedom	.021
Judicial Attempt at Increasing Religious Freedom	.057(*)
Integrated, Scaled Increased Scrutiny Variable with Amici Adjustment	.110(**)

N = 1,612

\*\* Correlation is significant at the 0.01 level (2-tailed).

\* Correlation is significant at the 0.05 level (2-tailed).

To make the data more clear, here are the correlations for the same variables from inside the missing data.

**Table 36 Correlation Scores for Cases Excluded from the Final Model**

	DEPENDENT VARIABLE Favorable Vote Outcome
Increased Scrutiny	-.071(**)
Legislative Attempt at Increasing Religious Freedom	-.056(*)
Judicial Attempt at Increasing Religious Freedom	-.033
Integrated, Scaled Increased Scrutiny Variable with Amici Adjustment	-.092(**)

N = 1,638

\*\* Correlation is significant at the 0.01 level (2-tailed).

\* Correlation is significant at the 0.05 level (2-tailed).

It was something of a mystery as to why this very clear pattern occurs when the data are spliced in a seemingly unrelated way. Seeking the answer began with an analysis of the missing data.

The missing data were largely drawn from the inability to collect from three areas: claimant’s religious tradition, the legal variables in derived cases, and judge politics.

Where do the derived cases and harder to find judge politics logically reside? The

answer is in the lower levels of courts. The missing data included 95% of the district and trial court votes.

Why would rows of data with some missing cells that are more heavily drawn from lower courts show states attempting to increase religious freedom negatively correlated when compared to the overall dataset? The answer is time. Date was not controlled in the model. Therefore the rise in states increasing scrutiny is not captured in the missing data because the missing data occur earlier.

For evidence of that, see table 37 below showing the characteristics of votes in a variable which splits the dates of the data into ten roughly equal segments.

But also see the second part of the mystery in the column for pro-religious freedom vote-rate.

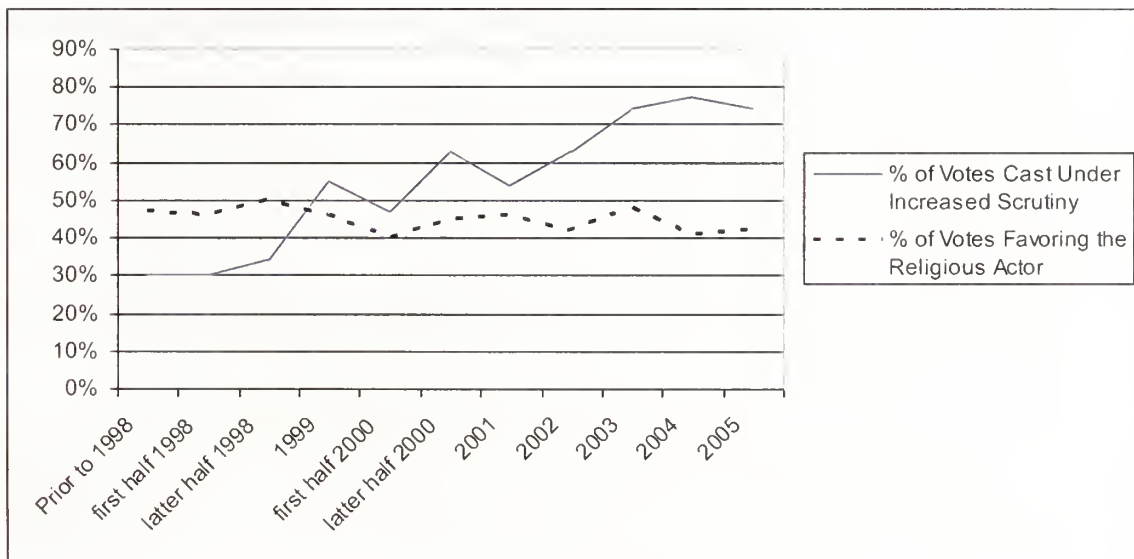
**Table 37 Comparison of Means for Selected Variables**

Date assigned to the case (Banded)	Increased Scrutiny	Integrated, Scaled Increased scrutiny Variable w/ Amici Adj.	DEPENDENT VARIABLE Favorable Vote Rate	N
Prior to 1998	.30	-1.04	.47	298
to July 1998	.30	-1.32	.46	296
latter half 1998	.34	-.77	.50	296
most of 1999	.55	-.03	.46	294
1999-2000	.47	-.19	.40	296
latter half 2000	.63	.02	.45	297
2001	.54	.12	.46	294
2002	.63	.30	.42	297
2003	.74	.42	.48	299
2004	.77	.51	.41	292
2005	.74	.29	.42	295
Total	.55	-.15	.45	3254

The number of votes occurring in protective states clearly goes up with time, as does the average scaled level of protection. But the vote-rate does not increase. It does not even stay the same: it decreases over time.<sup>228</sup>

And it is specifically that dynamic which characterizes the strange difference between the complete data used in the model and the data with a missing judge party ID or legal reasoning coding – the difference between the pairwise and listwise tables 33 and 34, in other words. See Figure 4 for a visual representation of this dynamic.

**Figure 4 Comparison of Increased Religious Freedom and Actual Protective Voting**



To be sure, further analysis was done on the missing data and it only confirmed this conclusion. The regional categorizations do not show any over or under representation in the missing data, nor do the judicial selection systems, surprisingly, since judge party identification was one of the three largest missing data variables. Other variables that are significantly correlated with the missing data include a positive correlation with population and number of claimants. But in both of those the reason behind their

<sup>228</sup> To be sure, the correlation score is -.03, with a significance of .104.



correlation is the bent toward the lower courts, as lower courts have twice the average population as the Supreme Court, and larger claimant groups tend to end cases on a lower level.

And to be clear, this piece of evidence is one of the most probative in the search for whether state institutional attempts at increasing religious freedom actually work:

Does a partial correlation on the time-series variables support or question this? This model supports those findings of futility, but in a way that will relieve state government officials. Remember that when we look solely at RFRA contexts with votes before and after passage, we found  $-.120^{**}$  correlation with protective voting. And indeed, for all pre-increased contexts through the increase and end of the data, we found a  $-.086^{**}$  correlation with protective voting. All six possibilities (three dummy and three scaled variables) for an increase to correlate positively with voting failed, and three of them failed significantly. Increasing scrutiny saw voting get worse.

With all the described controls in place in the partial correlation, all of the negative significance evaporates, and only the pre- and post-legislative contexts are negative (discounting the  $-.003$ , that is).

**Table 38 Partial Correlation of Time-Series Institutional Variables**

Control Variables			DV Vote Outcome
-none-(a)	DV Vote Outcome	Corr.	1.000
	Pre- and Only Post-Increase	Corr.	-.086(**)
	Pre- and Only Post-Legislative Increase	Corr.	-.120(**)
	Pre- and Only Post-Judicial Increase	Corr.	-.036
	Pre- and Only Post-Increased Contexts, Scaled	Corr.	-.045
	Pre- and Only Post-Legislative Increase, Scaled	Corr.	-.132(**)
	Pre- and Only Post-Judicial Increase, Scaled	Corr.	-.019
Control Variables			
Claimant-Area Religious Agreement & Claimant was Prisoner & Act was Sex or Drug Related & Taxes were Sought & Land Use was Issue & Free Speech Language Raised & Establishment Language Raised & Free Exercise Language Raised & Judge Politics & Metro-Area Adherent Rate & Metro-Area Homogeneity Index & County Vote Normalized, Rep+ and Dem-	DV Vote Outcome	Corr.	1.000
	Pre- and Post-Increase	Corr.	-.003
	Pre- and Post-Legislative Increase	Corr.	-.040
	Pre- and Post-Judicial Increase	Corr.	.039
	Pre- and Post-Increased Contexts, Scaled	Corr.	.020
	Pre- and Post-Legislative Increase, Scaled	Corr.	-.045
	Pre- and Post-Judicial Increase, Scaled	Corr.	.075

\*\* Correlation is significant at 0.01 level

\* Correlation is significant at 0.05 level

a Cells contain zero-order (Pearson) correlations.

Missing data is excluded pairwise.

### The Logistic Regression

A third way of searching for a controlled measure of the relationship between religious freedom and the state attempt to attain it is via a logistic regression. Logistic regressions can determine effects on a binomial or categorical variable with predictor variables that are categorical, or if not as precisely, continuous. The difference between this model and the loglinear logit model is not great, but is helpful. This regression will display coefficients which are more directly related to the effect on the dependent variable than the parameter interpretation.

Or better, it would display those coefficients if it was an adequately fit model. But this model fails the goodness-of-fit test by not explaining enough of the dispersion to beat a variable-less model.<sup>229</sup>

It is telling that when the judicial and legislative increase attempt variables are removed from the model altogether, the goodness-of-fit test grows closer to significance, from .002 to .041, when .05 is considered a model which explains enough to be considered adequate.

Instead of entering all the variables as a whole block, a model was attempted where the variables are entered stepwise, or by picking the most explanatory variables (as determined by the Wald statistic) one at a time until the pool of variables left contains only insignificant ones. With this method, the variables left out are: Deviancy, Economic Impact, County Politics, Free Speech Issue, Metro Adherent Rate and Metro Religious Homogeneity. The model does then show an adequate goodness-of-fit (.110 where avoiding .05 is success). The pseudo  $R^2$  measures show 15% and 20% of the dispersion explained by the model.<sup>230</sup>

---

<sup>229</sup> The -2 Log likelihood score is not lower than the predicted score, and the Hosmer & Lemeshow test is significant, which rejects the hypothesis that randomness does not explain more.

<sup>230</sup> The two measure are Cox & Snell and Nagelkerke R Square, respectively.

**Table 39 Logistic Regression of Model, Stepwise Method**

	B	S.E.	Wald	df	Sig.	Exp(B)
Claimant Area Religious Agreement	.010	.003	16.865	1	.000	1.010
Prisoner(1)	-.823	.217	14.421	1	.000	.439
Establishment Issue Raised (1)	.995	.131	57.980	1	.000	2.706
Free Exercise Issue Raised (1)	-1.298	.124	110.265	1	.000	.273
Judge Politics	.014	.003	17.280	1	.000	1.014
County Voting (Republican)	-.008	.005	2.304	1	.129	.992
Judicial Increase Least Protective			35.278	5	.000	
Judicial Increase 0	1.456	.334	19.058	1	.000	4.290
Judicial Increase 1	1.261	.363	12.081	1	.001	3.530
Judicial Increase 2	.839	.407	4.256	1	.039	2.313
Judicial Increase 3	1.525	.344	19.629	1	.000	4.597
Judicial Increase Most Protective	1.732	.336	26.615	1	.000	5.651
Legislative Increase	.192	.171	1.259	1	.262	1.212
Constant	-2.312	.365	40.023	1	.000	.099

N = 1,616. Missing data excluded listwise.

The model does predict more than 2/3rds of the votes, which is 11.9 percentage points more than the variable-less model (55.4% explained).

**Table 40 Predicted and Observed Cases, Logistic Regression**

Observed			Predicted		
			Vote Outcome		Percentage Correct
			Lost	Won	
Step 1	Vote Outcome	Lost	603	292	67.4
		Won	255	466	64.6
	Overall Percentage				66.2

Interpreting the variables in the model confirms what the loglinear logit model showed us: using the Wald statistic, the two most influential variables in the model are the occurrences of establishment or free exercise language. If establishment related language is used, the odds of a successful vote increase by a factor of 2.706 when compared to votes without establishment language. And when Free Exercise is brought up in an opinion, the odds of a protective vote drop to only 27.3% as likely as votes on cases without that language.

The scaled judicial variable has five protective levels, and in a logistic regression, each factor is understood as the effect on the model with a one unit change in that factor.

So interpret each row as the change in probability when that row is changed to the least protective row. This scaled judicial variable, when taken as a whole, has the third most explanatory power in the model as indicated by the Wald statistic.

The judicial variable does not look linear at first blush, but note that each of the variables is a fairly drastic increase when compared to the reference category which is the least protective category. It is indeed the least protective when compared to all the others, in other words. The second to least protective category, coded 0, was the category which held all the institutionally ambiguous and not-yet-increased contexts. That it is higher than other categories is not a surprise. After accounting for those two dynamics, the variable makes more sense.

To interpret this judicial variable in light of the study's research question: in all of the data considered by a listwise logistic regression, states which increase their scrutiny do succeed when those states use the courts to do so.

The Legislative attempt variable is a) insignificant, but at least b) in the direction of a positive effect on religious actor success in court. So the research question here is answered negatively for RFRAs.

Both the legislative and judicial effects appear consistent even as other control variables are added to the model, such as the claimant size variable, the political geography variable, and the judicial selection system variable.<sup>231</sup>

Judge Politics shows that with each increase by one PAJID point, the odds of a successful vote grow by 1.4 percent. That effect is the fourth most predictive, followed

---

<sup>231</sup> Claimant size would be the third most explanatory variable, and predicts a 240% better chance at a successful vote. The political geography variables were insignificant, as were the judicial selection system variables.

by Claimant Area Religious Agreement, which has a similar predictive rate as one point of increase in the rate of agreement translates into 1 percentage point more likelihood of a successful vote.

The last significant variable is the Prisoners dummy variable which shows that the odds of a prisoner winning are .44 times the odds of non-prisoners, which are actually better odds for prisoners than the simple comparison of means on the data which showed prisoners winning only 33% of the time that others win (16% versus 48% nonprisoners.).

Judge Politics, Claimant Area Religious Agreement and County Voting all show very stable effects as shown by their small standard errors.

Variables which proved insignificant once all these effects were held constant include judge and claimant gender, judge and claimant religious tradition (minus being an Other religious claimant). There are only 359 votes coded with a judge religious tradition known, which lent to the insignificance, presumably. But the outcomes, if insignificant, give one pause: the most protective judge religious tradition was the Conservative Non-Traditional Mormon or Jehovah's Witness. And the least protective category? Jewish judges, in 39 votes.<sup>232</sup> These outcomes surely give texture to the simple political generalization that left-leaning is more protective, which would be easy to take away from this study.

State judicial selection system and dissenting votes showed no patterns. County population is insignificant, but metro population is significant at the .05 level, but with a *b* and EXP(*b*) of .000, has no direction.

---

<sup>232</sup> A simple comparison of means confirms this outcome as well.

But the model suffers from the same issue the Loglinear Logit model suffers from: the votes included are biased by time in such a way that cannot be controlled. But as the simpler descriptions throughout, and specific discussion above shows, the larger conclusions drawn regarding the effectiveness of state institutional abilities would not suddenly become effective if these models were to control for the effect of time.

### Conclusion

Both judicial and legislative attempts to increase religious freedom fail. Judicial states are more protective of religious actors, but this appears to be the case even before the court handed down the verdict which increased scrutiny. Legislative states do not appear to be more protective than other states. RFRA and religious freedom increasing landmark decisions have no effect, in other words. Or better, they have no positive effect.

If one is interested in the control variables as more than simple controls, as this exploratory dissertation is, then seeing the things which contribute to religious freedom more is quite a benefit to the research and analysis. And this list is lead by the legal language used in the opinion, even if not in the way predicted. Sociological and demographic factors like the judge's gender or judge's religion, or region of the country, or judicial selection system all fail to explain much beyond luck when compared to a judge's using constitutional language.

## CHAPTER 6

### CONCLUSION

This study assessed how state attempts to increase religious freedom fared in terms of actual votes for religious actors in state courts. The simple answer to the question is that state institutions, especially statehouses, do not fare well at all. Based on the research conducted and the results of the model above, I offer a summary of the major findings, and some concluding remarks.

The following are some selected findings presented in the order reported in the study.

- Institutional attempts to increase religious freedom failed to increase the rate at which judges vote to protect religious behavior, even when the controls were added. (ch. 3, 5)
- The Other Religious category, with Muslims as the largest religion represented, saw its favorable vote-rate double after September 11, 2001. (p. 41)
- When the focus is narrowed to only the states which will increase scrutiny, the favorable vote-rate before increasing scrutiny is 50%, and after increasing it the rate drops to 42%. (p. 65, 157-159)
- The unclear states that did not increase or decrease scrutiny have a favorable vote-rate of 57%, which is 22% better than the average of 45%. (p. 69)
- Counties which voted more Democratic had more protective voting occur in their courts. (p. 77) Liberal judges voted to protect religious actors more than conservative judges. (p. 101) States which attempt to increase religious freedom have more liberal judges than conservative judges. (101-102)
- Claimants with popular religious traditions receive more favorable votes than claimants with unpopular religious traditions. (p. 119)
- Prisoners receive favorable votes 24% of the time in judicially increased states, 18% of the time under RFRA contexts, and 5.6% of the time when scrutiny is not increased. (p. 130)
- Female judges do not vote differently than male judges, but do populate the bench in increased scrutiny states at significantly higher rates. (p. 152-153)



- Religious litigants in groups of more than three received favorable votes more than twice as often as smaller groups. (p. 156-158)

### Inter- And Intra-Branch Power Sharing

Questions about legislative and judicial power sharing are raised by RFRAs which fail to produce higher favorable vote-rates in this study. And this goes against recent research which finds that “state supreme courts are usually deferential to [state] legislative will.”<sup>233</sup>

Judicial attempts did not increase that favorable vote-rate either, but that is a less clear rejection of the prediction that the rate would go up. This is so because court decisions which increase scrutiny can be seen as a simple clarification of the state’s judicial religious freedom doctrine, rather than a cue to increase that vote-rate which was then ignored. Scholarship on intra-judicial relations is showing them to be cooperative as well,<sup>234</sup> but this does not speak to the issue of what generally is expected from a judicial ruling on increased scrutiny. The answer is likely to be unique to each case and state rather than something that can easily be generalized.

### Left-Right Or Center-Periphery Variance

The study originally intended to construct the continuous variables (county voting, judge politics, area religious adherence and homogeneity, and claimant’s religious popularity) so that the poles were the variable’s average and the furthest from average. Or better, with a center and periphery construction, rather than the more conventional conservative ranging over to liberal construction. So to be clear, originally, judges were

---

<sup>233</sup> Stumpf (1998, 428) citing the then-upcoming second edition of Canon and Johnson (1999).

<sup>234</sup> Stumpf 1998, 431.

going to range from those with average PAJID score over to those with the extreme-right and extreme-left PAJID scores. And also to be clear, these constructions produced significant results. But they did not capture as much of what the variable refers to as did the right-left construction. So the study went with the latter. But the former, center-periphery construction strikes me, after having completed this study as a very fertile ground for future study. The difference between conservative and liberal areas, judges and religions explains more of what was studied here, but the difference between the status quo and those outside the normal politics and religions is explanatory of something, and that something deserves to be explored.

Future research on interest group activity at the state level may also find that the conservative religious legal groups put fewer resources into state cases. That finding is predicted, actually, since the use of free speech language (which is the strategic tack taken by these groups because of the lack of success in either advancing a Free Exercise of Religion claim or Establishment of Religion defense) in this study was somewhat rare and not helpful when employed.

#### Applying Directly To The Literature

This study can add to the state judge characteristic literature, or as Carp and Stidham's assessment put it, judges who are "overwhelmingly older, white, male [] Protestant... homegrown [and] moderately conservative."<sup>235</sup> While those characteristics are still common, the makeup of the state court system is evolving to include more

---

<sup>235</sup> Carp and Stidham, 1998, 260.

women and racial minorities, and may not be moderately conservative. Women judges cast 26.5% of the COLR votes in this study, which shows an increase from a 2002 study finding 24% of justices on state courts of last resort were women.<sup>236</sup> But as scholars note, the percentage diminishes with the level of court: 20.4% of intermediate appeals votes, and only 16.6% of trial court votes were cast by women.

As mentioned above, female judges tended to vote against the religious actor more once all the controls were in place, although not significantly so. This result appears to be another counter-intuitive point in the unsuccessful search for compelling evidence that women jurists vote differently.<sup>237</sup> But the significantly positive correlation between women being judges and increased scrutiny states suggests that evidence could be close.

A further step in this research could attempt to determine whether women judges fostered the increase in scrutiny, or whether women judges appear more because the context is more hospitable.

Regardless of the answer, one implication of the findings here is that searching for a female judge effect could be more fruitful (finding an effect or confirming the absence of one) by shifting from an individual level of analysis to one which considers the size of the female judge populations. This suggestion is not new, though, as feminist jurisprudence has long held that the socializing influences and peer pressures within legal institutions mean that the judges who are women are not representative of women as a

---

<sup>236</sup> Martin and Pyle, 2002, 39-40.

<sup>237</sup> For a good literature review on the difference between the theory and evidence in gender specific judicial behavior studies, see Stumpf (1998, 157), and McCall, Madhavi and Michael A. McCall. 2007. "How Far Does the Gender Gap Extend? Decision Making on State Supreme Courts in Fourth Amendment Cases, 1980-2000" *The Social Science Journal*. 44(1):67-69. Related research is showing that female judges sentence criminals more often and to longer sentences, but there is not yet a consensus around women being tougher judges, so this study does not confirm or negate, but instead continues to fill in the picture.

whole. With larger groups of women judges (in a county or state, for example), that socializing influence and pressure to conform to the male created traditions would wane. It is that dynamic that may be driving the correlation between increased scrutiny and women judges.

Recent research on state judge religious identification has found that Evangelical judges uphold death penalties more, vote against obscenity more, and vote more conservatively in gender discrimination cases.<sup>238</sup> And this study finds Evangelicals to be significantly more conservative on the PAJID scale and to identify as Republican more.

But for reasons that are not immediately clear, and in a comparison that is not fully commensurate in issue areas, the findings here show a very different picture. If I redefine the variable for Evangelicals to mirror the Songer and Tabrizi construction, this redefined group of Evangelicals was more protective of religious freedom overall. And this finding was not inflated by rulings in favor of other Evangelical or Conservative Non-Traditionals (where, surprisingly, Evangelical judges were a bit less protective.) Evangelical judges in this study were more protective than non-evangelical judges of each religious group minus Catholics, where Evangelicals voted only one percentage point lower than the average. And the largest difference came with the Other Religious category, where this altered version of Evangelicals voted to protect 60% of the time<sup>239</sup> versus non-evangelical judges who voted to protect 18% of the time.

Evangelical judges here were more protective of deviant behavior (59% in 29 votes versus a 56% favorable vote-rate from non-evangelicals), and more protective of

---

<sup>238</sup> Songer and Tabrizi, 1999

<sup>239</sup> Albeit with only 15 votes, so the small number may be responsible for the outcome.

prisoners (15% in only 13 votes versus a 13% favorable vote-rate from non-evangelicals.)

This study therefore stands in contrast to the Songer & Tabrizi 1999 findings.

A third way this study adds to an on-going discussion is in the area of minority success in the courts. As already mentioned in the section on claimant religious popularity (p. 115-116) these findings generally confirm that minority religious litigants are less successful than average, but so are the more numerous Evangelical Protestants. Newer evidence that Catholics and Baptists win at lower rates than minor religions is not fully rejected or confirmed here.<sup>240</sup> Ultimately though, this study posits the question in a new way. Rather than asking whether, for example, Baptists win or lose more, I asked how Baptists fared in areas with many or few other Baptists. Instead of understanding the popularity of the religious traditions fixed at the national level, which is what studies have inadvertently done to this point, I assess popularity at the immediate, metro or county level. My results, as reported elsewhere, are significant.

---

<sup>240</sup> See p. 115-116 for more details. See Sisk (2005), Brent (1999) and Lupu (1998).

### Implications Of This Research

One implication of this study is that the state courts are a better venue for religious actors. Religious actors won more cases before the time frame studied here, and they won more during the time frame. And despite the impotence of RFRA and pro-religious freedom precedent, that more favorable context is likely to remain because a), the federal institutional attempts have mattered (and they are currently allowing religious behavior to be regulated by rational laws), and b) states have been more protective all along and there is no reason to believe they will lower their actual pro-religious freedom voting rates.

But to temper this forecast, that states are friendlier venues as a whole does not help potential litigants in Oregon or Nebraska or the other six states where the rational basis standard has been accepted and judicial voting is less protective. Nor is it likely that legal interest groups will focus efforts on state decisions because federal decisions are (conceptually at least) fifty times more encompassing than a single state decision. Going from this generalized picture to the more specific picture of religious freedom is the next step in this line of research.

## APPENDIX A

### LIST OF HYPOTHESES

- Hypothesis 1:* States with RFRA result in more judicial votes favoring religious freedom than states without RFRA.
- Hypothesis 2:* State court precedent providing for the use of strict scrutiny or the equivalent protecting religious freedom result in more judicial votes favoring religious freedom than states without such precedent.
- Hypothesis 3:* County-level Republican presidential voting is associated with less favorable religious freedom votes for religious actors than County-level Democratic Presidential voting.
- Hypothesis 4:* More liberal judges will vote more in support of religious freedom than more conservative judges.
- Hypothesis 5:* Judges whose courts are in high religious adherence areas will support religious freedom claims more than judges from lower religious adherence areas.
- Hypothesis 6:* The more religiously diverse the area in which the judge sits, the greater the likelihood the judge will support the religious freedom claim.
- Hypothesis 7:* Religious freedom claimants from minority religions will meet with less success than those from majority religions.
- Hypothesis 8:* Religious freedom claims based on sexual or illicit drug usage will be less likely to be supported than those that are not.
- Hypothesis 9:* Religious freedom claims of prisoner are less likely to be supported than claims from non-prisoners.
- Hypothesis 10:* Religious freedom claims that do not require public resources (tax money or land usage) are more likely to be supported than those that do.
- Hypothesis 11:* When the religious freedom claim is recognized by the judge to concentrate free exercise of religion, it is more likely to be supported than if it is not.
- Hypothesis 12:* When the religious freedom claim is recognized by the judge to concern the separation of church and state (an establishment clause), that claim is less likely to be supported by the judge than if the separation of church and state is not involved.
- Hypothesis 13:* When the religious freedom claim is coupled with a free speech claim it is more likely to be supported than if it is not.

## APPENDIX B

### COMPLETE LIST OF DENOMINATIONS IN RELIGIOUS TRADITIONS

The following is a reproduction of the Appendix from Brian Steensland's 2000 article detailing the religious traditions categories used in this study.<sup>241</sup>

314 / *Social Forces* 79:1, September 2000

#### APPENDIX

The following list includes all denominations within the classification scheme described above. Catholic (RELIG = 2) and Jewish (RELIG = 3) traditions are not listed because there are no further subspecifications available in the General Social Survey for these affiliations. In addition to the denominations listed, "Other Affiliation" includes faith traditions such as Buddhism, Hinduism, Islam, and Eastern Orthodoxy (RELIG = 5-10, 12). Numbers in parentheses refer to the numeric value label for that denomination under the variable listed (DENOM or OTHER).

#### **Black Protestant**

*Using Variable "DENOM"*

African Methodist Episcopal Church (20)  
African Methodist Episcopal Zion Church (21)  
American Baptist Association<sup>b</sup> (10)  
American Baptist Churches in the U.S.A.<sup>b</sup> (11)  
Baptist, Don't Know Which<sup>b</sup> (18)  
Methodist, Don't Know Which<sup>b</sup> (28)  
National Baptist Convention of America (12)  
National Baptist Convention, U.S.A., Inc. (13)  
Other Baptist Churches<sup>b</sup> (15)  
Other Methodist Churches<sup>b</sup> (23)  
Southern Baptist Convention<sup>b</sup> (14)

*Using Variable "OTHER"*

African Methodist (15)  
Apostolic Faith (14)  
Christian Tabernacle (128)  
Church of God in Christ (37)  
Church of God in Christ Holiness (38)  
Church of God, Saint & Christ (7)  
Disciples of God (88)  
Federated Church (98)  
Holiness; Church of Holiness (56)  
House of Prayer (104)  
Missionary Baptist<sup>b</sup> (93)  
Pentecostal Apostolic (103)  
Primitive Baptist (133)  
Sanctified, Sanctification (78)  
United Holiness (79)  
Witness Holiness (21)  
Zion Union (85)  
Zion Union Apostolic (86)  
Zion Union Apostolic-Reformed (87)

#### **Evangelical Protestant**

*Using Variable "DENOM"*

American Baptist Association<sup>c</sup> (10)  
Baptist, Don't Know Which<sup>c</sup> (18)  
Lutheran Church-Missouri Synod (32)  
Other Baptist Churches<sup>c</sup> (15)

---

<sup>241</sup> Steensland, 2000, 314-16.



Other Lutheran Churches (34)  
Other Methodist Churches<sup>c</sup> (23)  
Other Presbyterian Churches (42)  
Southern Baptist Convention<sup>c</sup> (14)  
Synod (33)  
Wisconsin Evangelical Lutheran

*Using Variable "OTHER"*

Advent Christian (10)  
Amish (111)  
Apostolic Christian (107)  
Apostolic Church (138)  
Assembly of God (12)  
Bible Missionary (109)  
Brethren Church, Brethren (20)  
Brethren, Plymouth (22)  
Brother of Christ (132)  
Calvary Bible (110)  
Chapel of Faith (122)  
Charismatic (102)  
Chinese Gospel Church (135)  
Christ Cathedral of Truth (108)  
Christ Church Unity (29)  
Christ in Christian Union (26)  
Christ in God (101)  
Christian and Missionary Alliance (9)  
Christian Calvary Chapel (125)  
Christian Catholic (28)  
Christian Reformed (32)  
Christian; Central Christian (31)  
Church of Christ (35)  
Church of Christ, Evangelical (34)  
Church of Daniel's Band (127)  
Church of God of Prophecy, The (121)  
Church of Prophecy (5)  
Church of the First Born (116)  
Church of the Living God (39)  
Churches of God (Except with Christ and Holiness) (36)  
Community Church (41)  
Covenant (42)  
Dutch Reformed (43)  
Evangelical Congregational (2)  
Evangelical Covenant (91)  
Evangelical Free Church (47)  
Evangelical Methodist (112)  
Evangelical United Brethren (120)  
Evangelical, Evangelist (45)  
Faith Christian (139)  
Faith Gospel Tabernacle (124)  
First Christian (51)  
Four Square Gospel (53)  
Free Methodist (13)  
Free Will Baptist (16)  
Full Gospel (52)  
Grace Brethren (100)  
Holiness (Nazarene) (18)  
Holiness Church of God (90)  
Holy Roller (55)  
Independent (24)  
Independent Bible, Bible, Bible Fellowship (3)  
Independent Fundamental Church of America (134)  
Laotian Christian (146)

Living Word (129)  
 Macedonia (131)  
 Mennonite (63)  
 Mennonite Brethren (115)  
 Mission Covenant (92)  
 Missionary Baptist<sup>c</sup> (93)  
 Missionary Church (117)  
 Nazarene (65)  
 New Testament Christian (6)  
 No Denomination Given or Nondenominational<sup>d</sup>  
 Open Bible (27)  
 Other Fundamentalist (97)  
 Pentecostal (68)  
 Pentecostal Assembly of God (66)  
 Pentecostal Church of God (67)  
 Pentecostal Holiness, Holiness Pentecostal (69)  
 People's Church (140)  
 Pilgrim Holiness (57)  
 Primitive Baptist (133)  
 Salvation Army (76)  
 Seventh Day Adventist (77)  
 Swedish Mission (94)  
 Triumph Church of God (106)  
 Way Ministry, The (118)  
 Wesleyan (83)  
 Wesleyan Methodist-Pilgrim (84)

#### **Mainline Protestant**

##### *Using Variable "DENOM"*

American Baptist Churches in the U.S.A.<sup>c</sup> (11)  
 Methodist, Don't Know Which<sup>c</sup> (28)  
 Presbyterian Church in the U.S.A. (40)  
 American Lutheran Church (30)  
 Presbyterian, Don't Know Which (48)  
 Episcopal Church (50)  
 Presbyterian, Merged (43)  
 Evangelical Lutheran (35)  
 United Methodist Church (22)  
 Lutheran Church in America (31)  
 United Presbyterian Church in the U.S.A. (41)  
 Lutheran, Don't Know Which (38)

##### *Using Variable OTHER*

American Reformed (99)  
 Baptist (Northern) (19)  
 Christian Disciples (25)  
 Congregationalist (40)  
 Congregationalist, First Reformed (71)  
 Disciples of Christ (44)  
 Evangelical Reformed (46)  
 First Christian Disciples of Christ (49)  
 First Church (48)  
 First Reformed (50)  
 Friends (54)  
 Grace Reformed (89)  
 Hungarian Reformed (1)  
 Latvian Lutheran (105)  
 Moravian (8)  
 Quaker (70)  
 Reformed Church of Christ (73)  
 Reformed United Church of Christ (72)  
 Schwenkfelder (148)  
 United Brethren, United Brethren in Christ (23)

United Church of Canada (119)  
United Church of Christ (81)  
United Church of Christianity (96)

#### Other Affiliation

*Using Variable OTHER*

##### *CONSERVATIVE NONTRADITIONAL*

Christadelphians (30)  
Jesus LDS (62)  
Christian Scientist (33)  
LDS (59)  
Church of Jesus Christ of the LDS–Mormon (60)  
Restoration (145)  
LDS–Reorganized (61)  
Church Universal and Mormon (64)  
Triumphant (114)  
True Light Church of Christ (130)  
Jehovah's Witnesses (58)  
Worldwide Church of God (113)

##### *LIBERAL NONTRADITIONAL*

Christ Church Unity (29)  
Religious Science (74)  
Eden Evangelist (17)  
Spiritualist (11)  
Mind Science (75)  
Unitarian, Universalist (80)  
New Age Spirituality (136)  
United Church, Unity Church (82)  
New Birth Christian (141)  
Unity (95)

a Also included within the Catholic tradition are those who belong to the Polish National Church (OTHER = 123).

b Included only if race of respondent is black

c Included only if race of respondent is not black

d Includes only those who responded "no denomination given or nondenominational" (DENOM = 70).

From this pool, those who attend church less than "about once a month" (ATTEND < 4) or those who responded "don't know or no answer" (ATTEND = 9) are excluded. This also includes additional respondents who responded with "Christian" or "interdenominational/no denomination" on the 1998 RELIG variable (RELIG = 11 or 13).

## BIBLIOGRAPHY

- Adamczyk, Amy, John Wybraniec, and Roger Finke. 2004. "Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA." *Journal of Church and State* 46 (2): 237-62.
- Aldrich, John Herbert and Forrest D. Nelson. 1984. *Linear Probability, Logit And Probit Models*. Beverly Hills, Calif.: Sage Publications.
- Baker, Ross K. 2007. *Strangers on a Hill: Congress and the Court*. New York: Norton.
- Barone, Michael. 1997. "Divide and Rule." *National Journal*. July 12 (29)
- Blakeman, John C. and D. E. Greco. 2004. "Federal District Court Decision Making in Public Forum and Religious Speech Cases, 1973-2001." *Journal for the Scientific Study of Religion* 43 (3): 439-49.
- Borooah, Vani K. 2002. *Logit and Probit: Ordered and Multinomial Models*. 1st ed. CA: Sage Publications, Inc.
- Brace, Paul, Kellie Sims-Butler, Kevin Arceneaux, and Martin Johnson. 2002. "Public Opinion in the American States: New Perspectives using National Survey Data." *American Journal of Political Science* 46 (1): 173-89.
- Brace, Paul and Melinda Gall Hall. 1990. "Neoinstitutionalism and Dissent in State Supreme Courts." *Journal of Politics* 52 (1): 55-70.
- Brace, Paul, Laura Langer, and Melinda Gall Hall. 2000. "Measuring the Preferences of State Supreme Court Judges." *Journal of Politics* 62 (2): 387-413.
- Bratton, Kathleen A. and Rorie L. Spill. 2002. "Moving Beyond Tokenism: The Effect of Existing Gender Diversity on the Selection of Women in State Supreme Courts." *Social Science Quarterly* 83: 504-518
- Brent, James C. 2003. "A Principal-Agent Analysis of US Courts of Appeals Responses to *Boerne v. Flores*." *American Politics Research* 31 (5): 557-70.
- Brent, James C. 1999. "An Agent and Two Principals - US Court of Appeals Responses to *Employment Division, Department of Human Resources v. Smith* and the Religious Freedom Restoration Act." *American Politics Quarterly* 27 (2): 236-66.
- Brooks, C. 2000. "Civil Rights Liberalism and the Suppression of a Republican Political Realignment in the United States, 1972 to 1996." *American Sociological Review* 65 (4): 483-505.

- Brown, Steven Preston. 2002. *Trumping Religion : The New Christian Right, The Free Speech Clause, And The Courts*. Tuscaloosa, Ala.: University of Alabama Press.
- Brownstein, Alan E. 1999. "State RFRA Statutes and Freedom of Speech." *U.C. Davis Law Review* Spring (32): 607.
- Canon, Bradley C. and Charles A. Johnson. 1999. *Judicial Policies: Implementation and Impact*. 2<sup>nd</sup> Ed. Washington, D.C.: CQ Press.
- Carp, Robert A. and Ronald Stidham. 1996. *Judicial Process in America*. 3<sup>rd</sup> Ed. Washington, D.C.: CQ Press.
- Chen, Ming Hsu. 2004. "Two Wrongs make A Right: Hybrid Claims of Discrimination." *New York University Law Review* May (79): 685.
- Crane, Dan A. 1998. "Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts." *St. Thomas Law Review* Winter (10): 235.
- Demerath, N. J., and Rhys H. Williams. 1992. *A Bridging Of Faiths : Religion And Politics In A New England City*. Princeton, N.J.: Princeton University Press.
- Drinan, R. F. 1999. "The Lustre of our Country: The American Experience of Religious Freedom." *Michigan Law Review* 97 (6): 1948-55.
- Farnsley, Arthur E., et al. 2004. *Sacred Circles, Public Squares: The Multicentering of American Religion*. Bloomington: Indiana Univ. Press.
- Field, Andy. 2005. *Discovering Statistics Using SPSS*. 2<sup>nd</sup> Ed. London: Sage Publishing.
- Finke, Roger and Christopher Scheitle. "Accounting for the Uncounted: Computing Correctives for the 2000 RCMS Data." *Review of Religious Research*. 47: 14.
- Fellowes, M., V. Gray, and D. Lowery. 2006. "What's on the Table? The Content of State Policy Agendas." *Party Politics* 12 (1): 35-55.
- Forren, John P. 2001. "In Smith's wake: The impact of the United States Supreme Court's peyote decision in the lower courts." Ph.D. diss. The Johns Hopkins University.
- French, R. 2003. "Shopping for Religion: The Change in Everyday Religious Practice and its Importance to the Law." *Buffalo Law Review* 51 (1): 127-99.
- Friedman, Lawrence Meir. 1984. *American Law*. 1st ed. New York: Norton.

- Gildin, Gary S. 2000. "A Blessing in Disguise: Protecting Minority Faiths through State Religious Freedom Non-Restoration Acts." *Harvard Journal of Law and Public Policy* 23 (2): 411.
- Gildin, Gary S. 2004. "The Rise of State Law Sanctuary for Minority Religious Liberty in the Wake of the Fall of Federal Constitutional Protection of Nonmainstream Faiths." In *Democracy and Religion: Free Exercise and Diverse Visions*, ed. David Odell-Scott. 1st ed. Kent, Ohio: The Kent State University Press, 89.
- Glenmary Research Center. 2002. *The Religious Congregation and Membership in the United States 2000: An Enumeration by Region, State and County Based on Data Reported for 149 Religious Bodies*. Association of Statisticians of American Religious Bodies (ASARB). Nashville.
- Goldman, Sheldon. 1997. *Picking Federal Judges : Lower Court Selection From Roosevelt through Reagan*. New Haven: Yale University Press.
- Hamilton, Marci A. 2004. "Religious Institutions, the no-Harm Doctrine, and the Public Good." *Brigham Young University Law Review*: 1099
- Hamilton, Marci A. 2003. "Federalism and the Public Good: The True Story Behind the Religious Land use and Institutionalized Persons Act." *Indiana Law Journal* 78 (1): 311-61.
- Hamilton, Marci. 2005. *God vs. The Gavel : Religion And The Rule Of Law*. New York: Cambridge University Press.
- Hanson, James A. 2004. "Missouri's Religious Freedom Restoration Act: A New Approach to the Cause of Conscience." *Missouri Law Review*. Summer: 853.
- Hays, William L. 1994. *Statistics*. 5<sup>th</sup> Ed. Harcourt Brace.
- Hosmer, David W., and Stanley Lemeshow. 2000. *Applied logistic Regression*. 2nd ed. New York: Wiley.
- Keetch, Von G., and Matthew K. Richards. 1999. "The Need for Legislation to Enshrine Free Exercise in the Land use Context." *U. C. Davis Law Review* 32 (3): 725.
- King, Gary. 1989. *Unifying Political Methodology : The Likelihood Theory Of Statistical Inference*. Cambridge ; New York: Cambridge University Press.
- King, Gary, Robert O. Keohane, and Sidney Verba. 1994. *Designing Social Inquiry : Scientific Inference In Qualitative Research*. Princeton, N.J.: Princeton University Press.

- Kohut, Andrew. 2000. *The Diminishing Divide : Religion's Changing Role In American Politics*. Washington D.C.: Brookings Institution Press.
- Kosmin, Barry Alexander, and Seymour Lachman. 1993. *One Nation Under God : Religion In Contemporary American Society*. 1st ed. New York: Crown Trade Paperbacks.
- Langer, Laura and Paul Brace. 2005. "The Preemptive Power of State Supreme Courts: Adoption of Abortion and Death Penalty Legislation." *Policy Studies Journal* 33 (3): 317-40.
- Langer, Laura, and T. Wilhelm. 2005. "The Ideology of State Supreme Court Chief Justices." *Judicature* 89 (2): 78-86.
- Laycock, Douglas. 2004. "Theology Scholarships, The Pledge Of Allegiance, And Religious Liberty: Avoiding The Extremes But Missing The Liberty." *Harvard Law Review* 118 (November): 155-211.
- Leege, David C., Lyman A. Kellstedt, and 20 Wheaton College Authors. 1993. *Rediscovering the Religious Factor In American Politics*. Armonk, N.Y.: M.E. Sharpe.
- Lupu, Ira C. 1998. "The Failure of RFRA." *University of Arkansas, Little Rock* 20: 575.
- Mazur, Eric M. 1999. *The Americanization of Religious Minorities: Confronting the Constitutional Order*. Baltimore: Johns Hopkins Univ. Press.
- Marguiles, Martin B. 1999. "1998: The First Amendment in the Second Circuit of Connecticut." *Quinnipiac Law Review*. 18: 773
- McConnell, Michael W., John H. Garvey and Thomas C. Berg. 2002. *Religion and the Constitution*. Aspen Publishers. Chapter 1.
- Pampel, Fred C. 2000. *Logistic Regression: A Primer*. Sage University Papers Series on Quantitative Applications in the Social Sciences, 07-132. Thousand Oaks, CA: Sage.
- Porto, Brian L. 2005. "Validity, Construction, and Operation of State Religious Freedom Restoration Acts." *American Law Reports* 116: 233.
- Schragger, Richard C. 2004. "The Role Of The Local In The Doctrine And Discourse Of Religious Liberty." *Harvard Law Review* 117: 1810.
- Sisk, Gregory C., Michael Heise, and Andrew P. Morriss. 2004. "Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions." *Ohio State Law Journal* 65: 491.

- Sisk, Gregory C. 2005. "How Traditional and Minority Religions Fare In the Courts: Empirical Evidence from Religious Liberty Cases." *University of Colorado Law Review* 76, (4)
- Slotnick, Elliot E. 1999. *Judicial Politics : Readings From Judicature*. 2nd ed. Chicago, IL: American Judicature Society.
- Smith, Christian. 2000. *Christian America? : What Evangelicals Really Want*. Berkeley: University of California Press.
- Smith, Christian and Michael Emerson. 1998. *American Evangelicalism: Embattled And Thriving*. Chicago: University of Chicago Press.
- Songer, Donald R. and Susan J. Tabrizi. 1999. "The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts." *Journal of Politics* 61 (2): 507-26.
- Stark, Rodney and William S. Bainbridge. 1985. *The Future of Religion: Secularization, Revival, and Cult Formation*. Berkley, CA: University of California Press.
- Start, Rodney and William S. Bainbridge. 1987. *A Theory of Religion*. New York: Peter Lang Publishing.
- Steensland, Brian, et al. 2000. "The Measure of American Religion: Toward Improving the State of the Art." *Social Forces*. 79: 291-318.
- Stumpf, Harry P. 1998. *American Judicial Politics*. 2nd ed. Upper Saddle River, N.J.: Prentice Hall.
- Stumpf, Harry P., and John H. Culver. 1992. *The Politics of State Courts*. New York: Longman.
- Tarr, G. Alan. 1989. "Church and State In The States." *Washington Law Review* 64: 73.
- Wybraniec, John. 1998. "The Battle Over Religious Freedom: Court Decisions and the Religious Economy in the United States." Ph.D. diss. Purdue University.
- Wybraniec, John and Roger Finke. 2001. "Religious Regulation and the Courts: The Judiciary's Changing Role in Protecting Minority Religions from Majoritarian Rule." *Journal for the Scientific Study of Religion* 40 (3): 427-44.



4584-14











