

# William & Mary Bill of Rights Journal

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Volume 15 (2006-2007)  
Issue 1

Article 5

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October 2006

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Stephen M. Feldman, *Empiricism, Religion, and Judicial Decision-Making*, 15 Wm. & Mary Bill Rts. J. 43 (2006), <https://scholarship.law.wm.edu/wmborj/vol15/iss1/5>

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# EMPIRICISM, RELIGION, AND JUDICIAL DECISION-MAKING

Stephen M. Feldman\*

Most people would acknowledge that religious orientation often influences an individual's political values or preferences. Members of evangelical Protestant denominations, for example, are more likely to be conservative Republicans than liberal Democrats. Empirical studies in political science reinforce this common sense view.<sup>1</sup>

But what about judicial decision-making? Do judges' religious orientations influence their votes or decisions when resolving judicial disputes? To me, the answer to this question is obvious: yes. To me, this is common sense. But for many, this assertion is controversial. It challenges basic assumptions about the rule of law and the independence of the judiciary.<sup>2</sup>

Many lawyers, judges, and law professors would insist that neither a judge's political preferences, in general, nor a judge's religious affiliation, more specifically, should affect decision-making. Any such influence would corrupt the judicial process. Judging should be neutral and apolitical. In other words, judges, including United States Supreme Court Justices, should decide cases in accordance with judicial precedents and legal doctrines, not because of political or religious values. Most political scientists, of course, scoff at this internal view of adjudication. They subscribe instead to an external view: at least at the Supreme Court, Justices vote their political preferences. In the words of Jeffrey A. Segal and Harold J. Spaeth, the leading proponents of the so-called attitudinal model: "Simply put, [William] Rehnquist votes the way he does because he is extremely conservative; [Thurgood] Marshall voted the way he did because he is extremely liberal."<sup>3</sup>

Recently, an incongruous clash between the legal (internal) and the political science (external) views of judicial decision-making shadowed the ill-fated Supreme Court

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<sup>1</sup> 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, 507 (1999). Clyde Wilcox emphasizes the political conservatism of Christian fundamentalists while acknowledging that the precise identification of fundamentalists is controversial. Clyde Wilcox, *Fundamentalists and Politics: An Analysis of the Effects of Differing Operational Definitions*, 48 J. POL. 1041 (1986).

<sup>2</sup> When Daniel R. Pinello asked law professors for help in identifying the religious affiliation of several judges, Pinello received a "heated" response from at least some professors. DANIEL R. PINELLO, *GAY RIGHTS AND AMERICAN LAW* 156 (2003).

<sup>3</sup> JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993).

nomination of Harriet Miers. On the one hand, the Bush administration trumpeted Miers's commitment to judicial restraint, to interpreting the Constitution faithfully, and to following the rule of law. Of course, every Supreme Court nominee must be depicted similarly. When would any administration nominate an individual and then declare, "She will ignore the law and impose her personal preferences on the rest of the country!"? Yet, President Bush also emphasized Miers's religious affiliation, as if it were a credential qualifying her to be a Supreme Court Justice. Indeed, many conservatives applauded Miers's religiosity—and her more specific religious commitments—while many liberals worried about the same.<sup>4</sup> But why would Miers's religious orientation matter at all if Supreme Court decision-making were neutral and apolitical? Didn't conservatives and liberals both stress Miers's religiosity exactly because they hoped, or feared, that her religious views would influence her interpretations of legal texts, particularly the Constitution?

In this Essay, I will prioritize neither the external nor internal understandings of judicial decision-making. Indeed, I have elsewhere argued that, particularly at the Supreme Court level, both approaches are valid and can be harmonized. They are not necessarily antithetical.<sup>5</sup> Nonetheless, I will argue that law professors should pay more attention to empirical studies showing that a judge's religious orientation influences decision-making. To be sure, then, I argue from one side of the law-political-science-divide in this particular Essay, but not because the other side is wrong. Rather, I argue from the political science side exactly because law professors so often seem to disregard it. Of course, this disregard can be partly explained by disciplinary boundaries: law professors primarily read legal scholarship, while political scientists primarily read political science scholarship. Even so, each side—the law professors and the political scientists—would profit from listening to what the other is saying.

Given the context of this Essay—addressed to an audience mostly of law professors—I do not need to advocate for the acceptance of the internal or legal view of judicial decision-making. A couple of anecdotes suggest the need to argue for the worthiness of an external view. In the Massachusetts Supreme Judicial Court decision holding that the denial of a marriage license to a same-sex couple violated the state constitution, the majority opinion stated:

Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual

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<sup>4</sup> E.g., Edward Lazarus, *Original Sin*, NEW REPUBLIC, Nov. 7, 2005, at 15 (discussing Miers's commitment to strict constructionism); Noam Scheiber, *Merit Scholars*, NEW REPUBLIC, Oct. 17, 2005, at 6 (discussing Miers's religion).

<sup>5</sup> Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 LAW & SOC. INQUIRY 89 (2005).

persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance . . . .<sup>6</sup>

The court claimed, in other words, that religious views are irrelevant to constitutional interpretation. Now, one might respond that this assertion was standard judicial rhetoric and should not be taken seriously; the judges, that is, knew religion mattered. My second anecdote suggests otherwise. In the summer of 2002, the Association of American Law Schools (AALS) and the American Political Science Association (APSA) jointly sponsored a Conference on Constitutional Law. According to its organizers, the Conference's goals were "ambitious," "broad," and "deep."<sup>7</sup> The Conference sought to "foster interdisciplinary approaches to constitutional law."<sup>8</sup> Law professors and political scientists alike were thus invited to "be a part of a collaborative community."<sup>9</sup> Unfortunately, despite these laudable purposes, the Conference showcased the persistent disciplinary differences rather than fusing a collaborative community of interdisciplinary scholars. When political scientists spoke, they favored political explanations of Supreme Court decision-making. Some political scientists willingly discussed legal doctrine, yet they clearly assumed that political attitudes primarily determined Justices' votes. Meanwhile, when legal academics spoke, they typically invoked Supreme Court cases and the concomitant legal doctrines. To listen to the law professors, one would think legal doctrine not only mattered to but chiefly determined judicial outcomes, including in hard constitutional cases. Even the most sophisticated constitutional scholars, it seemed, followed the internal approach, at least to a significant degree.

Part I of this Essay examines several empirical studies that relate to the influence of religion on judicial decision-making.<sup>10</sup> Part II explores the inherent limitations of these studies.<sup>11</sup> The results should not be taken as unequivocal proof of any hypotheses, but rather as evidence of certain tendencies in judicial decision-making. The Conclusion emphasizes the salience of religion in distinguishing social groups.

## I. EMPIRICAL STUDIES AND RELIGION

From a theoretical standpoint, the reason that politics necessarily influences judicial decision-making is that the interpretation of legal texts is not mechanical. When the Supreme Court decides a case, the Justices must interpret case precedents and other

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<sup>6</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (2003).

<sup>7</sup> Assoc. of Am. Law Schools, Conference on Constitutional Law: Why Attend?, <http://www.aals.org/profdev/constitutional/why.html> (last visited Aug. 25, 2006).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See *infra* text accompanying notes 12–59.

<sup>11</sup> See *infra* text accompanying notes 60–77.

legal texts, including the Constitution. Like with all interpretation, legal interpretation is simultaneously enabled and constrained by our participation in communal traditions, which inculcate us with expectations, interests, and prejudices. Our expectations, interests, and prejudices open us to the meaning of the text, but also limit our possible understandings of the text. When we interpret a text, we can therefore discuss and debate its meaning, but we can never determine the meaning through some mechanical or methodical process. Our expectations, interests, and prejudices include, of course, our political preferences. Moreover, culturally inculcated values, whether religiously based or otherwise, can be categorized as contributing to our political preferences or as a distinct component of our expectations, interests, and prejudices. Either way, one's cultural background, including religion, and one's political preferences are always integral to legal interpretation.<sup>12</sup>

At least two types of empirical research support the thesis that religious orientation influences judicial decision-making. One type of research is general, while the other is more specific. The general research comes from social psychology and shows that an individual's sense of membership in a social group strongly influences the person's values and perceptions.<sup>13</sup> Group membership shapes cognitive processes as well as the most basic emotional reactions.<sup>14</sup> Individuals "tend to perceive themselves

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<sup>12</sup> See Feldman, *supra* note 5, at 99–129 (articulating an interpretive-structural theory of Supreme Court decision-making).

<sup>13</sup> See, e.g., Marilynn B. Brewer, *The Social Self: On Being the Same and Different at the Same Time*, 17 PERSONALITY & SOC. PSYCHOL. BULL. 475 (1991); Marilynn B. Brewer & Sherry K. Schneider, *Social Identity and Social Dilemmas: A Double-edged Sword*, in SOCIAL IDENTITY THEORY: CONSTRUCTIVE AND CRITICAL ADVANCES 169 (Dominic Abrams & Michael A. Hogg eds., 1990); Johan M.G. van der Dennen, *Ethnocentrism and In-Group/Out-Group Differentiation: A Review and Interpretation of the Literature*, in THE SOCIOBIOLOGY OF ETHNOCENTRISM 1 (Vernon Reynolds et al. eds., 1986); Samuel L. Gaertner et al., *Reducing Intergroup Bias: The Benefits of Recategorization*, 57 J. PERSONALITY & SOC. PSYCHOL. 239 (1989); Norman Miller & Marilynn B. Brewer, *Categorization Effects on Ingroup and Outgroup Perception*, in PREJUDICE, DISCRIMINATION, AND RACISM 209 (John F. Dovidio & Samuel L. Gaertner eds., 1986); James Sidanius, *The Psychology of Group Conflict and the Dynamics of Oppression: A Social Dominance Perspective*, in EXPLORATIONS IN POLITICAL PSYCHOLOGY 183 (Shanto Iyengar & William J. McGuire eds., 1993); Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, in PSYCHOLOGY OF INTERGROUP RELATIONS 7 (Stephen Worchel & William G. Austin eds., 2d ed. 1986); Wolfgang Tönnemann, *Group Identification and Political Socialisation*, in THE SOCIOBIOLOGY OF ETHNOCENTRISM 175 (Vernon Reynolds et al. eds., 1986); John C. Turner, *The Experimental Social Psychology of Intergroup Behaviour*, in INTERGROUP BEHAVIOR 66 (John C. Turner & Howard Giles eds., 1981).

<sup>14</sup> For discussions of cognitive processes, see Richard E. Nisbett et al., *Culture and Systems of Thought: Holistic Versus Analytic Cognition*, 108 PSYCHOL. REV. 291, 291–92 (2001), and Hazel Rose Markus & Shinobu Kitayama, *Culture and the Self: Implications for Cognition, Emotion, and Motivation*, 98 PSYCHOL. REV. 224, 224–25, 231–35 (1991). For a discussion of emotions, see Hazel Rose Markus & Shinobu Kitayama, *The Cultural Construction of Self and Emotion: Implications for Social Behavior*, in EMOTION AND CULTURE: EMPIRICAL STUDIES OF MUTUAL INFLUENCE 89, 89–91 (Shinobu Kitayama & Hazel Rose Markus eds., 1994). "[P]sychological group membership is first of all a perceptual and cognitive affair, and . . . an

as having similar or identical goals to members of their own group and different or opposed goals to members of other groups.”<sup>15</sup> Thus, even an individual’s assessment of self-interest varies with group membership.<sup>16</sup>

Unsurprisingly, then, social psychology research also shows that group membership shapes an individual’s evaluations of in-group members as well as of members of other distinct social groups. In-group-out-group perceptions strongly control social attitudes and interactions. An individual tends to “favor in-group members in the allocation of rewards, in their personal regard, and in the evaluation of the products of their labor.”<sup>17</sup> Simultaneously, the individual tends to disfavor out-group members. As one psychologist writes, “mere categorisation is sufficient to produce intergroup discrimination.”<sup>18</sup> Another researcher explains that “prejudice and discrimination” are not “pathological or quasi-pathological conditions” but rather the normal or “default conditions” of political societies.<sup>19</sup> In other words, favoring one’s own group members and discriminating against others is a normal feature of social identity. “[I]n group favoritism and outgroup hostility are . . . consequences of the unit formation between self and other ingroup members and the linking of one’s identity to them.”<sup>20</sup> When tangible conflicts between social groups arise, the cohesion within each respective group and the salience of the division between groups are both likely to increase. Yet, even when there is no tangible conflict, individuals are likely to discriminate against outgroup members.<sup>21</sup>

In light of this research regarding social group identity, one would expect that if an individual identifies him- or herself as part of a particular religious community or group—for example, evangelical Protestants, Roman Catholics, or Jews—then the individual’s values and perceptions will be shaped by the respective social (religious) identity. If the individual is a judge, then the judge’s religious orientation would likely influence his or her interpretation of legal texts, including the First Amendment. This thesis is reinforced by the extensive political science research showing that Supreme Court Justices frequently decide according to their political preferences, and the psychology and political science studies suggesting that, in many circumstances, religious identities and differences are especially salient.<sup>22</sup> Unsurprisingly, then, more specific empirical research reveals that

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emotional involvement with the group may follow as a consequence of the perceived group membership.” Tönnemann, *supra* note 13, at 184.

<sup>15</sup> Turner, *supra* note 13, at 97.

<sup>16</sup> Brewer, *supra* note 13, at 476; Brewer & Schneider, *supra* note 13, at 170.

<sup>17</sup> Gaertner et al., *supra* note 13, at 239.

<sup>18</sup> van der Dennen, *supra* note 13, at 17.

<sup>19</sup> Sidanius, *supra* note 13, at 215.

<sup>20</sup> Miller & Brewer, *supra* note 13, at 213.

<sup>21</sup> “[A]n individual will discriminate against a member of an out-group even when there is no conflict of interest and there is no past history of intergroup hostility.” van der Dennen, *supra* note 13, at 17.

<sup>22</sup> See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (marshaling empirical support for attitudinal model); Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529

religious orientation is likely to influence a judge's resolution of legal issues. These recent empirical studies, albeit few in number, come in two basic forms: first, a focus on cases unrelated to religious freedom per se, and second, a focus explicitly on religious-freedom cases.<sup>23</sup>

In a 1999 study, Donald R. Songer and Susan J. Tabrizi explored the influences of religious affiliation on state court judges deciding death penalty, obscenity, and gender discrimination cases—cases that did not present express issues of religious freedom but that nonetheless entailed political or moral stances likely to intertwine with an individual's religious beliefs.<sup>24</sup> The empirical evidence demonstrated that “the religious affiliation of the judges appears to exert a substantial influence.”<sup>25</sup> Overall,

evangelical judges were substantially more likely to cast conservative votes than their mainline Protestant brethren . . . Catholic

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(2000) (summarizing empirical studies supporting the attitudinal model); *supra* note 1 and accompanying text (discussing and citing studies emphasizing influence of religious affiliation on political outlooks). It is worth noting that, until recently, the Supreme Court remained overwhelmingly Protestant. Through 1990, ninety-one of 104 Supreme Court Justices came from Protestant backgrounds, while from the 1940s through the 1970s, no more than one Catholic and one Jew ever sat on the Court at any time. Eight Justices were Roman Catholic: Roger B. Taney (appointed in 1835), Edward D. White (1894), Joseph McKenna (1897), Pierce Butler (1922), Frank Murphy (1939), William J. Brennan Jr. (1956), Antonin Scalia (1986), and Anthony M. Kennedy (1987). *See* 2 DAVID G. SAVAGE, GUIDE TO THE U.S. SUPREME COURT 796, 910 (4th ed. 2004). Five Justices were Jewish: Louis D. Brandeis (1916), Benjamin N. Cardozo (1932), Felix Frankfurter (1939), Arthur J. Goldberg (1962), and Abe Fortas (1965). *Id.* James F. Byrnes, who served as an Associate Justice during the 1941–1942 term, was born into a Roman Catholic family, but converted to Episcopalianism when he married in 1906. More recently, two more Jewish Justices have been appointed: Ruth Bader Ginsburg and Steven G. Breyer. Clarence Thomas was born a Baptist, raised a Catholic, began attending an Episcopal church, and most recently, returned to Catholicism. *See* THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1995, at 526–530 (Clare Cushman ed., 2d ed. 1995) (detailing Thomas's religious background through 1995). In fact, if Thomas is categorized as Catholic, then 1996 marked the first time that a majority of the Justices were not Protestant. ERIC MICHAEL MAZUR, THE AMERICANIZATION OF RELIGIOUS MINORITIES: CONFRONTING THE CONSTITUTIONAL ORDER 12, 179 n.3. With the confirmation of Samuel Alito, the Court now has a majority of Catholics: Alito, Kennedy, Roberts, Scalia, and Thomas. *See* Franklin Foer, *Brain Trust*, NEW REPUBLIC, Nov. 14, 2005, at 6.

<sup>23</sup> I will discuss the following: DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW (2003); 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 (1999); Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004); 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 (1999). For citations to other sources, see PINELLO, *supra*, at 218–20 & nn.15–23.

<sup>24</sup> Songer & Tabrizi, *supra* note 23.

<sup>25</sup> *Id.* at 521.

judges were also more likely than mainline Protestants to support conservative outcomes, but they were less conservative than the Protestant evangelicals. Jewish judges had voting patterns that were similar to those of mainline Protestants.<sup>26</sup>

Songer and Tabrizi concluded by attempting to fit their conclusions into the attitudinal model so predominant in political science. They reasoned that religious affiliation influenced a judge's political attitudes or preferences and, therefore, that political scientists should identify judges' political values by examining both political party and religious affiliations.<sup>27</sup> In a similar study not explicitly focused on religious freedom, Daniel Pinello explored the factors that influence judicial decisions regarding gay rights.<sup>28</sup> He concluded that judges' religious affiliations significantly correlated with their votes either to favor or disfavor gay rights: the highest percentage of judges to favor gay rights were Jewish, with mainstream Protestants next, then Catholics, and then fundamentalist Protestants being most hostile.<sup>29</sup>

In 1999, James C. Brent published an empirical study of free exercise decisions in the United States Courts of Appeals.<sup>30</sup> He was especially concerned with whether the lower federal court judges were more likely to heed Supreme Court doctrine, as articulated in *Employment Division, Department of Human Resources v. Smith*,<sup>31</sup> or a congressional mandate, as articulated in the Religious Freedom Restoration Act (RFRA).<sup>32</sup> In the typical free exercise case, the claimant seeks an exemption (or exception) from a generally applicable law that burdens the exercise of his or her religion. The claimant, that is, asks the court to order the government to accommodate religion. For example, Air Force regulations prohibited wearing a hat or other head covering in certain circumstances, yet religious convictions mandated that Orthodox Jews always keep their heads covered (by wearing, for example, a yarmulke or skull-cap). Consequently, in *Goldman v. Weinberger*, an Orthodox Jewish Air Force officer sought a free exercise exemption so that he could follow his religious convictions while remaining in the Air Force.<sup>33</sup> In 1963, in *Sherbert v. Verner*, the Court set forth a strict scrutiny test that until 1990 would remain the presumptive standard for resolving such cases: a state could justify a burden on an individual's free exercise of religion only by showing that the

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<sup>26</sup> *Id.* Songer and Tabrizi concluded that the conservatism of evangelical judges was most strongly evident in gender discrimination cases. *Id.* On the definition of evangelicals and mainline Protestants, see *id.* at 509, 513.

<sup>27</sup> *Id.* at 523.

<sup>28</sup> PINELLO, *supra* note 23, at 87–91.

<sup>29</sup> *Id.*

<sup>30</sup> Brent, *supra* note 23, at 236.

<sup>31</sup> 494 U.S. 872 (1990).

<sup>32</sup> Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb–4 (1994)).

<sup>33</sup> 475 U.S. 503 (1986). The Court rejected Goldman's claim.



state action was necessary to achieve a compelling state interest.<sup>34</sup> Otherwise, the government would be required to accommodate the religious practices. In deciding *Smith* in 1990, the Court expressly abandoned the *Sherbert* strict scrutiny test for most free exercise challenges to laws of general applicability. Apart from a couple of narrow exceptional situations, the Court suggested that the “political process” would effectively determine the scope of free exercise rights.<sup>35</sup> Under *Smith*, courts were to show remarkable deference to the legislative process. After the Court decided *Smith*, however, Congress attempted to reinstate the strict scrutiny test by enacting RFRA in 1993. Although the Court eventually invalidated the Act, Brent examined whether the lower courts followed the *Smith* doctrine or the RFRA mandate during the “brief life” of the statute.<sup>36</sup>

Brent concluded that, overall, free exercise claimants were generally unsuccessful at the Court of Appeals level. They won only 26.1% of their cases while losing 69.9%.<sup>37</sup> He explained this result partly by referring to the influence of religion on the legislative process: “Because of the majoritarian process, lawmakers are less likely to adopt laws that place burdens on adherents of Christianity, the majority religion.”<sup>38</sup> Thus, members of mainstream Christian denominations are less likely than are members of religious outgroups to find their religious beliefs or practices infringed by generally applicable laws.<sup>39</sup> More to the point, Brent found that “claimants who belonged to mainstream Catholic and Protestant sects were more likely to win than were claimants who belonged to other religions (38.9% vs. 24.5%).”<sup>40</sup> Finally, Brent concluded that the “Court of Appeals became more hostile to religious free exercise claims after *Smith* and became more receptive to such claims after the passage of RFRA. The lower courts appear willing to act as the agents of *both* the Supreme Court and Congress.”<sup>41</sup>

Gregory C. Sisk, Michael Heise, and Andrew P. Morriss conducted an empirical study (the Sisk study) that examined the resolution of religious freedom issues, including free exercise and establishment clause cases, in the lower federal courts (both district courts and the Courts of Appeals) from 1986 through 1995.<sup>42</sup> Publishing in 2004, the authors concluded: “In our study of religious freedom decisions, the single most prominent, salient, and consistent influence on judicial decisionmaking was *religion*—religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community.”<sup>43</sup> Thus, while still seeking future empirical

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<sup>34</sup> 374 U.S. 398 (1963).

<sup>35</sup> *Smith*, 494 U.S. at 890.

<sup>36</sup> Brent, *supra* note 23, at 240; *see City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down RFRA).

<sup>37</sup> Brent, *supra* note 23, at 249. Brent coded four percent of the cases as having a “mixed result.” *Id.*

<sup>38</sup> *Id.* at 248.

<sup>39</sup> *See id.* at 259 (discussing definition of mainstream religion).

<sup>40</sup> *Id.* at 250–51.

<sup>41</sup> *Id.* at 236 (abstract) (emphasis added).

<sup>42</sup> Sisk et al., *supra* note 23.

<sup>43</sup> *Id.* at 614.

confirmation, the Sisk study suggested that “religious factors are meaningfully associated with judging outcomes.”<sup>44</sup> The Sisk study agreed with Brent in finding that mainline Protestants rarely became religious freedom claimants—in only 1.7% of the cases.<sup>45</sup> The Sisk study also found that most free exercise claimants lose, and unsurprisingly, that “judges from Jewish and non-mainstream Christian backgrounds were significantly more likely to approve claims for accommodation.”<sup>46</sup> Similarly, in Establishment Clause cases, most claimants lose, though the success rate is higher than for free exercise claims: 42.3% vs. 35.6%.<sup>47</sup> Moreover, and again like the free exercise context, non-mainstream judges tended to be more receptive to Establishment Clause claimants. In particular, “Jewish judges and Asian-American/Latino judges (but not African-American judges) were significantly more likely to uphold Establishment Clause claims.”<sup>48</sup>

When it came to the religion of the claimants, the Sisk study found, again predictably, that Muslims, far outside the American religious mainstream, “may be significantly disadvantaged in asserting Free Exercise/Accommodation claims.”<sup>49</sup> Nonetheless, one of the authors’ more surprising findings concerned the judicial treatment of Catholic and Baptist free exercise claimants seeking religious accommodations. They were “significantly less likely to succeed” than other claimants.<sup>50</sup> One might initially expect claimants from such mainstream Christian groups to fare well in litigation. In fact, recall that Brent found that mainstream Catholics and Protestants were more likely than non-mainstream claimants to win free exercise claims.<sup>51</sup> Yet, two earlier studies of free exercise cases reached conclusions somewhat consistent with the Sisk study findings. Publishing in 1983, Frank Way and Barbara J. Burt considered the success of members of marginal religions in free exercise claims in all state and federal courts during two time periods, 1946 to 1956 and 1970 to 1980.<sup>52</sup> As other researchers would conclude, they found that members of mainline religions rarely would need to litigate a free exercise claim.<sup>53</sup> Members of marginal religions, they explained, were

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<sup>44</sup> *Id.* “In sum, our study provides concrete evidence to support the observation by Donald Songer and Susan Tabrizi that ‘religious affiliation may provide a useful indicator of judicial values that has been ignored by previous studies examining the impact of judges’ values on their decisions.’” *Id.* at 503.

<sup>45</sup> *Id.* at 563. “Mainline Protestantism was defined as consisting of the following denominations: American Baptist, Christian Church (Disciples of Christ), Church of the Brethren, Episcopal, Lutheran (except Missouri Synod), Moravian Church, Presbyterian, Reformed Church, Congregational/United Church of Christ, and United Methodist.” *Id.* at 577 n.317.

<sup>46</sup> *Id.* at 555, 557.

<sup>47</sup> *Id.* at 555, 571.

<sup>48</sup> *Id.* at 572.

<sup>49</sup> *Id.* at 566.

<sup>50</sup> *Id.* at 557.

<sup>51</sup> Brent, *supra* note 23, at 250–51.

<sup>52</sup> Frank Way & Barbara J. Burt, *Religious Marginality and the Free Exercise Clause*, 77 AM. POL. SCI. REV. 652 (1983).

<sup>53</sup> *Id.* at 656.

more likely to initiate "free exercise litigation because membership in a marginal group can bring the faithful into conflict with secular norms, administrative regulations, or statutes."<sup>54</sup> Regardless, Way and Burt concluded, harmoniously with the Sisk study, that free exercise claimants from marginal groups won more often than did claimants from mainline religions.<sup>55</sup> Then, in a 1993 article, Joseph A. Ignagni examined United States Supreme Court free exercise decisions from 1961 to 1990.<sup>56</sup> Ignagni tested several hypotheses, including one based on Way and Burt's study, namely "that if the religious group involved in a dispute can be deemed marginal, the Supreme Court will be more likely to uphold its free exercise claims."<sup>57</sup> Like Way and Burt, Ignagni concluded that the empirical evidence showed that the Court favors such marginal religious groups.<sup>58</sup>

## II. LIMITATIONS

So, what does all this mean? Clearly, empirical research should not be accepted unconditionally, not when different studies reach results that are, if not conflicting, at least in tension. One must remain skeptical of hypotheses and conclusions in publications from any discipline, whether law, political science, or social psychology. One must dig below the surface to seek explanations for various results. Way and Burt themselves suggested that the apparent relative success of marginal-religion claimants might be due to the nature of their free exercise claims. Such claims generally sprang from serious infringements on religious practices, while mainline free exercise claims typically concerned insignificant burdens arising from zoning or taxing laws.<sup>59</sup> The Sisk study also suggested why members of mainstream religions, Baptists and Catholics, might be expected to lose a disproportionate percentage of free exercise claims. As numerous researchers have concluded, mainline Protestants are unlikely to raise free exercise claims—Catholics too are unlikely to do so, though more likely than mainline Protestants<sup>60</sup>—exactly because they are in the religious mainstream. Most legislators (or other lawmakers) either belong to or are fully aware of the mainstream religions and thus are unlikely to adopt general laws that seriously interfere with mainstream practices and beliefs. In other words, the nature of democratic processes assures that legislation ordinarily will protect, not burden, the mainstream. Thus, when a Catholic or Baptist challenges a generally applicable law and seeks a free exercise exemption, that

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Joseph A. Ignagni, *U.S. Supreme Court Decision-Making and the Free Exercise Clause*, 55 REV. POL. 511 (1993). Using a "cognitive-cybernetic decision-maker" model, which overlapped with the attitudinal model, Ignagni viewed the justices "as political decision-makers who have computational limitations." *Id.* at 516–17, 528.

<sup>57</sup> *Id.* at 518.

<sup>58</sup> *Id.* at 527.

<sup>59</sup> Way & Burt, *supra* note 52, at 656–58.

<sup>60</sup> Sisk et al., *supra* note 23, at 563–64.

claimant has, almost by definition, taken him- or herself out of the mainstream. As the Sisk study explained, “when traditionalist Catholics and Baptists resist governmental regulation of private conduct by seeking court-ordered exemptions from, for example, anti-discrimination or licensing laws, they run against the grain of mainstream secular society, particularly in metropolitan localities.”<sup>61</sup> The Sisk study added that some judges “may consciously or unconsciously” conclude that such claimants are being overly aggressive by seeking judicial relief.<sup>62</sup> These judges imply that the claimants, instead of litigating, should work through the democratic process precisely because they belong to the mainstream.<sup>63</sup>

A careful reader of empirical studies should remember that each researcher started with a particular perspective, with certain assumptions, both overt and tacit. These assumptions inevitably influenced the researcher’s choice of subject matter and methods. Both the Way and Burt study and the Ignagni study began with hypotheses consistent with the oft-stated belief that, as a general matter, the Supreme Court boldly protects discrete and insular minorities against majoritarian overreaching. Given that other (empirical) researchers have refuted this nonetheless still-common belief,<sup>64</sup> one should only accept Way and Burt’s and Ignagni’s conclusions with circumspection.<sup>65</sup> The Sisk study authors themselves revealed how ostensibly conflicting studies can sometimes be reconciled. They acknowledged a tension between their results and those of Brent regarding the effect of the *Smith* decision on the

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<sup>61</sup> *Id.* at 566.

<sup>62</sup> *Id.* at 564.

<sup>63</sup> *See id.* at 564–66 (attributing the lack of relief for these two groups to judicial distrust of politically active social conservatives).

<sup>64</sup> *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957). Michael J. Klarman has attempted to explain why “the myth of the heroically countermajoritarian Court” persists despite “consistently contravening evidence.” Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6 (1996); *cf.* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 336–37 (1991) (arguing that courts can rarely generate social reform).

<sup>65</sup> Way and Burt also found that “the majority of all [free exercise] claimants lost their cases, and further, with the exception of cases involving family relations, leafletting-soliciting-proselytizing, and religious rights of prisoners, they lost by wide margins.” Way & Burt, *supra* note 52, at 662. Given that members of marginal religions brought most of the claims, the significance of their success-rate should not be overstated. Ignagni built his free exercise study on his earlier study of the Burger Court’s Establishment Clause decisions. Joseph A. Ignagni, *Explaining and Predicting Supreme Court Decision Making: The Burger Court’s Establishment Clause Decisions*, 36 J. CHURCH & ST. 301, 302 (1994). While this article was published after Ignagni’s free exercise article, it was nonetheless based on his earlier dissertation, written in 1990. Ignagni, *supra* note 56, at 515 n.17. Ignagni also published a subsequent Establishment Clause study. Joseph A. Ignagni, *Supreme Court Decision Making: An Individual-Level Analysis of the Establishment Clause Cases During the Burger and Rehnquist Court Years*, 15 AM. REV. POL. 21 (1994).

lower courts. Eventually, though, the Sisk study authors explained that the apparently conflicting results reflected “different nuances and inherent limitations in each study.”<sup>66</sup> Indeed, “when the data is closely examined,” the authors concluded, the possible conflict between the studies disappeared: “[o]ur results are consistent with Brent’s.”<sup>67</sup>

Frequently, a researcher’s assumptions will find expression in key definitions. For instance, if one seeks to draw conclusions contrasting mainstream and non-mainstream religions, one must define the mainstream. One must categorize different religions as falling on one side of the line or the other. Way and Burt as well as Ignagni defined mainline religions to include Judaism.<sup>68</sup> Brent refused to do so, partly because Jews constitute such a small numerical minority in the United States—only 2.3% of the population.<sup>69</sup> For that reason, Brent’s characterization of the mainstream, including “only major Catholic and Protestant (e.g., Presbyterians, Baptists, Lutherans, Episcopalians, etc.) sects,” carries more force.<sup>70</sup> Given the religious makeup of the nation—ninety percent of Americans believe Jesus Christ truly lived and seventy percent “believe he was truly God”—all non-Christian religions should, it seems, be considered marginal or outside the mainstream.<sup>71</sup> Indeed, one might question whether Catholics should be deemed mainstream. On the one hand, if one divides Protestants into their respective sects and denominations, Catholics have constituted the largest Christian grouping in the United States

<sup>66</sup> Sisk et al., *supra* note 23, at 567–68.

<sup>67</sup> *Id.* at 568.

<sup>68</sup> Ignagni, *supra* note 56, at 523; Way & Burt, *supra* note 52, at 654 n.7.

<sup>69</sup> With regard to the distinction between mainstream and nonmainstream religions, Brent wrote:

Operationalizing this variable poses at least two problems. First, our religious culture is often described as “Judeo-Christian.” A question might be raised regarding whether Judaism constitutes a mainstream religion. For the purposes of this article, Judaism is classified as a nonmainstream religion. It is classified in this manner for two reasons. First, only 2.3% of the population claims to be Jewish. Thus, in terms of sheer numbers, Jews constitute a distinct minority. Second, the Supreme Court historically has not been particularly accommodating to Jews in free exercise cases.

A second problem of operationalization is that many religions are “Christian” in that they profess some sort of belief in Jesus Christ. However, many of these religions fall outside of the mainstream Christian tradition. Examples of nonmainstream Christian religions include Seventh-Day Adventists, Jehovah’s Witnesses, Unitarians, the Vow of the Nazarite, and Church of Jesus Christ Christian (an arm of the Aryan Nation). Therefore, for the purposes of this study, mainstream religions include only major Catholic and Protestant (e.g., Presbyterians, Baptists, Lutherans, Episcopalians, etc.) sects.

Brent, *supra* note 23, at 259 (citation omitted).

<sup>70</sup> *Id.*

<sup>71</sup> ROBERT WUTHNOW, *THE RESTRUCTURING OF AMERICAN RELIGION* 300 (John F. Wilson ed., 1988).

since the mid-nineteenth century.<sup>72</sup> On the other hand, the total number of Protestants has always far outnumbered Catholics, and many Protestants have expressed vehement anti-Catholicism at different points in American history. Several recent historical studies have detailed how Protestant anti-Catholicism influenced the conceptualization of church-state relations during the nineteenth and twentieth centuries.<sup>73</sup> While overt anti-Catholicism has certainly diminished since World War II (as has overt anti-Semitism and racism), the Sisk study authors reluctantly admitted that it “is possible that residual antipathy toward Catholicism may persist in the federal judiciary.”<sup>74</sup>

The significance of this definitional problem should not be understated. Recall that Ignagni categorized Judaism, somewhat questionably, as a mainstream rather than a marginal religion. He then concluded that the Supreme Court had favored marginal religious groups in free exercise cases. Remarkably, though, the Court has never granted a free exercise exemption to any non-Christian claimant. Yet, the Court has granted exemptions to members of small Christian sects, such as the Old Order Amish. In *Wisconsin v. Yoder*, for instance, the majority opinion rhapsodized about the Amish commitment “to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life.”<sup>75</sup> The Court even quoted the New Testament in reasoning that “the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction . . . .”<sup>76</sup> Obviously, then, a researcher’s conclusions will be influenced by how he or she categorizes Jews and the Old Order Amish: are either or both mainstream or marginal?

### CONCLUSION

As the foregoing discussion suggests, these empirical studies necessarily have limitations. They do not unequivocally prove any hypotheses, but rather provide

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<sup>72</sup> THOMAS BAILEY ET AL., *THE AMERICAN PAGEANT* 306 (11th ed. 1998) (noting that, by 1850, the Catholic Church was the largest Christian group, with 1.8 million members).

<sup>73</sup> PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 193–94 (2002); Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 *LOY. U. CHI. L.J.* 121 (2001); Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 *U. PA. J. CONST. L.* 222, 231–35 (2003); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 *MICH. L. REV.* 279, 281–82 (2001); cf. STEPHEN M. FELDMAN, *PLEASE DON’T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE* (1997) (focusing on the relation between anti-Semitism and the development of the separation of church and state).

<sup>74</sup> Sisk et al., *supra* note 23, at 565.

<sup>75</sup> 406 U.S. 205, 210 (1972).

<sup>76</sup> *Id.* at 216 (“[T]he Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, ‘be not conformed to this world . . . .’ This command is fundamental to the Amish faith.”).

evidence of certain tendencies in judicial decision-making. Specifically, the religious orientations of both the judge (or judges) and the claimants appear to affect whether or not a religious freedom claim, particularly one brought under the free exercise clause, is likely to be either validated or invalidated. More generally, an individual's perceived membership in a social group is likely to influence his or her values, interests, and judgments. Significantly, then, an individual can perceive him- or herself as belonging to multiple social groups simultaneously, the specific groups can change, and the boundaries of the various groups can change. Marilyn B. Brewer writes: "[T]he self-concept is *expandable and contractable* across different levels of social identity with associated *transformations* in the definition of self and the basis for self-evaluation. When the definition of self changes, the meaning of self-interest and self-serving motivation also changes accordingly."<sup>77</sup>

The salience of an individual's identification with a particular social group varies with surrounding circumstances. Tangible conflicts between social groups engender greater cohesion within each group as well as a stronger separation between the groups.<sup>78</sup> In an empirical study of the 1928 presidential election, Allan J. Lichtman identified a number of "antagonisms that allegedly sundered the nation into two Americas during the 1920s: Catholics versus Protestants, wets versus dries, immigrants versus natives, and city versus country."<sup>79</sup> Lichtman showed, however, that the overriding division governing the election was religious. Protestant anti-Catholicism intensified in 1928 precisely because a Catholic, Al Smith, ran for President for the first time.<sup>80</sup> The salience of the Protestant-Catholic separation became particularly intense during that year. Afterward, anti-Catholicism receded to its more normal level.<sup>81</sup> Given such variability of salience, one should recognize that an individual who brings a free exercise exemption claim is likely to "'switch on'" a judge's prejudices against the claimant's religious group.<sup>82</sup> Salience intensifies exactly because of the nature of a free exercise claim. A free exercise claim accentuates conflict or difference: a request for a court-ordered exemption from a general law amounts to a request for special treatment *because* of religious *differences* (from the mainstream).<sup>83</sup>

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<sup>77</sup> Brewer, *supra* note 13, at 476.

<sup>78</sup> "[A]n individual will discriminate against a member of an out-group even when there is no conflict of interest and there is no past history of intergroup hostility . . ." van der Dennen, *supra* note 13, at 17, 30; see Tönnemann, *supra* note 13, at 184 (discussing how people typically favor "dissimilar in-group members over similar out-group members").

<sup>79</sup> ALLAN J. LICHTMAN, PREJUDICE AND THE OLD POLITICS: THE PRESIDENTIAL ELECTION OF 1928, at 25 (1979).

<sup>80</sup> *Id.* at 74.

<sup>81</sup> Lichtman explained that anti-Catholicism "lost its immediate salience." *Id.*

<sup>82</sup> See Tönnemann, *supra* note 13, at 184 (discussing how the salience of group membership is "'switched on'" in accordance with various situations); cf. Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1499-1501 (2003) (discussing how xenophobic prejudices influence jury decision-making).

<sup>83</sup> Cf. Lewis Z. Schlosser, *Christian Privilege: Breaking a Sacred Taboo*, 31 J.

At the same time, given the variability of salience, one should also recognize that a division—such as that between Protestants and Catholics—might have been especially important in 1928, or 1948, or any other time, but it is not necessarily the most salient group division today, at least in many circumstances. Some commentators, for instance, argue that one's political or ideological categorization likely outweighs religion in shaping attitudes. From this perspective, the current division between conservatives and progressives is more salient than the division between Protestants and Catholics. Evangelical Protestants and conservative Catholics are more likely to share overlapping values and interests than are liberal and conservative Protestants.<sup>84</sup> Other commentators suggest that an individual's degree of religiosity determines attitudes more strongly than does religious denomination or grouping. The Sisk study notes that:

[V]oter data from the most recent presidential election demonstrates that a person's level of religious observance was a more significant influence upon voting behavior than mere denominational affiliation. [With some exceptions], more religiously observant Americans, across denominational lines, tended to vote more conservatively (Republican) than their secular or less devout counterparts.<sup>85</sup>

Finally, despite my focus in this Essay on the influence of religion on judicial decision-making, law matters. I do not wish to prioritize an external or political science approach to understanding adjudication. In fact, some recent political science-empirical studies conclude that legal doctrines (or "jurisprudential regimes") influence judicial decisions.<sup>86</sup> Yet, simultaneously, one should not prioritize legal doctrine. A variety of factors influence how judges interpret legal rules, principles, and precedents. Of those other factors, empirical research shows that religion is often one of the most important.

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MULTICULTURAL COUNSELING & DEV. 44, 47 (2003) (emphasizing how American society propagates Christian privilege vis-à-vis non-Christian religions).

<sup>84</sup> Berg, *supra* note 73, at 123; Suzanna Sherry, *Religion and the Public Square: Making Democracy Safe for Religious Minorities*, 47 DEPAUL L. REV. 499, 516–17 (1998); Sisk et al., *supra* note 23, at 565–66; John Quist, Book Review, 20 L. & HIST. REV. 431, 433 (2002).

<sup>85</sup> Sisk et al., *supra* note 23, at 579.

<sup>86</sup> Herbert M. Kritzer & Mark J. Richards, *Jurisprudential Regimes and Supreme Court Decisionmaking: The Lemon Regime and Establishment Clause Cases*, 37 L. & SOC'Y REV. 827, 827–28 (2003); Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 305–06 (2002).