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Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts

Gregory C. Sisk* & Michael Heise**

In our continuing empirical study of religious-liberty decisions in the federal courts, American Muslims were at a distinct and substantial disadvantage in raising free exercise or accommodation claims between 1996 and 2005. With other variables held constant, the likelihood of success for non-Muslim claimants in Religious Free Exercise claims was 38%, while the probability of success for Muslim claimants fell to 22% (with an even higher disparity among court of appeals judges). In sum, Muslim claimants enjoyed only about half the chance to receive accommodation of their religious beliefs and practices as did claimants from other religious communities.

Drawing on insights from legal studies, political science, and social and cognitive psychology, we discuss alternative explanations for this result, including: (1) a cultural antipathy toward Islam as another minority religion outside the modern American religious triumvirate of Protestantism, Catholicism, and Judaism; (2) the growing secularism in certain sectors of society along with opposition to groups holding traditional religious values; (3) the possibility that claims made by Muslims are weaker and deserve to be rejected on the merits; and (4) the fears harbored by many Americans that followers of Islam pose a security danger to the United States, especially in an era of terrorist anxiety. As a new threat to religious liberty, the persistent uneasiness of many Americans about Islam and its followers appears to have filtered into the attitudes of such well-educated and independent elites as federal judges.

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*The great tides and currents which engulf the rest of men, do not turn aside
in their course, and pass the judges by.*

—Justice Benjamin N. Cardozo¹

I. INTRODUCTION

Following an Islamic legal ruling by local Muslim leaders, Somali immigrant taxi drivers in the Twin Cities refused to transport passengers who were openly carrying alcoholic beverages, believing that doing so would violate the Qur'an's ban on intoxicants.² Many travelers arriving at the Minneapolis–St. Paul International Airport, who were toting transparent bags containing bottles of wine or carrying boxes of liquor were turned away by the first driver waiting in the taxi line (if he were a Muslim) and instead directed to another taxi driver (who was not).³ Upset at being declined service by a taxi driver, travelers lodged complaints with the airport administration.⁴

Wanting to ensure that all arriving travelers would find convenient ground transportation while also accommodating the beliefs of the Somali Muslim taxi drivers, the Metropolitan Airports Commission came up with what both airport officials and Somali taxi drivers thought was an “ingenious solution.”⁵ Those taxi drivers who, by reason of religious stricture, could not transport alcoholic beverages would install a light on top of their cabs so that the dispatcher could instead signal a different taxi driver to come forward for passengers openly carrying liquor.⁶ In this way, most persons seeking a taxi at the airport would be served promptly and likely not even

1. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

2. Keith Oppenheim, *If You Drink, Some Cabbies Won't Drive*, CNN.COM (Jan. 26, 2007), <http://www.cnn.com/2007/US/01/25/oppenheim.cabbies/index.html>; *see also* QUR'AN, *Surah Al-Ma'idah* 5:90 (prohibiting intoxicants).

3. *See* David Van Biema, *Religion: Minnesota's Teetotal Taxis*, TIME (Jan. 19, 2007), <http://www.time.com/time/magazine/article/0,9171,1580390,00.html>. These Somali immigrant taxi drivers do not have any religious duty to inquire of passengers about alcoholic beverages or to investigate whether closed baggage contained liquor. *See* Dolal v. Metro. Airports Comm'n, No. A07-1657, 2008 WL 4133517, at *1 (Minn. Ct. App. Sept. 9, 2008) (reporting affidavit of Muslim religious leader that taxi drivers are prohibited from searching passenger baggage and are only precluded from transporting a passenger when the driver knows he is carrying alcohol). Thus, only when a potential passenger was carrying an alcoholic beverage in view of the driver, such as in a bag that did not hide its contents or in a labeled liquor box, did the driver then believe that to accept the passenger would be to knowingly participate in the transportation of intoxicating substances.

4. Oppenheim, *supra* note 2.

5. Van Biema, *supra* note 3.

6. *Id.*

notice that they were being picked up by one taxi driver rather than another.

Notwithstanding this carefully crafted compromise, and without substantial evidence that implementing this accommodation for Muslim taxi drivers would disrupt ground transportation or significantly inconvenience passengers, the Metropolitan Airports Commission suddenly revoked its support for the proposal. The reason for the abrupt reversal was, in the words of the commission spokesman, a “public backlash” in the form of emails and telephone calls opposing the policy.⁷ The spokesman said that “the feedback we got, not only locally but really from around the country and around the world, was almost entirely negative. . . . People saw that as condoning discrimination against people who had alcohol.”⁸

Newspaper editorialists had urged the public to register protests with the commission. Some decried the accommodation policy as an “insidious” imposition of “the Shari’a, or Islamic law, with state sanction.”⁹ Others raised fears of a slippery slope that would lead to further accommodations for Muslims, warning that “down the road could lie a legally sanctioned religious separatism that is incompatible with America’s unifying civic vision.”¹⁰ One comment on an online bulletin board simply told the Muslim cabbies to “GET OVER IT, you are in America[,] act like an American!”¹¹

In the end, a governmental body overturned an apparently well-balanced and effectively operating accommodation for a particular sincerely held religious belief of a minority based, not on any showing of concrete and substantial harm, but on the vehement opposition of vocal objectors. Indeed, after changing course, the commission took a progressively harsher stance against the Muslim taxi drivers. Previously, the commission had simply directed that taxi drivers who refused a fare would be required to go to the back of the line, which could mean waiting hours for the next potential passenger.¹² Subsequently, the commission adopted a new policy imposing a thirty-day suspension of a driver’s airport license for a first-time refusal of a fare and a two-year revocation for a second offense,¹³ effectively forcing these Muslim taxi drivers to choose between being faithful and making a living. A Minnesota imam and Islamic law scholar remarked,

7. Oren Dorell, *Cabbies, Culture Clash at Minn. Airport*, USA TODAY (Oct. 11, 2006), http://www.usatoday.com/news/nation/2006-10-10-cabbies-culture_x.htm.

8. Oppenheim, *supra* note 2.

9. Daniel Pipes, *Don’t Bring That Booze into My Taxi*, N.Y. SUN (Oct. 10, 2006), <http://www.danielpipes.org/4046/dont-bring-that-booze-into-my-taxi>.

10. Katherine Kersten, *A Two-Tiered Airport Taxi System Could Lead to ‘Chapter Two,’* MINN. STAR TRIB. (Oct. 16, 2006), <http://www.startribune.com/local/11585696.html?refer=y>.

11. Amy White, *Muslim Cabbies*, CENTER ON RELIGION & PROFS. (May 28, 2009), <http://www.religionandprofessions.org/1328/muslim-cabbies-case-study>.

12. Oppenheim, *supra* note 2.

13. *MAC Approves New Penalty for Taxi Drivers Who Refuse Service*, KARE 11 NEWS (Apr. 16, 2007), http://www.kare11.com/news/news_article.aspx?storyid=251338.

“[t]his type of job helps immigrants move to the next level. Blocking that can cost jobs [and] can also cost immigrants and their families the American dream.”¹⁴

Having lost the political battle for religious accommodation in the wake of the public backlash, the taxi drivers turned to the Minnesota courts, asserting that the Commission’s strict no-exception policy infringed their constitutional right to freely exercise their religion.¹⁵ Noting alternative non-equitable and administrative remedies, as well as the possibility of a stay of any suspension of taxi-driving privileges, the Minnesota courts denied the taxi drivers’ request for an injunction against enforcement of the Commission’s new rule.¹⁶ So far, at least, a judicial venue has not been availing.

As part of our continuing empirical study of religious-liberty decisions,¹⁷ we highlight in this Article the steep uphill climb faced by American Muslims in asserting free exercise of religion or religious accommodation claims in the lower federal courts between 1996 and 2005.¹⁸ We find that, unlike members of nearly every other religious community, Muslim claimants were at a distinct and substantial disadvantage.¹⁹ While Muslim claimants accounted for 15.6% of free exercise claimants in our study, they accounted for only 10.0% of successes. A regression analysis modeling the outcomes of the free exercise and accommodation cases reveals that the “Muslim” claimant variable was statistically significant in a negative direction,

14. Barbara Pinto, *Muslim Cab Drivers Refuse To Transport Alcohol, and Dogs*, ABC NEWS (Jan. 26, 2007), <http://abcnews.go.com/International/story?id=2827800&page=1>.

15. *Dolal v. Metro. Airports Comm’n*, No. A07-1657, 2008 WL 4133517, at *1 (Minn. Ct. App. Sept. 9, 2008). While the Twin Cities Muslim taxi-driver case illustrates the kinds of accommodations sought by persons of faith and the political responses sometimes encountered, it was not among those cases included in our data set for empirical analysis, both because it was decided by Minnesota state courts under the Minnesota Constitution (whereas our data set includes lower federal court decisions) and because it was decided in 2008 (whereas our data set includes cases from 1996–2005).

16. *Id.* at *3–4; see also *Muslim Cab Drivers Lose Round in Court*, MPR NEWS (Sept. 9, 2008), http://minnesota.publicradio.org/display/web/2008/09/09/muslim_cabs_court.

17. See Michael Heise & Gregory Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. (forthcoming 2013) [hereinafter Heise & Sisk, *Religion Before the Bench*]; Michael Heise & Gregory C. Sisk, *Religion, Schools, and Judicial Decision Making: An Empirical Perspective*, 79 U. CHI. L. REV. 185 (2012); Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. COLO. L. REV. 1021 (2005); Gregory C. Sisk & Michael Heise, *Ideology “All the Way Down”?* *An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201 (2012) [hereinafter Sisk & Heise, *Establishment Clause Decisions*]; Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743 (2005) [hereinafter Sisk & Heise, *Judges and Ideology*]; Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004).

18. See *infra* Part III.

19. See *infra* Part III.B.

in contrast with the variables for all other categories of religious claimants (with the sole exception of marginal sects of black separatists).

The magnitude of the negative effect on Muslim claimants in these religious-liberty cases is powerful. Holding all other variables constant, the predicted likelihood of success for non-Muslim claimants was approximately 38%, while the predicted probability for success for Muslim claimants was approximately 22%.²⁰ In other words, after controlling for the type of case (such as whether the claimant was a prisoner or raised an employment discrimination claim), the ideology of deciding judges, and other judge demographic variables such as gender, race, and professional background, Muslim claimants were predicted to prevail little more than half as frequently as claimants from other religious communities.

Aside from a small number of black separatist sects, followers of other minority religions were not similarly disadvantaged in our study. Indeed, while the numbers were small, Buddhist and Rastafarian claims prevailed at a higher predicted rate than those from other religious groups. Thus, the results of our study cannot be readily explained by the conventional wisdom that members of minority religions seldom succeed in religious-liberty litigation.²¹

Nor can we confidently attribute these results to the traditionalist nature of Islam—that is, viewing the results of this study through the lens of the larger “culture wars” within the United States.²² We found that adherents to other faiths that emphasize traditional moral values, such as Catholics and Baptists, were not subject to the same disadvantage in court for this time period, although a particular trend in the legal doctrine may account for why these other traditionalist religious believers may no longer suffer a similarly diminished opportunity for success.²³ In any event, the types of cases typically brought by Muslim claimants did not present direct clashes between traditional values and secular regulations, which instead tend to arise in cases such as those involving the application of anti-discrimination laws to religious institutions.²⁴

By employing control variables, separately examining prisoner and non-prisoner cases, and noting the typical nature of Muslim claims, we conclude that the poorer results for Muslim claimants uncovered by our study cannot be attributed to weaker religious-liberty claims on the merits.²⁵

We believe the most likely explanation for the impaired success for Muslims in religious-liberty claims lies in the lingering perception that Islam

20. *See infra* Part III.

21. *See infra* Part IV.B.1.

22. *See infra* Part IV.B.2.

23. *See infra* Part IV.B.2.c.

24. *See infra* Part IV.B.2.d.

25. *See infra* Part IV.B.3.

poses a risk to our nation's security.²⁶ The results of this study suggest that federal judges are not immune to the fears and suspicions often directed toward Muslims in American public life. These negative attitudes—harbored by those who see followers of Islam as posing a danger to American society—appear to have infected the subconscious attitudes of such well-educated and independent elites as federal judges.²⁷

II. EMPIRICAL STUDY OF RELIGIOUS FREE EXERCISE/ACCOMMODATION DECISIONS IN THE FEDERAL COURTS, 1996–2005

A. *THE RELIGIOUS FREE EXERCISE/ACCOMMODATION STUDY*

1. The Nature of the Study

In the present 1996–2005 study, we conducted an analysis of decisions made by judges of both the federal courts of appeals and the district courts in cases where plaintiffs raised constitutional or statutory religious freedom claims.²⁸ For this Religious Free Exercise/Accommodation phase of the study, we created a data set of the universe of Westlaw digested decisions by the federal district courts and courts of appeals from 1996 through 2005 in which a religious believer or institution sought accommodation by the government or asserted that a government action burdened the free exercise of religion, inhibited religious expression, or discriminated on religious grounds.²⁹

As in our prior study,³⁰ we defined “Religious Free Exercise/Accommodation” cases to include (1) claims arising directly under the Free Exercise Clause of the First Amendment of the United States Constitution;³¹ (2) claims arising under the Free Speech Clause of the First Amendment involving alleged government suppression of religious

26. *See infra* Part IV.B.4.

27. *See infra* Part V.

28. For more information about our data set, primary regression analysis results, coding of each decision, coding of each judge, and information about our coding methods, see Gregory Sisk & Michael Heise, *Empirical Study of Religious Liberty Decisions*, U. ST. THOMAS, <http://courseweb.stthomas.edu/gcsisk/religion.study.data/cover.html> (last visited Aug. 30, 2012).

29. In our prior 1986–1995 study of religious-liberty decisions, we included only published decisions in our data set. In so doing, we knowingly “biased our database in favor of decisions that raise highly visible, controversial, landmark, or difficult questions of religious freedom, or at least issues of religious freedom that a judicial actor found particularly interesting and thus worthy of publication.” Sisk, *supra* note 17, at 1049. For the present study, we have expanded the data set to include the set of unpublished but digested opinions available on Westlaw. In addition to 1290 judicial participations from published decisions, our data set for Religious Free Exercise/Accommodation decisions includes 341 judicial participations from decisions that were digested by Westlaw but not published in the reporter system.

30. For further explanation of the definition and coding of Free Exercise/Accommodation, see Sisk, Heise & Morriss, *supra* note 17, at 531–34; Sisk, *supra* note 17, at 1031–33.

31. U.S. CONST. amend. I.

expression;³² (3) claims based on federal statutes designed to promote the free exercise of religion and speech, including the Religious Freedom Restoration Act (“RFRA”),³³ the Equal Access Act (“EAA”),³⁴ and the Religious Land Use and Institutionalized Persons Act (“RLUIPA”);³⁵ and (4) charges against government entities of discrimination or inequitable treatment of individuals or organizations based on religious conduct or affiliation, including constitutional equal-protection claims and statutory employment-discrimination claims against federal government employers. A substantial majority (58.5%) of the claims presented were premised, at least in part, directly on the Free Exercise Clause, followed by assertions of unequal governmental treatment (30.4%). Statutory religious-liberty claims were raised in 20.9% of the observations, and 26.7% involved religious-expression claims.

As the decisions were collected, we coded and cataloged the direction of each ruling,³⁶ general factual category of the case, religious affiliation of both the claimant and judge, the religious demographics of the judge’s community, the judge’s ideology, the judge’s race and gender, and various background and employment variables for the judge.³⁷ As the point of analysis, we examined each individual judge’s ruling in each particular case as a “judicial participation.”³⁸ Each district court judge’s ruling was coded separately, as was each distinct vote of the multiple judges participating on an appellate panel.

Our Religious Free Exercise/Accommodation data set consisted of 1631 judicial participations (395 by district court judges and 1236 by court of appeals judges). In terms of raw frequencies, before multivariate

32. *Id.*

33. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2006). Although the Supreme Court invalidated RFRA as applied to state and local governments on the grounds that Congress exceeded its congressional powers under the Fourteenth Amendment, *City of Boerne v. Flores*, 521 U.S. 507 (1997), the statute continues to apply to the federal government. See *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418 (2006).

34. Equal Access Act, 20 U.S.C. §§ 4071–4074 (2006).

35. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5 (2006).

36. For further information on how we coded a religious-liberty decision on the merits, see Sisk & Heise, *Establishment Clause Decisions*, *supra* note 17, at 1207–11; Sisk, Heise & Morriss, *supra* note 17, at 546–48.

37. Every decision was independently coded by both a trained law student and one of the authors. For more detailed information about our study, data collection, and coding, see the description published as part of our prior study of religious-liberty decisions from 1986–1995, Sisk, Heise & Morriss, *supra* note 17, at 530–54, 571–612. The few changes in the selection of variables and coding from the prior study may be found by reviewing our table and coding. See *supra* note 28.

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

regression analysis, the religious-liberty claim was favorably received by the ruling judge at a rate of 35.5%.³⁹

The dependent variable was the direction of the individual judge's vote in each case, coded as "1" when the Religious Free Exercise/Accommodation claim was accepted and as "0" when it was rejected. Because we analyzed the influences of multiple variables, multiple regression models were adopted. Because the dependent variable was dichotomous, we used logistic regression.⁴⁰

2. Clustering Standard Errors at the Judge and Circuit Levels

Recognizing that judicial rulings may not be fully independent from one another by reason of precedential constraints within a circuit or because of the repeated participation of the same judge in multiple cases, we adjusted the standard errors by clustering on one level or another. In the Establishment Clause phase of our study, we found no substantive differences between clustering standard errors at the circuit level and at the judge level. Because the chosen dimension made no substantive difference, and believing that those Establishment Clause cases were somewhat more likely to be responsive to circuit precedent, we reported the regression results in that companion article with clustering at the circuit level.⁴¹

In this Religious Free Exercise/Accommodation phase of study, 1379 of the 1631 observations (84.6%) were made by judges who participated in more than one decision, indicating that standard errors should be adjusted by clustering at the individual judge level. Both Establishment Clause and Free Exercise cases typically raise "constitutional fact" disputes,⁴² where the salience or comparative weight of factual elements of the case are at the core of the constitutional question. Such constitutional claims demand *de novo* judicial evaluation similar to that used when resolving questions of law, even on appellate review.⁴³ While recognizing the legal nature of these

39. In our prior 1986–1995 study, Free Exercise/Accommodation claimants prevailed at a rate of 35.6%, *id.* at 553, reflecting a truly astoundingly stable rate of success across two decades, varying only by one-tenth of a percentage point.

40. *See id.*

41. *See Sisk & Heise, Establishment Clause Decisions, supra* note 17, at 1213 & n.43.

42. *See Rankin v. McPherson*, 483 U.S. 378, 385 n.8 (1987) (explaining that "any factual findings subsumed in [a constitutional] determination are subject to constitutional fact review" by the appellate court and thus demand non-deferential evaluation by each judicial actor); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) ("[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record'" to determine the constitutional importance of the facts of the case (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284–86 (1964))). *See generally* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985).

43. *See First Vagabonds Church of God v. City of Orlando*, 638 F.3d 756, 760 (11th Cir. 2011) (holding that, in Free Exercise Cases, "[courts] review the core constitutional facts *de novo*, unlike historical facts, which are measured only for clear error" (quoting *Bloedorn v. Grube*, 631 F.3d 1218, 1229 (11th Cir. 2011)) (internal quotation marks omitted)); *Faustin v.*

dispositions, Free Exercise decisions appeared to be less affected by circuit-specific precedents. Based on our review of the opinions, the Free Exercise cases appeared more likely to turn on each judge's evaluation of the legal merits of individual claims and the government's defenses—that is, a comparative evaluation of the burden on the claimant's practice of religion against the magnitude of the interests cited by the government in resisting accommodation. Following the path of other researchers who study judicial decision-making, we also apprehend that a larger number of clusters enhances the accuracy of inferences.⁴⁴

For these reasons, and mindful that “[c]lustering helps mitigate the underestimation of standard errors . . . and reduces the risk of rejecting a true null,”⁴⁵ we have adopted clustering at the judge level as the first of our primary models in the current phase of the study. We employed clustering at the circuit level as an alternative primary model.

We report the results of both clustering approaches in the regression table below. Results from these two primary models are similar but not identical, as some variables meet significance levels for one clustering approach but not the other. We note those differences in significance of variables when relevant in the discussion below. We also used alternative proxies for ideology, which produced nearly identical results. For convenience, we created a table for the model using “Common Space Scores” to measure ideology.⁴⁶

3. Statistical Significance for Finding a Correlation Between an Independent (Explanatory Variable) and the Dependent (Outcome) Variable

Among social scientists, statistical significance is traditionally set at the $p < .05$ level (or 95% probability level).⁴⁷ This roughly means that the probability (“ p ”) that the reported association between an independent variable and dependent variable is a product of chance is less than (“ $<$ ”) 1 in

City of Denver, 423 F.3d 1192, 1195–96 (10th Cir. 2005) (“We also review the district court’s findings of constitutional fact in a First Amendment claim and conclusions of law de novo.”).

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

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

46. On Common Space Scores as a proxy for judicial ideology, see Sisk & Heise, *Establishment Clause Decisions*, *supra* note 17, at 1222–26. On proxy variables for measuring judicial ideology, see Sisk & Heise, *Judges and Ideology*, *supra* note 17, at 769–94.

47. See ALAN AGRETI & BARBARA FINLAY, STATISTICAL METHODS FOR THE SOCIAL SCIENCES 154 (4th ed. 2009) (explaining that researchers generally “do not regard the evidence against [the null hypothesis] as strong unless P is very small, say, $P < 0.05$ or $P < 0.01$ ”); see also David A. Gulley, *The Adoption of Statistical Tests by Natural Scientists: An Empirical Analysis* 19 (Columbia Univ. Dep’t of Indus. Eng’g & Operations Research, Working Paper, 2012), available at <http://ssrn.com/abstract=2012659> (finding that, for natural scientists conducting empirical research, the statistical significant test of 95% probability or higher had become “almost universal” during the twentieth century).

20, or 5% (“.05”).⁴⁸ We acknowledge that selection of the 95% probability level as the benchmark for identifying those variables deserving interpretive attention is arbitrary. We appreciate that the difference between, say, $p < .05$ and $p < .07$ is “not itself statistically significant.”⁴⁹ Indeed, some researchers contend “that a finding of ‘statistical’ significance, or the lack of it, statistical insignificance, is on its own almost valueless, a meaningless parlor game.”⁵⁰ In challenging the convention of statistical significance, these scholars argue that the effect size of the correlation is more important than the probability level for dismissing the null hypothesis of no effect.⁵¹ Nonetheless, for our own empirical work in the field of judicial decision-making, where we believe that the first question remains *whether* an association between selected variables actually does exist,⁵² we cautiously adhere to the $p < .05$ (or smaller) standard to report a finding.

Accordingly, in the present study, we regard an observed correlation found between variables in our study as reliable only when it is statistically significant at the $p < .05$ or 95% probability level or better in one of our two primary models—clustering at the (1) judge or (2) circuit levels. When that association in a primary model is statistically significant or marginally significant in the alternative primary model as well, we express greater confidence in the reliability of that finding. When empirical scholars refer to a statistical correlation as “marginally significant,” they typically mean that the probability level approaches, but does not reach, statistical significance, usually at the $p < .10$ level.⁵³ To be clear, however, marginal significance is not our standard for reporting a finding, but rather is corroboration that a

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

49. See Andrew Gelman & Hal Stern, *The Difference Between “Significant” and “Not Significant” Is Not Itself Statistically Significant*, 60 AM. STATISTICIAN 328, 328 (2006).

50. STEPHEN T. ZILLAK & DEIRDRE N. MCCLOSKEY, *THE CULT OF STATISTICAL SIGNIFICANCE: HOW THE STANDARD ERROR COSTS US JOBS, JUSTICE, AND LIVES* 2 (2008).

51. See *id.*

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

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

finding in one model remains reasonably robust in another model. For the reader who believes our strict approach to be unduly conservative or who wishes for more detailed information, we have made our data set and other information available on-line, including regression analyses of our primary models complete with probability values for every independent variable.⁵⁴

We do agree that, beyond statistical significance, the substantive *size* of the effect of an independent variable on the dependent variable deserves central attention. As Professor Frank Cross reminds us, “the reader should not place undue importance on a finding of statistical significance, because such a finding shows a correlation between variables but by itself does not prove the substantive significance of that correlation.”⁵⁵ As Cross emphasizes, “[o]ne must also consider the magnitude of the association.”⁵⁶ In the discussion that follows, we chart most statistically significant findings in terms of predicted probabilities, along with confidence intervals, to describe the substantive size of the effect as well.

TABLE 1

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

<i>Case Type</i>	Model 1: Standard Errors Adjusted for Clusters by Judge		Model 2: Standard Errors Adjusted for Clusters by Circuit	
Regulation	.435	(.378)	.435	(.633)
Public Education (Elementary)	.714	(.378)	.714*	(.332)
Public Education (Secondary/Higher)	.689	(.418)	.689	(.388)
Private Education	1.005*	(.438)	1.005*	(.501)
Religious Meetings	1.040	(.539)	1.040	(.725)
Religious Expression	1.113***	(.313)	1.113**	(.363)
Zoning	.364	(.369)	.364	(.569)
Prisoner	.971**	(.340)	.971	(.531)
Employment Discrimination	.642	(.339)	.642	(.457)

54. *See supra* note 28.

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

56. *Id.*

	Model 1		Model 2	
<i>Case Type</i>				
Exemption from Anti-Discrimination Laws	1.766***	(.422)	1.766**	(.606)
Criminal	-.502	(.402)	-.502	(.731)
<i>Claimant Religion</i>				
Catholic	-.049	(.246)	-.049	(.458)
Mainline Protestant	-.016	(.375)	-.016	(.511)
Baptist	-.087	(.346)	-.087	(.329)
Christian Variation	.445	(.443)	.445	(.355)
Seventh-Day Adventist	-.252	(.422)	-.252	(.696)
Jehovah's Witness	-.307	(.457)	-.307	(.860)
Jewish Orthodox	-.413	(.281)	-.413	(.397)
Jewish Other	-.309	(.279)	-.309	(.443)
Muslim	-.767***	(.218)	-.767	(.399)
Native American	.253	(.283)	.253	(.561)
Rastafarian	.696*	(.355)	.696	(.612)
Buddhist	1.048**	(.408)	1.048	(.627)
White Separatist	-.275	(.406)	-.275	(.514)
Black Separatist	-2.294**	(.740)	-2.294*	(.939)
Other	-.210	(.216)	-.210	(.371)
Institutional Religious Claimant	.501*	(.201)	.501	(.327)
Defensive Free Exercise Claim	.493	(.313)	.493	(.418)
<i>Judge Religion</i>				
Catholic	-.012	(.163)	-.012	(.107)
Baptist	-.175	(.259)	-.175	(.216)
Other Christian	-.157	(.245)	-.157	(.135)
Jewish	.019	(.184)	.019	(.212)
Other	-.165	(.355)	-.165	(.207)
None	-.070	(.185)	-.070	(.176)
Religious Correlation Between Judge and Claimant	-.607*	(.292)	-.607*	(.269)

	Model 1:		Model 2:	
<i>Judge Sex and Race</i>				
Sex (Female)	.162	(.163)	.162	(.106)
African American	.203	(.212)	.203	(.245)
Latino	.468	(.267)	.468*	(.224)
Asian	1.239**	(.392)	1.239***	(.167)
<i>Judge Ideology or Attitude Factors</i>				
Common Space Score	-.136	(.180)	-.136	(.147)
ABA Rating—Above Qualified	.055	(.135)	.055	(.150)
ABA Rating—Below Qualified	.322	(.219)	.322	(.176)
Seniority on Federal Bench	-.001	(.001)	-.001	(.001)
Elite Law School	-.051	(.128)	-.051	(.070)
<i>Judge Employment Background</i>				
Military	.079	(.146)	.079	(.131)
Government	-.086	(.122)	-.086	(.102)
State or Local Judge	-.112	(.136)	-.112	(.149)
Law Professor	.303	(.159)	.303*	(.120)
<i>Community Demographics</i>				
Catholic Percentage	-.010	(.005)	-.010*	(.004)
Jewish Percentage	.002	(.012)	.002	(.012)
Adherence Rate	.011	(.006)	.011	(.007)
<i>Precedent and Timing Variables</i>				
Boerne	.104	(.249)	.104	(.403)
After 9/11	.092	(.223)	.092	(.338)
Year of Decision	-.009	(.050)	-.009	(.081)
(Constant)	16.375	(98.957)	16.375	(160.806)
Pseudo R ²	.091		.091	
Percent Explained	67.26		67.26	
N	1631		1631	

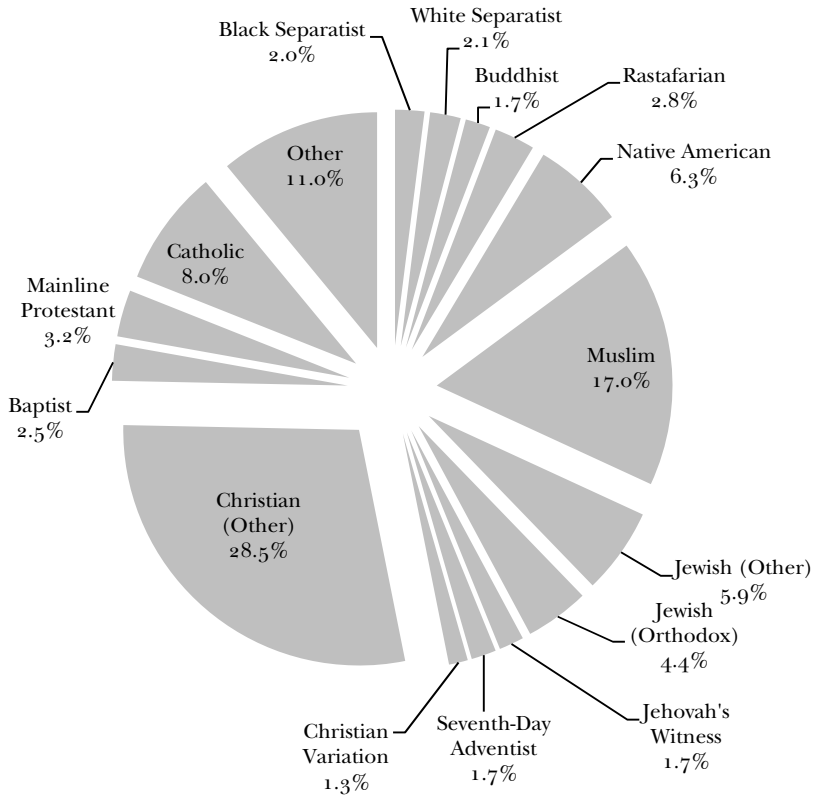
Notes: Free Exercise Successful Outcome = 1.

* $p < .05$; ** $p < .01$; *** $p < .001$.

B. RELIGIOUS CLAIMANT VARIABLES: IDENTITY AND CODING

FIGURE 1

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



For the 1631 observations in Religious Free Exercise/Accommodations cases in which the religious affiliation of claimants could be determined, we coded claimants⁵⁷ into sixteen general categories, for which dummy variables were created.

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

TABLE 2
CLAIMANTS BY RELIGIOUS AFFILIATION

<i>Religious Affiliation</i>	<i>Percent</i>	<i>(n)</i>
Catholic	8.0%	(n = 130)
Mainline Protestant	3.2%	(n = 53)
Baptist	2.5%	(n = 41)
Christian (Other) (primarily members of non-denominational, evangelical, and fundamentalist churches)	28.5%	(n = 465)
Christian (Variation) (Mormons, Christian Scientists, and Unitarians)	1.3%	(n = 22)
Seventh-Day Adventist	1.7%	(n = 28)
Jehovah's Witness	1.7%	(n = 28)
Jewish (Orthodox)	4.4%	(n = 72)
Jewish (Other)	5.9%	(n = 96)
Muslim	17.0%	(n = 277)
Native American	6.3%	(n = 103)
Rastafarian	2.8%	(n = 45)
Buddhist	1.7%	(n = 27)
White Separatist	2.1%	(n = 34)
Black Separatist	2.0%	(n = 33)
Other (including Sikh, Wiccan, and New Age)	10.9%	(n = 177)
TOTAL	100%	(n = 1631)

By examining pleadings and other court documents through the PACER federal court dockets system, we were able to confirm religious affiliation for a much larger proportion of claimants than in our prior 1986–1995 study, even in cases where the claimant's religion was not identified in the opinion itself. In the present 1996–2005 study, we could not determine the religious affiliation of 7.7% of the claimants (n = 136). By contrast, in our 1986–1995 study, we had been unable to determine the religious affiliation of 19.1% of claimants—a figure nearly three times higher than in the current study. In both this and the prior studies, we were forced to treat these observations as missing when analyzing claimant-religious-affiliation dummy variables.

While no manifestly obvious candidate emerged as the appropriate reference variable, we selected “Christian (Other)” because it collected

together various Christian adherents without a clear denominational association and thus appeared to be most representative of the Christian mainstream. Not incidentally, this was the largest category, which is ordinarily preferable as a reference category.

In our coding of Muslim claimants (which proved to be the claimant variable of most interest for this period),⁵⁸ we included the full diversity of American Islam. We followed in the steps of prior research, notably including the Pew Research Center's and Gallup, Inc.'s surveys of Muslim Americans (which we address later in this Article),⁵⁹ in relying upon self-identification by the individual. Accordingly, those religious-liberty claimants who identified as Sunni or Shi'i (often rendered in western media as "Shia"), as well as those who reported they were Muslim without any additional affiliation and those who said they belonged to the Nation of Islam ("NOI"), were included in our data set.⁶⁰

The NOI diverges in doctrine from Sunni and Shi'i Islam in several ways. The NOI elevates founder Fard Muhammad, and subsequent leader Elijah Muhammad, to an incarnation of God and a holy prophet, respectively, while orthodox Islam regards God as wholly other than human and believes the Prophet Muhammad to whom the Qur'an was revealed to be the final prophet.⁶¹ Moreover, the NOI's emphasis on race stands in contrast to the universalism of mainstream Islam. While some Islamic studies scholars see the NOI as moving toward Sunni Islam,⁶² others scholars question whether the NOI accepts the central religious tenets of Islam.⁶³

Nonetheless, the NOI has been a highly visible representation of Islam in the United States and has been a way station for many Americans who

58. In our companion article, *Free Exercise of Religion Before the Bench*, we report additional results of our Religious Free Exercise/Accommodation study for 1996–2005, including our findings that cases involving exemption from anti-discrimination laws were significantly more likely to result in pro-accommodation rulings and that Asian and Latino judges as well as judges who were former law professors were particularly favorable to Free Exercise and Accommodation claims. Heise & Sisk, *Religion Before the Bench*, *supra* note 17.

59. PEW RESEARCH CTR., MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 76 (2007) [hereinafter 2007 PEW MUSLIM AMERICANS], available at <http://pewresearch.org/assets/pdf/muslim-americans.pdf> (providing survey results on question about religious preferences); THE MUSLIM WEST FACTS PROJECT, MUSLIM AMERICANS: A NATIONAL PORTRAIT 10 (2009) [hereinafter 2009 GALLUP MUSLIM AMERICANS], available at <http://www.gallup.com/strategicconsulting/153572/REPORT-Muslim-Americans-National-Portrait.aspx> (explaining that respondents "self-identified as Muslims").

60. See 2007 PEW MUSLIM AMERICANS, *supra* note 59, at 22 (including those affiliated with the NOI among American Muslims).

61. On the doctrine of the NOI, see generally Zafar Ishaq Ansari, *Islam Among African Americans: An Overview*, in MUSLIMS' PLACE IN THE AMERICAN PUBLIC SQUARE: HOPE, FEARS, AND ASPIRATIONS 222, 237–43 (Zahid H. Bukhari et al. eds., 2004).

62. See Aminah Beverly McCloud, *Conceptual Discourse: Living as a Muslim in a Pluralistic Society*, in MUSLIMS' PLACE IN THE AMERICAN PUBLIC SQUARE, *supra* note 61, at 73, 82.

63. Ansari, *supra* note 61, at 237, 259.

later associated with Sunni Islam,⁶⁴ most notably Malcolm X and two of the sons of Elijah Muhammad.⁶⁵ In any event, few claimants in our study volunteered that they were affiliated with the NOI, most declaring themselves to be Muslim without more specific description (a few of whom undoubtedly were members of the NOI).⁶⁶

Relying on self-identification by claimants as Muslim has further merit in this context, where the study seeks to uncover the attitudes of judicial decision-makers toward religious-liberty claimants' proclaimed affiliations. Moreover, for Muslim claimants, Free Exercise claims typically involved prayer and worship rituals and dietary requirements,⁶⁷ subjects on which the NOI has adopted orthodox Muslim rules.⁶⁸

By contrast, we separately coded members of black separatist religious groups—such as the Moorish Temple and the Five Percenters.⁶⁹ While sharing some beliefs and holy days with mainstream Islam, these sects have diverged even further (such as eschewing prayer to Allah in the belief that all black men are gods),⁷⁰ and their adherents distinctively identified themselves as belonging to those sects rather than being Muslims.

III. THE RESULTS: THE MUSLIM DISADVANTAGE IN RELIGIOUS-LIBERTY CASES

A. EMPIRICAL EVIDENCE ON MUSLIM RELIGIOUS-LIBERTY CLAIMANTS ACROSS TWENTY-YEAR SPAN OF STUDY

Across the now twenty-year span of decisions in our continuing empirical study of religious-liberty rulings in the lower federal courts,

64. See Farida Jalalzai, *The Politics of Muslims in America*, 2 POL. & RELIGION 163, 166 (2009) (“[M]ost African-American[] [Muslims] are converts to Islam, many initially entering as followers of the Nation of Islam.”).

65. See Ansari, *supra* note 61, at 243–47, 251–54.

66. In the prison setting, from which arise most of the Muslim religious-liberty claims in our study, Sunni Muslims significantly outnumber members of the NOI. While religious demographic data on prisoners is not readily available for all prison settings, detailed data pertinent to the era of our study from New York state prisons in 2003 and a study on Ohio state prisons published in 2004 suggest that mainstream Muslims outnumber NOI members by more than three-to-one. See DAN BERNSTEIN, STATE OF N.Y. DEP'T OF CORR. SERVS., RELIGIOUS AFFILIATION OF UNDERCUSTODY POPULATION 5 tbl.2.1 (2003) (reporting 9868 prisoners identifying with Islam generally and 2900 with NOI); Nawal H. Ammar, Robert R. Weaver & Sam Saxon, *Muslims in Prison: A Case Study from Ohio State Prisons*, 48 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 414, 421 tbl.2 (2004) (using a sample from Ohio prisons containing 79 prisoners who affiliated with American Muslim Mission, 26 with the NOI, and 25 with no preference or who attended mosques from either affiliation).

67. See *infra* notes 189–90 and accompanying text.

68. See Ansari, *supra* note 61, at 258 (noting that Minister Louis Farrakhan has effected changes in religious rituals leaning toward mainstream Islam).

69. On the Moorish Temple and the Five Percenters, see Ansari, *supra* note 61, at 235–36, 259.

70. See *Self-Allah v. Annucci*, No. 97-CV-607(H), 1999 WL 299310, at *2–6 (W.D.N.Y. Mar. 25, 1999) (reporting self-description of “Five Percenters” about their religion).

evidence that Muslim claimants have been at a disadvantage has been accumulating. In our 1986–1995 study, we refrained from describing the evidence we had found as a finding, suggesting instead that the matter deserved further attention and additional study. Now having examined religious-liberty decisions over an additional ten-year span, we do find—with the conventions of statistical significance fully satisfied—that Muslim claimants were indeed significantly less likely than non-Muslims to successfully raise Religious Free Exercise and Accommodation claims, especially in the federal courts of appeals.

In our 1986–1995 study, the Muslim claimant variable did not approach significance in our standard model (reaching only the 83% probability level).⁷¹ Interestingly, when district court and court of appeals judges were examined using separate regression analyses, the Muslim variable did rise to the $p < .01$ level (or 99% probability level) for statistical significance, and in the same negative direction.⁷² Both because our primary model combined these two sets of judges and because we found it odd that the variable would be significant for each separately but slide well out of significance when they were combined, we reported those results but did not present them as a finding. We additionally found that Muslims were significantly less likely to succeed when claiming unequal treatment or discrimination.⁷³

“[A]t least pending further study,” we concluded in that prior 1986–1995 study, “there is some evidence that adherents to Islam, apparently alone among the non-Christian religious faiths, may encounter greater resistance in pressing claims for religious accommodation in federal courts.”⁷⁴

Having progressed forward another ten years, examining federal court decisions from 1996 to 2005, the present study confirms the informed hunch we had at the conclusion of that earlier study nearly a decade ago. Among all of the diverse categories of religious claimants included in the primary models of our present study, Muslims nearly alone were significantly and powerfully associated with a negative outcome before the federal courts (the minor exception being Black Separatists, for whom a significant negative association also persisted, mostly in prisoner cases).⁷⁵ Claimants from other religious communities were nearly twice as likely to prevail as Muslims.

In our primary regression model (clustering standard errors at the judge level), the variable for Muslim claimants was highly significant at the

71. Sisk, Heise & Morriss, *supra* note 17, at 566.

72. *Id.*

73. *Id.*

74. *Id.* at 566–67.

75. See Heise & Sisk, *Religion Before the Bench*, *supra* note 17, at 17.

$p < .001$ level (or 99.9% probability level). The Muslim variable remains marginally significant in the alternative model (clustering standard errors at the circuit level), falling inside the $p < .06$ level, as well as in alternative models using political party as the proxy for judicial ideology.

As explained in greater detail in our companion article describing the results of the Establishment Clause phase of our study, our primary model for religious-liberty decisions combines rulings by both district court and court of appeals judges for unitary analysis.⁷⁶ In resolving the central constitutional issues in a case, trial and appellate courts share parallel responsibilities. The deferential standard of appellate review that is ordinarily applied to a trial court's factual findings is subject to the "constitutional fact" exception for "factual" disputes that lie at the core of a constitutional question.⁷⁷ For these and other reasons, we concluded that expanding our empirical study beyond appellate judges and evaluating the behavior of a larger and more inclusive set of lower federal judges has much merit, especially in this context of rulings on constitutional and parallel statutory claims.

However, in this Free Exercise/Accommodation phase of our study, when judges from each of the lower federal courts are examined separately in the primary model, the Muslim variable falls well out of significance for district court judges, while remaining highly significant for court of appeals judges (at the $p < .001$ or 99.9% probability level). As reported in Figure 3 below, the disparity in success rates between Muslims and non-Muslims is even greater when court of appeals judge rulings are examined separately rather than combined with district court judge rulings. Our findings for court of appeals judges may also be more solidly grounded. Our data set of all digested Westlaw opinions includes a larger share of the universe of published and unpublished federal appellate decisions (excluding only summary dispositions that were not digested) than is likely to be the case for district court decisions in the Free Exercise/Accommodation area. In addition, the disproportion in our study between judicial participations by federal appellate judges and trial judges is high, with 1236 (75.8%) by court of appeals judges and 395 (24.2%) by district court judges. Accordingly, while we report our findings and measure the effect size under both unitary and separate analyses, the reader may reasonably conclude that the findings in this study apply primarily or with more emphasis to federal appellate judges.

76. See Sisk & Heise, *Establishment Clause Decisions*, *supra* note 17, at 1208–10.

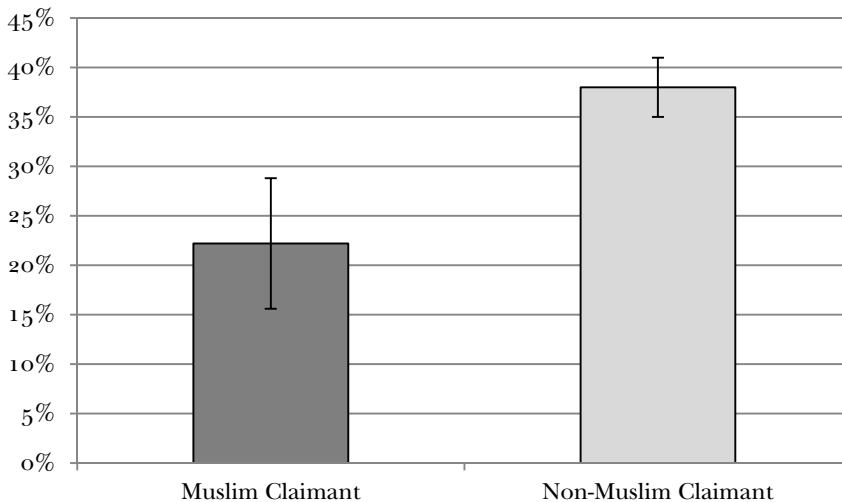
77. See *supra* notes 42–43 and accompanying text. In the Free Exercise context, most of the statute-based claims are parallel to claims founded directly on the First Amendment, with some exception for discrimination-based claims.

B. MEASURING THE SIZE OF THE MUSLIM DISADVANTAGE

Our finding that Muslim claimants were less likely than claimants of other religions to prevail when raising religious-liberty claims in the lower federal courts, and most specifically in the courts of appeals, is reliable, confirmed by conventions of statistical significance. And the size of that effect is substantial. As shown in Figure 2, holding all other independent variables constant at their means, the predicted probability that a Muslim claimant would succeed in presenting a Religious Free Exercise/Accommodation claim to an individual federal judge was 22.2%, while non-Muslim claimants would succeed at a rate of 38.0%.

FIGURE 2

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



The vertical lines in Figure 2 represent the 95% confidence intervals for these two predictions. By “95 percent confidence interval,” statisticians mean that the interval is “one within which we are 95 percent certain that the true variable value falls.”⁷⁸ Thus, while our best estimate is that a Muslim claimant had a 22.2% likelihood of succeeding on a Religious Free Exercise/Accommodation claim, the probability could be as low as 15.6% or as high as 28.8%. Similarly, while we predict that a non-Muslim claimant

78. ROBERT M. LAWLESS, JENNIFER K. ROBBENOLT & THOMAS S. ULEN, *EMPIRICAL METHODS IN LAW* 239 (2010); see also Lee Epstein, Andrew D. Martin & Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 *VAND. L. REV.* 1811, 1814 (2006) (“Such is the reality of the statistical world: We can never be certain about our best guesses (i.e., inferences) because they themselves are based on estimates. We can, however, report our level of uncertainty (e.g., a confidence interval) about those guesses.”).

would succeed 38.0% of the time, the probability could be as low as 35.0% or as high as 41.1%.

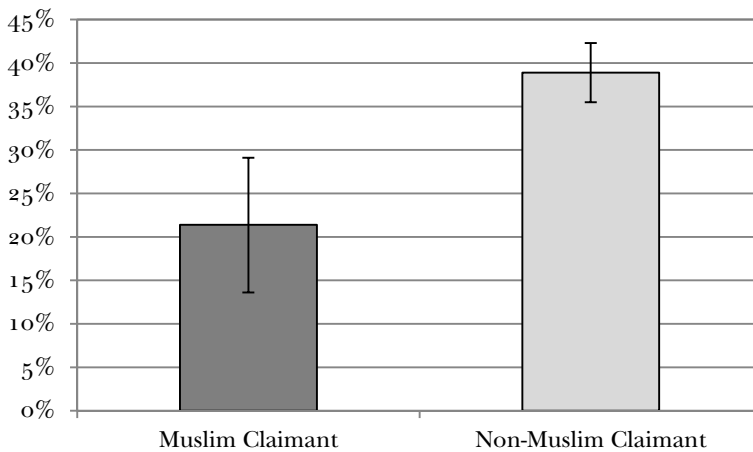
The probability that the comparative values would appear both in the higher end of the interval for a Muslim claimant and in the lower end of the interval for a non-Muslim claimant is much lower than 5%, strengthening our confidence that the disparity between the two is not only significant in statistical probability but quite substantial in size. Indeed, even before adjusting for other independent variables in a regression, the raw frequency success rate before federal judges was 37.9% for non-Muslim claimants, while only 22.7% for Muslims.

When judicial participations from each of the lower federal courts in our study are examined separately in our primary model, the Muslim variable falls well out of significance for district court judges but becomes highly significant (at the $p < .001$ or 99.9% probability level) for court of appeals judges. And the magnitude of the effect not only remains substantial, but increases slightly, for court of appeals judges.

As shown in Figure 3, holding all other independent variables constant, the predicted probability that a Muslim claimant would succeed in presenting a Religious Free Exercise/Accommodation claim to a federal court of appeals judge was 21.4%, while non-Muslim claimants succeeded at a rate of 38.9%.⁷⁹

FIGURE 3

PREDICTED PROBABILITY THAT A CLAIMANT WILL SUCCEED ON A RELIGIOUS FREE EXERCISE/ACCOMMODATION CLAIM, BY MUSLIM IDENTITY (COURT OF APPEALS JUDGES ONLY)



79. The 95% confidence interval for predicted success rate by a Muslim claimant before court of appeals judges ranges from 13.6% to 29.1%, and for non-Muslim claimants from 35.5% to 42.3%.

To examine whether there was a more specific “9/11 Effect”—that is, whether there was a shift in the legal landscape for Muslim religious-liberty claimants following the terrorist attacks on Washington, D.C. and New York City—we also conducted separate but parallel analyses of cases decided both before and after September 11, 2001. This date restriction produces nearly an even division of the 1996–2005 decisions, with 48% of judicial participations occurring before 9/11 and 52% afterward. When separated into sets of pre-9/11 cases and post-9/11 cases, the Muslim variable remained significant for the pre-9/11 period (January 1, 1996 to September 10, 2001) and slips barely out of significance but stays inside the $p < .06$ level for the post-9/11 period (September 11, 2001 to December 31, 2005).

In raw frequencies, Muslim claimants achieved a favorable response from judges at a rate of 24.4% before 9/11 and then at a slightly lower rate of 21.2% afterward. When all other explanatory variables are held constant in a regression analysis, the predicted probability of success for a Muslim claimant is 21.9% before 9/11⁸⁰ and rises slightly to 24.1% after 9/11.⁸¹ In any event, these differences are relatively small and their confidence intervals preclude any confident conclusion about genuine movement in either direction between these two periods. In addition, we included a control variable for 9/11, which did not prove significant in our primary model, although that 9/11 control variable did rise to significance in a separate regression analysis of prisoner-only cases before the courts of appeals.

Moreover, assuming the post-9/11 months were perceived by Muslim Americans as a period of backlash against Islam, we would expect those perceptions to play a strategic role in their decisions whether or not to litigate their religious-liberty claims. Under the Priest–Klein Hypothesis, plaintiff win rates in cases that actually are litigated to judgment will trend toward 50% regardless of the substantive standard of law.⁸² Rational litigants will adjust their behavior by agreeing to settle rather than continue with litigation based on their predictions of success in light of that legal standard, meaning that only close cases will actually proceed to trial.

To be sure, the Priest–Klein Hypothesis is “not an iron law,”⁸³ is based solely on economic determinants for settlement and litigation,⁸⁴ and

80. For the pre-9/11 period, the 95% confidence interval for predicted success rate by a Muslim claimant ranges from 11.4% to 32.5%, and for non-Muslim claimants from 34.4% to 42.8%.

81. For the post-9/11 period, the 95% confidence interval for predicted success rate by a Muslim claimant ranges from 14.5% to 33.6%, and for non-Muslim claimants from 32.1% to 40.5%.

82. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 5, 8, 14–15, 17 (1984).

83. Matthew C. Turk, *Why Does the Complainant Always Win at the WTO?: A Reputation-Based Theory of Litigation at the World Trade Organization*, 31 NW. J. INT'L L. & BUS. 385, 397 (2011).

84. Priest & Klein, *supra* note 82, at 4.

assumes “primarily that the parties have equal stakes in the litigation.”⁸⁵ In religious-liberty cases, many persons of faith whose free exercise of religion is severely burdened by government rules or decisions may feel that they have no alternative but to press forward with litigation despite a weak prospect for success; religious plaintiffs’ requests for accommodation may have little or no economic benefit or cost; or government defendants may be less motivated by either financial impact or litigation costs in deciding whether and how to defend against such claims.

Nonetheless, even in the religious-liberty context, litigation trends surely are affected to some degree by litigation costs and rational predictions of success or failure in court, as well as by strategic considerations regarding public perception and the impact of negative court rulings. Thus, we would expect Muslims in the post-9/11 period to withhold more religious-liberty claims, choosing instead to accept the burdens and costs of non-accommodation when possible, or to withdraw from sectors of public and economic life if necessary to avoid a conflict over religious principle. During such a difficult period, and perhaps more generally, we would expect Muslims to resort to the courts only when their claims were strongest on the merits. If these assumptions are correct, such rational responses to a challenging situation may explain why success rates for Muslim religious-liberty claimants who litigated after 9/11 did not fall or may have even risen slightly.

In sum, we have confidence in the overall finding that Muslim claimants generally had a lower success rate than non-Muslim claimants in the lower federal courts (and especially before judges of the courts of appeals) between 1996 and 2005. Although the evidence is mixed and the possibility of strategic adjustment cannot be ignored, there is no strong evidence of a specific “9/11 effect” leading to a marked decline in the Muslim success rate in Religious Free Exercise claims following the 2001 terrorist attacks. For the ten-year span from 1996 to 2005, our findings translate into a predicted success rate for Muslim claimants that is only slightly better than half that for other religious claimants. Especially in light of the trend we observed in our 1986–1995 study,⁸⁶ the Muslim deficit in religious-liberty litigation success appears to be real and persistent at least through 2005.

85. Ahmed E. Taha, *Judge Shopping: Testing Whether Judges’ Political Orientations Affect Case Filings*, 78 U. CIN. L. REV. 1007, 1018 (2010); see also Priest & Klein, *supra* note 82, at 24 (explaining that the model assumes “that the stakes of the relevant disputes are symmetric to plaintiffs and defendants”).

86. See *supra* Part III.A.

IV. AMERICAN ATTITUDES ABOUT ISLAM AND ALTERNATE THEORIES OF THE MUSLIM DISADVANTAGE

A. *THE AMERICAN PROMISE OF RELIGIOUS LIBERTY AND THE MUSLIM EXPERIENCE*

Like Catholic and Jewish immigrants before them, Muslims coming to America (as well as the increasing numbers of native-born Muslims) strive to maintain their identity and hold fast to their core beliefs while integrating into the mainstream of American life. Whether “the robust promise [of] the American experiment [in religious liberty] still holds”⁸⁷ will be tested in the coming years by the experiences of Muslims as fellow citizens, coworkers, and neighbors. If that promise is kept, that message of freedom may resonate well beyond our own borders.

Although it came only after a struggle spanning many decades, Catholics have succeeded in realizing the American Dream—prospering economically, thriving in society, and achieving parity in political, educational, and employment activity—without sacrificing their faith. And that success played no small role in the development of a better understanding of the virtues of religious liberty within the universal Catholic Church. In his famous book, *We Hold These Truths: Catholic Reflections on the American Proposition*, published in 1960 on the eve of the Second Vatican Council, as well as in earlier theological writings, American Jesuit John Courtney Murray offered the success of the unique American experiment in religious liberty as evidence of a new moral truth consistent with the natural law tradition of the Catholic Church.⁸⁸

While also drawing on the traditional Catholic principle of conscience and the work of other Catholic scholars such as French philosopher Jacques Maritain on the dignity of the human person,⁸⁹ the Second Vatican Council was greatly influenced by Murray and his observations about religious liberty in the American context.⁹⁰ At the close of the Council in 1965, Pope Paul VI promulgated *Dignitatis Humanae* (The Declaration on Religious Freedom) formally declaring as Catholic teaching that “the right to religious freedom has its foundation in the very dignity of the human person.”⁹¹ Writing about

87. See JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT, at xiii (2d ed. 2005).

88. JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION (1960).

89. Catherine M. A. McCauliff, *Jacques Maritain's Embrace of Religious Pluralism and the Declaration on Religious Freedom*, 41 SETON HALL L. REV. 593, 594, 601 (2011).

90. See JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 331–53 (1998); Richard W. Garnett, *Francis Bacon Takes on the Ghouls*, 3 GREEN BAG 2D 447, 454–55 (2000) (reviewing JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES (2000)).

91. SECOND VATICAN ECUMENICAL COUNCIL, DECLARATION ON RELIGIOUS FREEDOM: DIGNITATIS HUMANAЕ § 2 (1965), available at http://www.vatican.va/archive/hist_councils/

Murray and the Second Vatican Council, Judge John Noonan observes that “the Declaration on Religious Freedom would not have come into existence without the American contribution and the experiment that began with Madison.”⁹²

As Professor Kristine Kalanges writes, “Catholics in the United States were witnesses to the fact that a truth-proclaiming religion could prosper in a pluralistic society.”⁹³ Likewise, she observes, “[i]nsofar as they thrive here, American Muslims . . . could bear witness to the Muslim world that religious freedom is compatible with the practice of (at least certain visions of) Islam.”⁹⁴ While such a development has “the potential to be profound,” Kalanges warns that it is not inevitable.⁹⁵

Unfortunately, for at least three reasons, each of which is discussed in more detail in succeeding parts of this Article, believers in Islam may face a steeper climb to full-fledged acceptance into the American mainstream than did Catholics and Jews.⁹⁶ Muslims may find that accommodations from their new countrymen are less forthcoming than those that were grudgingly and gradually granted to Catholics and Jews on their journeys through the nineteenth and twentieth centuries.

First, many Americans perceive Islam’s central tenets to be further distant from the religious mainstream in the United States than was the divergence of Catholic beliefs and Jewish traditions from the Protestant Christianity that dominated the American religious landscape a century and more ago.⁹⁷ Over time, Catholics and Jews have been elevated to “equal partnership status in the American religious triumvirate.”⁹⁸ With America now increasingly described as “Judeo-Christian” in a more expansive compass of religious traditions, Protestants, Catholics, and Jews are more likely today to find some theological common ground, emphasizing a

ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html (English translation).

92. NOONAN, *supra* note 90, at 353.

93. KRISTINE KALANGES, RELIGIOUS LIBERTY IN WESTERN AND ISLAMIC LAW: TOWARD A WORLD LEGAL TRADITION 163 (2012).

94. *Id.* at 164.

95. *Id.*

96. *Cf.* Christopher C. Lund, *The New Victims of the Old Anti-Catholicism*, 44 CONN. L. REV. 1001, 1003–04, 1013–17 (2012) (describing how religious-liberty cases today often connect deeply with the nineteenth century history of anti-Catholicism in the United States, such as the case of a female Muslim police officer in Philadelphia who was prohibited from wearing a veil by citation to a still-extant Pennsylvania statute enacted in the nineteenth century to exclude Catholic priests and nuns from public employment because they wore cleric garb).

97. *See* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 47 (1996) (referring to the “Protestant consensus” that prevailed at least until the late nineteenth century).

98. *Id.* at 58; *see also* WILL HERBERG, PROTESTANT—CATHOLIC—JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY (Anchor Books rev. ed. 1960) (providing an analysis of Protestantism, Catholicism, and Judaism in modern American culture).

monotheistic unity, similarities in worship practices, some common Western history, and a connection to the Bible.

At some future point, Muslims may be added to Catholics, Protestants, and Jews as within the common faith heritage of Americans because all of the “Abrahamic religions tend to share a substantial ethical foundation.”⁹⁹ But we have not yet reached the historical or cultural point where Islam has been received by public approbation to full partnership in an American religious “quadruple alliance.”¹⁰⁰ For the moment, in the eyes of most Americans, Islam remains an outsider and minority religion in the United States.¹⁰¹

Moreover, while beyond the scope of this study, we cannot dismiss the possibility that a racial element is also at play. The majority of followers of Islam in the United States are non-white, thus making Muslims in America a minority in ethnic and racial terms as well as in religious. According to the Pew Research Center, in 2007, 38% of American Muslims identified themselves as white (although a substantial majority are actually of Arab origin),¹⁰² 26% as black, 20% as Asian, and 16% as mixed or other.¹⁰³ A 2009 Gallup Poll found a larger percentage of Muslim Americans self-

99. Azizah Y. al-Hibri, *Faith and the Attorney–Client Relationship: A Muslim Perspective*, 66 *FORDHAM L. REV.* 1131, 1139 (1998); see also JOHN L. ESPOSITO, *PLURALISM IN MUSLIM–CHRISTIAN RELATIONS* 6 (2008), available at http://acmcu.georgetown.edu/files/20080401_Pluralism_in_Muslim-Christian_Relations.pdf (“Both [Islam and Christianity] recognize and worship God as Creator, sustainer and Judge, share a belief in common prophets and in divine revelation to humankind, believe in moral responsibility and accountability, the last judgment and eternal reward and punishment.”). The “Three Grand Tenets” of Islam—monotheism, final judgment, and divine intervention in history—have parallels in Christian and Jewish teaching. See RAJ BHALA, *UNDERSTANDING ISLAMIC LAW (SHAR’A)* 104–14 (2011). Even should Islam join Protestant Christianity, Catholic Christianity, and Judaism in the religious mainstream, recently departed Professor Steven Gey feared that a “reduction of all major branches of Western religious thought into a generic brand of monotheism” would, at least in the application of the Establishment Clause, “lead[] to the embrace of religious majoritarianism” to the detriment of those falling outside of that theological or sociological consensus. Steven G. Gey, *Life After the Establishment Clause*, 110 *W. VA. L. REV.* 1, 19–21 (2007).

100. The term “quadruple alliance” originated with various strategic alliances among European powers, most prominently the Quadruple Alliance of Britain, Russia, Prussia, and Austria which followed the Napoleonic wars. See Myrna Boyce, *The Diplomatic Relations of England with the Quadruple Alliance 1815–1830*, *U. IOWA STUD.*, Nov. 1918, at 1, 5, available at <http://ia600406.us.archive.org/23/items/diplomaticrelatiooboyc/diplomaticrelatiooboyc.pdf>.

101. See *infra* Part IV.B.

102. See Ilyas Ba-Yunus & Kassim Kone, *Muslim Americans: A Demographic Report*, in *MUSLIMS’ PLACE IN THE AMERICAN PUBLIC SQUARE*, *supra* note 61, at 299, 317 (reporting that the largest ethnic group of American Muslims are those of Arab origin (32%), followed by mostly African American Muslims (29%)).

103. 2007 PEW MUSLIM AMERICANS, *supra* note 59, at 17–18. In a 2011 follow-up survey, the Pew Research Center found similar racial demographics, with 30% of Muslims identifying as white, 23% as black, 21% as Asian, 6% as Hispanic, and 19% as other or mixed. PEW RESEARCH CTR., *MUSLIM AMERICANS: NO SIGNS OF GROWTH IN ALIENATION OR SUPPORT FOR EXTREMISM* 16 (2011) [hereinafter 2011 PEW MUSLIM AMERICANS], available at <http://www.people-press.org/files/legacy-pdf/Muslim-American-Report.pdf>.

identifying as African American (35%) and fewer classifying themselves as White (28%).¹⁰⁴ While we were not able to code the religious claimants in our data set by race,¹⁰⁵ we expect that a substantial majority of Muslim claimants in the present study were non-white.¹⁰⁶

Second, American Muslims today face cultural and political obstacles beyond and different from those that Catholics and Jews encountered from a Protestant–Christian hegemony in the nineteenth and early twentieth century. In today’s America, Muslims face opposition not only from members of other religions in America who regard them as religiously discordant or theologically deviant, but also from a growing number of secularists in certain circles of American cultural and political life.¹⁰⁷ Professor Noah Feldman describes two opposing camps in the debate over the proper role of religion in American public life—“values evangelicals” and “legal secularists.”¹⁰⁸ Neither camp appears at present to be favorably disposed toward full-fledged participation by Muslims as people of faith in American public life. While “values evangelicals” might be expected to view Muslims as allies on certain social issues, suspicion and fear by many evangelical Christians hold Muslims apart.¹⁰⁹

104. 2009 GALLUP MUSLIM AMERICANS, *supra* note 59, at 10, 20.

105. In coding claimants for Religious Free Exercise/Accommodation by religion, we did not and could not also code them by race. Because of the nature of the claims being raised, focused as they were on the claimant’s religion-based conflict with the government, the race of the claimants was not consistently revealed in court documents. While we might assume that most (but not all) followers of Native American religious traditions were themselves Native Americans (and claimants of that faith were not statistically significant in our study), we could not make similar assumptions about the other religious groupings included in the analysis.

106. As discussed elsewhere in this Article, *see supra* Part II.B; *infra* Part IV.B.3, nearly three-quarters of Muslim claimants in our data set are prisoners, and the overwhelming majority of Muslim prisoners are black. *Terrorist Recruitment and Infiltration in the United States: Prisons and Military as an Operational Base: Hearing Before the Subcomm. on Terrorism, Tech., & Homeland Sec. of the S. Comm. on the Judiciary*, 108th Cong. (2003) [hereinafter Waller Testimony] (testimony of J. Michael Waller, Annenberg Professor of International Communication, Institute of World Politics), available at <http://www.judiciary.senate.gov/hearings/hearing-search.cfm> (select hearing year “2003” and search witness testimony for “Waller”; then follow “Dr. Michael Waller” hyperlink) (stating that Muslim inmates in prison “are overwhelmingly black with a small, but growing Hispanic minority”).

107. *See infra* Part IV.B.2.

108. NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH–STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 7–8 (2005).

109. *See* PEW RESEARCH CTR., *CONTINUING DIVIDE IN VIEWS OF ISLAM AND VIOLENCE* 2 (2011), available at <http://people-press.org/files/2011/03/714.pdf> (reporting that 60% of white evangelical Protestants regard Islam as more likely to encourage violence than other religions); Mohammed Nimer, *Muslims in the American Body Politic*, in *MUSLIMS’ PLACE IN THE AMERICAN PUBLIC SQUARE*, *supra* note 61, at 145, 157 (describing relationships between Muslims and the Christian Right as “uncertain and highly confrontational at times”); James M. Penning, *Americans’ Views of Muslims and Mormons: A Social Identity Theory Approach*, 2 *POL. & RELIGION* 277, 287 (2009) (reporting on a study showing that “evangelical Protestants in the United States tend to hold particularly negative views of Muslims”).

Third, just as Muslims began to rise in significant numbers and to positions of prominence in the United States, Islamic-extremist-inspired terrorism has become a serious threat to national and international security. Even as they write encouragingly about finding meaningful accommodations for Muslim religious tenets within the context of American constitutionalism and political liberalism, Professors John Witte and Joel Nichols warn of setbacks due to a “cultural backlash against Muslims prompted by 9/11, 7/7, Fort Hood, or the bloody and unpopular wars against Islamicist extremists in Iraq, Afghanistan, and beyond.”¹¹⁰ Based on our empirical study of federal court religious-liberty decisions, we fear that religious liberty may become a casualty of that cultural backlash.¹¹¹

We should emphasize that our study focused on religious-liberty claims in *court*. While our readers will be aware of troubling developments in other dimensions of American life, our findings are grounded in data from a particular time period before judges of the lower federal courts. At the same time, we believe that trends in the judicial reception of religious-liberty claims flow back into society and influence societal attitudes.¹¹² Moreover, the impartial and even-handed treatment of claimants by judges, regardless of religious identity, is a cardinal value in itself. Thus, judicial responses to claims for Religious Free Exercise/Accommodation in the federal courts comprise an important chapter in the modern story of American religious liberty.

B. ALTERNATIVE THEORIES FOR THE MUSLIM DISADVANTAGE IN RELIGIOUS-LIBERTY CASES

We discuss below four alternative theories to explain—or, in one instance, explain away—our finding that Muslim claimants suffer a significant and powerful disadvantage in presenting religious-liberty claims to the lower federal courts:

First, as the “Minority Religion Disadvantage” thesis, we consider the possible impact of a general cultural antipathy toward Islam as yet another minority religion outside the modern American triumvirate of Protestantism, Catholicism, and Judaism.

Second, as the “Culture War” thesis, we discuss the growing secularism in certain sectors of society, along with opposition to groups holding traditional religious values. Because most American Muslims maintain what are conventionally seen as conservative views on many social issues, we

110. John Witte, Jr. & Joel A. Nichols, *Faith-Based Family Laws in Western Democracies?*, 2010 FIDES ET LIBERTAS 122, 126–27, available at <http://www.irla.org/assets/files/Fides/Fides2010.pdf>.

111. See *infra* Parts IV.B.4 & V.

112. See Marie A. Failing, *Islam in the Mind of American Courts: 1800 to 1960*, 32 B.C. J.L. & SOC. JUST. 1, 2 (2012) (“The courts can both reflect American social attitudes and shape them, countering misperceptions and stereotypes that result in social and legal harm to minorities.”).

consider the possibility that negative responses to Muslim religious-liberty claims may be generated by the wider “Culture War” on social and moral controversies that persists in American social and political discourse.

Third, as the “Muslims Deserve To Lose” thesis, we evaluate the possibility that claims made by Muslims are distinctively weaker on their merits and thus deserve to be rejected at a higher rate than claims made by those from other religious communities.

Fourth, as the “Islam Viewed as Dangerous” thesis, which we believe is the most likely explanation for the Muslim disadvantage, we describe the fears harbored by many Americans that followers of Islam pose a security danger to the United States, especially in an era of terrorist anxiety. We further explain that these negative perceptions of Islam and its followers in America bear little resemblance to reality.

Then, in the next Part of the Article, we suggest that the persistent uneasiness of many Americans about Islam and its followers appears to have filtered into the attitudes of such well-educated and independent elites as federal judges.

1. The “Minority Religion Disadvantage” Thesis

The conventional wisdom has been that adherents to minority religions are more likely to fail when pressing religious-liberty claims in court, while followers of mainstream Christianity are more likely to succeed. Given the history of discrimination and persecution against religious minorities, scholars have understandably believed that “the scales generally tip in favor of Judeo-Christian beliefs, and against those outside that framework.”¹¹³

In our prior 1986–1995 study, we did not find that followers of minority religions generally were significantly less likely to secure a favorable hearing from federal judges.¹¹⁴ In fact, counter to the popular narrative, we found that adherents to traditionalist Christian faiths, notably Catholics and Baptists, entered the courthouse doors at a distinct disadvantage.¹¹⁵ And now, in the present 1996–2005 study, Muslims are nearly alone in suffering a disadvantage in religious-liberty litigation. The only exception involves claims by adherents to small black-separatist sects, some three-quarters of which arose in the context of criminal proceedings and prisons, where racial tensions can pose security threats for both correctional officers and other prisoners.¹¹⁶

113. Verna C. Sánchez, *All Roads Are Good: Beyond the Lexicon of Christianity in Free Exercise Jurisprudence*, 8 HASTINGS WOMEN'S L.J. 31, 35 n.12 (1997).

114. Sisk, *supra* note 17, at 1033–37; Sisk, Heise & Morriss, *supra* note 17, at 562–67.

115. *See supra* note 114.

116. *See* Heise & Sisk, *Religion Before the Bench*, *supra* note 17, at 17. On the regression results for and the coding of Black Separatists, see *supra* Table 1 and notes 69–70 and accompanying text.

Professor William Marshall once argued that “[a] court is more likely to find against a claimant on definitional grounds when the religion is bizarre, relative to the cultural norm, and is more likely to find that a religious belief is insincere when the belief in question is, by cultural norms, incredulous.”¹¹⁷ One of us has “submit[ted] something of the opposite may be as common . . . given the natural human tendency to respond more vigorously to the perceived threat next door than to the peculiarity on the far side of town”¹¹⁸:

Because such unconventional thinking or conduct is so distant from our own, and because the actors are so remote from our own world and experiences, we are less likely to compare those attitudes and actions against our own beliefs and practices Nor are we likely to feel threatened, again precisely because the perspective involved is so alien and thus so far removed from our day-to-day life.¹¹⁹

Thus, when a judge hearing a religious-liberty case encounters what he or she sees as a novel or eccentric religious exercise by a follower of a peculiar religion, that judge may be more willing to direct tolerance of that religious practice as perhaps unusual, but harmless and easily accommodated. Moreover, when the believer is part of a small minority religion, we anticipate that exceptions and accommodations can be more easily contained with minimal impact. In sum, Free Exercise accommodations to small, minority religions do not occasion much, if any, real inconvenience to the majority.

By contrast, when a religion no longer is alien and remote, but instead is regularly encountered, societal forbearance may be lifted for the practices of that religion that diverge from majoritarian customs and preferences. Thus, one of us has argued, “the typical American may be more threatened by that which is familiar and close at hand, but regarded as morally reprehensible, than by that which is foreign and remote (culturally if not geographically).”¹²⁰ In addition, when the followers of that faith increase in numbers, the sincerity of the majority’s commitment to religious tolerance is put to the test. In those circumstances, religious liberty is not merely a high-minded ideal but begins to have real costs.

For many decades, as Professor John Esposito reminds us, “Islam had remained invisible on the cognitive maps of most Americans.”¹²¹ But today,

117. William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 311 (1991).

118. Sisk, *supra* note 17, at 1042.

119. *Id.* at 1042–43.

120. *Id.* at 1043.

121. John L. Esposito, *Foreword to MUSLIMS’ PLACE IN THE AMERICAN PUBLIC SQUARE*, *supra* note 61, at xi.

“Islam and Muslims represent the second largest religion in Europe and the third in North America.”¹²²

Accordingly, the emergence of Muslims in larger numbers and with greater prominence in American life is more likely to explain their impaired success in seeking religious accommodation than the simple fact that they are a minority and non-Judeo-Christian religion. Indeed, if being a follower of a minority religion alone was sufficient to undermine the prospects for a religious-liberty claim, we would expect to find that Jehovah’s Witnesses, practitioners of Native American religions, and others encountered similar difficulties. But in our primary models, save for Muslims and Black Separatists, no other religious-grouping variable reached, or even approached, a similarly negative statistical significance. In fact, as discussed in more detail in a companion Article, we found that claimants from two minority religious groups—Rastafarians and Buddhists—appeared to be *more* likely to succeed in bringing Religious Free Exercise/Accommodation claims, although we expressed doubts about the reliability of those findings.¹²³

In sum, American Muslims appear to be at a pronounced disadvantage in obtaining accommodations for religious practices in federal court *because* they are Muslims, and not because they fall into a broader category of adherents to minority religions. The unequal judicial treatment is felt by the members of this particular faith group, distinct from others. The crucial question remains as to what it is about the perceptions of Islam held by other Americans that is seen to justify excluding American Muslims from fully enjoying the benefits of religious accommodations that are extended to persons of other faiths.

2. The “Culture War: Traditionalist v. Secularist” Thesis

a. *From 1986 to 1995: Traditionalist Christians Less Likely To Succeed in Religious-Liberty Cases*

In our prior study of religious-liberty decisions dating from 1986 to 1995, we found that adherents to traditionalist religions, specifically Roman Catholics and Baptists, were significantly less likely to succeed in seeking religious accommodations in the federal courts.¹²⁴ Based on those results, “we suggest[ed] that the phenomenon of impaired success for claimants from these two religious communities may [best] be understood as part of what Thomas Berg describes as ‘a broader distrust of politically active social conservatives,’ which now includes both Catholics and evangelical Protestants.”¹²⁵

When orthodox Catholics and traditionalist Baptists, adhering to conservative social values and moral principles, resisted, for example,

122. *Id.*

123. Heise & Sisk, *Religion Before the Bench*, *supra* note 17, at 21–25.

124. Sisk, Heise & Morriss, *supra* note 17, at 564–66; Sisk, *supra* note 17, at 1037–38.

125. Sisk, Heise & Morriss, *supra* note 17, at 565 (quoting Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 *LOY. U. CHI. L.J.* 121, 122 (2001)).

government regulation of private schools or the application of gay rights ordinances in certain metropolitan areas, such claims “tend[] to be a shot right across the bow of the secular ship of state.”¹²⁶ Given that federal judges are drawn from the cultural elite, they may react with greater skepticism to claims by traditionalist Christians that raise familiar and controversial social and cultural challenges to the social-policy initiatives of secularist governments, especially in metropolitan areas which tend to lean liberal socially.

So now, with the benefit of additional empirical evidence from our latest study of decisions from 1996–2005, has the continuing national controversy over the nature and scope of religious liberty evolved into what one of us has called “a new conflict between the agenda of a liberal secular elite and the practices and values of traditional religious believers”?¹²⁷ And should a now more visible Islam join the ranks of the traditionalist American faiths that find themselves engaged in a cultural war with liberal and secularist political movements?

b. Muslim American Attitudes on Moral Values, Religion in Public Life, and Politics

As with Christianity and Judaism, Islam and its American followers are heterogeneous and multi-faceted. Any attempt to capsulize the nature of that faith and its followers in theology, religious practice, political ideology, and social attitudes will unavoidably mischaracterize by inevitable over-generalization. As Professors Matt A. Barreto and Dino N. Bozonelos remind us, Muslim Americans are “extremely diverse” in race, religious sect, language, nation of origin, and history within the United States.¹²⁸

Still, as with Christianity and Judaism, certain central tenets and common practices do draw together the broad sweep of those who believe in Islam, at least in its more orthodox form. Moreover, as Professor Aminah Beverly McCloud writes, given the challenges that the Islamic community encountered in the aftermath of 9/11, both newer (mostly immigrant) and older (native-born) American Muslims in their various communities are “coming together” with greater appreciation for each other and a heightened recognition of the need for community discourse and common understanding.¹²⁹ Islamic studies scholar Zafar Ishaq Ansari believes “there are strong reasons to expect an enhanced cohesiveness among American Muslims in the future.”¹³⁰ Importantly, when evaluating the dominant American perception of Islam and its adherents—which, in turn, may shed light on why Muslims may be disadvantaged in asserting religious-liberty

126. Sisk, *supra* note 17, at 1045.

127. *Id.* at 1024.

128. Matt A. Barreto & Dino N. Bozonelos, *Democrat, Republican, or None of the Above? The Role of Religiosity in Muslim American Party Identification*, 2 POL. & RELIGION 200, 211 (2009).

129. McCloud, *supra* note 62, at 82–83.

130. Ansari, *supra* note 61, at 261.

claims—those unifying Islamic themes (or, more accurately, perceptions of those themes) take center stage.

Many Muslim immigrants over the past two decades, especially those from the Middle East and South Asia, have come from and have retained their religiously traditionalist cultures.¹³¹ African Americans, constituting nearly one-third of American Muslims,¹³² are even more likely to hold to conservative religious and moral precepts.¹³³

Based on a 2007 survey by the Pew Research Center, a substantial majority of American Muslims (61%) believed that society should discourage homosexuality,¹³⁴ although that number fell to less than half (45%) in a 2011 survey.¹³⁵ An earlier 2001 poll found that substantial majorities of American Muslims opposed same-sex marriage (71%), approved greater restrictions on abortion (57%), and supported stricter regulation of pornography (65%).¹³⁶ Majorities of Muslims also supported prayer and display of the Ten Commandments in public schools.¹³⁷ As with Christians and Jews,¹³⁸ more religiously active Muslims are even more conservative in social and moral values.¹³⁹

Muslim Americans also generally support a vigorous public role for religiously grounded moral teachings, although they are more evenly divided on the proper role of religious institutions in the political realm. As the Pew Research Center reported in its 2007 survey, 59% of Muslim Americans believed the government should play a stronger role in protecting morality, while only 29% take the opposing position.¹⁴⁰ Yet, by a 49% to 43% margin, Muslims believed their mosques should stay out of politics.¹⁴¹ With respect to this divide, native-born Muslim-Americans, and

131. See Jalalzai, *supra* note 64, at 165.

132. *Id.* at 166.

133. See 2007 PEW MUSLIM AMERICANS, *supra* note 59, at 45 (“[N]ative-born African American Muslims stand out for their particularly high levels of opposition to homosexuality (75% say homosexuality should be discouraged).”).

134. *Id.* at 7.

135. 2011 PEW MUSLIM AMERICANS, *supra* note 103, at 59.

136. Ali A. Mazrui, *Muslims Between the Jewish Example and the Black Experience*, in MUSLIMS’ PLACE IN THE AMERICAN PUBLIC SQUARE, *supra* note 61, at 117, 143 n.23 (citing *American Muslim Poll: November/December 2001*, ZOGBY INT’L (Dec. 19, 2001), http://www.amp.ghazali.net/Zogby_Poll_Dec_2001-000.htm).

137. *Id.*

138. ANDREW KOHUT ET AL., *THE DIMINISHING DIVIDE: RELIGION’S CHANGING ROLE IN AMERICAN POLITICS* 4 (2000); William A. Galston, *Political Polarization and the U.S. Judiciary*, 77 UMKC L. REV. 307, 308 (2008).

139. See 2007 PEW MUSLIM AMERICANS, *supra* note 59, at 45–46; 2011 PEW MUSLIM AMERICANS, *supra* note 103, at 59–60.

140. 2007 PEW MUSLIM AMERICANS, *supra* note 59, at 45–46.

141. *Id.* at 46.

especially African-American Muslims, more strongly supported expression on the political issues of the day by mosques.¹⁴²

As Muslims become full-fledged participants in American democracy while still retaining their Islamic identity, they will almost surely be another voice for a healthy religious presence in the public square.¹⁴³ As a matter of both Islamic history and religious teaching, religion and government have long been intertwined,¹⁴⁴ as is historically true of other religions. As Professor Faisal Kutty puts it, “Islam envisions no separation between the temporal and the spiritual.”¹⁴⁵ Imad-ad-Dean Ahmad, President of the Minaret of Freedom Institute, introduces what he acknowledges is a “novel, and therefore controversial” argument in Muslim circles for the disestablishment of religion in sectors of public life.¹⁴⁶ At the same time, Ahmad emphasizes that “religion and politics cannot and should not be completely separated,” arguing that “citizens in a democratic government can and should bring their religious sensibilities to their positions on the issues.”¹⁴⁷

For Christians and Jews in the United States, a higher level of religious engagement is likewise associated with more conservative or traditional views on social and moral matters.¹⁴⁸ But while religiously active Christians and Jews are much more likely to affiliate with the Republican Party in national politics,¹⁴⁹ a substantial majority of American Muslims now identify

142. *Id.*

143. Professor Stephen Carter has defended the religious voice in the public square, complaining that “we often ask our citizens to split their public and private selves, telling them in effect that it is fine to be religious in private, but there is something askew when those private beliefs become the basis for public action.” STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 8 (1993). As the late Richard John Neuhaus wrote, “The alternative to the naked public square is not the sacred public square; it is the civil public square.” Richard J. Neuhaus, *Rebuilding the Civil Public Square*, 44 *LOY. L. REV.* 119, 132 (1998).

144. Imad-ad-Dean Ahmad, *American and Muslim Perspectives on Freedom of Religion*, 8 *U. PA. J. CONST. L.* 355, 363 (2006) (stating that “the notion of entanglement of state and religion in Muslim history” has been well “entrenched”); *see also* L. Ali Khan, *The Qur’an and the Constitution*, 85 *TUL. L. REV.* 161, 168 (2010) (“[T]he Qur’an does establish a spiritual normative order under which all systemic norms are subjected to God’s authority as embodied in the Qur’an.”).

145. Faisal Kutty, *The Myth and Reality of “Shari’a Courts” in Canada: A Delayed Opportunity for the Indigenization of Islamic Legal Rulings*, 7 *U. ST. THOMAS L.J.* 559, 577 (2010).

146. Ahmad, *supra* note 144, at 364.

147. *Id.*

148. For more on the emergence of a devotional divide between Republicans and Democrats, *see generally* Sisk & Heise, *Establishment Clause Decisions*, *supra* note 17, at 1231–38.

149. THE PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY: RELIGIOUS BELIEFS AND PRACTICES: DIVERSE AND POLITICALLY RELEVANT 19 (2008), *available at* <http://religions.pewforum.org/pdf/report2-religious-landscape-study-full.pdf> (“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.”).

themselves as Democrats, with only about 10% describing themselves as Republicans.¹⁵⁰

Because of widespread opposition by American Muslims to both the foreign policy of the Bush Administration following September 11, 2001, and the war in Iraq, as well as stronger support for government social welfare programs, Muslims have shifted from supporting Republican candidates to Democratic candidates in the last two presidential election cycles.¹⁵¹

While most Americans tend to be conservative or liberal on both social and governmental policies, Professor Farida Jalalzai cites the 2007 Pew Research Center Report in concluding that Muslim Americans “are relatively unique compared to the general population in their high degrees of liberalism on social welfare while being very conservative on issues of morality such as gay rights.”¹⁵² In fact, precisely because their perspectives on various issues do not neatly fit the platforms of either party, and even while majorities of Muslims have voted for Democratic presidential candidates, a large proportion of Muslims resist affiliation with either political party.¹⁵³ While devout Christians and Jews are more likely to affiliate with the Republican Party,¹⁵⁴ a focused survey finds that “Muslims who follow the [Qur’an] and Hadith very much in their daily life are over 30% more likely to select no political party as their partisan identification.”¹⁵⁵

Despite this difference in political leanings, socially conservative Muslims may encounter the same resistance from the liberal and secularist side of the cultural divide as have conservative Christians and Jews. As Professor Azizah al-Hibri writes, “a Muslim is committed to an integrated worldview,” thus rejecting the “compartmentalization theory” which confines religious faith to private life and excludes religiously based values from public life.¹⁵⁶ By contrast, “[t]he new sense of secularization is not *neutral* among religions,” says al-Hibri, “but rather *averse* to them.”¹⁵⁷ Writing specifically about intellectual movements, Professor Sherman Jackson predicts that Black Muslim Americans are especially likely “to promote a

150. 2011 PEW MUSLIM AMERICANS, *supra* note 103, at 53 (reporting that 70% of U.S. Muslims identify as Democrats, with only 11% as Republicans); 2007 PEW MUSLIM AMERICANS, *supra* note 59, at 7 (reporting that 63% of U.S. Muslims identify as Democrats, with only 11% as Republicans); 2009 GALLUP MUSLIM AMERICANS, *supra* note 59, at 20 (reporting 49% of Muslim Americans identify as Democrats, with only 8% as Republicans).

151. Barreto & Bozonelos, *supra* note 128, at 204–05.

152. Jalalzai, *supra* note 64, at 183.

153. Barreto & Bozonelos, *supra* note 128, at 220.

154. Sisk & Heise, *Establishment Clause Decisions*, *supra* note 17, at 1233–36.

155. Barreto & Bozonelos, *supra* note 128, at 220.

156. al-Hibri, *supra* note 99, at 1134, 1136.

157. *Id.* at 1131.

more critical stance . . . vis-à-vis the secularizing tendencies of Western thought.”¹⁵⁸

In sum, to borrow Professor Stephen Carter’s metaphor, like evangelical Christians, traditional Catholics, and Orthodox Jews, religiously devout Muslims refuse to treat their religion “as a hobby.”¹⁵⁹ As with many other religiously devout Americans, Muslims will instead conform their behavior to their faith and allow their faith to inform their views on matters of public concern.

c. From 1996 to 2005: The Traditionalist Christian Disadvantage Disappears

In our prior study of decisions from 1986 to 1995, as we noted, Catholics and Baptists were less successful than members of other religions in raising religious free-exercise claims in federal court.¹⁶⁰ We attributed this result to a greater tendency by traditionalist Christian claimants to resist application of various social welfare regulations and anti-discrimination laws to church-related institutions.¹⁶¹ Catholic and Baptist objections to application of employment discrimination laws against religious colleges, schools, and other institutions; Catholic entities’ resistance to application of labor bargaining laws; and Baptist challenges to safety and health regulation and other licensing of religious schools were among the most common claims.¹⁶² During this period, judges tended to view such regulatory measures and civil rights laws as serving especially compelling public interests.¹⁶³

Interestingly, however, the apparent difficulty in raising free-exercise claims that we observed among Catholics and Baptists in the 1986–1995 study has faded away to statistical insignificance in the present 1996–2005 study.

In this present study, we added another Case Type variable for claims asserting Exemption from Anti-Discrimination Laws, which accounted for 4.4% of the claims in our Religious Free Exercise/Accommodation data set. That new variable proved statistically significant at nearly the $p < .001$ (or 99.9% probability) level and in a positive direction. The substantive effect of the Exemption from Anti-Discrimination Laws variable was also powerful. When all other independent variables are held constant, the predicted probability that a religious organization would succeed before an individual judge on an exemption claim was 74.6%, while parties in other Religious Free

158. Sherman A. Jackson, *Preliminary Reflections on Islam and Black Religion*, in *MUSLIMS’ PLACE IN THE AMERICAN PUBLIC SQUARE*, *supra* note 61, at 201, 217.

159. *See* CARTER, *supra* note 143, at 29.

160. Sisk, Heise & Morriss, *supra* note 17, at 564.

161. Sisk, *supra* note 17, at 1045.

162. *Id.*

163. *Id.*

Exercise/Accommodation cases were likely to succeed at a rate of only 33.6%.¹⁶⁴

Between 1996 and 2005, the federal courts of appeals affirmed—and most extended—the longstanding “ministerial exception” to anti-discrimination laws, while also broadly construing statutory exceptions for religious employers.¹⁶⁵ Grounded in the First Amendment to the United States Constitution, the ministerial exception precludes lawsuits challenging a religious organization’s choice of employees who perform religious functions, including the primary minister, priest, rabbi, or imam, and increasingly other employees with religious worship or religious teaching responsibilities.¹⁶⁶

In *Hosanna–Tabor Evangelical Lutheran Church & School v. EEOC*, decided in early 2012, the Supreme Court confirmed the constitutional foundation of the ministerial exception, holding that it precluded an employment discrimination suit against a religious school by a teacher who had the title and responsibilities of a minister.¹⁶⁷ Although the majority stated that the “ministerial exception is not limited to the head of a religious congregation” and that a “rigid formula” should not be applied, the Court did not clearly indicate the scope of the exception as applied to other employees of a religious organization who are not formally commissioned as ministers.¹⁶⁸

Accordingly, with the solidification and frequent expansion of the ministerial exception in the lower federal courts between 1996 and 2005, traditionalist religious organizations that were accused of discriminatory employment practices were no longer at a disadvantage. For that reason alone, perhaps, the poor prospects of traditionalist Christians that we observed in our prior study have seemingly disappeared.

164. For further discussion of traditionalist Christians as claimants and the Exemption from Anti-Discrimination Laws Case Type variable, see Heise & Sisk, *Religion Before the Bench*, *supra* note 17, at 24–27.

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

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

167. *Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705–10 (2012).

168. *Id.* at 707.

d. No Evidence that the Muslim Disadvantage Is Due to Traditionalist Nature of Islam

Might our finding that Muslims alone now suffer a meaningful disadvantage in asserting Religious Free Exercise claims indicate that a cultural antipathy to traditionalist religions has emerged in another context? In terms of resistance to liberal secular social policy, have Muslims become the new Catholics and Baptists? Given the nature of religious-liberty cases involving Muslim claimants, we do not believe the evidence from our present study can support that conclusion.

Although the claims by Muslims for recognition of their religious free-exercise rights do arise in a variety of contexts in our data set, including challenges to regulations, assertion of free-expression rights, zoning disputes, and employment discrimination, nearly three-quarters (74.7%) of the observations involving Muslims in our data set are claims by prisoners. Prisoner claims do not raise the kinds of challenges to secular social welfare and anti-discrimination laws that present a direct conflict with traditional moral teachings as did the claims of Baptists and Catholics that we examined in our prior study. Non-prisoner claims by Muslims, of which the largest share are employment discrimination cases against the federal government, did not consistently involve the kinds of disputes that bring traditionalist beliefs into conflict with government regulations or equality directives. Indeed, in contrast with the continued frequency of claims by traditionalist Christians for exemption from anti-discrimination laws, not a single one of the Muslim claims in this study fell into that category.

In the final analysis, then, the so-called “Culture War” between religious traditionalists and secular liberals did not connect with the types of religious-liberty claims being presented by Muslims to the federal courts in our study. The traditionalist moral beliefs of Muslims may well clash with liberal secularism and may impair their claims for religious liberty in other political settings or judicial venues.¹⁶⁹ Or perhaps Muslims will escape from being recruited into one side or the other in the ongoing “Culture War.”

In any event, the great majority of Muslim claims in our study cannot be categorized as conflicts between traditionalist values and secular public policies. Whether or not Muslim integration into American society is affected by general controversies over social and moral issues, our study provides no evidence of any such effect in federal religious-liberty litigation.

¹⁶⁹ See generally Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 CARDOZO L. REV. 1755, 1779 (2011) (arguing that religious liberty generally “is being slowly eroded by the forces of secularization and by the decline of traditional religious understandings,” because the strong “religious-moral foundation of religious liberty” has been undermined and the weaker “political-pragmatic justification for religious liberty” may “lead to a far less generous regime of religious liberty and, eventually, the complete demise of religious liberty as a distinctive constitutional or legal right”).

3. The “Muslims Deserve To Lose” Thesis

Religious communities have contrasting doctrines, promote diverse theological and moral values, have different expectations for their members, and generate a variety of conflicts with government entities and rules. Perhaps, one reasonably might inquire, Muslim claimants lose at a disproportionate rate in the lower federal courts because their particular claims of Religious Free Exercise/Accommodation are simply weaker or different in nature than those presented by members of other religious communities. In other words, one might postulate that to compare the success of Muslim claimants to, say, Catholic or Native American claimants, is to compare apples and oranges, such that disparities in outcome rates have no substantive meaning and tell us nothing about judges or their attitudes toward religious groups.

The ideal study of judicial decision-makers would examine the identical case or specific question being simultaneously decided by a large set of judicial actors. Such a natural experiment rarely presents itself in the real world.¹⁷⁰ Instead, nearly all empirical studies of courts and judges involve large data sets of judicial rulings that encompass a multitude of different cases, each of which presents circumstances, parties, arguments, and dynamics that are to some extent unique to that case.

If that unavoidable starting point for empirical examination of judicial decision-making disqualifies such studies, then nearly every attempt to explore judicial behavior by quantitative measures simply dies aborning. Some critics of the empirical study of judicial decision-making undoubtedly would endorse that diagnosis of still-birth. We think the better response is to do what is possible in planning and conducting an empirical study of judges or courts to anticipate, measure, and control for meaningful differences among the cases and decisions under study, while acknowledging the limits and uncertainties inherent in such a study. Researchers then should conduct follow-up and alternative studies to see if findings in one study are confirmed or undermined by other studies.

Moreover, with respect to the merits of each case, the kinds of disputes that are resolved by a written opinion by a federal judge typically involve plausible claims and defenses by each side. Precisely in such circumstances, statistical analysis of a larger set of decisions provides the opportunity to search for patterns that might not be discernible in the individual case and influences that may not be conscious to an individual decision-maker.

170. We have been fortunate in the past to study “such a natural laboratory, or something quite close to it,” when “[t]he equivalent of a single case was presented to hundreds of federal district court judges” who had to resolve constitutional challenges to the new federal sentencing guidelines system in 1988. 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, 1381 (1998). Such an opportunity, however, may come only once in a researcher’s lifetime.

Uncovering such patterns by piercing through a fog of multiple factors and variables is one of the great values of empirical research.

In the present study, several factors mitigate (but can never entirely eliminate) the risk that we are comparing apples and oranges to no productive end: First, as noted, our study examines only digested written opinions by federal district and court of appeals judges. If the followers of a specific religious tradition are prone to present frivolous claims, those should be weeded out before reaching the stage where the judge has issued a written ruling. For this reason, among the set of non-frivolous claims for religious free exercise and accommodation that result in a written opinion, if Muslims still fare worse than other claimants, as we have found in this study, then something other than obvious lack of merit presumably explains the result.¹⁷¹

Second, both this and our prior study of religious-liberty decisions include a set of written decisions spanning a full decade. The effect of episodic but short-lived trends in religious-liberty litigation and the type of claims made should dissipate over the course of that time period. By including a larger number of cases for analysis over a longer time sweep, the idiosyncratic elements of any peculiar or atypical case should be submerged into the greater mass of rulings and variables.

Third, to the extent that Muslim claimants tended to litigate as individuals, while many other religious-liberty claims were brought by institutions, we adjusted the model in the present study to separate out that effect by adding a dummy “Institutional Religious Claimant” variable. Churches, dioceses, parishes, synagogues, mosques, religious-affiliated hospitals and universities, and other religious organizations were coded as institutional claimants. In this way, we control in part for the perhaps greater credibility and community standing of religious organizations, as well as their presumably greater access to litigation resources, which also may result in better framing of institutional claims through superior legal representation.¹⁷²

Religious groups represented in our study varied greatly on whether claims were presented to the courts predominately by institutions or by individuals. More than three-quarters (75.5%) of claims by Mainline

171. See Pat K. Chew & Luke T. Kelley-Chew, *The Missing Minority Judges*, 14 J. GENDER RACE & JUST. 179, 186–87 (2010) (rejecting “The Simple Explanation” that the poor success rate for Asian-American plaintiffs in racial harassment cases is because “Asian-American plaintiffs have weak cases on the merits,” observing that the procedural and legal obstacles to bringing a case to disposition in litigation likely means that “cases that reach this stage of litigation would be strong rather than weak on the merits”).

172. Some legal scholars have called for a “more institution-sensitive understanding of the Religion Clauses,” Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 291 (2008), and have asked whether “religious entities occupy a distinctive place in our constitutional order,” Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 92 (2002).

Protestants and more than one-third (36.9%) of claims by Catholics were brought by institutions, whereas the vast majority of claims by Muslims (97.8%) and Native Americans (93.2%) were brought by individual believers. In our primary model, the Religious Institutional Claimant variable was significant and in the positive direction as hypothesized, although the variable was not marginally significant in the secondary model or the alternative models using party as a proxy for judicial ideology. Still, given that we included the variable as a control to account in part for the effects of organizational support and litigation resources, separate from the religious identity of claimants, these results confirm the wisdom of adding such a control variable to our model.

Finally, we included case-type control variables to ensure that any relationship observed was not an artifact of a particular type of case. As Professors Donald Songer and Susan Tabrizi explain, “integrated models will be incompletely specified unless they include the particular case facts that are most relevant for the type of cases examined.”¹⁷³

Because 74.7% of the claims raised by Muslims in our data set arose in the prison context, some will understandably wonder whether the litigation disadvantage we discovered is attributable to this particular case type as a proxy for merit-deficit. Some might be tempted to dismiss our study as simply replicating in larger numbers the traditional inhospitality of the courts to “a Muslims-in-prison case.”¹⁷⁴

In *Cutter v. Wilkinson*, involving a prisoner claim under the Religious Land Use and Institutionalized Persons Act, the Supreme Court noted that Congress “anticipated that courts would apply the Act’s standard [for evaluating burdens on religious practice] with ‘due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.’”¹⁷⁵ Thus, under one possible categorical approach to the often conflicting themes in Supreme Court religious-liberty doctrine, prisoner claims may fit into those “clusters of cases dealing with failed free exercise claims.”¹⁷⁶

For several reasons, conjectures about the lack of merit to religious-liberty claims by prisoners in general, and by Muslims in particular, are

173. Donald R. Songer & Susan J. Tabrizi, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. POL. 507, 511 (1999).

174. See Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 261 (admonishing that “a long line of Supreme Court decisions rejecting free exercise claims could each be satisfactorily explained to most Americans by simply referencing the appropriate buzz words,” including “a Muslims-in-prison case” (citing *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987))).

175. *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) (quoting 146 CONG. REC. 16,698, 16,699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy)).

176. WITTE, *supra* note 87, at 146–47.

belied by the empirical evidence. As we found in both this and our prior study, prisoner claims in general are not less likely to succeed in court, at least if those cases persevere to final written decisions. Moreover, the type of claims typically raised by Muslim prisoners in our study—for prayer space or dietary accommodation¹⁷⁷—do not implicate special security or penological concerns.

Most importantly, even controlling for the “prisoner effect”—the supposition that claims by prisoners are likely to be perceived as less meritorious—by removing all prisoner cases from the study, the Muslim disadvantage remains significant in Religious Free Exercise/Accommodation claims. In sum, prisoner cases are not driving the impaired success of Muslim claimants in religious-liberty cases.

Given the unique setting of a prison, the special security concerns of prison administrators and guards, the potentially dangerous nature of prisoners, and the necessary loss of freedom that follows a criminal conviction, one might understandably expect that judges would approach prisoner claims with greater skepticism and thus that the success rate of prisoners in requesting religious accommodations would be low. But despite arguments for treating prisoner claims more skeptically and extending greater deference to prison administration in regulating prison life, the lower federal courts in written decisions do not appear to reject prisoner claims at a higher rate than other types of religious-liberty claims.

In our prior 1986–1995 study, while 35.6% of Religious Free Exercise/Accommodation claimants overall were favorably received by judges, the success rate among prisoners on such claims was higher, at 40.2%—a difference in outcome rate that was not statistically significant.¹⁷⁸ Moreover, when we conducted a focused regression analysis excluding all prisoner cases, the results remained remarkably similar to those from the primary model.¹⁷⁹

For the 1996–2005 study, the success rate of prisoners of all religious affiliations (most of whom were not Muslims) asserting Religious Free Exercise/Accommodation claims was 33.0%. When compared to the overall success rate of 35.5% for claimants in all case types, the slightly lower success rate for prisoner claims was, again, statistically insignificant.

In sum, in raising Religious Free Exercise/Accommodation claims, prisoners did not face greater resistance from the federal courts, at least in our data set of cases resulting in a written decision. Indeed, in our current study, the Prisoner case-type category control variable is statistically significant ($p < .01$ or the 99% probability level) in a *positive* direction. Thus,

177. See U.S. COMM’N ON CIVIL RIGHTS, ENFORCING RELIGIOUS FREEDOM IN PRISON 23 (2008) [hereinafter CIVIL RIGHTS PRISON REPORT], available at <http://www.usccr.gov/pubs/STAT2008ERFIP.pdf> (reporting that religious diet claims were 44.4% of religious grievances filed administratively in federal prisons, while 55.5% involved access to religious programs).

178. Sisk, Heise & Morriss, *supra* note 17, at 561.

179. *Id.*

our results do not suggest that, in general, prisoner claimants are predetermined to fail—rather, we find that incarcerated Muslim claimants are the true losers.

One might next query whether Muslims as a class of prisoners are rightly treated differently, for reasons of substance rather than their mere religious identity. Perhaps, some might suggest, the dominant Muslim sects in prison culture may be more dangerous or preach violence and hatred, thereby justifying tighter penal restrictions for legitimate security reasons.

Over the past decade, the nation has become increasingly aware that extremist groups, from racial supremacists and right-wing anti-government groups to radical environmentalists, have established a foothold within prisons and seek to recruit prisoners to their various causes.¹⁸⁰ Some fear that radical Islamic groups tied to international terrorism have succeeded in recruiting inmates to their extremist brand of Islam.¹⁸¹ Reports warn that inmates leading worship, without supervision by trained Islamic chaplains, “preach[] a breed of ‘Prison Islam’ that distorts Koranic teaching to promote violence and gang loyalty.”¹⁸² Others, however, including the leader of the prison chaplains’ organization, argue that “reports of prisons being infiltrated by terrorists or terrorist organizations via prison religious programs . . . have been blown way out of proportion.”¹⁸³

While the presence of extremist sects of Islam in prison cannot be denied, the Office of the Inspector General of the Department of Justice reported in 2004 that 85% of Muslims in federal prison are Sunni or NOI¹⁸⁴ and did not find that a substantial number of these are attracted to Wahhabism (an extreme and exclusionary branch of Islam linked by some to terrorism).¹⁸⁵ Federal prison chaplains predicted that “strict Wahhabism would not survive in prisons because it is too exclusionary to appeal to the

180. ANTI-DEFAMATION LEAGUE, DANGEROUS CONVICTIONS: AN INTRODUCTION TO EXTREMIST ACTIVITIES IN PRISONS 5–6 (2002), available at http://www.adl.org/learn/ext_terr/dangerous_convictions.pdf.

181. Waller Testimony, *supra* note 106.

182. *Primary Sources: “Prison Islam,”* ATLANTIC (Sept. 2004), <http://www.theatlantic.com/magazine/archive/2004/09/primary-sources/303427/>.

183. *Terrorism: Radical Islamic Influence of Chaplaincy of the U.S. Military and Prisons: Hearing Before the Subcomm. on Terrorism, Tech. & Homeland Sec. of the S. Comm. on the Judiciary*, 108th Cong. (2003) (testimony of Paul E. Rogers, President, American Correctional Chaplains Association), available at <http://www.judiciary.senate.gov/hearings/hearing-search.cfm> (select hearing year “2003” and search witness testimony for “Rogers”; then follow “Mr. Paul Rogers” hyperlink).

184. U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE FEDERAL BUREAU OF PRISONS’ SELECTION OF MUSLIM RELIGIOUS SERVICES PROVIDERS 5 (2004) [hereinafter *OIG REVIEW*], available at <http://www.justice.gov/oig/special/0404/final.pdf>.

185. See Stephen Seymour, Note, *The Silence of Prayer: An Examination of the Federal Bureau of Prisons’ Moratorium on the Hiring of Muslim Chaplains*, 37 COLUM. HUM. RTS. L. REV. 523, 527–28 (2006).

inmates.”¹⁸⁶ A senior official from the Federal Bureau of Prisons “said that he does not believe there is widespread terrorist radicalization or recruiting occurring in [federal prisons].”¹⁸⁷ A special report by the Homeland Security Policy Institute at George Washington University and the Critical Incident Analysis Group at the University of Virginia found that radicalization “remains the exception among prisoners rather than the rule.”¹⁸⁸

In sum, while we should take seriously the problem of prisoner radicalization, we should be loath to paint the majority of Muslim inmates with the brush of Islamic extremism.

In any event, before we could conclude that the Muslim prisoner disadvantage in religious-liberty litigation is justified by weaker quality on the merits, we would have to carefully examine the nature of claims actually raised seeking Religious Free Exercise/Accommodation. We would need to determine whether the claims as framed in court documents are infected by extremism and whether the accommodations requested are excessive by comparison. A Muslim prisoner with otherwise extreme religious views who seeks basic worship opportunities or asks to avoid pork and receive meals containing halal meat presumably ought not be treated any differently by a court than a prisoner of moderate Islamic views or a Christian or Jew who seeks a place to pray or a religiously mandated diet.

In our data set, the most common claims Muslim prisoners made were simple requests, such as prayer space¹⁸⁹ and dietary accommodations.¹⁹⁰

186. OIG REVIEW, *supra* note 184, at 9.

187. *Id.* at 7.

188. GEORGE WASHINGTON UNIV., HOMELAND SEC. POLICY INST. & UNIV. OF VA. CRITICAL INCIDENT ANALYSIS GRP., OUT OF THE SHADOWS: GETTING AHEAD OF PRISONER RADICALIZATION, at iv, 14 (2006) [hereinafter PRISONER RADICALIZATION], available at www.gwumc.edu/hspi/policy/PrisonerRadicalization.pdf.

189. See, e.g., Abdul-Matiyn v. Coughlin, 24 F. App'x 97 (2d Cir. 2001); Jones v. Roth, 950 F. Supp. 254 (N.D. Ill. 1996); Counts v. Newhart, 951 F. Supp. 579 (E.D. Va. 1996), *aff'd*, 116 F.3d 1473 (4th Cir. 1997).

190. See, e.g., Jackson v. Hill, 128 F. App'x 595 (9th Cir. 2005); McEachin v. McGuinnis, 357 F.3d 197 (2d Cir. 2004); Ford v. McGinnis, 352 F.3d 582 (2d Cir. 2003); Williams v. Morton, 343 F.3d 212 (3d Cir. 2003); Davis v. Clinton, 74 F. App'x 452 (6th Cir. 2003); Kind v. Frank, 329 F.3d 979 (8th Cir. 2003); Makin v. Colo. Dep't of Corr., 183 F.3d 1205 (10th Cir. 1999); Mack v. O'Leary, 80 F.3d 1175 (7th Cir. 1996), *vacated*, 522 U.S. 801 (1997); Eason v. Thaler, 73 F.3d 1322 (5th Cir. 1996); Hudson v. Maloney, 326 F. Supp. 2d 206 (D. Mass. 2004); Brown v. Johnson, No. 98-CV-6260CJS(F), 2003 WL 360118 (W.D.N.Y. Feb. 14, 2003); Majid v. Wilhelm, 110 F. Supp. 2d 251 (S.D.N.Y. 2000); Muhammad v. Warithu-Deen Umar, 98 F. Supp. 2d 337 (W.D.N.Y. 2000); Denson v. Marshall, 59 F. Supp. 2d 156 (D. Mass. 1999), *aff'd*, 230 F.3d 1347 (1st Cir. 2000); Abdullah v. Fard, 974 F. Supp. 1112 (N.D. Ohio 1997), *aff'd*, 173 F.3d 854 (6th Cir. 1999). While economic challenges in providing halal meats in prison locations far from areas with large Muslim American populations could explain the reluctance of prison authorities to make such accommodations, those logistical arguments were rarely asserted in court. When those arguments were presented, however, administrative or economic burdens proved surprisingly successful as defenses to religious-liberty claims by prisoners in court, even when used to justify discriminatory treatment of Muslims compared to others requesting a restricted-religious diet. See *Williams*, 343 F.3d at 217–22 (approving denial

As Senators Orrin Hatch and Edward Kennedy said in support of the Religious Land Use and Institutionalized Persons Act¹⁹¹: “It is well known that prisoners often file frivolous claims; it is less well known that prison officials sometimes impose frivolous or arbitrary rules.”¹⁹²

Most importantly, the Muslim disadvantage in raising Religious Free Exercise/Accommodation claims in federal court is not confined to the prison setting (pun intended). Even when we excluded prisoner cases altogether from the analysis and conducted a separate multivariate regression analysis of all other case types, Muslims remained statistically significant and negatively correlated with the outcome dependent variable—with the significance of the Muslim variable increasing to the $p < .01$ or 99% probability level.

In Figure 4, we present a comparison of predicted success rates for Muslims as compared to non-Muslims in both Prisoner and Non-Prison cases, holding all other explanatory variables constant.¹⁹³ Muslims are predicted to succeed before a federal judge at a rate of 15.5% in Prisoner cases and 17.9% in Non-Prison cases.¹⁹⁴ By contrast, non-Muslims are predicted to succeed before a federal judge at a rate of 44.8% in a Prisoner case and 37.3% in a Non-Prison case.¹⁹⁵ Thus, a Muslim prisoner raising a Religious Free Exercise/Accommodation claim has only about a third the chance for success as a non-Muslim prisoner, while Muslims raising claims

of halal meats to hundreds of Muslim prisoners based on security, administrative, and budgetary burdens, while noting that there was no evidence that kosher meals in the prison included meat); *Fard*, 974 F. Supp. at 1115 (denying halal meals to Muslim prisoners, despite kosher meals being provided to Jewish prisoners because “[t]he number of inmates demonstrating a need for such meals is small and [the prison] is able to meet the demand for kosher food for those few inmates at reasonable cost from outside suppliers”).

191. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5 (2006).

192. 146 CONG. REC. 16,698, 16,699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy).

193. In these case-type-differentiated regression analyses, a few claimant religion variables were dropped from analysis because they lacked variation due to perfect prediction of failure (Baptists, Seventh-Day Adventists, and Christian Variation in Prisoner cases; and Black Separatists, Buddhists, and White Separatists in Non-Prison cases). In addition, the Case Type control variables were necessarily omitted. Although the number of observations excluded in each regression run was small (6 out of 569 observations lost in Prisoner cases and 19 out of 1062 observations lost in Non-Prison cases), the omission of these and the Case Type control variables make these incompletely specified models. Accordingly, these predictions of effect size are somewhat less reliable than the overall predictions presented in Figures 2 and 3 in Part III.B.

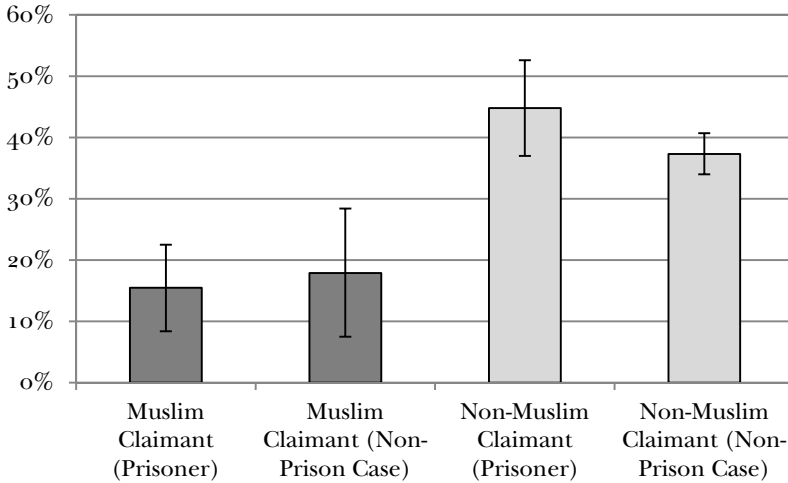
194. The 95% confidence interval for predicted success rate by a Muslim claimant in a Prisoner case ranges from 8.4% to 22.5%. The 95% confidence interval for predicted success rate by a Muslim claimant in a Non-Prison case ranges from 7.5% to 28.4%.

195. The 95% confidence interval for predicted success rate by a non-Muslim claimant in a Prisoner case ranges from 37.0% to 52.6%. The 95% confidence interval for predicted success rate by a non-Muslim claimant in a Non-Prison case ranges from 34.0% to 40.7%.

outside the prison setting succeed at a rate only about half that of non-Muslim religious-liberty claimants.

FIGURE 4

PREDICTED PROBABILITY THAT A CLAIMANT WILL SUCCEED ON A RELIGIOUS FREE EXERCISE/ACCOMMODATION CLAIM, BY MUSLIM IDENTITY AND BY TYPE OF CASE (PRISONER V. NON-PRISON)



In sum, Muslims still suffer a significantly and substantially diminished success rate in federal court, even setting aside claims made by prisoners and focusing instead on challenges to regulations, demands for protection of religious expression, objections to zoning laws, allegations of employment discrimination by the federal government as an employer, defenses to criminal charges, and others.

4. The “Islam Viewed as Dangerous” Thesis: Perceptions and Realities About American Muslims

The most obvious explanation for the Muslim disadvantage in asserting claims in federal court for accommodation of Islamic religious beliefs is, in our view, the one most likely to be correct. Beginning with the Islamic revolution in Iran and terrorist episodes during the 1970s and 1980s, and then accelerating through the terrorist attacks on the United States in 2001, Islam has been made “a target in the eyes of mainstream America.”¹⁹⁶ As Professor Richard Schragger writes, “[i]mmediately after 9/11, the idea that Islam was a fundamentally violent and depraved religion that needed to be

196. Barreto & Bozonelos, *supra* note 128, at 212.

opposed by right-thinking Americans took hold, and continues to be asserted by relatively mainstream figures.”¹⁹⁷

Pejorative news stories suggesting that Muslims in the West were cultural invaders and sought to coercively impose “Sharia law”¹⁹⁸ further “fueled ‘moral panic.’”¹⁹⁹ Sociologist Stanley Cohen, who originated the term, defines “moral panic” as when a “condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests [and] its nature is presented in a stylized and stereotypical fashion.”²⁰⁰

The negative image of Islam and its followers in America, sadly accepted by a substantial segment of our society, bears little resemblance to reality. As reported by the Pew Research Center in 2007:

A comprehensive nationwide survey of Muslim Americans finds them to be largely assimilated, happy with their lives, and moderate with respect to many of the issues that have divided Muslims and Westerners around the world. Muslim Americans are a highly diverse population, one largely comprised of immigrants. Nonetheless, they are decidedly American in their outlook, values, and attitudes. Overwhelmingly, they believe that hard work pays off in this society. This belief is reflected in Muslim American income and education levels, which generally mirror those of the general public.²⁰¹

Muslims have entered into mainstream America, energetically participating in the marketplace and social life. Based on a comprehensive survey of mosque leaders, Professor Ihsan Bagby reports the “virtually unanimous view (96 percent)” among mosque leaders that Muslims should be “involved in

197. Richard Schragger, *The Politics of Free Exercise After Employment Division v. Smith: Same-Sex Marriage, the “War on Terror,” and Religious Freedom*, 32 CARDOZO L. REV. 2009, 2011–12 (2011).

198. See Aziz Z. Huq, *Private Religious Discrimination, National Security, and the First Amendment*, 5 HARV. L. & POL’Y REV. 347, 347–50 (2011) (describing 2010 ballot initiative in Oklahoma to ban the use of “Sharia law” in court, to oppose the supposed intent of Muslims to bring all of Americans under Sharia law, as a campaign “to translate [private] animus into official form”); Joel A. Nichols, *Religion, Marriage, and Pluralism*, 25 EMORY INT’L L. REV. 967, 967–69, 971–73, 977–78 (2011) (stating that “Muslims are also on the receiving end of a great deal of cultural antipathy,” providing numerous examples, including the anti-Sharia law movement).

199. Kuty, *supra* note 145, at 566–67 (discussing how a proposal in Ontario, Canada for Muslims to use arbitration laws to voluntarily resolve family disputes by religious principles was misrepresented in the media as an effort to establish “new ‘Shari’a Courts’ with coercive powers to force all Muslims to arbitrate using Islamic laws”).

200. STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* 9 (1980).

201. 2007 PEW MUSLIM AMERICANS, *supra* note 59, at 1.

American society—they do not envision a community isolated from the American society.”²⁰²

A larger percentage of Muslims (71% in 2007, 74% in 2011) than the general American public (64% in 2007, 62% in 2011) has adopted the strong work ethic that is iconic of the “American way”—believing people can move ahead through hard work and determination.²⁰³ Evidencing their educational success, 86% of American Muslims, both men and women, work in three fields: engineering and electronics, computer science and data processing, and medicine.²⁰⁴

Muslim American women are especially highly educated when compared with other faiths, second only to Jewish women, and Muslim Americans have the highest level of gender pay equity.²⁰⁵ About half of Muslim Americans report having close friends from outside the Islamic faith.²⁰⁶ Overall, more than three-quarters of Muslims in the United States report that they are happy or satisfied with their lives.²⁰⁷ A very recent poll found that, among all religious groups, Muslim Americans are the most optimistic about their future.²⁰⁸

Attributable in part to their greater social and economic integration—having achieved income and education levels comparable to those of other Americans, unlike the persistent poverty and unemployment experienced by Muslim immigrants in Europe²⁰⁹—American Muslims are much more likely than their European counterparts to repudiate Islamic extremism.²¹⁰ Only 5% have a favorable view of Al Qaeda, and only 1% believes that suicide bombings are often justifiable to defend Islam, with only 7% saying they are sometimes justifiable.²¹¹ To be sure, even a small radical minority is cause for concern and appropriate vigilance. But that is true of other demographic groups in American society as well. We must remember that the most horrific home-grown terrorist attack on the United States was the Oklahoma

202. Ihsan Bagby, *The Mosque and the American Public Square*, in MUSLIMS’ PLACE IN THE AMERICAN PUBLIC SQUARE, *supra* note 61, at 323, 325.

203. 2007 PEW MUSLIM AMERICANS, *supra* note 59, at 2, 30; 2011 PEW MUSLIM AMERICANS, *supra* note 103, at 40.

204. Ba-Yunus & Kone, *supra* note 102, at 317–18.

205. 2009 GALLUP MUSLIM AMERICANS, *supra* note 59, at 11, 56–57.

206. 2007 PEW MUSLIM AMERICANS, *supra* note 59, at 2; 2011 PEW MUSLIM AMERICANS, *supra* note 103, at 35.

207. 2007 PEW MUSLIM AMERICANS, *supra* note 59, at 29; 2011 PEW MUSLIM AMERICANS, *supra* note 103, at 37.

208. ABU DHABI GALLUP CTR., MUSLIM AMERICANS: FAITH, FREEDOM, AND THE FUTURE 13 (2011) [hereinafter GALLUP MUSLIMS FUTURE], available at <http://www.gallup.com/strategicconsulting/153611/REPORT-Muslim-Americans-Faith-Freedom-Future.aspx>.

209. See 2007 PEW MUSLIM AMERICANS, *supra* note 59, at 3, 18–19.

210. See *id.* at 53–55.

211. 2007 PEW MUSLIM AMERICANS, *supra* note 59, at 5, 53–54; 2011 PEW MUSLIM AMERICANS, *supra* note 103, at 65–66.

City bombing in 1995—perpetrated by a white supremacist.²¹² Indeed, the most recent Gallup poll found that, among all major religious groups in America, Muslims are least likely to believe that an attack on civilians could ever be justified.²¹³

Followers of Islam support a stronger role for religious, or at least religiously based, moral teachings in public life (59%),²¹⁴ in which they differ not at all from evangelical Christians and conservative Catholics and Jews, as well as 37% of the American general public.²¹⁵ Indeed, a higher percentage of Christians (54%) than Muslims (43%) think religious institutions should express political views.²¹⁶

Just under half of American Muslims say they think of themselves as Muslim first and American second, but a similar proportion of Christians identify themselves primarily as Christian before American.²¹⁷ Indeed, a devout religious believer will likely regard the precepts of God and the unity of God's children as having a greater call on the believer than the ordinances of man and the structures of nationality.²¹⁸ Christian civil rights leader Martin Luther King, Jr. famously wrote in his *Letter from Birmingham City Jail* in 1963 that “one has a moral responsibility to disobey unjust laws” that do not square with “the law of God.”²¹⁹ Former British Lord Chancellor Thomas More, who was executed by King Henry VIII in 1535 for refusing to take an oath to the King's supremacy over the church, perished as “the King's good servant, but God's first.”²²⁰ (More was pronounced the patron saint of politicians and lawyers by Pope John Paul II in 2000.)²²¹ Thus, giving priority of place to one's faith and religious identity, over ethnic and

212. See Lois Romano & Tom Kenworthy, *McVeigh Guilty on All 11 Counts*, WASH. POST (June 3, 1997), <http://www.washingtonpost.com/wp-srv/national/longterm/oklahoma/stories/guilty2.htm> (describing Timothy McVeigh's conviction and adoption of a white supremacist novel calling for the violent overthrow of the government as his “political bible”). On the McVeigh case generally, see *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998) (affirming conviction and death sentence for Timothy McVeigh in 1995 bombing of Oklahoma City federal building).

213. GALLUP MUSLIMS FUTURE, *supra* note 208, at 6, 31.

214. 2007 PEW MUSLIM AMERICANS, *supra* note 59, at 7.

215. *Id.*

216. *Id.* at 8.

217. 2007 PEW MUSLIM AMERICANS, *supra* note 59, at 31; 2011 PEW MUSLIM AMERICANS, *supra* note 103, at 34.

218. See Omar Khalidi, *Living as a Muslim in a Pluralistic Society and State: Theory and Experience*, in MUSLIMS' PLACE IN THE AMERICAN PUBLIC SQUARE, *supra* note 61, at 38, 65 (encouraging Muslim parents to “[i]nculcat[e] the idea that Islam is beyond time, space, and ethnic and national identities”).

219. Martin Luther King, Jr., *Letter from Birmingham City Jail* (1963), in THE AMERICAN READER 568, 571 (Diane Ravitch ed., 2d ed. 2000).

220. PETER ACKROYD, THE LIFE OF THOMAS MORE 394 (1998) (last words before his execution (July 6, 1535)).

221. GEORGE WEIGEL, WITNESS TO HOPE: THE BIOGRAPHY OF POPE JOHN PAUL II 866 (Harper Perennial ed. 2005).

national allegiances, has a long and honored tradition in Anglo-American history.

Unfortunately, as every scholar, and especially every empirical researcher, recognizes, popular public perceptions do not always coincide with the reality confirmed by evidence beyond the anecdotal. In 2010, the Pew Research Center found that more Americans harbored an unfavorable view (38%) of Islam than a favorable one (30%).²²² In 2009, a Gallup poll found a majority of Americans had either a “not too favorable” or “not favorable at all” attitude toward Islam.²²³ In 2010, the margin between Americans who reject and those who accept the proposition that Islam is more likely than other religions to encourage violence was only 7% (42% reject to 35% accept).²²⁴ By the following year, the margin had slipped to only two percent (42%–40%).²²⁵ In 2004, Cornell University’s Media and Society Research Group reported that 44% of Americans believed that, to protect against terrorism, the government should “curtail civil liberties for Muslim Americans” in the United States.²²⁶ Professor Aminah Beverly McCloud worries that the tragic events of 9/11 have “hardened further the hearts of those who see Islam and Muslims as a threat to the ‘freedoms, rights, and peacefulness’ of the United States.”²²⁷

The remaining question and the subject of the next Part of this Article is whether the persistent uneasiness of many Americans about Islam and its followers has filtered into the attitudes of federal judges and affected rulings on religious-liberty claims. If so, as we suggest below, then the country faces a new threat to religious liberty.

V. OF TIDES AND CURRENTS: FEDERAL JUDGES AND ATTITUDES ABOUT ISLAM IN AMERICA

When adherents to Islam turn from ineffective or unraveling accommodations in the political realm and assert constitutional or parallel statutory claims for the free exercise of their religion, the courts responding to those claims are, of course, populated by human beings. The men and women who preside over those cases are as human as the rest of us, hardly immune from “[t]he great tides and currents which engulf the rest of

²²². *Public Remains Conflicted over Islam*, PEW RESEARCH CTR. (Aug. 24, 2010), <http://pewresearch.org/pubs/1706/poll-americans-views-of-muslims-object-to-new-york-islamic-center-islam-violence>.

²²³. THE MUSLIM WEST FACTS PROJECT, RELIGIOUS PERCEPTIONS IN AMERICA: WITH AN IN-DEPTH ANALYSIS OF U.S. ATTITUDES TOWARD MUSLIMS AND ISLAM 4, 7 (2009), *available at* <http://www.gallup.com/strategicconsulting/153434/ENGLISH-First-PDF-Test.aspx>.

²²⁴. *Public Remains Conflicted over Islam*, *supra* note 222.

²²⁵. PEW RESEARCH CTR., *supra* note 109, at 1.

²²⁶. *Fear Factor: 44 Percent of Americans Queried in Cornell National Poll Favor Curtailing Some Liberties for Muslim Americans*, CORNELL NEWS (Dec. 17, 2004), <http://www.news.cornell.edu/releases/Dec04/Muslim.Poll.bpf.html>.

²²⁷. McCloud, *supra* note 62, at 83.

men.”²²⁸ The horrific events of September 11, 2001, the strong emotional responses of a shattered nation, and the subsequent social and political convulsions, have not passed by the judges, notwithstanding their place in the elite sectors of society and their independence from ordinary political processes and economic dislocations. Every American from every walk of life was profoundly affected by the 9/11 attacks on our nation, which took the lives of Americans from every walk of life, not discriminating by socio-economic status, ideology, race, color, or religion.

Judges at the higher ranks of the federal judiciary, observe Professors Lawrence Baum and Neal Devins, “care more about the views of academics, journalists, and other elites than they do about public opinion.”²²⁹ The elite audiences for federal judges may be liberal on civil liberties,²³⁰ and the social circles in which federal judges move generally consist of highly educated and wealthy people.²³¹ But judges are not hermetically sealed away from the fears and fear-generated stereotypes that infect the general public. And when those fears are provoked by terrorist attacks that were deliberately targeted at prominent places regularly visited by the elites—the centers of commerce and government—then the walls may come down.

Well before 9/11, and with increasing frequency afterward, one need have only picked up a newspaper, turned on the television, or listened with half-an-ear to informal conversations at a coffee shop or while waiting at the airport to have heard admissions of disquiet about our Muslim neighbors or negative characterizations about Islam. While most federal judges undoubtedly would be among the plurality of Americans answering “no” to such polling questions as whether Islam encourages violence more than other religions,²³² judges still hear those questions being insistently asked. And if we hear alarming assertions repeated regularly, we may internalize those concepts, leaving us uneasy at a subconscious level. Stereotypes about Muslims may have been so powerful as to override the social psychology patterns and judicial role attitudes that otherwise would move federal judges toward greater tolerance.

The results of our ongoing study suggest that an uneasiness about Muslims in America and disquiet about Islam had filtered into the federal judiciary well before 2001, extending back more than a decade before Islamic extremist violence erupted on American soil. While 9/11 may not

228. CARDOZO, *supra* note 1, at 168.

229. Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1516 (2010) (writing about Supreme Court Justices); see also LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 25 (2006) (saying, as a matter of social psychology theory, that “[p]eople want to be liked and respected by others who are important to them”).

230. Baum & Devins, *supra* note 229, at 1545.

231. BAUM, *supra* note 229, at 89–90.

232. See *supra* notes 222–25 and accompanying text.

have initially implanted such attitudes, the attacks on our nation have undoubtedly made it harder to remove them, even for people committed to equity. Given the strong role that emotion plays in our psychology and cognition,²³³ the national concussion that we collectively suffered from witnessing the events of September 11, 2001, has surely left psychological scars and cognitive impairments with us all, even if we are not always aware of them.²³⁴ That deeply emotional national experience undoubtedly has infused “implicit beliefs” that affect the way in which we understand the world around us.²³⁵ Borrowing concepts from social and cognitive psychology, we may be able to better explain the Muslim disadvantage in religious-liberty cases and further understand the cognitive load on the judges who decide their fate.

In the types of cases that we examine in the present study, the religious claimant invariably is challenging government decisions, which in turn are often defended by public officers as necessary to law and order. Thus, we believe, even more so than in other types of litigation, underlying negative impressions about Muslims or Islam are likely to emerge, even if not consciously realized by the decider. Indeed, a Religious Free Exercise/Accommodation claim, by its nature, highlights the claimant’s religious beliefs and practices. Thus, when a religious-liberty claim is presented to a federal judge by a follower of Islam, his or her Muslim identity is placed front and center, not merely being a secondary attribute of the litigant. Stereotypes about Muslims as security risks and Islam as a religion of violence are especially likely to be activated in contexts that already breed negative stereotypes, such as claims by prisoners—the lion’s share of claims by Muslims included in this study.²³⁶

As psychology Professor Seymour Epstein explains, each of us “apprehend[s] reality in two fundamentally different ways, one variously labeled intuitive, automatic, natural, non-verbal, narrative, and experiential,

233. See Seymour Epstein, *Cognitive-Experiential Self-Theory of Personality*, in 5 HANDBOOK OF PSYCHOLOGY: PERSONALITY AND SOCIAL PSYCHOLOGY 159, 160–61 (Theodore Millon, Melvin J. Lerner & Irving B. Weiner eds., 2003) (describing “the experiential conceptual system”—the unconscious side of cognition—as “emotionally driven”).

234. See *id.* at 160 (explaining that the experiential or unconscious system of cognition in human beings “adapts by learning from experience rather than by logical inference,” including encoding information “particularly [from] events that were experienced as highly emotionally arousing”).

235. See Seymour Epstein, *Integration of the Cognitive and the Psychodynamic Unconscious*, 49 AM. PSYCHOLOGIST 709, 715 (1994) (explaining that “[p]eople have constructs about the self and the world” in the “two major systems by which people adapt to the world,” with constructs in the rational system being “beliefs” and constructs in the experiential system being “implicit beliefs” or “schemata,” which “consist primarily of generalizations derived from emotionally significant past experience”).

236. See *supra* notes 174–92 and accompanying text.

and the other analytical, deliberative, verbal, and rational.”²³⁷ Not only is the unconscious, intuitive, or experiential system an elemental part of our personality, but we could not function if we had to deliberately and purposefully pass every inclination and choice of action across the conscious, rational side. Psychology Professor and Nobel Laureate in economics Daniel Kahneman describes “System 1” (our intuitive process) as “operat[ing] automatically and quickly, with little or no effort and no sense of voluntary control,” while “System 2” (our “conscious reasoning self”) gives “attention to the effortful mental activities that demand it.”²³⁸ As Kahneman puts it, “the division of labor between System 1 and System 2 is highly efficient: it minimizes effort and optimizes performance.”²³⁹

Despite being an integral and often beneficial side of our personality, Epstein warns that the experiential system is “[m]ore crudely differentiated” and lends itself to “stereotypical thinking.”²⁴⁰ When we are making decisions about particular people, fundamental fairness and respect for human dignity demand that we make individual and rational judgments.²⁴¹ Because “[i]mplicit biases function automatically,” observes a group of law and psychology scholars in a recent article with Professor Jerry Kang as lead author, we must seek to counter harmful subconscious prejudices by “engag[ing] in effortful, deliberative processing.”²⁴²

We would be foolish and unjust to indict judges for being human and thus having an intuitive or experiential side to their personalities. If we have correctly diagnosed an unconscious tendency among federal judges to respond negatively to Muslim requests for exemption or accommodation from government rules or policies, then we really have done nothing more than identify one more dimension of that general attitude among the American people. In sum, it is not a problem with judges, but a problem with (nearly) all Americans.

Nonetheless, we properly demand that judges strive for impartiality, thus becoming aware of and overcoming stereotypes and biased inferences

237. Epstein, *supra* note 235, at 710; see also Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1450 (2003) (“The present treatment distinguishes two modes of thinking and deciding, which correspond roughly to the everyday concepts of reasoning and intuition.”). On dual-process theories of cognition as applied to judging, see generally Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007).

238. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20–21 (2011) (adopting terms originally proposed by psychologists Keith Stanovich and Richard West).

239. *Id.* at 25.

240. Epstein, *supra* note 235, at 711 tbl.1.

241. See Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1277 (2002) (“If our values include fairness and treating people as individuals, then anything that increases self-awareness should decrease our application of stereotypes.”).

242. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1177 (2012).

that could be affecting their decision-making ability at an unconscious level. Psychology Professor Albert Bandura emphasizes that “[t]he capability to reflect upon oneself and the adequacy of one’s thoughts and actions is . . . [an] exclusively human attribute”²⁴³ Professor Gary Blasi writes:

A general awareness of our frail rationality, however, is not sufficient. In order to inhibit judgments and behavior based on stereotypes, we must be aware of the *specific* stereotype *at the time* it is activated. The entire thrust of the research . . . is that stereotype activation often takes place at a preconscious or subconscious level. Assuming we do have some specific and timely awareness, we must also have both the motivation and the ability to control stereotype activation and application. Motivation can be supplied by social norms or our own moral values and personal will. The ability to control these otherwise automatic processes means devoting time and cognitive resources to focusing on individuating information.²⁴⁴

Many judges have no doubt conducted such careful self-examinations and emphasized conscious cognition in deliberations about religious-liberty cases involving Muslims (and other claimants). Not only does a particular ruling against a Muslim claimant standing alone fail to show bias, conscious or unconscious, but Muslims did not fail on every religious-liberty claim in our study (even though Muslims collectively did fail at a disproportionate rate). We take this opportunity to remind our readers that “it is not proper to assume that a social scientific finding is a good description of all individuals studied, much less any particular individual within a study.”²⁴⁵

Nonetheless, despite our own enormous respect for judges, more than one of whom we count as friends, we have no reason to believe that judges as a group are exempt from the implicit biases held by the general population. For example, an important study by Professors Jeffrey Rachlinski, Sheri Lynn Johnson, Chris Guthrie, and Judge Andrew Wistrich produced results that were “both alarming and heartening: (1) Judges hold implicit racial biases. (2) These biases can influence their judgment. (3) Judges can, at least in

243. Albert Bandura, *Social Cognitive Theory of Personality*, in HANDBOOK OF PERSONALITY 154, 180 (Lawrence A. Pervin & Oliver P. John eds., 2d ed. 1999).

244. Blasi, *supra* note 241, at 1252–53; see also Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 247 (2002) (insisting that “highly motivated individuals can modify the automatic operation of stereotypes and prejudice”); Patricia G. Devine & Margo J. Monteith, *Automaticity and Control in Stereotyping*, in DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 339, 346 (Shelly Chaiken & Yaacov Trope eds., 1999) (“First, one must be aware of the potential influence of the stereotype. This condition is rather obvious; one cannot counteract the outcome if one is unaware of the need for counteraction.”).

245. John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of “Social Frameworks,”* 94 VA. L. REV. 1715, 1735 n.58 (2008).

some instances, compensate for their implicit biases.”²⁴⁶ Judicial role expectations and a “professional commitment” to racial equality “appear[ed] to have limited impact on automatic racial associations” among the judges they studied.²⁴⁷ Encouragingly, the researchers found, “when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so.”²⁴⁸ Along the same lines, we hope our study imparts the need for judges to monitor and suppress the influence of negative religious stereotypes as well.

To avoid stereotypic responses, psychology Professors Patricia Devine and Margo Monteith maintain that a decision-maker must “tak[e] the more effortful and time-consuming route of gathering individual pieces of information about the target, rather than relying on activated stereotypes.”²⁴⁹ With a “bottom-up model” of judging, instead of resolving a dispute by abstract theoretical reasoning that is vulnerable to the influence of unconscious attitudes, the judge constructs a decision by assembling the facts and evidence that make up the building blocks of an individual case.²⁵⁰

Fortunately, in 2006—just after the period examined in the present study—the Supreme Court clarified religious free-exercise doctrine²⁵¹ in a manner that may motivate federal judges to engage in the kind of “cognitive correction”²⁵² that could mitigate the biasing influences of the unconscious mind.

In *Gonzales v. O Centro Espirita Beneficente União do Vegetal*,²⁵³ the Supreme Court unanimously insisted that RFRA²⁵⁴ demands a “focused” and not a “categorical approach” when balancing the government’s interest against the burden on the claimant’s ability to freely exercise their religion.²⁵⁵ The Court pronounced “that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant

246. Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009).

247. *Id.* at 1222.

248. *Id.* at 1221.

249. Devine & Monteith, *supra* note 244, at 347; see Kang et al., *supra* note 242, at 1160 (warning that when judges “lack sufficient individuating information,” they “have no choice but to rely more heavily on [their] schemas”).

250. See Brandon L. Bartels, *Top-Down and Bottom-Up Models of Judicial Reasoning*, in THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 41, 48 (David Klein & Gregory Mitchell eds., 2010) (“The bottom-up model is a data-driven reasoning process whereby the evidence, information, facts, and legal considerations objectively guide the decision maker.”).

251. *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418 (2006).

252. See Rachlinski, Johnson, Wistrich & Guthrie, *supra* note 246, at 1223 (noting that, when motivated, judges appeared to take steps to compensate for unconscious racial biases).

253. *O Centro*, 546 U.S. 418.

254. 42 U.S.C. §§ 2000bb–2000bb-4 (2006).

255. *O Centro*, 546 U.S. at 430.

whose sincere exercise of religion is being substantially burdened.”²⁵⁶ Accordingly, with respect to a religious sect that makes sacramental use of a hallucinogenic substance, the government’s “mere invocation” of a general prohibition on non-medical use of narcotics without individualized case-specific scrutiny was not insufficient.²⁵⁷

Reexamining this decision from a social-psychology perspective, *O Centro* mandates that judges hearing religious-liberty claims move beyond “category-based processes” and instead devote concerted attention to “individuating processes” that focus on the claimant’s particular attributes, thereby loosening the grip of stereotypes²⁵⁸: First, if the government no longer may rest on unexamined generalized policy concerns in defending religious-liberty cases—such as health and safety, national security, law and order, equality, the war on drugs, or uniform application—then the government is less likely to rely on crude categories that implicate stereotypes. In any event, because the court must now “look[] beyond broadly formulated interests justifying the general applicability of government mandates,”²⁵⁹ the deciding judge is encouraged to abandon stereotypical generalizations and engage in a differentiated and individualized analysis of each claim.

Second, by requiring that a court treat each religious-liberty claimant as an individual and conduct a focused examination, the *O Centro* Court effectively directs the deciding judge to resist intuitive or stereotypical responses to a claimant or claim. In this way, the court instead may better appreciate the character of the claimant’s religious practice and the nature of the requested accommodation. By undertaking that examination, the judge should learn about each claimant’s faith perspective, objectively and

256. *Id.* at 430–31; see also Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 222 (1994) (“It is not enough that the government’s regulation or program as a whole serves a compelling interest. Rather, the ‘application of the burden to the person’ must be the ‘least restrictive means’ of furthering a compelling interest.”); Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. MIAMI L. REV. 923, 928 (2012) (arguing that, under current religious-liberty doctrine, prison grooming policies cannot be sustained without “a particularized evidentiary basis that the specific plaintiffs or inmates in question pose an actual or threatened risk to the state’s compelling penological interests”).

257. *O Centro*, 546 U.S. at 432.

258. See Susan T. Fiske & Steven L. Neuberg, *A Continuum of Impression Formation, from Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation*, in 23 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1, 2 (Mark P. Zanna ed., 1990) (explaining that people first use category-based processes to form impressions of another, but turn to attribute-oriented processes given the opportunity and motivation). *But see* Laurie A. Rudman, Peter Glick & Julie E. Phelan, *From the Laboratory to the Bench: Gender Stereotyping Research in the Courtroom*, in BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 83, 85–90 (Eugene Borgida & Susan T. Fiske eds., 2008) (arguing that use of individuating information to contradict stereotypes is difficult and complex).

259. *O Centro*, 546 U.S. at 431.

rigorously but also sympathetically, thereby substituting new information and understanding for implicit beliefs.

Because the experiential system of our personality is so resilient, a decision-maker's considered and sincere resolution to set aside intuitions and stereotypes may fall short.²⁶⁰ A person may be better advised to "improve [the experiential system] by providing it with corrective experiences."²⁶¹ As psychology researcher Seymour Epstein further suggests, because "the experiential system learns directly from experience, another procedure is to provide real-life corrective experiences [or] to utilize imagery, fantasy, and narratives for providing corrective experiences vicariously."²⁶² Professor Kang and associates refer to this "potentially effective strategy" to reduce the impact of implicit biases in the courtroom as "expos[ing] ourselves to countertypical associations."²⁶³

By regular exposure to the diversity of the community, including different religious communities, judges may gain "real-life corrective experiences" to counter any unfortunate prejudices they may harbor against Islam or any other religious tradition. Within the courtroom, while the judge of course must eschew "imagery" or "fantasy" (which Epstein suggests for therapeutic purposes only), the judge should explore the claimant's religion through evidentiary narrative, allowing the judge to gain an appreciation for the faith tradition on its own terms, rather than as filtered through the lens of media and other portrayals.

Faithful application of the Supreme Court's *O Centro* framework may be a step forward in suppressing religious stereotypes and ensuring fair evaluation of each religious-liberty claim. By demanding individuated analysis, while resisting categorical generalizations, the *O Centro* decision may advance more equitable and properly differentiated treatment of each religious claimant, Muslim or otherwise.

VI. CONCLUSION

Nearly alone among the diverse groups of religious claimants included in our study of Religious Free Exercise/Accommodation claims in the lower federal courts from 1996 to 2005, Muslims were significantly and powerfully associated with a negative outcome. By comparison, claimants from other religious communities were nearly twice as likely to prevail as Muslims, even after controlling for other possible influences. Our findings were stronger and revealed the greatest disparities when examining rulings by the judges of the federal courts of appeals.

260. Epstein, *supra* note 233, at 166 ("[G]iven the intrinsically compelling nature of experiential processing and its highly adaptive value in most situations in everyday life, such resilience is to be expected.").

261. *Id.* at 161.

262. *Id.* at 165.

263. Kang et al., *supra* note 242, at 1169.

“Islam,” says Professor Richard Schragger, “is testing the polity’s commitment to religious tolerance.”²⁶⁴ We would add that it also appears to be testing the judiciary’s commitment to the impartial adjudication of claims of religious liberty among the diverse faith communities that bring constitutional and statutory religious-liberty claims in the federal courts. Schragger further observes that, while the reaction to the terrorist attacks of 9/11 has not yet been translated into the law, “it is just a matter of time before the politics of 9/11 comes to the doctrinal fore in the Religion Clauses.”²⁶⁵ Based on our study, public uneasiness with Muslims has long been felt concretely in the actual outcomes of religious-liberty cases, if not yet expressly articulated in the doctrine.

Each generation of Americans is called upon to renew the promise of religious liberty in the face of new political and cultural threats. More than a half century ago, the public demand for fealty to America in the face of external and internal threats of totalitarian ideologies imposed itself on religious communities who refused to engage in certain public displays of loyalty. Although initially sacrificing religious conscience to nationalism, the Supreme Court reversed course and eventually upheld the right of the children of Jehovah’s Witnesses not to salute the flag in public schools.²⁶⁶

During the 1970s and 1980s, the War on Drugs was extended to interrupt ceremonial use of sacred substances, when the Supreme Court held that the Free Exercise Clause did not prohibit enforcement of Oregon drug laws against sacramental use of peyote by Native Americans.²⁶⁷ Once again, a course correction came with the intervention of Congress in enacting RFRA²⁶⁸ generally, and then specifically extending permission for ceremonial use of peyote to all members of recognized Indian tribes.²⁶⁹ Subsequently, based on RFRA, the Supreme Court held unanimously that, when a religious sect makes sacramental use of a hallucinogenic substance, “mere invocation” by the government of a general prohibition on non-medical use of narcotics is insufficient to demonstrate a compelling governmental interest to override the individual’s sincere exercise of religion.²⁷⁰

More recently, the movement for equality has led to an expansion of anti-discrimination laws to cover new categories of protected persons, to include new sectors of society (employment, education, housing, services), and to apply to new entities, sometimes including religiously affiliated associations.

264. Schragger, *supra* note 197, at 2010.

265. *Id.* at 2014.

266. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

267. *Emp’t Div. v. Smith*, 494 U.S. 872, 890 (1990).

268. 42 U.S.C. §§ 2000bb–2000bb-4 (2006).

269. *Id.* § 1996a(b)(1).

270. *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 432 (2006).

When, for example, traditionalist religious associations seek exemption from laws that require provision of birth control coverage to all employees²⁷¹ or that preclude discrimination in employment and services on the basis of sexual orientation,²⁷² these religious groups run hard against the grain of mainstream secular society in certain regions of the country or municipalities.²⁷³ Although the extended application of the constitutional ministerial exception to anti-discrimination laws appears to have somewhat ameliorated the impact on religious communities,²⁷⁴ this cultural conflict between liberal secularists and laws and traditionalist religious groups and persons may emerge again in religious-liberty jurisprudence.

And now, we find that the post-9/11 backlash against Muslims and longstanding societal antipathy toward or fear of Islam poses a growing threat to religious liberty in the United States. Professor Noah Feldman likens the anti-Muslim bias that has erupted over the past couple of years to the animosity directed at Jehovah's Witnesses in the 1940s.²⁷⁵ Once again, we find the religious consciences of a people of faith being sacrificed to shifting political and cultural forces. American history teaches us that the free exercise of religion may too easily be submerged beneath platitudes about "law and order," "national security," or "the equal opportunity

271. See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004) (denying religious exemption to Catholic Charities from state statute requiring employers to provide contraceptive coverage to employees). See generally Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 101 (2006) (arguing that "society benefits from the existence and checking function of independent sources of moral authority" and, for that reason, "we should protect [Catholic Charities'] ability to be faithful to that vision against state regulations that undermine its moral integrity—unless some sufficiently important state interest is at stake that cannot be adequately furthered through some other means"); Susan J. Stabile, *When Conscience Clashes with State Law & Policy: Catholic Institutions*, 46 J. CATH. LEGAL STUD. 137, 150 (2007) ("A religious institution cannot communicate an effective message that conduct is sinful at the same time that it pays for that conduct to occur." (quoting Petition for Writ of Certiorari at 14, *Catholic Charities of Sacramento, Inc. v. California*, 543 U.S. 816 (2004) (No. 03-1618), 2004 WL 1243136, at *14)).

272. Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206, 206 (2010) ("Catholic Charities of Boston, a large provider of social services in Massachusetts, was told it would be barred from performing adoptions in the state unless it agreed to place children in same-sex households."); Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 414-15 (2011) (suggesting that a major current threat to religious liberty flows from perceptions by the gay rights movement that "traditional religion [is] their principal enemy" and further criticizing the failure of both gay rights activists and religious traditionalists to find compromise); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274, 302 (2010) (referring to "the now-famous withdrawal of adoption services by Catholic Charities of Boston, a case that sadly illustrates the social costs that may be incurred when religious charities are faced with nondiscrimination requirements in tension with faith principles" (footnote omitted)).

273. See Sisk, *supra* note 17, at 1049-50.

274. See *supra* Part IV.B.2.c.

275. Noah Feldman, *Islamic Constitutionalism in Context: A Typology and a Warning*, 7 U. ST. THOMAS L.J. 436, 437-38 (2010).

society.” Subordination of religious conscience to the dictates of the state, the preferences of the mainstream culture, or the stereotypes fostered by fear, in the name of some policy goal, societal convenience, or comfort to the fearful, is the antithesis of religious liberty.

We are all living in the shadow of 9/11—but that shadow appears to be longer and darker for Muslim Americans. By shining the light on the costs to religious liberty, we hope that shadow may begin to dissipate.