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Religion, Schools, and Judicial Decisionmaking: An Empirical Perspective

Michael Heise *
Gregory C. Sisk **

We analyze various influences on judicial outcomes favoring religion in cases involving elementary and secondary schools and decided by lower federal courts. A focus on religion in the school context is warranted as the most difficult and penetrating questions about the proper relationship between Church and State have arisen with special frequency, controversy, and fervor in the often-charged atmosphere of education. Schools and the Religion Clauses collide persistently, and litigation frames many of these collisions. Also, the frequency and magnitude of these legal collisions increase as various policy initiatives increasingly seek to leverage private and religious schools in the service of education reform. Our analyses include all digested Establishment and Free Exercise Clause decisions by federal court of appeals and district court judges from 1996 through 2005 that involved elementary and secondary schools. As it relates to differences between school and other (or non-school) cases, our main finding is that both measures of judicial ideology correlate with the likelihood of a pro-religion decision. That is, Republican-appointed judges were more likely than their Democratic-appointed counterparts to reach a pro-religion decision in school cases, and ideology did not correlate with a pro-religion outcome in non-school cases. Results using common space scores as a proxy for ideology were similar. Although these results dilute the strength of the “legal model” of judicial decisionmaking, this type of case (religion) in this particular context (schools) are particularly amenable to ideological influence.

Introduction

From the beginning of modern religious liberty jurisprudence, the most difficult and penetrating questions about the proper relationship between Church and State have arisen with special frequency, controversy, and fervor in the often-charged atmosphere of education. As Professor Viteritti notes, “As far back as can be remembered, religion has been at the center of American education, as a source of both inspiration and agitation.”¹ Likewise, Professor Berg observes that “religion and education are perennially mixing.”² When reviewing the battles about when the state must accommodate the religious demands of individual citizens and how the government should balance recognition of

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¹ JOSEPH P. VITERITTI, *THE LAST FREEDOM: RELIGION FROM THE PUBLIC SCHOOL TO THE PUBLIC SQUARE* 74 (2007).

² Thomas C. Berg, *The Story of the School Prayer Decisions: Civil Religion Under Assault*, in *FIRST AMENDMENT STORIES* 192 (Richard Garnett & Andrew Koppleman, eds.) (2011).

religious traditions in American history against the prohibition on government endorsement of religion, we find that school boards, school administrators, teachers, students and their parents have often occupied the front lines.³

Schools and the Religion Clauses collide persistently, and litigation frames many of these collisions. Current collisions rest on a deep legal history and approaches to resolving them continue to evolve over time. Indeed, the Supreme Court's first encounters with both of the Religion Clauses of the First Amendment in the modern era were in the education context. In 1925, in what later came to be recognized as the first application of the Free Exercise of Religion Clause of the First Amendment against the states, the Supreme Court held in *Pierce v. Society of Sisters*⁴ that the State of Oregon could not mandate that all children attend public schools and override a religiously-motivated parental preference to send their children to religious schools. Many decades later, in *Employment Division v. Smith*, the Court described *Pierce* as an example of the "Free Exercise Clause [working] in conjunction with other constitutional protections," specifically, "the right of parents . . . to direct the education of their children."⁵ In 1947, in *Everson v. Board of Education*,⁶ the Supreme Court first applied the Establishment Clause against the states, turning away a challenge to the use of public funds to reimburse parochial school students for bus transportation. And, in a landmark decision that continues to invite contest a half-century later, the Supreme Court's *Engel v. Vitale*⁷ decision in 1962 ended officially-sponsored prayer in public schools.

Educational policymakers' interest in non-public, including religious, schools is long-standing and flows from at least two prominent sources. One source involves private schools' record of addressing its students' educational needs. The modern scholarly effort to assess the educational efficacy of public and private schools was launched largely by the ground-breaking research of Professor James Coleman and various colleagues at the University of Chicago and focused on studies of Catholic schools.⁸ A second, more recent, and newly-emerging source involves non-public schools' ability to generate important positive externalities for the communities surrounding these schools.⁹

³ See generally VITERITTI, *supra* note 1, at 205.

⁴ 268 U.S. 510 (1925).

⁵ 494 U.S. 872, 881 (1990); see also *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) ("[T]he Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children."); *Troxel v. Granville*, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting) (saying that had *Pierce* "been decided in recent times," it might "well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion").

⁶ 330 U.S. 1 (1947).

⁷ 370 U.S. 421 (1962).

⁸ See e.g., JAMES S. COLEMAN ET AL., *HIGH SCHOOL ACHIEVEMENT* 143-46 (1982) (noting the distribution of academic success across various student backgrounds in Catholic schools); ANDREW M. GREELEY, *CATHOLIC HIGH SCHOOLS AND MINORITY STUDENTS* 107-08 (1982). For a more recent summary of the relevant literature, see e.g., TIMOTHY WALCH, *PARISH SCHOOL* (1996). For more recent studies on the 'Catholic School Effect,' see, e.g., Derek Neal, *The Effects of Catholic Secondary Schooling on Educational Achievement*, 15 J. LAB. ECON. 98, 100 (1997).

⁹ See Margaret F. Brinig & Nicole S. Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform*, 85 NOTRE DAME L. REV. 887, 921 (2010) (finding that Catholic school closures increase social disorder in surrounding neighborhoods).

As various school reform initiatives increasingly seek to leverage private and religious schools in the service of improving education, the number and magnitude of legal collisions involving the Religion Clauses increase.¹⁰ Publicly-funded voucher programs, for example, are among the most visible (and recent) of such education reform initiatives. Inevitably, such school reform initiatives triggered litigation. While the Supreme Court resolved a critical Establishment Clause question arising from the public funding of a voucher program that included substantial religious school participation in 2006 in *Zelman v. Simmons-Harris*,¹¹ derivative litigation persists.

Indeed, last Term the Supreme Court once again waded into turbulent Religion Clauses waters when it deflected challengers to an Arizona statewide scholarship tax credit program in *Arizona Christian School Tuition Organization v. Winn*.¹² Under the Arizona program, citizens who donate to qualifying non-profit organizations are entitled to take a dollar-for-dollar tax credit against their state taxes, up to \$500 per taxpayer. Recipient non-profit organizations include religious elementary and secondary schools. The Court's 5-4 decision, reversing the Ninth Circuit ruling, concluded that Arizona taxpayers lack standing to challenge the provision of tax credits for contributions to organizations that subsidize tuition at private religious schools.¹³ Justice Kennedy, writing for the majority, argued that the taxpayers could not avail themselves of the narrow exception to the general rule against taxpayer standing created by *Flast v. Cohen*.¹⁴ Echoing a theme from *Zelman*, the Court's decision in *Winn* emphasizes that any funding to religious schools was a function of private taxpayer action rather than state activity.¹⁵

While voucher programs certainly garner substantial public attention, such programs do not fully describe the breath of the intersections among public schools, religion, education reform, and religious schools. For example, many public school districts have recently become far more amenable to introducing religious subjects into the formal school curriculum.¹⁶ As well, one aspect of the No Child Left Behind Act of 2001,¹⁷ easily the federal government's most significant foray into the nation's elementary and secondary schools,¹⁸ that has generated relatively little public discussion is how the law facilitates public financial support for religious faith-based groups that provide tutoring services to students who qualify for such supplemental services, so long as the services provided are secular.¹⁹

¹⁰ See e.g., Note, *Church, Choice, and Charters: A New Wrinkle or Public Education?*, 122 HARV. L. REV. 1750 (2009)(discussing religiously "themed" public charter schools).

¹¹ 536 U.S. 639 (2002).

¹² See *Arizona Christian School Tuition Organization v. Winn*, 131 S.Ct. 1436 (2011).

¹³ *Id.* at 1447-49.

¹⁴ *Id.* at 1447. (citing *Flast v. Cohen*, 392 U.S. 83 (1968)).

¹⁵ *Id.* at 1447-48.

¹⁶ VITERITTI, *supra* note 1, at 228.

¹⁷ Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of the 20 U.S.C.).

¹⁸ For a general discussion of the No Child Left Behind Act see, e.g., James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004).

¹⁹ See 20 U.S.C. § 6316(e)(5)(D) (2003). For commentary see, e.g., William Dolan, *No Child Left Behind's Faith-Based Initiative Provision and the Establishment Clause*, 33 J.L. & EDUC. 1 (2004).

That various education reform initiatives continue to implicate religious schools, the Court's evolving Religious Clause jurisprudence, and the particular application of the Religious Clauses in the education setting underscore the need to gain a clearer understanding of how federal courts resolve such claims. While scholars approach such questions from an array of perspectives, ours is empirical and focuses on various background factors that are thought to inform religious clause litigation outcomes that involve elementary and secondary schools. Although different models seek to structure the relation between schools and the First Amendment in different ways, in this paper we dwell on one such model that we have considered previously, the "pro-religion" model.²⁰

Partly owing to the Supreme Court's use of malleable balancing tests and open-ended exceptions, the Religious Clause doctrine is noted for instability and uncertainty. Doctrinal instability and uncertainty affords lower federal court judges ample space to exercise their judgment and discretion in resolving religious cases. Insofar as our school cases overlay a frequently highly-charged political context—elementary and secondary education—onto religious issues, the prospect for extra-judicial factors to influence judicial outcomes increases.²¹ One benefit for empiricists, then, is that precisely because lower federal court judges are not typically bound by determinate High Court precedent a study, such as ours, of factors that influence judicial decisions in this area are likely to bear fruit.²²

Incident to our larger, ongoing empirical examination of religious liberty decisions in the lower federal courts,²³ this Article examines the efficacy of the pro-religion model in the education setting. To do so, we studied all digested Establishment and Free Exercise Clause decisions by federal court of appeals and district court judges from 1996 through 2005 that involved elementary and secondary schools. As it relates to differences between school and other (or non-school) cases, what we find, in brief, is that our alternative ideology variables of party-of-appointing-president and common space scores achieve significance.²⁴ That is, while Republican-appointed judges were more likely than their Democratic-appointed counterparts to reach a pro-religion decision in school cases, ideology did not correlate with a pro-religion outcome in non-school cases. Results using common space scores as a proxy for ideology were similar. Two other sets

²⁰ For a fuller articulation of the pro-religious/accommodationist model see Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 505-11 (2004).

²¹ See generally DIANE RAVITCH, *THE TROUBLED CRUSADE: AMERICAN EDUCATION 1945–1980* (1983); DIANE RAVITCH, *THE GREAT SCHOOL WARS: A HISTORY OF THE NEW YORK CITY PUBLIC SCHOOLS* (2000).

²² See Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 46 (2001) ("Where law and precedent provide weak guidelines rather than mandates, the judge's discretion is more likely to be the product of attitudes and environment.").

²³ See Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743 (2005); Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. COLO. L. REV. 1021 (2005); Sisk, Heise & Morriss, *Searching*, *supra* note 20; Gregory C. Sisk & Michael Heise, *Ideology "All The Way Down"?: An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 97 MICH. L. REV. (forthcoming 2012).

²⁴ See *infra* Part II.

of results also warrant note. First, judges with prior judicial experience as well as the more senior federal judges were less likely to reach pro-religion decisions in school cases, but not in non-school cases. Second, we note that for schools cases an increase in the percentage of Jews living in a jurisdiction increased the likelihood of a pro-religious decision. In contrast, for non-school cases an increase in the percentage of Catholics decreased the likelihood of a pro-religious outcome.

This Article proceeds in three parts. Part I describes our data and research methods. Our principal results are discussed in Part II. In our conclusion we emphasize our results' limitations and consider ways in which this line of research might be fruitfully expanded and developed in the future.

I. Data and Methodology

A. Data

Consistent with our prior empirical work on the federal courts, we focus on lower federal court judges and their decisions in cases raising constitutional religious freedom issues.²⁵ Specifically, we created a database of the universe of digested decisions by the federal district courts and courts of appeals resolving challenges to the Establishment and Free Exercise Clauses from 1996-2005.²⁶ As the decisions were collected, the direction of each judge's ruling, the general factual category of the case, the religious affiliation of the judge, the religious demographics of the judge's community, the judge's ideology, the judge's race and gender, and various background and employment variables for the judge were coded.²⁷

We treated each individual judge's ruling in an individual case as a "judicial participation," which served as our unit of analysis.²⁸ Each district judge's ruling was coded separately, as was each individual vote by the multiple judges participating on an appellate panel. Accordingly, the primary focus of our study was the judge rather than the court as an institution or a collective appellate. That is, we measured the individual response of each judge to each Religious Clause claim.

²⁵ Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998); Andrew P. Morriss, Michael Heise & Gregory C. Sisk, *Signaling and Precedent in Federal District Court Opinions*, 13 SUP. CT. ECON. REV. 63 (2005); Sisk & Heise, *Measures*, *supra* note 23; Sisk & Heise, *Ideology*, *supra* note 23. For a discussion of why we feel a study of lower federal court opinions is especially apt in this context, see Sisk & Heise, *Ideology*, *supra* note 23.

²⁶ In our prior study of 1986-1995 religious liberty decisions, we included only published decisions in our database. In so doing, we knowingly "biased our database in favor of decisions that raise highly visible, controversial, landmark, or difficult questions of religious freedom, or at least issues of religious freedom that a judicial actor found particularly interesting and thus worthy of publication." Sisk, *Liberty*, *supra* note 23, at 1054. For this 1996-2005 study, we have expanded the database to include the set of unpublished but digested opinions available on Westlaw.

²⁷ For more detailed information about our study, data collection, and coding, see the description published as part of our prior study of religious liberty decisions from 1986-1995, see Sisk, Heise & Morriss, *Searching*, *supra* note 20, at 530-54, 571-612.

²⁸ For a further discussion of judicial participations as the data point, see *id.* at 539-41.

A few research design points deserve attention. As our study endeavors to assess judicial decisionmaking, we excluded decisions by Supreme Court justices from our data set. Although the Supreme Court has the final word in constitutional decisions, the lion's share of federal constitutional cases are resolved by lower federal courts. Also, owing to the small and stable number of justices serving on the Court, we find that empirical studies of the members of that unique institution sometimes migrate from social science to biography. Moreover, as discussed above, because the Supreme Court's jurisprudence regarding both the Establishment and Free Exercise Clauses has been unstable over time and uncertain in application, the district and appellate court judges have retained important decisional latitude in this area. While Supreme Court precedent certainly plays a key role in federal court litigation in the lower courts, there remains substantial "play" in the doctrine as applied to an individual case and set of facts. For this reason, the body of litigation in the federal district courts and courts of appeals is particularly amenable to a meaningful empirical analysis of influences upon judicial decisionmaking. Finally, we believe that for decades social scientists and legal academics' focus on the Supreme Court may have come at the expense of scholarly attention to the lower federal courts.²⁹

Having decided to focus on lower federal courts, however, our inclusion of district judges along with courts of appeals judges in this study and coding both types of judges in the same way on merits decisions warrants discussion. Our effort to expand empirical study beyond circuit judges and evaluate the larger pool of lower federal judges has merit, particularly in the constitutional rulings' context. To be sure, many scholars are conducting important research on district court judges through quantitative study of dockets and developments and rulings at the multiple stages of the civil litigation process.³⁰ Recognizing that "the nature of district court judges' work is substantially different from that of appellate judges," many of these scholars tailor their empirical research to the distinct institutional setting of the district court.³¹ While we feel such work is important, we nonetheless concluded that a docket-oriented approach was neither possible nor particularly well-suited for our study of outcomes in religious cases. In the particular context of constitutional rulings, the appellate court's typical deferential posture regarding trial court factual determinations gives way to the "constitutional fact" exception for "factual" disputes that frequently resides at the heart of a constitutional question.³² Moreover, trial and appellate judges share parallel responsibilities for resolving contested constitutional questions, including the central constitutional

²⁹ Encouragingly, the traditional focus upon the Supreme Court has been broadened in the last decade, with the federal courts of appeals and district courts becoming the subject of increasing attention among political scientists and legal academics doing empirical work in the past decade. For a brief summary see generally Sisk, Heise & Morriss, *Searching*, *supra* note 20, at 529 n.156.

³⁰ See, e.g., Christina L. Boyd & David A. Hoffman, *Disputing Limited Liability*, 104 NW. U. L. REV. 853 (2010); Pauline T. Kim, Margo Schlanger, Christina L. Boyd & Andrew D. Martin, *How Should We Study District Judge Decision-Making?*, 29 WASH. U. J.L. & POL'Y 83 (2009); James D. Cox, Randall S. Thomas, & Lynn Bai, *There Are Plaintiffs and . . . There Are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements*, 61 VAND. L. REV. 355 (2008); David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 MICH. L. REV. 223 (2008).

³¹ See Kim et al., *supra* note 30, at 85.

³² See *Rankin v. McPherson*, 438 U.S. 385 n.8 (1987) (noting that trial court fact findings are subject to "constitutional fact review" by the appellate court); see generally Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985).

significance of factual assertions, precisely “to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects.”³³

As such, we first needed to place trial court rulings in the same decisional space as appellate court rulings, thus requiring us to focus on merits rulings and not preliminary non-merits rulings. Second, we examined decisions from 1996-2005, but the various federal docket and pleading databases are generally reliable only from 2000.³⁴ In particular, the restricted search options and limited nature of case coding of federal court dockets databases, especially when searching for cases raising religious liberty issues, functionally precluded effective use of these sources for the time period of our study.³⁵

A further complicating wrinkle flows from the small percentage of district court dispositions that generate a written opinion,³⁶ which is the data-point for our study. For the high visibility area of Religious Clauses challenges, however, we believe that the rate of district court dispositions through written, even published, decisions is much higher than the base rate. To test our belief, a spot-checked of a hundred Establishment Clause complaints produced in a search of the Westlaw Pleadings database, revealed that nearly three-quarters lead to written decisions, most of which were also published. To be sure, our search process undoubtedly captured a larger share of appellate rather than district court activity. In our school case sub-set we find 78 district court judicial participations (24.1%) and 246 appellate court judicial participations (75.9%). Accordingly, readers fairly might place greater weight on our findings with respect to court of appeals judges than to district court judges.

In our prior study of 1986-1995 religious liberty decisions, for substantive and practical reasons, we included only published decisions in our database. In so doing, we knowingly “biased our database in favor of decisions that raise highly visible, controversial, landmark, or difficult questions of religious freedom, or at least issues of religious freedom that a judicial actor found particularly interesting and thus worthy of publication.”³⁷ For this 1996-2005 study, we have expanded the database to include the set of unpublished but digested opinions available on Westlaw. In addition to 1,921 judicial participations from

³³ See *A Woman’s Choice-East Side Women’s Clinic v. Newman*, 305 F.3d 684, 689 (7th Cir. 2002) (“That admixture of fact and law, sometimes called an issue of ‘constitutional fact,’ is reviewed without deference in order to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects”).

³⁴ See Boyd & Hoffman, *supra* note 30, at 877 n.119, 880.

³⁵ See Mary Whisner, *Unanswerable Questions*, 100 LAW LIBR. 581, 583 (2008) (noting that the “Nature of Suit” coding in the federal docket PACER system lacks the detail needed for finding many types of cases); Gillian K. Hadfield, *Judging Science: An Essay on the Unscientific Basis of Beliefs About the Impact of Legal Rules on Science and the Need for Better Data About Law*, 14 J.L. & POL’Y 137, 144-45 (2006) (observing that cases are coded in the PACER docket for a single type, even if the cases involves multiple causes of action).

³⁶ See David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 710 (2007) (3 percent with written decisions); Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUST. SYS. J. 782, 789-90 (1992) (5 percent with reported decisions); Margo Schlanger & Denise Lieberman, *Using Court Records for Research, Teaching, and Policymaking: The Civil Rights Litigation Clearinghouse*, 75 UMKC L. REV. 155, 165 (2006) (9 percent with written decisions and 2.3 percent with reported decisions).

³⁷ Sisk, *supra* note 23, at 1054.

published decisions, our data set includes 401 judge votes from decisions that were digested by Westlaw but not published in the reporter system. Because not all decisions, even those that are written, are digested, the data set still is likely to be skewed to the more significant decisions. Thus, our data set may be biased toward decisions that raise highly visible, controversial, landmark, or difficult questions of religious freedom, or at least issues of religious liberty that a judicial actor found particularly interesting. Fortunately, those are precisely the types of decisions that we would wish to analyze for evidence of variation among judges in their response to significant constitutional problems upon which reasonable people could disagree.

Having decided to focus upon published and digested decisions, we conducted a search on Westlaw for all decisions³⁸ in which the digests of the opinions prepared by West include the terms “free exercise,” “establishment clause,” “establishment of religion,” “religious freedom restoration act,” or “equal access act.” In addition, we searched for the appearance in the opinion digests of “free speech,” “equal protection,” “due process,” “title vii,” and “discrimination” as connected to religious phrases.³⁹

In coding the decisions on the merits, a ruling by a district judge must have accepted or rejected a particular claim in a manner that engaged the underlying merits of the claim, even if the ruling was not a final judgment. We excluded non-merits justiciability and procedural rulings from our study.⁴⁰ For court of appeals judges, a ruling was coded on the merits if it affirmed or reversed a final judgment by a district court on an Establishment or Free Exercise Clause claim or remanded the case after an evaluation of a significant element of the merits of the claim.⁴¹ If a three-judge appellate panel issued a decision that later was reheard en banc (or was the subject of a dissent from the denial of rehearing en banc), each judge was recorded as having cast only one judicial vote, even if the judge participated on both the three-judge panel and the en banc panel (or the dissent from the denial of rehearing).⁴²

Our dependent variable, pro-religion, reflects the direction of the individual judge’s vote in each case, coded as “1” when the outcome favored religion and as “0” when religion was disfavored. We crafted our dependant variable by blending two distinct streams of cases. Thus, decisions *upholding* free exercise or related accommodation claims (thus affirming the vitality of the religious exercise or expression and elevating it above non-vital governmental controls) and decisions *rejecting*

³⁸ By adopting the universe of decisions in the selected time period as the basis for collection the data, we avoid issues of sampling in this study, other of course than the problem of our unavoidable omission of unpublished decisions, discussed earlier, and the question about representativeness of the time period that we selected, discussed below.

³⁹ As evidenced in our description of the background variables for the judges involved in this study, the U.S. Court of Appeals Data Base for which Professor Donald R. Songer at the University of South Carolina was the principal investigator and which is maintained at <http://www.ssc.msu.edu/~pls/pljp/ctadata.html> is an invaluable resource. However, as will be apparent in what follows, the scope of religious liberty decisions that we wish to explore is more expansive than captured in that database’s coding of court of appeals decisions in such categories as free exercise of religion and establishment of religion.

⁴⁰ See Sisk, Heise & Morriss, *Searching*, *supra* note 20, at 546.

⁴¹ See *id.* at 547-48.

⁴² See *id.* at 552-53.

Establishment Clause claims (thus approving governmental acknowledgment or support, at least on a neutral basis, for religious sentiments or institutions) were treated as decisions favoring religion. In contrast, decisions that rejected free exercise or related accommodation claims as well as decisions upholding Establishment Clause claims, in contrast, were treated as disfavoring religion.

Of course, by adopting a “favoring” and “disfavoring” religion coding scheme, we of course in no way intend to imply that any individual judge or scholar who resists giving preferential treatment to religious practice under the Free Exercise Clause or who insists upon a strict “Separation of Church and State” under the Establishment Clause is hostile to religious faith or is in any way “anti-religious.” Rather, we adopt a more positive tact by suggesting that a person who takes the position of upholding the priority of religious practice in the absence of a compelling governmental interest *and* who generally approves of the open participation of religious individuals in community affairs and the accommodation of religious institutions with government can be plausibly characterized as pro-religion in public life.

Our final dataset consists of 2,322 judicial participations, drawn from 1,091 distinct decisions. As Table 1 illustrates, of the universe of judicial participations, 324 involved elementary or secondary schools (public and non-public). In our sub-set of schools cases just under one-half (46.9%) were classified as a pro-religious outcomes. While the overwhelming majority (81.1%) of other cases (that is, cases not involving schools) dealt with Free Exercise Clause claims, within the smaller sub-set of schools cases Free Exercise claims were a slight minority (45.4%). In summary, the particular sub-set of judicial participations of interest, school cases, benefits from a relatively equal mix of pre-religious and non-pro-religious outcomes as well as Free Exercise and Establishment Clause claims.

Table 1: Summary of Case Types (1996-2005)

	Establishment Clause	Free Exercise Clause	(N)	Pro-Religion Decision
<i>All cases:</i>	555	1,767	2,322	955
<i>School cases:</i>	177	147	324	152

B. Methodology

Our effort to model the likelihood of pro-religion decisions draws heavily on our prior work.⁴³ Because we analyzed the influences of an array of independent variables, multiple regression models were adopted. As our dependent variable is dichotomous, we

⁴³ See *supra* note 23.

estimated logistic regression models.⁴⁴ Our two primary models (using different proxies for ideology) were nearly identical in the percentage of the overall variation explained and were largely parallel in statistically significant variable correlations.

Our independent variables organize into three broad categories: case types, judges’ background and demography, and community demography. As for case types, insofar as we are particularly interested in the pro-religion decisions in the education context, “School Case” identifies those cases involving private or public elementary or secondary schools. Moreover, for reasons we describe more fully below, we felt that both legal theory as well as the practical distribution of our data support including a dummy variable, “Establishment Clause Case,” which permits us to distinguish between the two distinct streams of decisions in our data set (Establishment and Free Exercise Clause decisions). This distinction is necessary as a control as we believe that the Establishment and Free Exercise Clause cases were likely to systematically differ in terms of their probability of generating a pro-religion outcome. Indeed, at the descriptive level, results in Table 2 suggest as much. Of the 147 Establishment Clause cases involving schools, 101 (or 68.7%) resulted in pro-religion decisions. In contrast, of the 177 Free Exercise cases, only 71 (or 40.1%) generated pro-religion decisions.

Table 2: Distribution of Pro-Religion Decisions in School Cases, by Case Type

	Pro-Religion	Non- Pro-Religion
<i>Case type:</i>		
Establishment clause	101	46
Free Exercise clause	71	106
(N)	172	152

Although our interest dwells on whether judicial decisions are pro-religious, our research necessarily draws on the larger judicial decisionmaking literature. As such, a second category of independent variables focuses on the judges, specifically, their religion, background, gender, and ideology. For background information on judges we drew on several sources, including standard biographies on federal judges,⁴⁵ on-line databases,⁴⁶ independent research into the records of Senate judicial confirmation hearings at the National Archives, and an earlier survey of federal judges on certain subjects where the information was uncertain.⁴⁷

⁴⁴ See Sisk, Heise & Morriss, *Searching*, *supra* note 20, at 553-54.

⁴⁵ ALMANAC OF THE FEDERAL JUDICIARY, THE AMERICAN BENCH, BIOGRAPHICAL DIRECTORY OF THE FEDERAL JUDICIARY 1789-2000, and WHO’S WHO IN AMERICAN LAW.

⁴⁶ In particular, we obtained valuable information from the “Multi-User Database on the Attributes of United States Appeals Court Judges, 1801-1994,” compiled by Gary Zuk, Deborah J. Barrow, and Gerard S. Gryski, which is available at <www.icpsr.umich.edu:8080/ABSTRACTS/06796.xml> [hereinafter “Multi-User Database on Appeals Court Judges”].

⁴⁷ When we conducted a survey of certain judges on whom data was uncertain about prior employment background, we obtained an extraordinary rate of return from the federal judges to whom the survey was sent, in excess of 90 percent.

To the extent that the religious demographics of the community in which the judge maintains chambers (the Catholic percentage in the community, the Jewish percentage in the community, and the total adherence rate to any religious group in a community), might inform judicial outcomes, we include these variables. Finally, to account for any possible time trend during the ten years of data, we also include the year of decision as a variable.

II. Results and Discussion

We estimate a pro-religion judicial outcome models for lower federal court cases that involved elementary and secondary schools using logistic regression. Table 3 presents our results.

Table 3: Logistic Regression Analysis for Pro-Religion Model, Federal Courts (1996-2005)

	(1) All Cases	(2) School Cases	(3) Other Cases	(4) All Cases	(5) School Cases	(6) Other Cases
School Case	-0.079 (0.165)	---	---	-0.073 (0.165)	---	---
Establishment Cl. Case	0.982** (0.148)	0.957** (0.321)	0.968** (0.131)	0.986** (0.147)	0.991** (0.310)	0.969** (0.130)
<i>Judge Religion:</i>						
Catholic	-0.017 (0.129)	0.130 (0.417)	-0.014 (0.130)	-0.022 (0.130)	0.173 (0.425)	-0.021 (0.133)
Baptist	-0.232 (0.174)	-0.118 (0.789)	-0.204 (0.148)	-0.231 (0.170)	-0.096 (0.825)	-0.200 (0.142)
Other Christian	-0.206 (0.128)	-0.309 (0.565)	-0.189 (0.133)	-0.215 (0.124)	-0.452 (0.524)	-0.193 (0.132)
Jewish	-0.032 (0.217)	-0.657 (0.492)	0.068 (0.220)	-0.044 (0.217)	-0.608 (0.478)	0.056 (0.222)
Other	-0.154 (0.189)	-0.605 (0.853)	-0.107 (0.184)	-0.168 (0.199)	-0.714 (0.754)	-0.121 (0.193)
None	-0.095 (0.149)	-0.091 (0.619)	-0.109 (0.182)	-0.097 (0.156)	-0.062 (0.597)	-0.116 (0.188)
<i>Judge Sex and Race:</i>						
Sex (Female)	0.133 (0.099)	0.489 (0.471)	0.084 (0.095)	0.140 (0.104)	0.580 (0.461)	0.083 (0.103)
African-American	0.151 (0.165)	-0.370 (0.467)	0.242 (0.189)	0.153 (0.179)	-0.249 (0.474)	0.235 (0.198)
Asian-Latino	0.460* (0.216)	-0.213 (0.987)	0.533** (0.183)	0.488* (0.210)	-0.011 (0.896)	0.542** (0.182)
<i>Judge Ideology or Attitude:</i>						
Common Space Score	0.295 (0.155)	1.539** (0.423)	0.158 (0.151)	---	---	---
Party of Appointing President	---	---	---	0.202 (0.140)	1.189** (0.423)	0.089 (0.128)
ABA Rating-Above Qualified	0.002 (0.097)	-0.011 (0.324)	-0.015 (0.099)	0.012 (0.098)	0.053 (0.315)	-0.010 (0.099)
ABA Rating- Below Qualified	0.186 (0.150)	0.731 (0.646)	0.104 (0.142)	0.201 (0.138)	0.868 (0.582)	0.117 (0.134)

Seniority on Federal Bench	-0.000 (0.000)	-0.002* (0.001)	0.000 (0.000)	-0.000 (0.000)	-0.003* (0.001)	0.000 (0.000)
Elite Law School	-0.026 (0.047)	0.058 (0.314)	-0.038 (0.048)	-0.029 (0.050)	0.034 (0.335)	-0.042 (0.049)
<i>Judge Employment Background:</i>						
Military	0.037 (0.089)	0.651 (0.419)	-0.049 (0.083)	0.033 (0.089)	0.676 (0.407)	-0.051 (0.084)
Government	-0.020 (0.069)	-0.447 (0.252)	0.017 (0.059)	-0.021 (0.069)	-0.463 (0.246)	0.017 (0.059)
State or Local Judge	-0.152 (0.098)	-0.670* (0.274)	-0.047 (0.089)	-0.167 (0.099)	-0.753* (0.261)	-0.055 (0.091)
Law Professor	0.188 (0.137)	0.345 (0.510)	0.242 (0.126)	0.174 (0.134)	0.193 (0.529)	0.235 (0.125)
<i>Community Demographics:</i>						
Catholic Percentage	-0.013** (0.004)	-0.008 (0.016)	-0.012** (0.004)	-0.014** (0.004)	-0.014 (0.015)	-0.013** (0.004)
Jewish Percentage	0.004 (0.009)	0.054* (0.027)	-0.003 (0.008)	0.003 (0.009)	0.050* (0.023)	-0.003 (0.008)
Adherence Rate	0.008 (0.005)	-0.016 (0.023)	0.009 (0.004)	0.008 (0.005)	-0.013 (0.022)	0.009* (0.004)
Year of Decision	0.013 (0.015)	0.035 (0.085)	0.009 (0.015)	0.014 (0.015)	0.046 (0.085)	0.010 (0.016)
(constant)	-27.250	-68.472	-19.009	-29.139	-91.836	-20.077
pseudo R2	0.043	0.169	0.034	0.042	0.172	0.034
percent correctly classified	64.13	70.37	63.46	63.95	69.14	63.36
(N)	2322	324	1998	2322	324	1998

NOTES: Pro-Religion Outcome=1. * p < .05; ** p < .01. Standard Error Adjusted for 13 Clusters in Circuits.

A. Findings on Political Party and Ideology Variables

In this study, “the ‘Pro-Religion’ dependent variable measures a particular robust view about the propriety of religion in public life,”⁴⁸ or, in this focused study on education, about the visibility and presence of religion and religious viewpoints in public school and public support for parents who wish their children to attend private religious schools. Opponents of public recognition or accommodation of religion in this educational context should not casually be characterized as “harbor[ing] antipathy toward faith or religious believers outside of this peculiar legal context,”⁴⁹ but rather as adopting a strict separationist or secularist perspective toward interactions with religion in this particular realm of public life.

As Table 3 illustrates, in federal court cases that arise at the intersection between the Religion Clauses of the First Amendment and elementary and secondary education, political ideology emerges as a robust predictor of outcomes. Holding all other variables constant, a Republican-appointed judge (at a rate of 59 percent) was nearly twice as likely to vote in a pro-religion direction as was a Democratic-appointed judge (at a rate of 30 percent). Using common space scores as a proxy for ideology, the more conservative

⁴⁸ See Sisk, Heise, and Morriss, *Searching*, *supra* note 20, at 508.

⁴⁹ *Id.*

judges were predicted to choose the pro-religion side of the case at a 63.7 percent rate, compared with a predicted probability of a vote in that direction of only 26.6 percent by the more liberal judges.

In two other phases of our religious liberty decisions study, we have separately explored the influences on federal judges when deciding Establishment Clause and Free Exercise Clause cases generally (including both education and non-education cases). In our overall examination of Establishment Clause decisions in the federal courts from 1996-2005, we found a powerful ideological or political party influence on outcomes. Holding other variables constant, Democratic-appointed judges were predicted to uphold Establishment Clause challenges at a 57.3 percent rate, while the predicted probability of success fell to 25.4 percent before Republican-appointed judges.⁵⁰ By contrast, in the Religious Free Exercise/Accommodation phase of the study, the lead story was the impaired success rate for Muslim claimants, not the political leanings of judges.⁵¹

Knowing that political variables were significant and potent in the general Establishment Clause case context, while not significant in the general Free Exercise Clause case context, we included a dummy variable for Establishment Clause cases in this combined education-focused study so that the demonstrated political salience of Establishment Clause cases would not drive the results. Importantly, even with that control, ideology measured in alternative ways emerged as a highly significant and substantively strong influence on the outcome in school cases. In sum, what we observe here is not merely a side-effect of the political influences on Establishment Clause decisions (as contrasted with Free Exercise decisions). Instead, we believe we have likely uncovered something specific to the education setting when Establishment Clause and Free Exercise decisions are examined together in the public and private elementary and secondary school context.

1. Party-of-Appointing-President

Although crude and subject to multiple qualifications, the simplest, most commonly used, most unambiguously reliable (for accurate coding), most frequently verified as a meaningful and stable influence on judges, and most easily interpreted measure as a proxy for judicial ideology is party-of-appointing-president (Republican or Democrat).⁵² For each judge casting a vote in a religious liberty case in our study, appointment by a Republican President was coded as “1” and by a Democratic President as “0.” Of the 2322 judicial participations on religious liberty cases overall, 1263 (or 54.4 percent) were by judges appointed by a Republican president and 1059 (or 45.6 percent) were by judges appointed by a Democratic president.

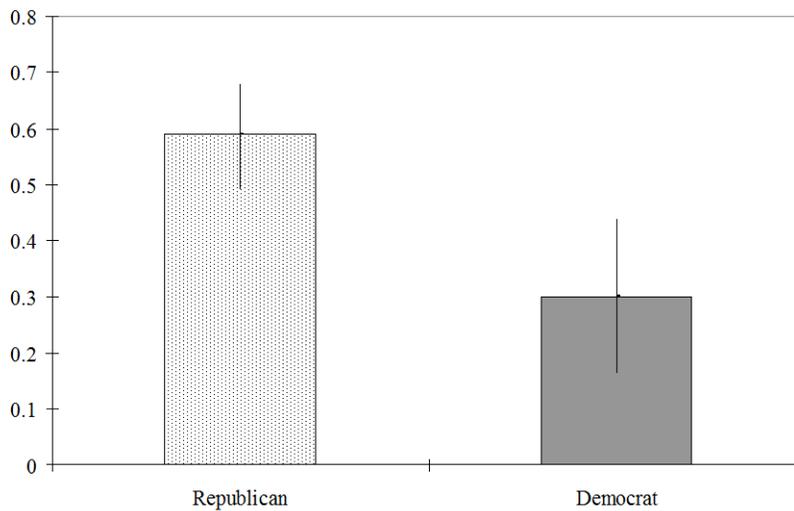
⁵⁰ Sisk & Heise, *Ideology*, *supra* note 23.

⁵¹ Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Post-9/11 Era: Empirical Evidence in the Federal Courts*, unpublished manuscript (copy on file with law review).

⁵² See Joshua B. Fischman & David S. Law, *What is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 167-68 (2009) (suggesting that “[t]he enduring popularity of this measure most likely derives from a combination of” how easy it is “both to observe and to interpret” and the long history of studies finding a correlation). For further discussion of this proxy for ideology and its suitability in the religious liberty study context, see Sisk & Heise, *Ideology*, *supra* note 23.

Insofar as our alternative measures of ideology achieve significance, both warrant closer examination. As shown in Figure 1, holding all other independent variables constant at their means, the predicted probability that a Republican-appointed judge would vote in a pro-religion direction is 59.0 percent, while the probability for a Democratic-appointed judge was 30.1 percent—a margin difference of 28.9 percent.⁵³ Thus, for the party that sought a religious accommodation or defended a public interaction with religion, the chance of success nearly doubled before a Republican-appointed judge, as compared to a Democratic-appointed judge.

Figure 1: Predicted Probability of a Pro-Religious Vote by Judge in School Cases, by Party-of-Appointing-President



NOTE: Fig.1 draws from Tbl.3, col.5.

Our political culture influences the agendas and policy goals of those individuals who compete for the presidency, and in the United States the two major political parties help shape the political culture. As a result, the ways in which the two major political parties approach religion and education policy warrant brief discussion. During the past few decades, a “Devotional Divide”⁵⁴ has opened in American politics and become embodied in the two major political parties and their platforms. “All else equal,”

⁵³ The vertical lines in Figure 1 represent the 95 percent confidence intervals for these two predictions. Thus, while our best estimate is that a Republican-appointed judge is 59 percent likely to rule in a pro-religion direction, the probability could be as low as 49.2 percent or as high as 67.9 percent. Similarly, while we predict that a Democratic-appointed judge would vote for the Pro-religion side of the case 30.1 percent of the time, the probability could be as low as 16.4 percent or as high as 43.8 percent. Because the probability that the comparative values would appear both in the higher end of the interval for a Republican-appointed judge and in the lower end of the interval for a Democratic-appointed judge is much lower than 5 percent, we are confident that the margin is higher, probably much higher, than the 5.4 percent margin between the low and high ends of these two confidence intervals.

⁵⁴ David E. Campbell, *A House Divided? What Social Science has to Say about the Culture War*, 15 WM. & MARY BILL RTS. J. 59, 64 (2006). For a general discussion of the religious divide in partisan identification, see Sisk & Heise, *Ideology*, *supra* note 23.

Professor William Galston writes, “the more often individuals attend church, the more likely they are to regard themselves as conservatives and vote Republican.”⁵⁵ Based on its 2008 survey of “religious intensity” and social and political views, the Pew Forum on Religion & Public Life found: “Across a variety of religious traditions, those who say that religion is very important in their lives, express a more certain belief in God, or pray or attend worship services more frequently tend to be much more conservative in their political outlook and more Republican in their party affiliation.”⁵⁶ While many persons of faith continue to affiliate with liberal political movements, the Democratic Party has become the political home for secularists, who have become a key constituency in the party and especially among party activists.⁵⁷ By 1992, fewer than a third of the delegates to the Democratic Convention attended church regularly, fewer than a quarter found religion to be highly salient in their lives, and more than 60 percent qualified as secularist in outlook.⁵⁸

On the specific topic of education, the platforms of the political parties confirm that Republicans look favorably at efforts to acknowledge, accommodate, and interact with religion in the educational setting, while Democrats look more skeptically at the introduction of religion or religious influences into public education or the inclusion of private religious school options in public programs. Since 1972, every national Republican Party platform has called for the return of prayer to schools.⁵⁹ The most recent national Republican Party Platform of 2008 “energetically assert[s] the right of students to engage in voluntary prayer in schools and to have equal access to school facilities for religious purposes.”⁶⁰ During this period, the word “prayer” has never appeared in national Democratic Party platforms.⁶¹

State Republican Party platforms have been even more emphatic in approval of prayer and acceptance of a religious presence in publicly-supported education. For

⁵⁵ William A. Galston, *Political Polarization and the U.S. Judiciary*, 77 UMKC L. REV. 307, 308 (2008).

⁵⁶ Pew Forum on Religion & Public Life, *U.S. Religious Landscape Survey: Religious Beliefs and Practices: Diverse and Politically Relevant* 19 (June 2008), at <http://religions.pewforum.org/pdf/report2-religious-landscape-study-full.pdf>.

⁵⁷ ANDREW KOHUT, JOHN C. GREEN, SCOTT KEETER & ROBERT TOTH, *THE DIMINISHING DIVIDE: RELIGION’S CHANGING ROLE IN AMERICAN POLITICS* 3 (2000).

⁵⁸ GEOFFREY LAYMAN, *THE GREAT DIVIDE: RELIGIOUS AND CULTURAL CONFLICT IN AMERICAN PARTY POLITICS* 107-109, 124 (2001).

⁵⁹ Republican Party Platform of 2008, at 45, at http://www.presidency.ucsb.edu/papers_pdf/78545.pdf; Republican Party Platform of 2004, at 82, at http://www.presidency.ucsb.edu/papers_pdf/25850.pdf; Republican Party Platform of 2000, at <http://www.presidency.ucsb.edu/ws/index.php?pid=25849>; Republican Party Platform of 1996, at <http://www.presidency.ucsb.edu/ws/index.php?pid=25848>; Republican Party Platform of 1992, at <http://www.presidency.ucsb.edu/ws/index.php?pid=25847>; Republican Party Platform of 1988, at <http://www.presidency.ucsb.edu/ws/index.php?pid=25846>; Republican Party Platform of 1984, at <http://www.presidency.ucsb.edu/ws/index.php?pid=25845>; Republican Party Platform of 1980, at <http://www.presidency.ucsb.edu/ws/index.php?pid=25844>; Republican Party Platform of 1976, at <http://www.presidency.ucsb.edu/ws/index.php?pid=25843>; Republican Party Platform of 1972, at <http://www.presidency.ucsb.edu/ws/index.php?pid=25842>.

⁶⁰ Republican Party Platform of 2008, *supra* note 59, at 44-45.

⁶¹ *See* Democratic Party Platform of 1996, at <http://www.presidency.ucsb.edu/ws/index.php?pid=29611> (twice “applaud[ing] the President’s work to ensure that children are not denied private religious expression in school,” while not mentioning prayer).

example, the Iowa Republican Party Platform of 2010 says that “Judeo-Christian values and Scripture should not be excluded from the public schools,”⁶² while Texas Republican Platforms regularly “urge school administrators and officials to inform Texas school students specifically of their First Amendment rights to pray and engage in religious speech, individually or in groups, on school property without government interference.”⁶³ More capaciously, the Oklahoma Republican Party Platform of 2009 “affirm[ed] the right of students and teachers to the free exercise of religion as guaranteed by the First Amendment, including the right to wear and display religious symbols, voluntary vocal prayer, optional Bible and religious study, religious expression including holidays, and equal access to use of school facilities for these activities.”⁶⁴

By contrast, the Colorado and Minnesota Democratic Party Platforms of 2010 specifically “support the separation of church and state in public education”⁶⁵ and “church-state separation in public school curriculum and educational funding.”⁶⁶ In contrast with the national Democratic Party platforms that tend to avoid the issue, the Washington State Democratic Party Platform of 2010 specifies opposition to “Organized prayer in public schools.”⁶⁷

To the extent that presidents and their judicial appointment agendas reflect the processes and structures that frame American political life, one might expect to find that ideology influences federal judicial decisions involving religion and schools, at least at the margins. Indeed, this finding of an ideological influence on federal court decisions on religious liberty in the educational context from 1996-2005 is consistent with results from our earlier study. In our study of religious liberty decisions in the federal courts from 1986-1995, both traditional partisan and alternative ideology proxies were not statistically significant in any of our major models.⁶⁸ The single exception was in the education context, where claims by parents and schoolchildren for accommodation of their religious beliefs or practices were more likely to be favorably received by Republican-appointed judges. As we concluded then, “[t]his result is not surprising, given that conservatives in recent years have been most critical of the educational establishment and frequently bemoan the exclusion of religious influences from public educational institutions; likewise, conservatives have been protective of the rights of private schools to operate with minimal governmental oversight.”⁶⁹

⁶² Iowa Republican Party Platform of 2010, at <http://iowagop.org/rpi-platform>.

⁶³ Texas Republican Party Platform of 2010, at https://www.1888932-2946.ws/TexasGOP/E-ContentStrategy/userfiles/FINAL_PLATFORM_2010_STATE_CONVENTION.pdf; Texas Republican Party Platform of 2004, at www.yuricareport.com/GOPorganizations/TexasRPTPlatform2004.pdf

⁶⁴ Oklahoma Republican Party Platform of 2009, at www.okgop.com/pdfs/PLATFORM2009_APPROVED.PDF.

⁶⁵ Colorado Republican Party Platform of 2010-12, at <http://www.scribd.com/doc/40725570/Colorado-Democratic-2010-Platform>.

⁶⁶ Minnesota Democratic-Farmer-Labor Party Platform of 2010, at <http://df.org/sites/df.org/files/2010%20Ongoing%20Platform.pdf>.

⁶⁷ Washington State Democratic Party Platform of 2010, at <http://www.wa-democrats.org/content/platform>.

⁶⁸ See Sisk, Heise & Morriss, *Searching*, *supra* note 20, at 602.

⁶⁹ *Id.*

2. Common Space Scores

As an alternative measure of judicial ideology, and to further test the robustness of a political or ideological influence in religious liberty cases arising in public or private elementary and secondary education, we also coded each district and court of appeals judge for common space scores. Professors Keith Poole and Howard Rosenthal originally developed the nominate common space score measure of ideological preferences for members of Congress, placing all aspects of legislative voting into the same ideological dimension along a liberal-conservative continuum.⁷⁰ Subsequently, Professors Micheal Giles, Virginia Hettinger, and Todd Peppers adapted this measure for the study of judges:

Scores on this dimension are scaled from -1 for most liberal to $+1$ for most conservative. Absent senatorial courtesy the measure of senatorial preferences is assigned a value of zero [and the President's score is substituted]. If senatorial courtesy is operative and there are two senators of the president's party in a state, senatorial preferences are measured as the mean of the common space scores of the senators.⁷¹

Among political scientists, common space scores have come to be regarded as “the state-of-the-art measure for the preferences of U.S. Court of Appeals judges.”⁷²

Just as being appointed by a Republican president was positively associated with a pro-religion vote on the religious liberty claims in our study, being scored conservative on the common space score continuum was also positively associated with a pro-religion vote. Holding all other variables constant at their means, the more liberal judges under the common space score measure (at -0.6) were predicted to cast a pro-religion vote at a 26.6 percent rate, while the more conservative judges (at 0.6) were predicted to vote in a pro-religion direction at a 63.7 percent rate.

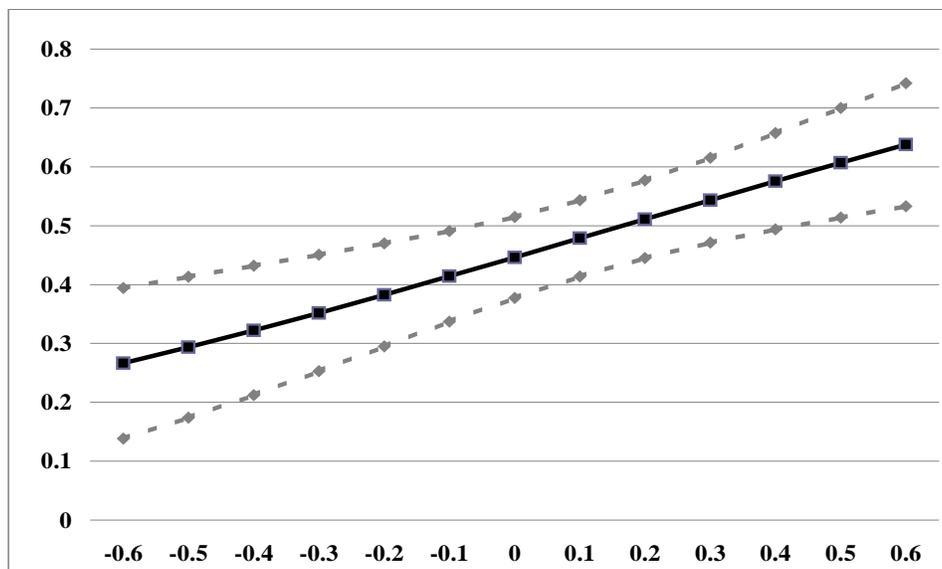
In Figure 2, we generate the average predicted probabilities of a positive vote on an Establishment Clause claim for each common space score in the range from -0.6 to 0.6 , at increments of 0.1 , while holding the other independent variables constant. The solid darker line in the middle is the best estimate of the average predicted probability for that increment in the common space score. The lighter broken lines which appear above and below are the higher and lower parameters of the 95 percent confidence intervals for the average predicted probability at each one-tenth increment of the common space score continuum.

⁷⁰ KEITH T. POOLE & HOWARD ROSENTHAL, *CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING* (1997).

⁷¹ Micheal Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 631 (2001).

⁷² Lee Epstein, Andrew D. Martin, Jeffrey A. Segal & Chad Westerland, *The Judicial Common Space Score*, 23 J.L. ECON. & ORG. 303, 306 (2007). For a more detailed discussion of common space scores as an ideology proxy, see Sisk & Heise, *Ideology*, *supra* note 23.

Figure 2: Predicted Probability of a Pro-Religious Vote by Judge in School Cases, by Common Space Score Increments



NOTES: Liberal < 0; Conservative > 0. Fig.2 draws from Tbl.3, col.2.

B. Judge Background and Community Demographic Variables

A federal judge’s prior experience as a state or local judge was significantly and negatively correlated with the pro-religion dependent variable in the context of school cases. Thus, prior service at the state or local level in the courts apparently was associated with a judge’s propensity to rule against educational accommodations for religious adherents and against public educational policies acknowledging religion. The standard hypothesis has been that “the insulation from popular sentiments that the judicial office often provides” should make a judge with prior judicial experience “more willing to support potentially unpopular claims.”⁷³ However, when that prior experience was obtained at the state and local level, where judges often are subject to electoral approval, we previously have suggested that such

⁷³ Jilda M. Aliotta, *Combining Judges’ Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking*, 71 JUDICATURE 277, 279 (1988) (speaking of Supreme Court Justices with prior judicial experience).

judges may develop habits of greater deference to the products of the elected branches of government.⁷⁴

In any event, the negative association by former state or local judges with the pro-religion dependent variable in school cases does not fit comfortably into either interpretive package. While a vote to accept the claim of a religious believer seeking a Free Exercise Clause accommodation overturns the decisions of education officials and agencies, a vote to reject an Establishment Clause challenge to government interaction with religion affirms the actions of the government. Perhaps local and state judges, having seen the sometimes volatile nature of religious disputes in their communities and local schools, become skeptical about the wisdom of any governmental interaction with or accommodation toward religion and religious believers.

Longer seniority of the judge (measured by number of months on the federal bench when the decision was issued) was also associated with a negative vote on the pro-religion dependent variable. In prior research, the hypothesis has been that years of seniority on the bench “test hardening not of the biological arteries [as would age] but rather of the bureaucratic judicial arteries.”⁷⁵ In our prior study of religious liberty decisions from 1986-1995, we found the seniority or time on the bench of the deciding judge to be significantly correlated with adoption of an anti-political model for interpreting the Religion Clauses of the Constitution, that is, a tendency to overturn the decisions of the political branches of government.⁷⁶ In contrast, in this study of religious liberty decisions from 1996-2005, the apparent adoption by judges of longer seniority of a secularist perspective involves a mix of rulings that sometimes defer to (in Free Exercise cases) and that sometimes demur to (in Establishment Clause cases) the actions or policies of government.

In the end, this particular finding may be (at least in part) an artifact of our introduction into this focused study of school cases of a control variable for Establishment Clause cases. While that control variable serves a vital purpose in clarifying the separate and powerful effect of political variables on religious liberty claims arising in the educational context, it may serve to distort the influence (or lack thereof) of such other variables as seniority. Indeed, when we remove the Establishment Clause control variable in alternative regression runs, seniority falls out of significance in one of the two models. Moreover, in our separate studies of Free Exercise Clause and Establishment Clause cases generally, seniority on the bench does not approach standard significance thresholds.

Finally, we note the finding that a higher Jewish presence in the population of the metropolitan area where the judge has his or her chambers was significantly associated with a pro-religion ruling by the judge. Because Jews in the United States have

⁷⁴ Sisk, Heise & Morriss, *Searching*, *supra* note 20, at 611.

⁷⁵ Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 499 (1975).

⁷⁶ Sisk, Heise & Morris, *Searching*, *supra* note 20, at 611.

“generally favored a policy of stringent separationism,”⁷⁷ this result is counter-intuitive. As we discuss elsewhere,⁷⁸ we fear that our religious demographic variables may mask other underlying influences, based on population density or region of the country. Accordingly, without further exploration and recalibration of demographic variables, we are reluctant to place too much analytic weight on these specific findings.

Conclusion

In many ways, our finding that a judge’s ideology influenced whether a judicial outcome in Religious Clause cases involving elementary and secondary school was pro-religion or not does not surprise. This finding did not jar either of us, even though we both cling to the aspiration of impartial judging and view the rule of law as requiring something more than judicial policy preferences in disguise. Of course, to the extent that ideology is poised to emerge, it is hard to imagine a riper context than what we selected for study—schools.

We are also mindful that skeptics of a “legal” model of judging will find comfort and empirical support in the findings from this study. A few important factors should temper any firm conclusions drawn from these results, however. We begin by acknowledging that law is not perfectly determinate in every case, particularly in Establishment and Free Exercise Clause cases, that some level of judicial discretion is both inevitable and, indeed, to some degree desirable, and that judges, as human beings, bring to their judicial decisions and analyses their general life experiences and perspectives to the task. Indeed, current Supreme Court Religious Clause jurisprudence almost guarantees as much. By failing to more clearly define its reasoning inside majority opinions, by emphasizing a multiplicity of theoretical approaches that resist distilling into a single, coherent theme, owing to uncertainties about discerning the governing legal rules and doctrine, and by offering the vaguest generalities in articulating adjudication standards, the Supreme Court’s Religious Clause rulings all but ask even the most conscientious of lower court judges to draw on personal reactions to religion and political attitudes about the role of religion in leading public institutions, including schools.

Compounding problems for lower federal court judges posed by legal uncertainty, the education context, particularly elementary and secondary schooling, is especially loaded from a political and ideological standpoint. Indeed, precious few issues can be more highly-charged and politically sensitive than religious issues incident to the operation of schools for the nation’s youth. The school endures as a unique institution in the manner in which it brings together the public and private lives of citizens together. It is also the locus of a collision of rights and interests between and among students, their

⁷⁷ Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 58 (1996); see also Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 238, 245 (2003) (describing American Jews as a “prototypical religious outgroup,” which as a matter of principle, has “strongly advocate[d] for the strict separation of church and state”).

⁷⁸ Sisk & Heise, *Ideology*, *supra* note 23.

parents, teachers, administrators, and citizens. Thus, either factor—legal uncertainty or a highly-charged political context—would lead many to expect that judge ideology will inform legal analyses. That these two factors interact in our context all but assures that ideology will play some role. Indeed, given our focus on religious cases involving schools we would have been far more surprised not to find evidence of ideology influencing judicial outcomes in some way.

Results such as ours, flowing from a specific context involving one particular corner (albeit, an important one) of constitutional law, benefit from greater context. Existing empirical evidence drawn from the larger landscape of judging in the federal lower courts provides little by way of empirical support for the conclusion that judicial ideology or a purely attitudinal model of judicial decisionmaking has displaced the legal model. Specifically, the weight of existing evidence drawn from studies exploring large numbers of judicial outcomes across a diverse array of subject matter and fields suggests that extralegal factors, including a judge’s ideology, explain only a small part of the variation in judicial outcomes.⁷⁹

In the future, researchers might consider extending our analysis in various ways. For example, other discrete settings (that is, settings besides school) would benefit from similar analyses to test whether our findings are unique to the setting or, in contrast, are robust in religion cases across various settings. Aside from whether alternative contexts are studied, researchers might also consider the admittedly arduous task of gathering and coding the larger set of unpublished and undigested decisions. Although we do not feel that the inclusion of unpublished decisions would materially upset our major findings, similar analyses in different contexts strikes us as quite a promising and interesting avenue for future work. We are as curious as anyone else about whether the salience of ideology that we find in the school context would emerge in Religious Clause decisions involving other contexts.

Insofar as the push for education reform is unlikely to dissipate anytime soon, the number and magnitude of intersections involving religion and schooling will continue to increase and place increased stress on legal doctrines. Thus, however one receives evidence of ideology influencing judicial outcomes in Religious Clause cases involving schools, it is likely that this evidence will persist over time.

⁷⁹ See, e.g., FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 38 (2007); Jason J. Czarnecki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretations*, 65 MD. L. REV. 841, 856-57 (2006); Sisk & Heise, *Measures*, *supra* note 23, at 746; Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 877 (2008).