

HOW TRADITIONAL AND MINORITY RELIGIONS FARE IN THE COURTS: EMPIRICAL EVIDENCE FROM RELIGIOUS LIBERTY CASES

GREGORY C. SISK*

There is an enduring legal myth that members of minority religious groups face a decidedly uphill battle in securing accommodation for or even tolerance of unconventional religious practices, expression, or values from the courts. According to conventional wisdom, traditional Christian believers may anticipate a more hospitable welcome from the judiciary when asserting claims of conscience or religious liberty. However based upon an empirical study of religious liberty decisions in the federal courts, the proposition that minority religions are less successful with their claims was found to be without empirical support, at least in the modern era and in the lower federal courts. In fact, counter to popular belief, adherents to traditionalist Christian faiths, notably Roman Catholics and Baptists, may enter the courthouse doors at a distinct disadvantage. As the new century unfolds, the most interesting empirical inquiry may be why those within the mainstream Christian traditions find themselves with a higher hill to climb when seeking judicial exemption from secular regulation or judicial recognition of expression and equality rights.

INTRODUCTION: MYTHS REGARDING MINORITY RELIGION FAILURE AND MAINSTREAM CHRISTIAN SUCCESS IN THE COURTS

When the call of religious conscience and the demand of public expectations meet at the crossroad of the public square, the enduring myth is that members of minority religious groups face a decidedly uphill battle in securing accommodation for or even tolerance of unconventional religious practices, expression, or values from the courts. By contrast, so

* Professor of Law, University of St. Thomas School of Law (Minneapolis) (gsisk@stthomas.edu). For their comments on an earlier draft of this essay, I thank Thomas Berg, Kent Greenawalt, and Michael Heise, as well as the other participants and the audience at the Byron White Center's Rothgerber Conference on "Conscience and the Free Exercise of Religion." The final responsibility for what is said in this essay belongs with me and me alone.

the conventional wisdom has it, traditional Christian believers may anticipate a more hospitable welcome from the judiciary when asserting claims of conscience or religious liberty. As James Brent states the standard hypothesis, "America is a predominantly Christian nation," and "[i]t therefore is not unreasonable to suppose that Christians should receive preferential treatment at the hands of the Court."¹

These suppositions regarding the comparative prospects for litigative success for contrasting religious groupings resonate with the proverbial story of religious intolerance in American history. By this familiar parable, religious minorities encounter persecution or discrimination, while Christian majorities achieve religious hegemony through judicial inaction to protect the religious liberties of outsider groups and through legislative incorporation of majority values into public laws and symbols. Thus, Verna Sánchez contends that "[t]he journey of religious freedom in this country has been a linear one," in which the course was set from the beginning to prefer Christian understandings of religion "and there has been virtually no deviation since."²

Looking at cases raising claims of religious conscience in the courts, few suggest that Christian claimants always succeed or that non-mainstream religious claimants always fail. Rather, scholarly messengers for the conventional understanding assert that "the scales generally tip in favor of Judeo-Christian beliefs, and against those outside that framework."³ When Christian claimants appear before the courts, commentators suggest that "Christian judges should be more likely to be sympathetic to the plight of fellow Christians."⁴

An understandable but perhaps myopic focus on the relatively small number of religious liberty cases that reach the Supreme Court may leave an exaggerated impression that repression of minority religions is the typical outcome when religious conscience disputes are litigated. Supreme Court decisions not surprisingly have a powerful and lasting impact upon the public consciousness. When the Supreme Court rejects Native American claims regarding religious use of peyote⁵ or turns down

1. James C. Brent, *An Agent and Two Principals: U.S. Court of Appeals Responses to Employment Division, Department of Human Resources v. Smith and the Religious Freedom Restoration Act*, 27 AM. POL. Q. 236, 248 (1999).

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

3. *Id.* at 35 n.12.

4. Brent, *supra* note 1, at 248; *see also* Sánchez, *supra* note 2, at 34 (arguing that the failure of minority religions to succeed in religious liberty claims is attributable to the judge's own religious background, judicial precedent "developed from an explicitly Christian perspective," or "the dominance of Judeo-Christian values which permeates American culture").

5. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

a petition by a Jewish servicemember to wear religious headgear despite restrictive military regulations,⁶ the message received by the public may be one of judicial antipathy to religious practices outside the mainstream. Constitutional scholar Mark Tushnet once offered the succinct verdict on religious liberty cases in the Supreme Court that "sometimes Christians win but non-Christians never do."⁷

However, only the smallest fraction of religious liberty disputes ever rise all the way up to the nation's highest court. Most religious liberty controversies are resolved in the lower courts. Importantly, the substantially larger and cumulative set of such cases in those courts, considered longitudinally across periods of time, affords a more stable and reliable indicator of general judicial attitudes toward religious liberty in general and toward separate religious groups in particular.

As David Steinberg anticipated, "members of small religious groups appear to have enjoyed somewhat greater success in free exercise exemption cases brought before the lower federal courts and the state courts, than in cases brought before the United States Supreme Court."⁸ Indeed, when success rates in religious liberty cases in the lower federal courts are examined methodically with statistical controls for other influences, the tapestry of conventional wisdom regarding comparative advantages and disadvantages among religious groups begins to unravel and indeed is turned inside-out.

Based upon a recent study that I conducted, along with my collaborators, Michael Heise of Cornell Law School and Andrew Morriss of Case Western Reserve University,⁹ the proposition that minority religions are significantly less likely to secure a favorable hearing from federal judges in the modern era was found to be without empirical support. Just as importantly, the myth that members of outsider faiths fail at a disproportionate rate proves to be only half of the story. In fact, counter to the popular narrative, adherents to traditionalist Christian faiths, notably

6. *Goldman v. Weinberger*, 475 U.S. 503 (1986).

7. Mark Tushnet, *Of Church and State and the Supreme Court: Kurland Revisited*, 1989 SUP. CT. REV. 373, 381; see also Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 251 (2003) ("In free exercise exemption cases at the Supreme Court level, the numbers are even more striking: while members of small Christian sects sometimes win and sometimes lose such free exercise claims, non-Christian religious outsiders never win.")

8. David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241, 255 n.65 (1995).

9. 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) [hereinafter Sisk, Heise & Morriss, *Searching for Soul*].

Roman Catholics and Baptists, prove to be the ones who enter the courthouse doors at a distinct disadvantage.

Now several qualifications should be made from the outset. To begin with, that religious minorities have suffered persecution in America is an undeniable and shameful historical fact. One need only recall the mob violence attending the pilgrimage of the Mormons across the country or against immigrant Catholics in urban centers during the nineteenth century, the ridicule and harassment directed at Jehovah's Witnesses who refused to pledge allegiance to the flag during the middle of the twentieth century, the enshrinement of Protestant Bible reading and prayers in the public schools that forced Catholics to form their own alternative school system, or the anti-Semitism that limited educational and employment opportunities for Jews. The empirical question of the moment is whether these historical bigotries persist and are realized in the courts. Instead, our study suggests that the nation's continuing controversy regarding the nature and scope of religious liberty may have evolved into a new conflict between the agenda of a liberal secular elite and the practices and values of traditional religious believers.

Moreover, current Supreme Court doctrine leaves to the political process most decisions on whether to accommodate public laws or regulations to religious conscience. As Kent Greenawalt has said, the Court thereby has chosen "to abandon minority religions to possibly inhospitable legislatures."¹⁰ To be sure, it is noteworthy that, for example, Native Americans have been granted a legislative exemption by Congress for sacramental use of peyote,¹¹ and Jews and other religious adherents in the armed services who sought to wear religious apparel also have been granted broader rights through congressional revision of military regulations.¹² Thus, despite having failed to secure judicially mandated exemptions and notwithstanding the minority status of these religious claimants, the political process proved open to and favorably disposed toward those particular claims. That minority religions on occasion have succeeded in gaining positive attention from legislative bodies hardly means that every minority religion has been able to gain meaningful access to the political process in every state or municipality. Nor can sporadic, discontinuous, and fractional political action ensure equal treat-

10. Kent Greenawalt, *Should the Religion Clauses of the Constitution Be Amended?*, 32 LOY. L.A. L. REV. 9, 17 (1998); see also Steinberg, *supra* note 8, at 253 ("Small, unfamiliar, and unpopular religions face far more uncertain treatment from the political branches of government").

11. See American Indian Religious Freedom Amendments Act of 1991, 42 U.S.C. § 1996a (1992).

12. 10 U.S.C. § 774 (2000).

ment among religious believers facing insuperable legal obstacles to practice of the faith. "Given the possible inequalities from legislative exemptions, judicially mandated exemptions provide an important backstop."¹³

Furthermore, in the absence of any constitutional mandate for some higher showing of governmental need before taking action that trespasses upon religious conscience, the insensitivity of governmental bureaucracy will be a continual and disturbing source of imposition upon religious minorities. No system of legislative exemptions can fully address the unthinking enforcement of general rules by administrators or government functionaries despite religious objections and the absence of any genuine and concrete basis for an action beyond routine habits. As a particularly sad case of such "bureaucratic inflexibility," Douglas Laycock describes how a medical examiner insisted upon conducting an autopsy, despite the objection of the family that such a mutilation of the body profoundly violated Hmong religious beliefs and without any real particularized need for the procedure in that case.¹⁴

Finally, it should be noted that claimants from both minority and more mainstream religious traditions seeking religious accommodation or exemption are much more likely than not to fail in the courts. Whether asserted by outsider religious groups or traditional Christians, about two-thirds of religious free exercise, religious expression, and religious discrimination claims coming before the lower federal courts during the 1986–1995 period of our study were doomed to failure.¹⁵ Nonetheless, an overall success rate approaching one-in-three was not insubstantial nor suggestive of a pervasive judicial hostility toward religious liberty claims. In any event, the question to be addressed in this essay is not whether religious claimants as a whole should fare better in the courts, a proposition with which I would tend to agree as a normative matter, but rather whether one or another religious group faces significantly greater or lesser obstacles in achieving that success.

The thesis of this essay is as follows: the conventional wisdom that, comparatively speaking, minority religious adherents are more likely to lose when presenting religious liberty claims in court, and that the Christian faithful are more likely win, is of doubtful continuing validity. Ac-

13. Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 974 (2005).

14. Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 226; see also Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 657–60 (2003) (listing cases of autopsies despite religious objections as arising regularly).

15. See *infra* Part I.C. (discussing results of study).

cordingly, as the new century unfolds, the more interesting empirical inquiry may be why those whose religious practices and values fit most comfortably within the mainstream Christian tradition find themselves with a steeper hill to climb than people of alternative beliefs when seeking judicial exemption from secular regulation or securing judicial recognition of expression and equality rights.

I. THE NATURE AND RESULTS OF OUR STUDY OF RELIGIOUS FREEDOM CASES

A. *Summary of Study and Religious Influences on Judging*

Given the vitality of religious faith for most Americans and the vigor of the enduring debate on the proper role of religious belief and practice in public society, a searching exploration of the influences upon judges in making decisions that uphold or reject claims implicating religious freedom has been long overdue. My colleagues and I previously have explained the general queries for our study as follows:

In the absence of clear precedential constraint, what might motivate a judge to smile upon the religious dissenter who seeks to avoid the burden of a legal requirement that conflicts with what he or she regards as the obligation of faithful belief? What experiences or attitudes might persuade a jurist to frown upon a specific example of governmental accommodation of religiously-affiliated institutions and instead insist upon a strict exclusion of what he or she regards as inappropriate sectarian elements from public life? Most poignantly, might the judge's own religious upbringing or affiliation influence his or her evaluation of religiously grounded claims that implicate those beliefs?¹⁶

Yet focused empirical studies on religious liberty cases have been few and most pertinent studies tend to collapse religious freedom disputes together with other First Amendment or civil liberties cases for analysis. To our knowledge, no prior study has conducted a comprehensive analysis of both federal circuit and district judges that is centered on constitutional religious freedom issues.

In an earlier article titled *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, we described the design of such a study, with a particular focus upon relig-

16. Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 9, at 494.

iously oriented variables and their influences upon federal judges.¹⁷ As the object for study, we created a database of the universe of religious freedom published decisions¹⁸ in the federal district courts and courts of appeals from 1986–1995.¹⁹ Our focus was upon decisions that involved constitutional rights, and parallel federal statutory civil rights, asserted by religiously affiliated organizations or individuals against governmental parties or to challenge the formal actions of government.²⁰ As the decisions were collected, the direction of each judge's ruling, the factual category of the case, and the legal claim being resolved in the case were coded for comparison.²¹

Consistent with a growing body of research on judicial decision-making, rather than using each individual judge as the data point, the primary focus of our study was upon "judicial participations."²² Each "judicial participation" consisted of a single judge's ruling in a single case. Each district judge's ruling was coded separately, as was each of the multiple judges on court of appeals panels. Thus, the focus of the study was upon the judge rather than the court, measuring the individual response of each judge to each claimant and claim, even if he or she was but one of three or more participants on an appellate panel.

In all aspects of our study, the dependent variable for each model was the direction of an individual judge's vote in a particular case, with a standard set of independent variables depending upon the pertinent model, consisting of statistical measures of the legal claims raised, the factual nature of the case, the religious affiliation of the claimant, the re-

17. Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 9. Our code book, data collection plan, coding of each decision, coding of each judge, and a spreadsheet containing all of our data may be found at <http://courseweb.stthomas.edu/gcsisk/religion.study.data/cover.html>.

18. For a discussion of our research choice to collect the data from published opinions, see *id.* at 534–39.

19. *Id.* at 539.

20. For a detailed definition of religious freedom cases for this study and for a description of our data collection method, that is, how we identified decisions to include in the database, see *id.* at 530–41.

21. For a detailed description or "code book" for allocating decisions between Free Exercise/Accommodation and Establishment sets and of each opinion into claim and case types, see *id.* at 541–76.

22. James J. Brudney & Corey Ditslear, *Designated Diffidence: District Court Judges on the Court of Appeals*, 35 LAW & SOC'Y REV. 565, 576 (2001); James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1696, 1700 (1999); Nancy Scherer, *Blacks on the Bench app.* (2004) (unpublished manuscript, on file with author); see also 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) (discussing use of judges' votes in cases as point of analysis). For a further discussion of our adoption of judicial participations as the data point and steps taken to avoid autocorrelation problems, see Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 9, at 539–41.

ligious affiliation of the judge, the religious demographics of the judge's community, the judge's ideology, and various background or employment factors for the judges.²³ Because we analyzed the influences of multiple variables, a multiple regression model was necessary. Because the dependent variable was dichotomous, we applied logistic regression.²⁴

The database consisted of 1484 judicial participations (that is, 1484 times in which an individual judge participated in the resolution of a religious freedom dispute), which were drawn from 729 published decisions. These represented 1103 judicial participations at the appellate court level and 381 judicial participations at the trial court level. Looking separately at free exercise of religion (and related) claims, there were 1198 judicial participations from 586 decisions, in which claimants were favorably received by the judge 35.6% of the time. Looking separately at establishment of religion claims, there were 286 judicial participations from 143 decisions, in which claimants were successful 42.3% of the time. A total of 537 judges participated in decisions included in the overall database, of whom 308 were district judges and 230 were court of appeals judges (three judges were on the district court for at least one decision during our study time period and had been elevated to the court of appeals for at least one other decision); two judges were from the Court of International Trade (sitting by designation on a court of appeals). The judges hailed from 79 of the nation's 94 district courts and from all twelve of the nation's regional federal circuit courts of appeals, as well as from the United States Court of Appeals for the Federal Circuit and the Court of International Trade.

When analyzing demands by religious claimants for exemption from governmental rules or regulations under the Free Exercise Clause of the First Amendment, together with related statutory, free speech, and equal protection claims, we found that Jewish judges and judges from Christian denominations outside of the Catholic and Mainline Protestant traditions were significantly more likely to approve of such judicially ordered accommodations.

In evaluating judicial resolution of challenges to governmental interaction with religion under the Establishment Clause of the First Amendment, Jewish judges were significantly more likely to conclude that governmental interaction with religion breached the figurative wall

23. For a detailed description of each variable, the theoretical basis for including that variable, the coding of the variable, and the results of the study pertinent to that variable, see Sisk, Heise & Morris, *Searching for Soul*, *supra* note 9, at 555–612.

24. For further explanation of our regression analysis, see *id.* at 553–54.

of separation between church and state.²⁵ In the particular context of education, Catholic judges were significantly more likely both to respond favorably to religious claimants seeking exemption from governmental rules or regulations (that is, more approving of Free Exercise Clause objections to government controls) and to resist challenges to governmental acknowledgment of religion or interaction with religious institutions (that is, less approving of Establishment Clause claims).²⁶

Shifting from a focus upon particular types of claims to analysis of our four integrated theoretical models of the Religion Clauses of the Constitution, the steady influence of religion-based variables again emerged in our study.²⁷ No significant variables were found among judges who adopted an approach toward the Free Exercise and Establishment Clauses that was most approving and accommodating of religion (the Pro-Religion model) (although Catholic affiliation for judges closely approached significance).²⁸ Nor did those judges who fit the antithetical model of insisting upon secularism in public life (the Pro-Secularist model) fall into any significant patterns (again with the near and negative exception of Catholic judges).²⁹

However, Jewish judges along with judges from non-mainstream Christian backgrounds were significantly more likely to approve of judicial intervention to overturn the decisions or actions of the political branch that either refused to accommodate religious dissenters or provided an official imprimatur upon a religious practice or symbol (the Anti-Political model).³⁰ Likewise, judges from these same religious backgrounds were significantly less likely to adopt a judicial restraint approach (the Judicial Restraint model), that is, these judges were less likely to defer to governmental actions that severely impacted religious minorities or that officially acknowledged religious traditions.³¹

Thus, in this comprehensive empirical study of federal circuit and district judges deciding religious freedom cases, the vitality of religious variables to a more complete understanding of judicial decisionmaking became abundantly clear. Indeed, the single most prominent, salient, and consistent influence on judicial decisionmaking in our study was *religion*—religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community, independent of other

25. See *id.* at 582–83.

26. See *id.* at 583–84.

27. See *id.* at 503–29.

28. See *id.* at 504–10.

29. See *id.* at 522–29.

30. See *id.* at 511–18.

31. See *id.* at 518–22.

background and political variables commonly used in empirical tests of judicial behavior. Thus, in light of the findings of this study, when searching for the soul of judicial decisionmaking in the legal or political sense, we must not neglect the presence and influence upon the judicial process of matters that affect the soul in the theological sense.

B. The Free Exercise/Religious Accommodation Model of our Study

In *Searching for the Soul of Judicial Decisionmaking*, we looked comprehensively at religious liberty issues implicating both the Free Exercise and the Establishment Clauses of the First Amendment.³² We directed attention primarily to our findings regarding the influence upon judges of religiously oriented variables. In another article, titled *Judges and Ideology: Public and Academic Debates About Statistical Measures*, we report in greater detail our findings with respect to ideological or partisan-based influences upon federal judges deciding religious liberty cases.³³

In this essay, I wish to focus upon that aspect of our study that involved claims based upon the Free Exercise Clause of the First Amendment and related legal theories involving religious expression and equality. Moreover, I want to place at the center of analysis the religious affiliations of the claimants, that is, the religious backgrounds of those persons of deep conviction who sought judicial support for claims of exemption or acceptance of religious practices or conscience. After explaining the nature of this model of our study, and reporting the basic results, I will expand upon the possible meaning or interpretation of these results in terms of the litigative prospects of religious minorities as contrasted with adherents to traditionalist faiths, with a greater focus upon the latter.

During the past half century, constitutional theories of religious freedom have been in a state of great controversy, perpetual transformation, and consequent uncertainty. With respect to the Free Exercise Clause in particular, doctrinal development has been episodic, lurching from a period during which (at least in theory) governments were obliged to establish a compelling interest before applying laws in a manner that burdened religious exercise,³⁴ to the present era in which a law of gen-

32. Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 9.

33. Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743 (2005).

34. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

eral application that is neutral in purpose will be upheld by the courts, notwithstanding the severity of impact on the sincere practice of religious faith.³⁵

However, the Supreme Court has reserved the power to set aside government actions harmful to religion, when formal neutrality is betrayed by underlying anti-religious bias as revealed by the underinclusiveness of a government directive, that is, when accommodations are granted for non-religious, but not religious, reasons.³⁶ In addition, while the Free Exercise Clause standing alone has been drained of much of its constitutional force, the Court has allowed that when the clause is invoked "in conjunction with other constitutional protections, such as freedom of speech and of the press or the right of parents . . . to direct the education of their children," neutral and generally applicable laws may fall before religiously motivated action.³⁷

Because the Supreme Court's Free Exercise jurisprudence has been unstable over time and uncertain in application, federal judges retained significant freedom of action in this area. Thus, while Supreme Court precedent on the Religion Clauses certainly and predictably constrained and influenced federal court litigation at the lower level to some degree, there remained substantial "play" in the doctrine as applied to individual controversies. For this reason, the body of religious freedom decisions in the federal district courts and courts of appeals is most amenable to a meaningful empirical analysis of influences upon judicial decisionmaking.

For the purpose of our study, we defined "Free Exercise/Accommodation" cases to include the following types of cases:³⁸

Free Exercise Clause Cases. At the heart of this part of the database, of course, lay decisions by the lower federal courts disposing of claims under the Free Exercise Clause of the United States Constitution. Claimants in these cases asserted that laws or governmental actions burdened religious practices or religiously mandated conduct, and that the government was obliged to establish a compelling interest to justify such an infringement. Included in this category, as examples, were objections to public school curricula or activities that offended the religious beliefs of students; resistance to anti-discrimination laws in employment that restricted religiously affiliated entities in employment decisions; challenges to prison rules that constrained

35. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

36. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

37. *Smith*, 494 U.S. at 881-82 (citations omitted).

38. The types of cases included in the database with citations to illustrative court decisions are further described in Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 9, at 530-54.

religious activities by prisoners; and arguments raised by criminal defendants that their conduct was religious in nature and deserving of special protection.

Free Speech Cases Involving Religious Expression. We also included cases raising claims under the Free Speech Clause that involved governmental suppression of expression that is religious in content, both because such claims are often proxies for what effectively is a free exercise of religion claim and because petitions for the right to express religious sentiments are essential to any understanding of full religious freedom. Thus, cases in this category involved religious meetings or distribution of religious literature in public schools; religious expression by individuals or groups on public property; expression of religious messages by government employees; and protest rallies organized by religiously motivated groups.

Statutory Religious Liberty and Expression Cases. In addition to religious liberty claims grounded directly upon the federal Constitution, we also included claims based upon two statutes designed to promote the freedom of religious liberty and expression. First, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA)³⁹ in response to the 1990 decision by the Supreme Court in *Employment Division v. Smith*.⁴⁰ In that decision, the Court held that enforcement of a law of general application that is formally neutral toward religion does not infringe upon the free exercise of religion, notwithstanding that application of such a law may significantly burden the exercise of religious faith through religious practice.⁴¹ Through RFRA, Congress, by legislative enactment, attempted to enhance protection for exercise of religious practices by re-establishing a “compelling governmental interest” standard for evaluating any government regulation that burdens religious exercise, whether or not intentionally so designed and whether or not the statute applies generally or singles out religious practices for different treatment.⁴² In substance, therefore, and with particular pertinence to this study, a claim under RFRA directly parallels, and indeed is a direct proxy for, a constitutional free exercise of religion claim under the state of the law that existed prior to the *Smith* decision. In any event, these statutory claims plainly are religious liberty claims by their very terms. Subsequently, in the 1997 decision of *City of Boerne v. Flores*⁴³—which post-dates the decisions included in our study—the Supreme Court invalidated RFRA as applied to state and local governments, holding that Congress exceeded its power under

39. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (previously codified at 42 U.S.C. §§ 2000bb to 2000bb-4).

40. 494 U.S. 872 (1990).

41. *Id.* at 878–82.

42. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (previously codified at 42 U.S.C. § 2000bb-1).

43. 521 U.S. 507, 515–36 (1997).

the Fourteenth Amendment to enforce constitutional rights by enacting a law that purported to change the substance of a constitutional provision. Second, Congress enacted the Equal Access Act (EAA),⁴⁴ which guarantees the right of public school children to use school buildings during non-class time for expressive purposes, including religious expression. In this regard, claims for religious expression that are pressed under the Equal Access Act must be included within our collection of religious liberty decisions. Just as the RFRA was an attempted codification of the Free Exercise Clause, the EAA is a codification of the Free Speech Clause for religious (and other) expression.

Governmental Discrimination on Religious Basis Cases. Finally, within the Free Exercise/Accommodation dataset, we included charges against governmental entities of discrimination against or inequitable treatment of individuals or organizations based upon their religious nature or identification. When the government discriminates against an individual—that is, treats the person differently from others similarly situated—because of their religious expression, behavior, or affiliation, religious liberty is denied. Indeed, employment discrimination claims based on religious grounds against public employers parallel (and often include) claims for accommodation of the free exercise of religion. Cases in which a religious organization protested that it was singled out for unequal treatment by a government are likewise included. Accordingly, religion-based claims under the Equal Protection Clause of the Fourteenth Amendment, the equal protection component of the Fifth Amendment, or under Title VII of the Civil Rights Act of 1964 are included, when a governmental actor or action is the target of complaint. Although arguably one also could include religious discrimination claims against private entities as implicating religious liberty in society, the focus of our study is upon more direct interaction between government and religion.

C. *Results of Study by Religious Affiliation of Claimant*

If the claimant succeeded on any significant claim,⁴⁵ then the judge's ruling was coded as "1" for the basic outcome dependent variable (FE-OUTCM). If the claimant failed on all significant claims, the FE-OUTCM dependent variable was coded as "0." Table 1 in the Appendix to this article reports the regression analysis for this Free Exercise/Accommodation model.

On this basic Free Exercise/Accommodation outcome variable, with 1198 judicial participations, the claimant was favorably received by the participating judge in 35.6% or 427 of the observations. (Measuring the success

44. 20 U.S.C. §§ 4071–74 (2000).

45. For further description of the coding of the outcome variables at the general and claim-type levels, and in the context of cases raising multiple claims, see Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 9, at 548–49.

rate alternatively by case, rather than using each judge as the datapoint, Free Exercise/Accommodation claimants succeeded in 32.7% of cases—that is, succeeded in obtaining a favorable decision by a district judge or by a majority of a court of appeals panel.) When we eliminated cases in which information on religious backgrounds of claimants was missing, our study included 969 judicial participations, in which the claimant succeeded in obtaining a positive response from the judge in 37.9% or 367 of the observations.

In 1990, which was a little less than half-way through the time range for our study, the Supreme Court issued its landmark decision in *Employment Division v. Smith*.⁴⁶ In *Smith*, the Court removed the requirement under prior precedent that government establish a compelling public interest to justify application of laws in a manner that substantially burdens a religious practice.⁴⁷ Nonetheless, our study found that the success rate for religious accommodation claimants in the lower federal courts actually increased after *Smith* (from 30.0% of the observations before *Smith* to 39.7% afterward).⁴⁸ Thus, because of the enactment of the Religious Freedom Restoration Act⁴⁹ in 1993, which at least temporarily restored the compelling public interest standard, and apparently because religious liberty claimants creatively adjusted to *Smith* by reframing complaints to assert freedom of speech claims in addition to or as substitutes for free exercise of religion claims,⁵⁰ success rates remained relatively stable throughout the period of our study.

The religious affiliation of the claimant in each Free Exercise/Accommodation case was identified, thus allowing us to explore whether judges were more or less receptive to the petitions of those from certain religious groups. Because we have not included unpublished decisions in our study,⁵¹ we have not mapped the entire topography in terms of judicial re-

46. 494 U.S. 872 (1990).

47. *Id.* at 882–89.

48. Measuring success rates by the case rather than by the judge, that is, making the case rather than judicial participation the datapoint, we found the same pattern of increasing success, from 29.8% of cases before *Smith* to 34.6% afterward. For a more detailed discussion of the impact of *Smith* and success rates for claimants before and after *Smith*, see Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 9, at 567–71. See also Brent, *supra* note 1, at 250 (finding in a study of the federal courts of appeals that, after the passage of the Religious Freedom Restoration Act in 1993, “the winning percentage of free exercise claimants rose again” to the same level as before *Smith*).

49. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (previously codified at 42 U.S.C. §§ 2000bb to 2000bb-4).

50. See Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 9, at 569–71 (discussing adaptation in theoretical strategy by religious liberty claimants, including evidence of “a marked growth in the number of religious expression and religious equality claims after *Smith*, sometimes attached to complaints invoking traditional free exercise theories and sometimes not, with a consequent rise in the success rate for religious liberty claims”).

51. For a discussion of the decision to use only published decisions and the qualifications arising therefrom, see Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 9, at 534–39.

sponses to claims for religious accommodation. Still, the presence or absence of patterns of success and failure in the published opinions is noteworthy, as it indicates judicial reaction to claims from particular religious communities in recorded decisions highlighted by publication.

In identifying religious affiliation, we of course understood that an individual's revelation of a religious label may or may not reflect that religion is an important aspect of the person's life or has any effect on the person's thinking or behavior. Fortunately, concerns about the significance of religion to the claimants are substantially mitigated by the nature of the cases included in our study. We assumed that a person for whom a religious principle is of such importance as to warrant litigation to defend it is rather likely to be a person of meaningful religious convictions (although, of course, cases in which people attempt to avoid legal responsibility may attract insincere claimants).⁵² Moreover, since our concern was with how variables such as the claimant's religious affiliation influence judicial decisionmaking, the most salient feature is the appearance of religious affiliation to the observer.

Religious affiliations of claimants were coded as follows (if more than one claimant from more than one religious persuasion were involved, which rarely occurred in the cases in our study, the affiliation of the lead claimant was coded). We began coding the claimant's religious affiliation variable at the most specific level possible by denomination and sect, although anticipating that due to small numbers in some religious affiliations it would become necessary to combine them into more general categories later. Based upon cell counts, we ultimately gathered the religious affiliations for claimants into eight general categories, for which dummy variables were created:

CATHOLIC: Catholic claimants accounted for 6.3% (or 75) of the 1198 observations in Free Exercise/Accommodation cases.

BAPTIST: Baptist claimants accounted for 3.0% (or 36) of these observations.

GENERAL CHRISTIAN: Claimants who were affiliated with other Christian denominations or sects accounted for a total of 25.2% (or 302) of the observations in the free exercise decision set. Of these, 1.7% (or 20) involved claimants who were identified as Mainline Protestant; 16.5% (or 198) involved claimants who could be identified only as other Christian, that is, not Mainline Protestant nor Catholic; 1.9% (or 23) involved Pentecostal Christians; 2.3% (or 27) involved Seventh-Day Adventists; 1.1% (or 13) involved self-identified Fundamentalist Christians; 0.5% (or 6 observations) involved claimants who were Eastern Orthodox; 0.7% (or 8) involved

52. See Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 325–26 (discussing the problem of “strategic claims of religious scruples” and noting that “the likelihood of fraudulent claims will turn on whether more may be lost by following the religious mandate at issue than may be gained by avoiding the legal provision in question”).

Quaker claimants; and 0.6% (or 7) involved claimants affiliated with Amish or Mennonite churches.

ORTHODOX JEWISH: Orthodox or Conservative Jews accounted for 7.2% (or 86) of the observations in Free Exercise/Accommodation cases.

JEWISH: Other Jewish claimants accounted for 4.2% (or 50) of the judicial participations in the Free Exercise/Accommodation set of decisions.

MUSLIM: Muslim claimants accounted for 14.5% (or 174) of the judicial participations in the Free Exercise/Accommodation set.

NATIVE AMERICAN: Claimants who followed Native American religious practices accounted for 5.7% (or 68) of the observations.

OTHER: Claimants with other religious affiliations accounted for 14.9% (or 178) of the observations. Of these, 0.3% (or 3) were Unitarian; 0.7% (or 8) were Mormon; 0.7% (or 8) were Jehovah's Witnesses; 0.3% (or 3) were Christian Scientist; 1.6% (or 19) were white separatists; and 11.4% (or 137) were divided among a large array of other religions not falling within the categories of Christian, Jewish, Muslim, or Native American.

Claimants for whom a religious affiliation could not be determined accounted for 19.1% (or 229) of the 1198 observations in the Free Exercise/Accommodation set of decisions. Accordingly, we were forced to treat these observations as missing in models that included the claimant religious affiliation dummy variables (which is the focus of this essay).

While no obvious candidate sprang forth as the appropriate reference variable, we selected **GENERAL CHRISTIAN** as the variable that best appeared to occupy the broad span of the religious spectrum. This General Christian variable collects together various non-Catholic and non-Baptist Christian adherents and thus is the one that is most broad and inclusive.

Looking at the results, what proved significant and what did not in terms of prospects of success in accommodation cases by religious affiliation is notable. First, those religious groupings that both today and historically have been regarded as outsiders or minorities, such as Jews, Muslims, Native Americans, and various others (including Jehovah's Witnesses and Christian Scientists), did not succeed or fail in making religious liberty claims at a rate (controlling for all other variables) that was significantly different than for other religious classifications. In sum, with a potential exception noted next, the hypothesis that minority or unconventional religious adherents enter religious liberty litigation at a significant disadvantage finds no support in our study. Whatever may have been the historical pattern, religious minorities did not experience disproportionately unfavorable treatments in the federal courts of the 1980s and 1990s, under our study.

The possible exception to this conclusion is that of Muslim claimants. While the Muslim claimant variable was significant at only the 83% probability level under our standard model, it rose to significance at the 99%

probability level when both district court decisions and court of appeals decisions were evaluated separately in ancillary regression runs. Because these ancillary runs were conducted primarily for cross-checking purposes, we have been reluctant to rely on them for findings. Still, although it is odd that this variable descends to a lower level of significance when those two sets of decisions are joined for combined regression analysis, the fact that appellate court decisions and district court decisions separately both are negatively and quite significantly correlated with claims by Muslims suggests that something measurable may be present here. Moreover, when cases involving claims of unequal treatment or discrimination were evaluated separately in a focused regression run of 188 judicial participations, Muslim claimants proved significantly less likely to succeed (at the 95% probability level).

Therefore, at least pending further 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. Given that this study involved cases decided well before the current War on Terror, which has focused upon Islamic extremists, we can only speculate as to whether such recent developments might further impair the prospects of Muslim claimants for religious accommodation in court.

Second, two categories of religious affiliation by claimants emerged as consistently and significantly associated with a negative outcome—Catholic (at the 99% probability level) and Baptist (at the 95% probability level).⁵³ In the remainder of this essay, I suggest and evaluate possible explanations for these findings.

II. INTERPRETING THE RESULTS: WHY ARE CATHOLICS AND BAPTISTS SIGNIFICANTLY LESS LIKELY TO SUCCEED IN RELIGIOUS LIBERTY CASES?

Given that it turns the persisting myth of religious liberty jurisprudence on its head, our finding that claims by Catholics and Baptists were significantly more likely to be rejected in the courts may seem counter-intuitive to many readers. Why would those whose religious views are at or reasonably close to the mainstream of American society be significantly less likely to succeed in obtaining a court-ordered accommodation of religious practices, while those adhering to outsider minority religions (with the possible exception of Muslims) did not encounter similarly negative responses? Upon further consideration, as well as exploration of additional evidence and findings

53. See *infra* tbl. 1, in Appendix.

from our empirical study, possible interpretations suggest themselves, several of which are interrelated and consistent with each other.

To begin with, I resist the unnecessary assumption that old-fashioned religious prejudice is an explanatory factor in the failure rate for traditionalist Christian claimants in religious liberty cases.⁵⁴ Likewise, at the other end of the range of possible explanations, the proposition that Catholic or Baptist claimants simply present weaker religious liberty claims to the courts, and thus deserve to lose on the merits at a greater rate, is contradicted by what pertinent empirical evidence is available in our study; further, such a pejorative appraisal of their claims might well be grounded in certain cultural or political preferences that, while quite possibly an influence here, should not be confused with actual legal merit.⁵⁵ A more likely explanation may be found in the perception that members of mainstream or near-mainstream faiths are fully capable of participating in the political process and sufficiently acculturated into society. Less-informed observers may find it difficult to believe that mainstream Christian believers are likely to suffer any genuine and concrete burdens on religious practices and, for that reason, observers making such an assumption may find such believers unworthy of judicial solicitude.⁵⁶ Moreover, given that orthodox Catholics and evangelical Baptists typically adhere to traditional or conservative social values and moral principles, the phenomenon of impaired success for claimants from these religious communities might be understood as part of a broader distrust by progressives of active social conservatives.⁵⁷ Similarly, because Catholic and Baptist claimants tend to assert familiar and controversial claims of conscience that conflict directly with the social policy-initiatives of liberal, secular government, especially in metropolitan areas, judges that are disproportionately drawn from the cultural elite may react more skeptically or hostilely to such claims, even aside from the legal merits.⁵⁸

A. The Possible Persistence of Simple Religious Prejudice

The simplest, and the most disturbing, explanation for the impaired litigation success of Catholics and Baptists would be that old-fashioned religious bigotry remains at work, even today and even on the judiciary. Thus, one possible explanation for the disproportionate failure of their claims may be that members of the Catholic Church and Baptist fellowships come into court

54. *See infra* Part II.A.

55. *See infra* Part II.E.

56. *See infra* Part II.B.

57. *See infra* Part II.C.

58. *See infra* Part II.D.

struggling against negative perceptions and attitudes shared by political and legal elites.

To begin with, as several scholars have documented in recent years, the evolution of church-state doctrine in the courts historically was substantially influenced by cultural prejudices against the Catholic Church as an institution and Catholics as religious minorities in American society.⁵⁹ Indeed, in the not-too-distant past, members of the United States Supreme Court rather openly expressed anti-Catholic sentiments, assailing the Church and its followers as "sectarian religious propagandists" who were aggressively seeking to "indoctrinat[e] [the Church's] creed."⁶⁰ Just a few years ago, in a plurality opinion for the Court,⁶¹ Justice Clarence Thomas characterized legal resistance toward government aid to so-called "pervasively sectarian" private schools as having a "shameful pedigree" and observed that it originated during a period of "pervasive hostility to the Catholic Church and to Catholics in general."⁶² At earlier points in American history, Baptists too suffered persecution for their enthusiastic and evangelical religious practices, including mob violence directed against Baptists in New England and imprisonment of itinerant Baptist preachers in the South during the founding period.⁶³

Although the general public perception of Catholics has improved in recent decades and Baptists have become mainstream members of the evangelical Christian movement in at least some regions,⁶⁴ it admittedly is possible that residual antipathy toward Roman Catholicism or Baptist evangelicalism may persist in the federal judiciary. I have found no clear evidence of such prejudice reflected in the opinions that we reviewed as part of our study, although it is possible that today's judges are more careful to

59. See generally PHILIP HAMBURGER, *SEPARATION OF CHURCH & STATE passim* (2002) (see index listing for "Anti-Catholicism"); Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121 *passim* (2001); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 282, 359 (2001); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 50–53, 57–58 (1997). For a succinct but rather complete summary of anti-Catholic attitudes and episodes in American history, see Richard W. Gamett, *American Conversations With(in) Catholicism*, 102 MICH. L. REV. 1191, 1198–1208 (2004) (reviewing JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM* (2003)).

60. Berg, *supra* note 59, at 129 (quoting anti-Catholic comments by Justices Black and Douglas, as well as others).

61. *Mitchell v. Helms*, 530 U.S. 793 (2000).

62. *Id.* at 828 (Thomas, J., plurality opinion); see also Gerard V. Bradley, *An Unconstitutional Stereotype: Catholic Schools as "Pervasively Sectarian,"* 7 TEX. REV. L. & POL. 1, 3 (2002) (arguing that "the 'pervasively sectarian' theory presents an unconstitutional stereotype of Catholic belief and practice").

63. Berg, *supra* note 13, at 932–33.

64. See CHRISTINE LEIGH HEYRMAN, *SOUTHERN CROSS: THE BEGINNINGS OF THE BIBLE BELT* 189, 236–47 (1997) (describing the rise of evangelicals in the South from outsider status to numerical and cultural dominance).

conceal such attitudes than were the Supreme Court justices of the not-too-distant past.

However, despite the sobering lessons of history, the skeptical judicial audience encountered by Catholic and Baptist claimants in our study need not be understood in terms of anti-Catholic or anti-Baptist bigotry. Although "explicit dislike of Catholicism" remains an unfortunate element of the Church-State debate in some quarters,⁶⁵ my collaborators and I have been reluctant to believe that such discriminatory attitudes may be found on the modern federal bench. Moreover, Baptist claimants faced the same uphill climb in our study, which of course cannot be explained by the more recent history of anti-Catholic feeling in the United States; indeed, Baptists historically have been on the other side of the Catholic-Protestant religious divide on matters of Church and State.⁶⁶

B. Leaving Mainstream Religious Groups to the Political Process—A Lack of Solicitude for the Supposedly Powerful

A second possible explanation for the results in our study may be that the very fact of near-mainstream status works against a successful request for accommodation. Because Catholics and Baptists are found in significant numbers across the country, judges may consciously or subconsciously conclude that followers of those religious traditions are capable of effectively participating in the political process and thus are neither in need nor deserving of protection through judicial intervention from the results of that political process.

Along the same lines, because Catholics and Baptists in general are perceived by judges as having been fully acculturated into American society, individuals from such religious traditions may not be taken as seriously when asserting a conflict between their religious values and a secular directive. As Michael McConnell has argued, judges may be unwilling to believe that "ordinary Americans" from mainstream religious groups "might entertain religious convictions that are out of the ordinary."⁶⁷ On the assumption that no mainstream religious believer need seriously fear repression or persecution by majoritarian government, unlike religious minorities, judges may be inclined to view claims of undue burden by traditional Christian believers as overstated and not worthy of judicial intervention.

If judicial disregard for mainstream religious believers, because they are thought capable of fending for themselves or are unlikely to experience a se-

65. Berg, *supra* note 59, at 168.

66. HAMBURGER, *supra* note 59, at 376-78.

67. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1136 n.118 (1990).

rious conflict with governmental regulations, should prove to be an ingredient in the explanation for our study results, I submit this would be most unfortunate and unfair. First, the very fact that these Catholic and Baptist claimants are seeking accommodation or protection in the courts confirms that, at least on the matters at hand, any attempt to secure political acknowledgment was unavailing. Second, presuming to treat a purportedly mainstream religion with less solicitude because of its supposed political strengths ignores the fact in our pluralist society that what constitutes the mainstream in one region of the country may fall well outside of the norm in another.⁶⁸ For example, Thomas Berg writes that "in many places and institutions in the nation, evangelical Christians dominate culturally and politically and non-Christians constitute minorities," while "in many other places and institutions, and on certain issues, traditionalist Christians join traditionalist Orthodox Jews as the outsiders."⁶⁹

C. *Ideology: Liberal Rejection of Conservative Religious Values*

As a third possible explanation, and one that may overlap with the fourth suggested interpretation set forth below,⁷⁰ the phenomenon of impaired success for claimants from the Catholic and Baptist religious communities might 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.⁷¹ The pertinent legal or political "division is no longer between Catholics and everyone else," but rather is a general cultural divide between traditionalists and progressives.⁷² What Catholics and evangelical Protestants, such as those identified as Baptists in our study,⁷³ tend to hold in common today is a general adherence to traditional or conservative social values and moral principles, that may conflict with the commands and policy-initiatives of a secular and liberal government. Thus, when traditionalist Catholics and Baptists resist governmental regulation of private conduct by seeking court-ordered exemptions from,

68. Berg, *supra* note 13, at 943–46.

69. *Id.* at 958.

70. See *infra* Part II.D.

71. Berg, *supra* note 59, at 123; see also Suzanna Sherry, *Religion and the Public Square: Making Democracy Safe for Religious Minorities*, 47 DEPAUL L. REV. 499, 516–17 (1998) (describing the "alliance" between evangelicals, particularly Southern Baptists, and conservative Catholics).

72. Berg, *supra* note 59, at 169; see also JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 42–51 (1991) (describing "culture war" between traditionalists and progressives in American society).

73. While there always has been a liberal wing of the Baptist movement, claimants and judges belonging to the American Baptist Church were separately classified in our study as Mainline Protestants, while the claimants coded as Baptists for our study fell into the fundamentalist or evangelical categories.

for example, anti-discrimination or licensing laws, they run against the grain of mainstream secular society, particularly in metropolitan localities.⁷⁴

Despite antipathy between Protestants and Catholics in the past, conservative Baptists are a visible element of the so-called Religious Right, whose perspective on cultural and social matters often parallels that of orthodox Catholics. Importantly, this shared traditionalist perspective tends to contrast with that of the Mainline Protestant worldview (although, of course, there are traditionalist or conservative elements even in the most modernist or progressive of the Mainline Protestant denominations).⁷⁵ Although the numbers of Mainline Protestant churchgoers have significantly declined in recent years, in part at the expense of the growing evangelical denominations,⁷⁶ more of the federal judges in our study identify with those established mainline churches (representing more than 37% of the judicial participations) than with any other single religious grouping.

D. The Greater Perceived Threat of the Controversial Familiar Religious Perspective than the Unconventional Religious Practice

William Marshall has argued that “[a] court is more likely to find against a claimant . . . when the religion is bizarre, relative to the cultural norm.”⁷⁷ In fact, I submit something of the opposite may be as common, or more common, a phenomenon, 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.

Thus, when we hear stories of strange (to us) beliefs or practices in far-flung places of the world, our natural reaction tends to be one not of antipathy or disagreement, but of detached curiosity. 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

74. Specific case examples of these types of claims asserted by Catholics and Baptists, drawn from the cases included in our database for this study, are discussed below with respect to the fourth and final possible explanation addressed in this essay.

75. On the intra-denominational division between religiously conservative and religiously liberal elements, especially on cultural or social values, see Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 9, at 580–81.

76. Berg, *supra* note 59, at 126; Jeffries & Ryan, *supra* note 59, at 340–58.

77. William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 311 (1991); see also Feldman, *supra* note 7, at 259 (suggesting, in context of Supreme Court, that free exercise claimants from minority religions may not fare as well because “the crux of the claimant’s free exercise argument is precisely that her religion diverges from the mainstream Christian views,” in that the claimant is asking “the Court to create an exception from the mainstream or normal understanding of religion and religious freedom, as manifested in the generally applicable laws as well as in previous Supreme Court decisions”).

those attitudes and actions against our own beliefs and practices. Such odd behaviors or beliefs simply do not cut sufficiently close to home so as to cause us to examine or revisit our own values. 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.

By contrast, 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). We may react more defensively and with greater concern to the neighbor who is in almost all aspects similar to ourselves but who departs markedly on some essential point that is crucial to our own sense of values or identity. When we look into the mirror as it were and see something so familiar and yet so wrong, we may be more likely to be disturbed. Consider our response toward someone who looks much like us, grew up in similar ways, lives in the same neighborhoods, attended the same schools, holds the same kinds of jobs, but who then holds what we see as peculiar and abhorrent views on human sexuality or abortion and reproduction or relations between the genders or responsibility for the community and social welfare. To be sure, we might (ideally) respond by developing a greater appreciation for perspectives at variance with our own and a greater willingness to hear alternative viewpoints. But too often we are all the more troubled because a person with such views is so close at hand and so beguilingly similar to us in other respects.

Moreover, in today's cultural milieu, at least in certain areas of the country or in certain social settings, our otherwise normal neighbor's deviant views are even more likely to be disturbing if they should be grounded in religious devotion. As Stephen Carter wrote a decade ago, "even within the acceptable mainline, we often seem most comfortable with people whose religions consist of nothing but a few private sessions of worship and prayer, but who are too secularized to let their faiths influence the rest of the week."⁷⁸ But should a person move beyond treating his or her religion "as a hobby,"⁷⁹ and actually conform his or her behavior to faith or allow faith to inform his or her views on matters of public concern, then we are likely to see the individual as deranged and even dangerous to the secular social order.

Let me then try to extrapolate these speculations about common human reactions to the alien-but-remote, as contrasted with the familiar-but-controversial, into the realm of human behavior known as judging. When a judge encounters a religious practice that is not merely a variation of his or her own mainstream religious experiences (or if the judge is not religiously devout, his or her own experiences with other persons in his or her social cir-

78. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 29 (1993).

79. *Id.*

cles that hold mainstream religious perspectives), but rather departs so radically from the conventional as to appear distinct and wholly other, the judge may be more willing to tolerate it as harmless (or at least easily contained) for that very reason. When a religious outsider wishes to avoid eating a particular type of food, abhors having her photograph taken for a driver's license, or insists upon wearing religious apparel, a judge is unlikely to react with agreement or disagreement to such practices but instead to view them simply as different and unconventional. Thus, the judge may be more willing to tolerate the unusual religious conduct, perhaps seeing it merely as eccentric even if sincere, which in turn then predisposes the judge to see accommodation as unlikely to disrupt important governmental goals.

However, when the follower of a traditional religious group presses a claim of conscience that folds into one of the conventional, if controversial, perspectives within the mainstream of American cultural life, a judge's reaction may be more likely to include an additional stage of evaluation, whether conscious or not. Precisely when such claims impinge upon issues of current societal ferment, the judge may pass the religious claim across the metric of his or her own worldview before turning to the question of legal accommodation. In this way, the very fact that traditional Christian values, still adhered to with devotion by evangelical Protestants and by orthodox Catholics, have been part of the mainstream and remain part of cultural and political debate makes the assertion of such beliefs more threatening to those who disagree. Thus, for example, when an evangelical Christian school challenges the application of employment discrimination laws when discharging an unmarried pregnant school teacher or a Catholic hospital resists accreditation requirements for providing abortion-related training or services, a judge may find it more difficult not to think of how those claims stand against the judge's own religious or political viewpoints. If the judge disagrees as matter of policy or belief with claims that flow directly out of the ongoing culture war, the judge may react more skeptically or even hostilely to such claims, even aside from the legal merits.

In addition, traditionalist Christians are more numerous in many parts of the country than outsider sects whose small size means that few claims for accommodation of unconventional views will be pressed. For that reason, judges sharing the perspective of secular liberalism may be more fearful of the cumulative effects of accommodating claims for accommodation by mainstream or near-mainstream religionists. Because the cost of accommodating members of the larger religious group may not appear as marginal as would allowing an exemption for adherents to a minority religion, a judge might more readily conclude that the government has a compelling interest that justifies overriding even sincere claims of religious conscience. In other words, so the reasoning might proceed, the larger the religious group, the

greater the potential effect on governmental interests from accommodation and therefore the higher (and more unacceptable) the costs to society in tolerating them. Thus, by legal slight of hand, the compelling governmental interest analysis becomes short-hand for repressing religious conscience whenever it cannot easily be contained and isolated within a small sect. Whenever the claim of religious conscience impinges at all upon the dominion of secularism, the rule of statism prevails.

Among the most sacred cows of modern secular liberalism are the social welfare and regulatory system in which all are obliged to participate and the principle of anti-discrimination, which constantly expands to cover new categories of protected persons and new sectors of society (employment, education, housing). In this regard, as revealed by the underlying individual cases that provide the cumulative database for our study, the typical claim by a Catholic or Baptist tends to be a shot right across the bow of the secular ship of state. Thus, as examples of unsuccessful claims, Catholic claims in our database include objections by Catholic colleges, schools, or institutions to application of employment discrimination laws,⁸⁰ resistance to application of labor bargaining laws to Catholic entities,⁸¹ and objection to withdrawal of accreditation of a Catholic hospital based upon its refusal to provide sterilization and abortion training.⁸² Similarly, unsuccessful Baptist claims in our database include challenges to safety and health regulation or other licensing of religious schools,⁸³ resistance to enforcement of labor and wage laws against a religious school,⁸⁴ a claim for exemption by the church from inclusion un-

80. See, e.g., *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993) (age discrimination claim against Catholic high school); *Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324 (3d Cir. 1993) (age discrimination claim against Catholic school); *Stouch v. Brothers of the Order of Hermits of St. Augustine*, 836 F. Supp. 1134 (E.D. Pa. 1993) (age discrimination claim against monastery); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57 (E.D. Pa. 1991) (age discrimination claim against Catholic hospital); *Soriano v. Xavier Univ. Corp.*, 687 F. Supp. 1188 (S.D. Ohio 1988) (age discrimination claim against Catholic university). But see *EEOC v. Catholic Univ. of Am.*, 856 F. Supp. 1 (D.D.C. 1994), *aff'd*, 83 F.3d 455 (D.C. Cir. 1996) (upholding challenge to application of sex discrimination law in case of professor of canon law denied tenure); *Powell v. Stafford*, 859 F. Supp. 1343 (D. Colo. 1994) (upholding challenge by Catholic high school to application of age discrimination statute in termination of theology teacher).

81. See, e.g., *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295 (9th Cir. 1991); *Christ the King Reg'l High Sch. v. Culvert*, 644 F. Supp. 1490 (S.D.N.Y. 1986), *aff'd*, 815 F.2d 219 (2d Cir. 1987).

82. See, e.g., *St. Agnes Hosp. of Baltimore, Inc. v. Riddick*, 748 F. Supp. 319 (D. Md. 1990).

83. See, e.g., *Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8th Cir. 1987); *N. Valley Baptist Church v. McMahon*, 696 F. Supp. 518 (E.D. Cal. 1988), *aff'd*, 893 F.2d 1139 (9th Cir. 1990). But see *Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988) (upholding challenge by church-run child care centers to state licensing requirements).

84. See, e.g., *U.S. Dep't of Labor v. Shenandoah Baptist Church*, 707 F. Supp. 1450

der the state workers' compensation statute,⁸⁵ resistance to inclusion of church workers in the social security system,⁸⁶ and a challenge to an employment discrimination investigation regarding discharged church employees.⁸⁷ In sum, claims for religious accommodation by traditionalist religions, such as Catholics and Baptists, are especially likely to come up hard against central, might we say, "sacred," features of the modern secular legal regime.

In addition to predicting a negative response to claims by minority religions, Marshall argued that "religious claims most likely to be recognized . . . are those that closely parallel or directly relate to the culture's predominant religious traditions."⁸⁸ Perhaps during a period of religious hegemony that saturates the elite secular realm of society as well, that observation might be correct. But the present period is one in which "the culture's predominant religious traditions" increasingly find themselves in conflict with the political decrees of a liberal secularism that prevails in certain regions (especially urban areas) and among certain sectors of society (including the legal profession). Accordingly, orthodox Christians who seek accommodations that reflect traditional religious values may not be at all well-positioned for litigative success in the modern era—especially before a judiciary that is drawn largely from the cultural elite.

E. Testing the Alternative Suggestion That Catholic and Baptist Claims Were Weaker on Merits

As a final possible explanation, one might suggest that the claims for religious accommodation made by Catholic or Baptist claimants simply were not as strong as those brought by the wide-ranging collection of other religions represented in our database. In other words, so this argument might proceed, Catholics and Baptists lose not because of any inequitable treatment on the basis of religion or cultural worldview but simply because they deserve to lose on the merits. By this reckoning, Catholics and Baptists might tend to present claims that are weaker in terms of the burden imposed upon religious conscience or under circumstances where the public interest justifying the imposition is stronger. For the reasons stated below, I suggest that this hypothesis is contradicted by the pertinent empirical evidence available in our

(W.D. Va. 1989), *aff'd*, 899 F.2d 1389 (4th Cir. 1990).

85. See, e.g., *South Ridge Baptist Church v. Indus. Comm'n*, 676 F. Supp. 799 (S.D. Ohio 1987), *aff'd*, 911 F.2d 1203 (6th Cir. 1990).

86. See, e.g., *Bethel Baptist Church v. United States*, 629 F. Supp. 1073 (M.D. Pa. 1986), *aff'd*, 822 F.2d 1334 (3d Cir. 1987).

87. See, e.g., *Ninth & O St. Baptist Church v. EEOC*, 633 F. Supp. 229 (W.D. Ky. 1986).

88. Marshall, *supra* note 77, at 311.

study and, moreover, may ultimately shade into little more than a restatement of the preferences of modern secular liberalism as discussed immediately above.⁸⁹

To begin with, that Catholics and Baptists as categories of claimants submit claims for religious conscience that differ substantially in legal quality, and in a negative direction, from the vast and diverse set of other religious claimants included in our study—ranging from Mainline Protestants and other Christian denominations to Jewish, Muslim, and Native American religions—strikes me as a counter-intuitive proposition. In our study, Catholic and Baptist claimants were compared not only to outlier religious groups whose claims might be seen as most likely to raise vital and urgent objections to repression by a hostile society, but also were compared with non-Orthodox Jews and other Christians whose position on the religious spectrum falls closer to the middle. Before embracing the conclusion that Baptists and Catholics have been uniquely defective in formulating religious liberty claims, we would expect rather clear evidence. The burden of proof plainly would lie with the researcher who might suggest that these particular religious claimants are more likely than members of other religious groups to interject substandard and flawed legal claims into the courts.

Next, empirical research certainly has its limits and not everything may be readily and reliably quantified for statistical study. Although certain factors or elements varying among case streams may roughly estimate greater or lesser legal validity, especially when the courts have identified those particular factors or elements as pertinent to the legal analysis, we did not and probably could not directly scale each case's underlying legal merit in this study. Indeed, to have attempted to formulate a direct measure of legal merit in a field of law (religious liberty) in which the courts have applied generally stated balancing tests would not only have been difficult but likely would have been inescapably subjective.

Nonetheless, depending on how one understands legal merit in the context of religious liberty, our study did include at least three different proxies for, or indirect approximations of, claim strength or validity. Furthermore, an analysis of each of these empirical elements tends to undermine any hypothesis that the significantly more negative reception received by Catholic and Baptist claimants can be explained by assertion of weaker claims on the merits.

First, we included case-type control variables to ensure that any relationship discovered between a religious (or other) variable and the dependent variable is not an "artifact" of some correlation between that variable and a

89. See *supra* Part II.D.

particular type of case.⁹⁰ As Donald Songer and Susan Tabrizi explain, “integrated models will be incompletely specified unless they include the particular case facts that are most relevant for the type of cases examined.”⁹¹ As described in greater detail in our earlier published report on this study,⁹² the nine case-type dummy variables were (1) health, safety, and regulation/licensing of private activity; (2) private education; (3) public education; (4) religious expression; (5) tax; (6) prisoner; (7) employment discrimination in government; (8) criminal; and (9) other. If none of these case-type variables had proven to be significant, that would have suggested an error in our selection of the appropriate control variables. In fact, three of the eight case-type variables—religious expression, tax, and criminal—were statistically significant in the Free Exercise model⁹³ and two other case-type variables—employment discrimination (government) and prisoner—proved significant in certain focused regression runs.

In addition to serving other purposes, the inclusion of case-type variables ought to reduce the chance that some oddity about or concentration of claims around a particular type of case might be driving the result. Consider, for example, the suggestion that the fact of weaker success for Catholic and Baptist claimants might be attributable to the fact that these plaintiffs disproportionately asserted claims falling within a distinct type of case category (such as health and safety regulations) that diluted prospects for success (because plaintiffs initiating that type of case lost at a greater rate). If our case-type control variables were adequately defined and specified, our statistical analysis should have separated out that case-type correlation with negative outcomes on the dependent variable from the association between religious affiliation for claimants and the dependent variable. Admittedly, our case-type variables necessarily were defined with some degree of breadth and could never be perfectly and individually specified, nor should we place excessive interpretive weight upon the inclusion of such control variables in a statistical model. Together with the other factors discussed here, however, the inclusion of case-type control variables provides some cumulative evidence against a case-type-driven explanation for the decreased success of Catholic and Baptist claimants.

90. Songer & Tabrizi, *supra* note 22, at 517 (explaining that, in a study of evangelical Christian judges and rulings in death penalty, gender discrimination, and obscenity cases, “[t]he case facts employed in each model below are primarily viewed as control variables to insure that any associations discovered between religion and judicial decisions are not an artifact of some correlation between particular types of cases and the concentration of particular religions in regions giving rise to those types of cases”).

91. *Id.* at 511.

92. Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 9, at 559–62.

93. See *infra* tbl. 1, in Appendix.

Second, included in the overall model for Free Exercise/Accommodation were cases that raised issues of religious expression and asserted claims under the Free Speech Clause of the First Amendment. Because freedom of speech is one of the most highly venerated, and vigorously protected, of constitutional rights, being subject to infringement only for the most compelling of reasons, claims of religious expression ought to be among the strongest religious liberty claims on the merits. Thus, separating out religious expression claims from those grounded instead on the Free Exercise Clause directly (or statutory parallels, like the Religious Freedom Restoration Act) might make a rough division based upon respective merits. When we did precisely that, conducting alternative regression runs that excluded religious expression (and equal protection) claims and thus were limited to free exercise claims, our results remained stable. Looking only at free exercise of religion claims, Baptist claimants were significantly less likely to succeed and the variable for Catholic claimants remained negative in direction and came very close to the standard measure of statistical significance (above the 94% probability level).⁹⁴

Third, the very fact that we focused upon published judicial decisions in our study, while incorporating certain limitations that we address briefly below,⁹⁵ provides something of a rough measure of quality. By examining only published decisions, we 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. The collected set of published opinions also is likely to be skewed toward those cases that raised viable, as opposed to frivolous, claims and those that resulted in decisions in favor of claimants against the government, because judicial rulings that overturn the decisions of governmental entities are more likely to generate the kind of attention and interest by judges that would lead those judges to submit such decisions for publication.⁹⁶ Indeed, because the set of published decisions may overstate the degree of success (because successful claims against the government are more likely to result in publication), the fact that Baptist

94. These alternative regression runs are not reported by a table in the Appendix to this Article, but the data are available from the author.

95. See *infra* notes 105–108 and accompanying text.

96. See Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 111–14 (2001) (finding, in a study of published and unpublished decisions in labor law cases, that “a decision [by a court of appeals panel] to reverse or the presence of a dissent, play a large role in predicting publication,” although also finding “a surprising number of reversals, dissents, and concurrences among unpublished opinions”).

and Catholic claimants nonetheless failed at a significantly greater rate to convince federal judges to endorse their claims is all the more noteworthy.

Finally, to the extent that evaluation of the strength of religious liberty claims on the merits turns more directly upon the nature of claims being asserted by Catholics and Baptists, that appraisal may shade into little more than a subjective aversion to the cultural values expressed by traditional religionists and a subjective preference for the present-day priorities of secular liberalism, along the lines addressed above.⁹⁷ In other words, on this account, the diminished success of Catholics and Baptists may be attributed to their greater tendency to resist application of various social welfare regulations and discrimination laws to church-related institutions, because judicial decisionmakers regard such regulatory measures and civil rights laws as serving especially compelling public interests. If this is the case, however, then the legal question on the merits of claims of religious conscience is to be answered according to the directives of secular liberalism, which has achieved political ascendancy in many regions or localities. If the claims of members of traditional religions are rejected on these grounds and for these reasons, then decisionmakers ought at least to be candid in acknowledging what is occurring. The burden also lies on those justifying such outcomes to explain why the welfarist and anti-discrimination agenda of the moment should be regarded as more impervious to claims of religious conscience than the traditional governmental interests of law and order and loyalty to American democracy that were invoked in days past against minority religious groups.

CONCLUSION: HOW ROBUST WILL RELIGIOUS LIBERTY BE IN THIS NEW CENTURY?

Any single work of empirical research, including the study upon which this essay is based, must be understood as providing only preliminary evidence to support or undermine any particular hypothesis.⁹⁸ Every study is subject to qualifications and limitations inherent in the study's design and purpose as well as in the unavoidable human choices made in identifying the subject of study, collecting and organizing data, transforming observations into mathematical constructs, etc. Until a study is replicated by other researchers and its hypotheses tested and confirmed in other related contexts or expanded to other time periods, any conclusions or interpretations about patterns or trends likewise must be understood as tentative. Even the most important of social science

97. See *supra* Part II.D.

98. On the qualifications and caveats attendant to any work of empirical research, see Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 9, at 613-14.

findings generally will be recognized as such only after they have been incorporated into and regularly confirmed by the larger body of ongoing work in the field. Thus, in the area of judicial decisions regarding religious liberty, much more work remains to be done.

In the present case, moreover, the empirical evidence to date, even limited as it is, does not run unerringly in one direction. Another study conducted by James Brent of religious liberty decisions from the lower federal courts during roughly the same time period reported what appear to be the diametrically opposed results, that is, that "claimants who belonged to mainstream Catholic and Protestant sects were more likely to win than were claimants who belonged to other religions."⁹⁹ A simple explanation for these disparate results is elusive. Although Brent's study was limited to court of appeals decisions,¹⁰⁰ while our overall study included district court decisions as well, we did conduct alternative regression runs that separated district court and appellate court rulings and yet which produced results consistent with our larger model.¹⁰¹ Brent's study also was limited to free exercise claims,¹⁰² while our overall study included religious expression and equality claims as well.¹⁰³ However, when we conducted alternative regression runs that were limited to free exercise claims, our results remained stable, with Baptist claimants significantly less likely to succeed and the variable for Catholic claimants remaining negative in direction and coming very close to the standard measure of statistical significance (above the 94% probability level).¹⁰⁴ Brent's study also focused on outcomes by case, whereas the datapoint for our study was the judge (thus looking at each individual judge on an appellate panel). However, when we alternatively calculated overall success rates for Free Exercise/Accommodation claims by case, the result (32.7%) remained comparable to that for judicial participations (35.6%).

Instead, the reason for the divergence between our study and Brent's study, on the particular point of success rates for religious claim-

99. Brent, *supra* note 1, at 250–51.

100. *Id.* at 246.

101. When district court rulings were considered separately, Baptist claimants continued to be significantly less likely to succeed, and while the Catholic claimant variable fell out of statistical significance, it remained negative in direction. When appellate court rulings were considered separately, Catholic claimants continued to be significantly less likely to succeed, while it was the Baptist claimant variable that dropped below significance while remaining negative in direction. These alternative regression runs are not reported by a table in the Appendix to this Article, but the data are available from the author.

102. Brent, *supra* note 1, at 246.

103. See *supra* notes 38–44 and accompanying text.

104. These alternative regression runs are not reported by a table in the Appendix to this Article, but the data are available from the author.

ants, more likely lies in differences in the selection of a set of variables to be examined, the coding and categorization of the religious affiliations of claimants, and the identification of decisions for examination. Our study was somewhat more specified in terms of background variables of judges and case types, which may mean that alternative influences upon outcomes were better controlled for and separated out in our study. In addition, in what stands out as a potentially pivotal variation, Brent's study gathered into a single "mainstream religion" category all the "major Catholic and Protestant (e.g., Presbyterians, Baptists, Lutherans, Episcopalians, etc.) sects."¹⁰⁵ Thus, the enfeebled success of Catholics and Baptists may have been submerged within the results for the multiple other denominations of Christians that Brent combined into the same general religious category.

In addition, Brent's study included unpublished as well as published decisions of the courts of appeals,¹⁰⁶ while our study used only published decisions in both the courts of appeals and the district courts. In our earlier article about our broader study, we pointed out the practical reasons for using published decisions because of the difficulty in locating all pertinent unpublished decisions given the multiple dimensions and purposes of our primary study; the incomplete availability of unpublished decisions during the period in question, which made use of such decisions potentially misleading; and the particular suitability of published decisions for our original and primary study purpose, which was to explore influences upon the judges, particularly in terms of their own religious backgrounds.¹⁰⁷ Nonetheless, when the focus of study turns from influences upon judges to what Brent aptly calls "judicial impact research,"¹⁰⁸ that is, the development or effect of changes in legal doctrine, then the entire universe of pertinent cases, published and unpublished, ideally would be examined for a more complete picture of trends in outcome. Accordingly, when looking at success rates for claimants, Brent's approach arguably was superior. And inclusion of unpublished decisions might be warranted for future work based upon the more recent time period, for which a more complete set of unpublished decisions may be available, although the limited data that can be extracted from unpublished decisions (especially on the crucial factor of religious affiliation of claimants) may still pose a serious obstacle.

Still, there is no apparent reason why a statistically significant disadvantage for Catholics and Baptists asserting religious accommodation

105. Brent, *supra* note 1, at 259.

106. *Id.* at 249.

107. Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 9, at 534-39, 568-69.

108. Brent, *supra* note 1, at 249.

claims would emerge only in published decisions. Indeed, the standard hypothesis has been that rulings that might reveal inequitable treatment or questionable reasoning by judges are more likely to be buried among the unpublished decisions. For that reason, a full explanation of the contrast in results between the Brent study and our own likely requires consideration not only of the database but also of the different model specifications and the very different coding of religious groups as discussed above.

In any event, the empirical research contributions to date demonstrate the need for and set the stage for future exploration. The set of religious liberty decisions during the past ten years has yet to be examined by rigorous empirical methods to determine whether prior trends or influences suggested by the research have continued or moved in other directions.

For example, our study (along with Brent's) indicated that overall success rates for free exercise claims remained remarkably stable even after the Supreme Court's decision constraining claims of religious conscience in *Employment Division v. Smith*,¹⁰⁹ perhaps because of Congress's enactment of the Religious Freedom Restoration Act (RFRA)¹¹⁰ or the creativity of claimants in reformulating religious liberty claims into free speech and equality claims or both.¹¹¹ Given that the Supreme Court subsequently invalidated RFRA in *City of Boerne v. Flores*¹¹² and that commentators have raised serious doubts about whether "free speech [or] statutory protections of religious liberty can ultimately substitute for a more rigorous free exercise clause,"¹¹³ empirical researchers should explore whether success rates for religious liberty claimants have declined, and by how much, over the past ten years.

In addition, the intriguing results obtained by our research and the questions thereby provoked about the comparative success rates for claimants from different religious backgrounds should be tested again with more recent case decisions, to confirm whether those apparent patterns are real and continue or whether other developments have altered the religious liberty landscape. With respect to minority religions, our research produced results hinting at a disadvantage for Muslim claimants, alone among outsider religious

109. 494 U.S. 872 (1990).

110. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (previously codified at 42 U.S.C. §§ 2000bb to 2000bb-4).

111. Sisk, Heise & Morriss, *Searching for Soul*, *supra* note 9, at 569-71.

112. 521 U.S. 507, 515-36 (1997).

113. JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 176 (2d ed. 2005).

groups.¹¹⁴ Given fears about a rise of anti-Islamic sentiment in the wake of the terrorist attacks on the World Trade Center and the subsequent international war on terrorism, a systematic exploration of judicial treatment of claims of conscience or inequitable treatment by Muslims is especially in order.

And, given the provocative findings of our study that traditionalist Christian claimants, specifically those from the Catholic Church and Baptist fellowships, encountered significantly greater obstacles to achieving recognition of their claims for religious accommodation in the lower federal courts in the mid-1980s through the mid-1990s, any empirical study of trends in religious liberty litigation should include a searching examination of whether such a pattern of negative prospects persists. Depending upon the results of ongoing empirical study, one of the most pertinent and pressing questions regarding religious liberty in these early years of the new century may be whether religious tolerance will be extended not only to the small and marginal sects that dot the countryside (as it should) but also to those larger and more mainstream religious groups that play a more visible role in the cultural and political controversies of our time. Is our nation's concept of religious liberty sufficiently robust to encompass those whose claims of conscience may directly challenge the cherished orthodoxies of modern secular liberalism?

114. See *supra* Part I.C.

APPENDIX: REGRESSION TABLE

Table 1: Regression Analysis of Free Exercise/Accommodation Decisions [FE-OUTC=1]

	Party-of-Appointing- President Set	Common Space Score Set
<i>Case Type:</i>		
Regulation	-.18 (.31)	-.18 (.31)
Private Education	-.19 (.44)	-.20 (.44)
Public Education	.10 (.33)	.10 (.33)
Expression	1.35** (.32)	1.35** (.32)
Tax	-2.65* (1.05)	-2.65* (1.05)
Prisoner	.39 (.25)	.39 (.25)
Employment (Gov.)	-.66 (.35)	-.66 (.35)
Criminal	-1.90** (.64)	-1.90** (.64)
<i>Claimant Religion:</i>		
Catholic	-1.01** (.35)	-1.00** (.35)
Baptist	-1.69* (.77)	-1.68* (.77)
Jewish	.22 (.36)	.22 (.36)
Orthodox Jewish	-.56 (.32)	-.56 (.32)
Muslim	-.35 (.26)	-.35 (.26)
Native American	.02 (.32)	.01 (.32)
Other	.12 (.23)	.13 (.24)
<i>Religious Correlation Betw. Judge & Claimant</i>		
Religious Correlation	.01 (.40)	.02 (.40)
<i>Supreme Court Precedent:</i>		
Post-Smith	.39* (.16)	.40* (.16)
<i>Judge Religion:</i>		
Catholic	.37 (.21)	.36 (.21)
Baptist	.41 (.35)	.40 (.35)
Other Christian	.74** (.27)	.73** (.28)
Jewish	.73** (.27)	.71** (.27)
Other	.37 (.42)	.36 (.42)
None	.19 (.36)	.19 (.36)

*Table 1: Free Exercise/Accommodation Decisions (Cont'd)**Judge Sex and Race:*

Sex	-.20 (.30)	-.22 (.30)
African-American	.14 (.34)	.11 (.34)
Asian-Latino	.93 (.56)	.92 (.56)

Judge Ideology or Attitude:

CS-Score	—	-.13 (.28)
Party	-.02 (.19)	—
ABA-Above Qualified	.05 (.18)	.05 (.18)
ABA-Below Qualified	.01 (.30)	.01 (.30)
Seniority	.00 (.00)	.00 (.00)

Judge Education:

College Prestige	-.01 (.01)	-.01 (.01)
Elite Law School	.31 (.19)	.30 (.19)

Judge Employment Background:

Military	-.30 (.18)	-.30 (.18)
Government	.10 (.16)	.10 (.16)
State or Local Judge	-.34 (.18)	-.33 (.18)

Community Demographics:

Catholic-%	-.00 (.01)	-.00 (.01)
Jewish-%	.03 (.02)	.03 (.02)
Adherence Rate	.02* (.01)	.02* (.01)
Religious Homogeneity	-.01 (.01)	-.01 (.01)

(constant)	-1.40 (.86)	-1.38 (.84)
% predicted	66.5	66.5
pseudo R ²	.14	.14
N	969	969

* p < .05; ** p < .01.