St. John's Law Review

Volume 96, 2022, Number 3 Article 6

Where to Place the "Nones" in the Church and State Debate? Empirical Evidence from Establishment Clause Cases in Federal Court

Gregory C. Sisk

Michael Heise

WHERE TO PLACE THE "NONES" IN THE CHURCH AND STATE DEBATE? EMPIRICAL EVIDENCE FROM ESTABLISHMENT CLAUSE CASES IN FEDERAL COURT

GREGORY C. SISK[†]
MICHAEL HEISE[††]

INTRODUCTION

In this third iteration of our ongoing empirical examination of religious liberty decisions in the lower federal courts,[1] we studied all digested Establishment Clause decisions by federal circuit and district court judges from 2006 through 2015.[2] The first clause of the First Amendment to the United States Constitution directs that "Congress shall make no law respecting an establishment of religion."[3] That provision has generated decades of controversy regarding the appropriate role of religion in public life.

[†] Laghi Distinguished Chair in Law, University of St. Thomas School of Law (Minnesota) (gcsisk@stthomas.edu). We thank research assistants Andrea Boeckers and Megan Massie for coding work on the collected decisions and Alexandra Anderson and Lauren Gunderson for research on religious background of judges. And we appreciate the financial support for that research assistance provided by the Murphy Institute for Law and Public Policy at the University of St. Thomas.

[††] William G. McRoberts Professor in the Empirical Study of Law, Cornell Law School (michael.heise@cornell.edu).

[1] *See generally* Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201 (2012) [hereinafter Sisk & Heise, *Ideology All the Way Down*] (another iteration of the ongoing empirical study of lower federal court decisions); Michael Heise & Gregory C. Sisk, *Religion, Schools, and Judicial Decision Making: An Empirical Perspective*, 79 U. CHI. L. REV. 185 (2012) (another iteration of the ongoing empirical study, focusing on the efficacy of pro-religion models in education); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743 (2005) (submitting new and additional evidence to the ongoing empirical study of lower federal court decisions); 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 et al., *Searching for the Soul*].

[2] *See infra* Part I.

[3] U.S. CONST. amend. I.

Holding key variables constant, we found that Catholic judges approved Establishment Clause claims at a 29.6% rate, compared with a 41.5% rate before non-Catholic judges.[4] We had reported a similar influence in the past, finding that, in the education context, Catholic judges were significantly more likely to resist Establishment Clause challenges to governmental acknowledgment of religion or interaction with religious institutions.[5]

Unprecedented in prior empirical studies, we also found that judges without a religious affiliation—falling within the growing demographic of the so-called "Nones"—were significantly less likely to uphold an Establishment Clause claim. Holding other variables constant, the predicted probability that a judge without a religious affiliation would approve an Establishment Clause challenge was 24.9%.[6] Judges with a religious affiliation approved such claims at a 40.0% rate.[7]

Interestingly, and counterintuitively, our study suggests that a *decrease* in religious affiliation in society may not inevitably be accompanied by a secularist opposition to acknowledgment of religion in the public square or the robust participation of religious persons and entities in public life.[8]

Studies confirm that the number of Americans who do not affiliate with organized religion ("Nones") has increased to a quarter of the population.[9] We find that demographic change is now reflected among federal judges as well, as 11.5% of the observations in this study involved judges without a religious affiliation.[10] While not surprisingly finding that Catholic judges were significantly more likely to reject an Establishment Clause claim,[11] we also found evidence that judges who are Non-Religiously-Affiliated, or Nones, were also more likely to turn away Church and State complaints.[12]

Consistently, we found evidence that judges from communities with more religiously unaffiliated populations appeared less likely to be attracted to Establishment Clause

---

[4] *See infra* Section II.C.
[5] *See infra* Section II.C.
[6] *See infra* Section II.D.2.
[7] *See infra* Section II.D.2.
[8] *See infra* Section II.D.3.
[9] *See infra* Section II.D.1.
[10] *See infra* Section II.A.
[11] *See infra* Section II.C.
[12] *See infra* Section II.D.

claims.[13] The growth in numbers of Americans not affiliated with organized religion may be lowering the stakes on some of these issues.

Perhaps those who stand outside of the traditional battles among religious believers—that is, those not embedded within the historical tensions among Protestants, Catholics, and Jews—may be less likely to take offense at the inclusion of religious entities in public programs or a religious reference or icon in a public setting. Perhaps a diverse and tolerant secularity might help lower the temperature on some religious disputes in public life.

I. A SUMMARY DESCRIPTION OF DATA AND FINDINGS IN STUDYING ESTABLISHMENT CLAUSE DECISIONS IN THE FEDERAL COURTS, 2006-2015

For the ten-year period of 2006 to 2015, we examined decisions made by judges of both the federal courts of appeals and district courts involving challenges to governmental conduct as violating the Establishment Clause.[14]

A. Data

For the 2006 to 2015 period, we created a dataset of the universe of digested decisions on Establishment Clause claims by the federal district courts and courts of appeals on Westlaw.[15] The decisions were coded by the direction of each judge's ruling, the general factual category of the case, the religious affiliation of the judge, the religious demographics of the judge's community, the judge's ideology, the judge's race and gender, and various background and employment variables for the judge.[16]

As in the prior two stages of our longitudinal study, our point of analysis was each individual judge's ruling in an individual

---

[13] *See infra* Part III.

[14] Our dataset, primary regression run results, coding of each decision, coding of each judge, and coding information may be found at *Empirical Study of Religious Liberty Decisions (2006-2015), Data Archive*, ARDA, https://www.thearda.com/data-archive?fid=SISK2015_[https://perma.cc/EK62-Z479] (July 25, 2022).

[15] With the addition that we included unpublished digested decisions, our Westlaw search terms and our method for identifying religious liberty decisions are described in Sisk et al., *Searching for the Soul*, *supra* note 1, at 534–44.

[16] Every decision was independently coded by both a trained law student and one of the authors. For more detailed information about our coding, see the description published as part of our prior study of religious liberty decisions. *See id.* at 530–54, 571–612.

case as a "judicial participation."[17] The primary focus of our study was the judge rather than the court as an institution or a collective appellate panel; that is, we measured the individual response of each district or circuit judge to each Establishment Clause claim.

In coding decisions on the merits, a ruling by a district judge must have accepted or rejected a particular claim in a manner that engaged the merits of the claim, even if the ruling was not a final judgment, while non-merits procedural rulings were excluded.[18] For court of appeals decisions, a ruling was coded on the merits if it affirmed or reversed a final judgment by a district court on an Establishment Clause claim or remanded the case after an evaluation of a significant element of the merits of the claim.

Table 1 presents a descriptive summary of our data set.

Table 1: Summary Descriptive Statistics

	MEAN	STD. DEV.
Dep. Var:		
Judge Vote (1=relig. claimant prevailed on an issue)	0.38	0.48
Case Type:		
Private Educ.	0.02	0.14
Public Educ. (Elem.)	0.17	0.38
Public Educ. (Sec.)	0.07	0.26
Public Educ. (High.)	0.03	0.17
Religious Meetings	0.15	0.36
Religious Symbols	0.17	0.37
Judge Religion:		
Catholic	0.26	0.44
Baptist	0.03	0.17

[17] For a further discussion of judicial participations as the data point, see *id.* at 539–41.

[18] *See also* Adam M. Samaha & Roy Germano, *Are Commercial Speech Cases Ideological? An Empirical Inquiry*, 25 WM. & MARY BILL RTS. J. 827, 847 (2017) (similarly excluding "anterior" procedural decisions from rulings on the merits).

Other Christian	0.12	0.33
Jewish	0.14	0.35
Latter-Day Saints	0.04	0.19
Other	0.01	0.11
None	0.11	0.32
Judge Sex and Race:		
Sex (Female=1)	0.25	0.44
African-American	0.11	0.31
Asian-Latino	0.08	0.27
Judge Ideology or Attitude:		
Party of Appoint. POTUS (1=Rep.)	0.56	0.50
Common Space Score	0.09	0.40
ABA Rating-Above Qualified	0.67	0.47
ABA Rating- Below Qualified	0.09	0.29
Seniority on Fed. Bench (mos.)	211.14	122.57
Elite Law School	0.37	0.48
Judge Employment		
Background:		
Military	0.27	0.44
Government	0.62	0.48
State or Local Judge	0.31	0.46
Law Professor	0.11	0.31
Community Demographics:		
Catholic %	21.70	7.72
Jewish %	2.19	1.84
None %	23.68	4.65
Precedent Variables:		
After-Winn	0.37	0.48
After-Greece	0.12	0.33

NOTE: N=498.

B. Empirical Strategy

Because the dependent variable is dichotomous and given the hierarchical structure of our data, we estimated mixed-effects

models of our dichotomous outcome variable.[19] Our two primary models (using different proxies for judge ideology) generated substantially similar results. Table 2 presents results from our two models.

Our Establishment Clause data set includes 498 judicial participations, in which the claim was favorably received by the ruling judge 37.6% of the time (or 187 observations). In our prior two time-period studies, Establishment Clause claimants succeeded at a similar rate of 39.8% for 1996 to 2005 and 42.3% for 1986 to 1995.[20]

Table 2: Mixed-Effects Logistic Regression Models of Establishment Clause Judicial Participations, Federal Courts, 2006-2015

	Party-of-Appointing-President Model	Common Space Score Model
Case Type:		
Private Educ.	4.36 (3.85)	5.11 (4.50)
Public Educ. (Elem.)	0.89 (0.30)	0.88 (0.30)
Public Educ. (Sec.)	1.47 (0.66)	1.53 (0.68)
Public Educ. (Higher)	0.19 (0.21)	0.19 (0.21)
Religious Meetings	1.86 (0.65)	1.86 (0.65)
Religious Symbols	1.27 (0.42)	1.33 (0.44)
Judge Religion:		
Catholic	0.54* (0.17)	0.55 (0.17)
Baptist	0.50 (0.34)	0.55 (0.38)
Other Christian	0.58 (0.23)	0.60 (0.24)
Jewish	0.91 (0.34)	0.87 (0.33)
Latter-Day Saints	1.68 (0.98)	1.91 (1.13)
Other	3.74 (3.95)	3.34 (3.56)
No Religious Affil.	0.45 (0.19)	0.44* (0.18)
Judge Sex and Race:		
Sex (Female)	0.68 (0.20)	0.68 (0.20)
African-American	1.12 (0.45)	1.07 (0.43)
Asian-Latino	0.48 (0.24)	0.48 (0.24)

[19] Specifically, our core results emerge from estimations using the "meqrlogit" command in Stata (v.17.1).

[20] Sisk & Heise, *Ideology All the Way Down*, *supra* note 1, at 1211; Sisk et al., *Searching for the Soul*, *supra* note 1, at 571.

Judge Ideology or Attitude:		
Party of Appoint. POTUS	0.55* (0.13)	---
Common Space Score	---	0.37** (0.12)
ABA Rating-Above Qual.	1.07 (0.28)	1.10 (0.29)
ABA Rating- Below Qual.	0.84 (0.39)	0.91 (0.43)
Seniority on Fed. Bench	1.00 (0.00)	1.00 (0.00)
Elite Law School	1.35 (0.33)	1.38 (0.34)
Judge Employ. Bkg.:		
Military	1.16 (0.33)	1.16 (0.34)
Government	0.91 (0.21)	0.88 (0.21)
State or Local Judge	1.30 (0.33)	1.27 (0.32)
Law Professor	0.72 (0.28)	0.68 (0.26)
Community Demographics:		
Catholic %	1.00 (0.02)	1.00 (0.02)
Jewish %	1.01 (0.10)	1.02 (0.10)
None %	0.94 (0.03)	0.93* (0.03)
Precedent Variables:		
Winn	0.02** (0.03)	0.03** (0.03)
Greece	0.50 (0.59)	0.48 (0.58)
Constant	5.20 (4.92)	4.65 (4.31)
Year fixed effect	Y	Y
N	*498*	*498*

Notes: The dependent variable for both models is Establishment Clause Outcome=1. The models were estimated using the "meqrlogit" command in Stata (v.17.1). Robust standard errors, clustered on Circuits, in parentheses. * $p < .05$; ** $p < .01$.

Two sets of variables proved significant in our study for 2006 to 2015: judge ideology and judge religion.

As addressed in another article from this study, both of our proxies for judicial ideology—Party-of-Appointing-President and the Judicial Common Space score—were statistically significant.[21] For cases decided in 2006 to 2015, holding all other independent variables constant at their means, the predicted probability that a Republican-appointed judge would vote to uphold an Establishment Clause claim is 33.0%, while the probability that a Democratic-appointed judge would uphold the claim is 45.1%.[22] While the margin remains significant, it is

[21] Gregory C. Sisk & Michael Heise, *Cracks in the Wall: The Persistent Influence of Ideology in Establishment Clause Decisions*, 54 ARIZ. ST. L.J. 625, 638–42 (2022).

[22] *Id.* at 652.

markedly smaller than we found previously for the 1996 to 2005 period.[23] For that earlier ten-year period, "the predicted probability that a Republican-appointed judge would vote to uphold an Establishment Clause claim was 25.4%, while the probability that a Democratic-appointed judge would uphold the claim was" more than twice as high at 57.3%.[24]

Judges' religious affiliation, or lack thereof, proved significant for Establishment Clause decisions during this period in two ways.[25] Even controlling for other variables, including ideology, Catholic judges were significantly more likely to reject Establishment Clause claims. Interestingly, we found the same significance and in the same direction for judges with no declared religious affiliation. These correlations are the subject of this article.

II. JUDGE RELIGIOUS BACKGROUND INFLUENCES ON ESTABLISHMENT CLAUSE DECISIONS

A. Judge Religious Background Variables: Identity, Coding, and Frequencies

Focusing in this article on the religious affiliation of the deciding judges, we find that Catholic judges and judges with no religious affiliation (the "Nones") were significant in one of our two models and in the negative direction of being more likely to reject Establishment Clause claims.

Going beyond the traditional trilogy of Catholic, Protestant, and Jew used in most prior empirical studies of judges, we were able to categorize the judges into eight general categories, for which dummy variables were created:

> CATHOLIC: Catholic judges accounted for 26.1% (or 130) of the 498 total observations in our largest models.
> MAINLINE PROTESTANT: Judges affiliated with Mainline Protestant denominations[26] accounted for 28.5% (or 142) of the judicial participations.
> BAPTIST: Baptist judges accounted for 2.8% (or 14) of the observations.

---

[23] *Id.*

[24] Sisk & Heise, *Ideology All the Way Down*, *supra* note 1, at 1216.

[25] *See infra* Part II.

[26] 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.

> OTHER CHRISTIAN: Judges affiliated with other Christian denominations or sects accounted for a total of 12.0% (or 60) of the judicial participations. These involved judges who identified as Protestant, Quaker judges, Mennonite judges, or only as Christian.
> JEWISH: Jewish judges accounted for 14.1% (or 70) of the judicial participations.
> LATTER-DAY SAINTS: Latter-Day Saint or Mormon judges accounted for 3.8% (or 19) of the judicial participations.
> OTHER: Judges with other religious affiliations accounted for 1.2% (or 6) of the observations. These included Christian Scientist, Bahai, or others.
> NONE: Judges who did not designate a religious affiliation accounted for 11.5% (or 57) of the judicial participations.

As the excluded reference variable, we selected MAINLINE PROTESTANT. Historically, Mainline Protestantism has been the dominant cultural position among the elites in American government.[27] And even today, that religious affiliation is the single largest grouping for judicial participations in our study. We concluded that Mainline Protestant remains the fundamental center of our judicial participations for purposes of comparison.[28]

For this study of Establishment Clause decisions in the lower federal courts from 2006 through 2015, information on the religious background of federal appellate judges was obtained from the multi-user database compiled by Gary Zuk, Deborah J. Barrow, and Gerard S. Gryski,[29] the generosity of Sheldon Goldman for background on district judges, data shared by Sepehr Shahshahani and Lawrence Liu, corrections and additions made by René Reyes and Jessica Reyes in their adaptation of data from our prior studies,[30] and our own

---

[27] Daniel G. Hummel, *Power and Pluralism: American Protestantism and the American Century*, 17 MOD. INTELL. HIST. 903, 905–06 (2020).

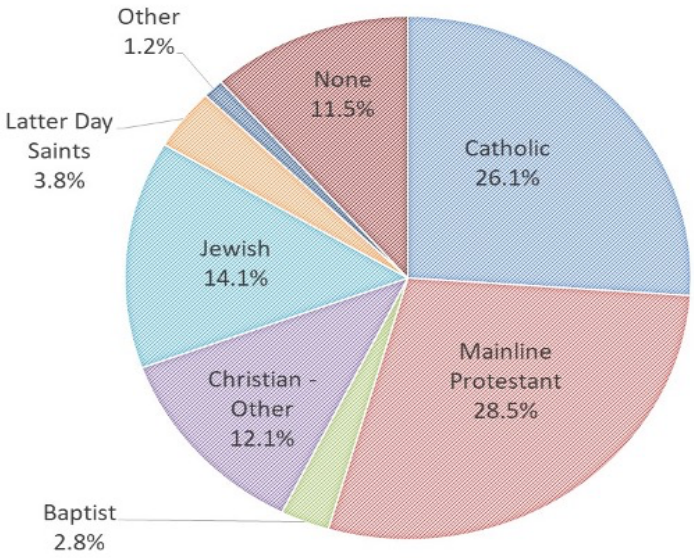
[28] *See* Donald R. Songer & Susan J. Tabrizi, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. POL. 507, 513 (1999) (adopting Mainline Protestant category as the excluded dummy variable in a study of the influence of religious affiliation on state supreme court justices).

[29] GARY ZUK, DEBORAH J. BARROW & GERARD S. GRYSKI, MULTI-USER DATABASE ON THE ATTRIBUTES OF UNITED STATES APPEALS COURT JUDGES, 1801-2000, at 3 (2009), https://doi.org/10.3886/ICPSR06796.v2 [https://perma.cc/6UFM-EHFT].

[30] René Reyes & Jessica W. Reyes, *Religion in Judicial Decision-Making: An Empirical Analysis*, 2019 BYU L. REV. 293, 304 n.35 (2019).

independent research into judicial biographies, confirmation hearing records, and news reports.

Figure 1. Judge Religious Background Variables as Percentage of Observations, Federal Courts, 2006-2015



B. Impartiality and Religious Background for Judges

An aspirational model of impartial judging in a liberal political state would "view religious neutrality as a noble ideal for judges."[31] Yet cognitive psychology teaches that human beings "lack the psychological capacity" to interpret and apply the law "without indulging sensibilities pervaded by our attachments to highly contested visions of the good,"[32] which of course includes

[31] Howard Kislowicz, *Judging Religion and Judges' Religion*, 33 J.L. & RELIGION 42, 43 (2018).

[32] Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 116–17 (2007); *see also* Mark Modak-Truran, *The Religious Dimension of Judicial Decision Making and the* De Facto *Disestablishment*, 81 MARQ. L. REV. 255, 256–57 (1998) ("[J]udicial deliberation necessarily relies on a comprehensive or religious conviction about authentic human existence in hard cases."); Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 933 (1989) ("[R]eliance by

religious values. If there is to be any hope of mitigating external variables on judging, including those derived from religious faith, we must begin by uncovering the hidden influences so that the judge is self-consciously aware and can ensure a breadth of deliberation and consideration of sources to overcome religious partiality.

As Howard Kislowicz writes, by "being explicitly engaged" in identifying religious perspectives as an influence on judicial reasoning, rather than pretending they do not exist, a judge can "subject [stereotypes and religious norms] to scrutiny" and thereby "consciously answer them."[33] As a prominent example, Justice Amy Coney Barrett co-authored an article many years ago with John Garvey in which they encouraged Catholic judges to be faithfully self-aware in the context of death penalty cases.[34] If a Catholic judge recognizes a conflict between the obligation "by oath, professional commitment, and the demands of citizenship to enforce the death penalty" and their obligation "to adhere to their church's teaching on moral matters," the conscientious Catholic judge may be obliged to recuse in certain cases.[35]

So what is the empirical evidence on the possible association between a judge's religious affiliation and his or her decisions in legal cases? The earliest significant empirical work on religious background of judges was reported by Donald Songer and Susan Tabrizi in 1999.[36] Although they found that Catholic and Jewish state supreme court justices appeared to be slightly more liberal than Mainline Protestant justices, the difference was not statistically significant.[37] However, evangelical Christian justices were significantly more likely to reach conservative answers in death penalty, sex discrimination, and obscenity cases.[38]

More recently, René Reyes and Jessica Reyes explored judicial religious background influences in federal court decisions in what they described as "fundamental moral values" cases,

---

judges on their personal religious convictions is as proper as reliance on their personal moral convictions of any other kind.").

[33] Kislowicz, *supra* note 31, at 56.

[34] John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 303 (1998).

[35] *Id.*

[36] Songer & Tabrizi, *supra* note 28, at 507.

[37] *Id.* at 520–23.

[38] *Id.*

such as abortion, obscenity, gay and lesbian rights, and capital punishment.[39] When examining the interaction of ideology with religion, they found that "Catholics in particular appear to vote relatively conservatively in moral values cases regardless of their political ideology."[40]

In the first stage of our religious liberty studies for 1986 to 1995, we found judicial religious background to be a powerful influence in religious liberty decisions.[41] For that period, we found "religious affiliation variables—both those of judges and of claimants—were the most consistently significant influences on judicial votes in the religious freedom cases included in our study."[42] Looking specifically to Establishment Clause decisions, we found Jewish judges to be significantly more likely to uphold challenges to interactions between government and religion.[43] And, in the particular context of education, Catholic judges were significantly more likely to resist Establishment Clause claims.[44]

By the second round of decisions, for 1996 through 2005, however, when we focused on Establishment Clause decisions in the lower federal courts, we found no judicial religious background variable to be significant.[45] Rather, during that period, ideology had a powerful correlation to Establishment Clause case outcomes,[46] while religious background variables did not emerge as a significant factor.

For this most recent set of cases, from 2006 through 2015, ideology influences persist, although waning, while two judicial religious background variables now have emerged as significant. Both Catholic judges[47] and, perhaps counter-intuitively, Non-Religiously-Affiliated judges[48] were significantly more likely to reject an Establishment Clause challenge to government interaction with religion. While each variable was significant in one of our two models, they both also barely fell outside the

---

[39] Reyes & Reyes, *supra* note 30, at 296, 303.

[40] *Id.* at 335; *see also* William Blake, *God Save This Honorable Court: Religion as a Source of Judicial Policy Preferences*, 65 POL. RSCH. Q. 814, 822 (2012) (finding that Catholic justice on the Supreme Court voted more conservatively in Establishment Clause cases).

[41] Sisk et al., *Searching for the Soul*, *supra* note 1, at 501.

[42] *Id.*

[43] *Id.* at 502.

[44] *Id.*

[45] Sisk & Heise, *Ideology All the Way Down*, *supra* note 1, at 1211–12.

[46] *Id.* at 1214–26.

[47] *See infra* Section II.C.

[48] *See infra* Section II.D.

traditional threshold for statistical significance in the other model,[49] thus both being relatively stable across models.

C. Catholic Judges More Likely to Reject Establishment Clause Claims

From 2006 to 2015, Catholic judges accounted for 26.1% of the sampled judicial observations, that is, 130 observations out of 498. The direction of influence for Catholic background was in the predicted "Pro-Religion" direction,[50] that is, more likely to approve of government acknowledgment of, and interaction with, religion.[51]

As shown in Figure 2, for the 2006 to 2015 period, holding all other independent variables constant in our Party-of-Appointing-President model, our best estimate was that the success rate for Establishment Clause claimants before a Catholic judge was 29.6%, while that predicted success rate rose to 41.5% before a non-Catholic judge.[52]

---

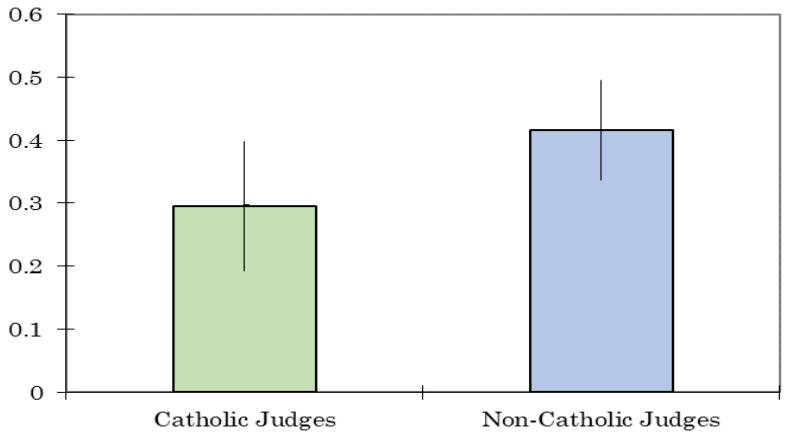
[49] While the Catholic judge variable achieves statistical significance at the ninty-five percent level under our Party-of-Appointing-President model, it falls just outside ($p<0.058$) for our Common Space Score model.

[50] Sisk et al., *Searching for the Soul*, *supra* note 1, at 584.

[51] *See* FRANK J. SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE 220 (1976) (saying that Catholic judges "vote heavily accommodationist").

[52] The vertical lines, commonly called "whiskers," in Figure 1 represent the ninty-five percent confidence intervals for these two predictions. By "95 percent confidence interval," statisticians mean that the interval is "one within which we are 95 percent certain that the true variable falls." ROBERT M. LAWLESS, JENNIFER K. ROBBENNOLT & THOMAS S. ULEN, EMPIRICAL METHODS IN LAW 239 (2010). Thus, while our best estimate is that a Catholic judge is likely to rule favorably on an Establishment Clause claim at a rate of 29.6%, the probability could be as low as 19.3% or as high as 39.8%. Similarly, while we predict that a non-Catholic judge would uphold an Establishment Clause claim 41.5% of the time, the probability could be as low as 33.6% or as high as 49.4%. Although the confidence intervals overlap, there nonetheless remains a ninty-five percent confidence level that differences in outcomes between these binary party proxies are not a product of random chance.

Figure 2: Predicted Probability of a Positive Vote by Judge on Establishment Clause Claim, by Catholic and Non-Catholic Judges (2006-2015)



NOTES: Coefficients correspond to the meqrlogit regression results reported in Tbl.2, model 1, and are reported as marginal effects evaluated at the predicted sample mean. The whiskers demark the ninty-five percent confidence interval.

The longstanding hypothesis is that Catholics are "more favorable toward interactions between government and religious institutions" particularly in "government-aid" cases which historically involved "aid to students attending Catholic parochial schools."[53] And we had found a similar influence in the past, particularly for 1986 to 1995. In the education context, Catholic judges were significantly more likely both to respond favorably to religious claimants seeking Free Exercise exemptions from government restrictions and to resist Establishment Clause challenges to governmental acknowledgment of religion or interaction with religious institutions.[54]

As we wrote previously:

> Given the frequency and visibility of cases involving Catholic parochial schools in the historical Establishment Clause debate

[53] *See* Sisk & Heise, *Ideology All the Way Down, supra* note 1, at 1228.
[54] Sisk et al., *Searching for the Soul*, *supra* note 1, at 583–84.

> and that arguments for separation of Church and State often were framed in terms of excluding "sectarian" (a "code" word for Catholic) influences from public education and precluding support of "sectarian" institutions in private education, it is not at all surprising that Catholic judges would be least responsive to these claims.[55]

By contrast, Jewish background for judges did not rise to statistical significance for our study of 2006 to 2015 Establishment Clause cases. Nor did Jewish judges rule in a significantly different way for the previous 1996 to 2005 period.[56] However, for the first stage of our study, 1985 to 1995, Jewish judges were significantly more likely to rule favorably on Establishment Clause claims challenging government accommodation of religion.[57]

The conventional hypothesis has been that judges from the Jewish religious tradition are more likely to be skeptical of perceived governmental endorsements of religion or incorporation of majoritarian religious beliefs, which typically would be Christian in nature.[58] But, for whatever reason, we have not found Jewish judges to be acting in a significantly different way on Establishment Clause decisions in the twenty years from 1996 to 2015.

In their cumulative study of a larger 30-year period, Sepehr Shahshahani and Lawrence Liu found that Jewish judges were significantly more pro-claimant in Establishment Clause cases.[59] They did not, however, differentiate among the time periods. So their findings are consistent with ours, given that we found a significantly more favorable disposition of Jewish judges to Establishment Clause claims during the first ten years (1986-1995) of this thirty-year period. In sum, their finding that Jewish judges were "a secularizing force keen on preserving the separation of church and state"[60] may belong primarily to this earliest part of the three-decade period of 1986 to 2015 under study.

---

[55] *Id.* at 574.

[56] Sisk & Heise, *Ideology All the Way Down*, *supra* note 1, at 1211–12.

[57] Sisk et al., *Searching for the Soul*, *supra* note 1, at 572, 582.

[58] *Id.* at 515, 582.

[59] Sepehr Shahshahani & Lawrence J. Liu, *Religion and Judging on the Federal Courts of Appeals*, 14 J. EMPIRICAL LEGAL STUD. 716, 718, 730 (2017).

[60] *Id.* at 718.

D. Non-Religiously-Affiliated Judges (the "Nones") Were Significantly More Likely to Accept Government Interaction with Religion

One of the most remarkable findings in our study is that judges with no religious affiliation were significantly associated with the outcome on Establishment Clause decisions. To our knowledge, this result regarding judges with No Religious Affiliation is unprecedented in empirical explorations of federal court decision-making.

And, even more intriguing, the direction of influence was not in favor of insisting on greater secularity in public life. Rather, those judges among the so-called "Nones" were significantly more likely to reject an Establishment Clause claim.

1. Data on Judges Without Religious Affiliation ("Nones")

In coding judges on religious background, we found an increasing number of federal judges for whom no religious affiliation could be discerned despite the considerable research that we and others have conducted into judicial background. We treat this category as a proxy for no religious affiliation rather than as signifying missing information for these judges.

During confirmation hearings, submissions to the Senate Judiciary Committee, news reports, and other biographical presentations, federal judges were repeatedly asked about their memberships and affiliations. In addition, individuals who are actively affiliated with a religious body are not likely to be reluctant so to acknowledge.

A few of these instances may be missing or overlooked data. It is possible that some judicial nominees publicly demur from revealing their religious affiliation for strategic reasons or to avoid confirmation controversy. Yet it would be hard for a judge who had been actively affiliated with a religion to hide all of the clues in a lifetime's worth of biographical information submitted in the confirmation process. Moreover, since it is often commented upon positively during confirmation hearings, religious affiliation—at least with mainstream religious groups—ordinarily would enhance a nominee's reception before the Senate.

We believe it most likely that a judge's failure to identify participation in a particular faith tradition is an affirmative decision by that judge to disclaim religious affiliation. At the very least, the absence of any information about religious

affiliation is evidence that an individual judge does not actively adhere to an organized religion. Accordingly, based on our continuing experience with this variable, we have treated coding of a judge in this category as the affirmative absence of religious affiliation.[61]

As discussed further below,[62] in the general American population, the number of so-called "Nones" had grown to 26 percent of the population by 2019.[63] The number of federal judges who today report no religious affiliation is growing as well. For the first period of our study, 1986 to 1995, Non-Religiously-Affiliated judges were 5.5% of our observations.[64] For this study of Establishment Clause decisions from 2006 through 2015, the number of religiously unaffiliated judges had doubled to 11.5%, comprising 57 of the 498 observations.

In terms of other variables, the Nones among judges are diverse. Indeed, the mean percentage of religiously unaffiliated in the community for all judges, 23.7%, is nearly identical to that for the judges without a religious affiliation, 23.5%.

As other researchers have found, and as we've outlined previously, "the Democratic Party has become the political home for secularists, who have become a key constituency in the party."[65] In the 2000 presidential election, those who reported either no religious affiliation or that they never attend religious services voted by a nearly two-thirds margin, 61 percent of each, for the Democratic candidate for President.[66] That rose to 67 percent and 62 percent respectively for 2004.[67] For the 2008 and

---

[61] *See also* Sisk et al., *Searching for the Soul*, *supra* note 1, at 577–78. By contrast, Shahshahani and Liu omitted judges without identified religious affiliation from their study of religious liberty decisions. Shahshahani & Liu, *supra* note 59, at 725 n.12. On the influence of lack of religious affiliation for judges, we are unable to compare results.

[62] *See infra* Section II.D.3.

[63] *In U.S., Decline of Christianity Continues at Rapid Pace*, PEW RSCH. CTR. (Oct. 17, 2019), https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace [https://perma.cc/8QQY-7TUU].

[64] Sisk et al., *Searching for the Soul*, *supra* note 1, at 577.

[65] Sisk & Heise, *Ideology All the Way Down*, *supra* note 1, at 1233; *cf.* ANDREW KOHUT ET AL., THE DIMINISHING DIVIDE: RELIGION'S CHANGING ROLE IN AMERICAN POLITICS 3–4 (2000); *id.* at 156.

[66] *Exit Polls: State-by-State Voter Surveys*, ABC NEWS, https://web.archive.org/web/20120321023943/http://abcnews.go.com/sections/politics/2000vote/general/exitpoll_hub.html.

[67] *Election Results: America Votes 2004*, CNN, https://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html [https://perma.cc/6C6F-MLQ2] (last visited Jan. 29, 2023).

2012 elections, which occurred during the period of this most recent study, the Nones voted for the Democratic candidate at 75 and 70 percent.[68]

For our 2006 to 2015 observations in Establishment Clause cases, 56.1% of the judges without religious affiliation were appointed by a Democratic president, compared to 43.8% overall. While judge Nones thus were more likely to be appointed by a Democratic president, 43.9% of the Nones had been appointed by a Republican president. Moreover, our regression analysis controlled for an ideology variable when measuring correlation of the Nones with the Establishment Clause case outcomes. Thus, the Nones' result we found is not simply an artifact of or proxy for a partisan divide on Establishment Clause cases.[69]

2. "Nones" Among Judges Significantly More Likely to Reject Establishment Clause Claims

Counter to conventional wisdom, far from being a force for greater secularization on the separation of Church and State side of religious liberty disputes, our study suggests a disaffinity by Nones judges for Establishment Clause objections to government interaction with religious believers and entities.

In Figure 3, for the 2006 to 2015 period, holding all other independent variables constant in our Common Space Score model,[70] our best estimate was that the success rate for Establishment Clause claimants before a Non-Religiously-Affiliated or Nones judge was 24.9%,[71] while that predicted success rate rose to 40.0% before all other judges—that is, judges with some religious affiliation.[72]

---

[68] *Exit Polls 2012: How the Vote Has Shifted*, WASH. POST (Nov. 6, 2012), https://www.washingtonpost.com/wp-srv/special/politics/2012-exit-polls/table.html [https://perma.cc/PDM2-XHPN].

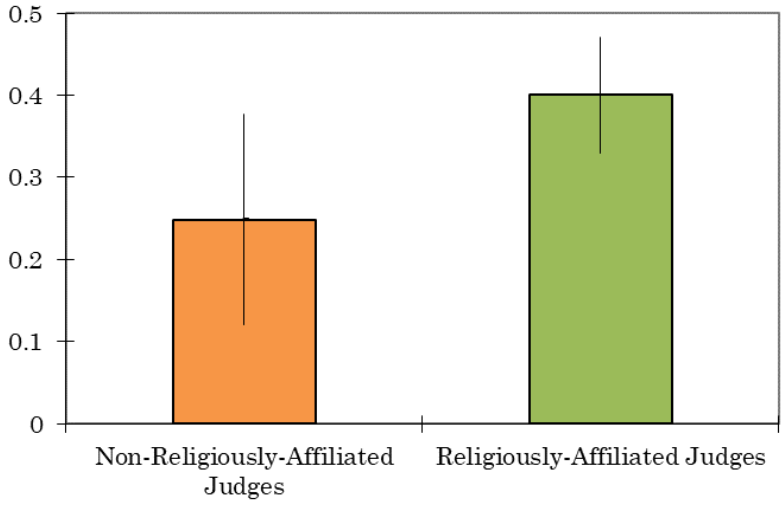
[69] *See generally* Sisk & Heise, *supra* note 21 (discussing the continuing, but diminishing, partisan divide on Establishment Clause cases).

[70] The variable for "Nones" Judges is significant at the ninty-five percent confidence mark in our Common Space Score model and just outside the statistically significant level ($p<0.056$) for the Party-of-Appointing-President model.

[71] The ninty-five percent confidence interval for predicted success rate before a Non-Religiously-Affiliated Judge ranges from 12.0 to 37.7.

[72] The ninty-five percent confidence interval for predicted success rate before all other judges ranges from 33.0 to 47.1.

Figure 3: Predicted Probability of a Positive Vote by Judges on Establishment Clause Claim, by Non-Religiously-Affiliated and Religiously-Affiliated Judges (2006-2015)



NOTES: Coefficients correspond to the meqrlogit regression results reported in Tbl.2, model 2, and are reported as marginal effects evaluated at the predicted sample mean. The whiskers demark the ninty-five percent confidence interval.

3. The Rise and Nature of the "Nones" in America

When describing those Americans who do not identify with a religious group, " 'None' is a 'negative definition.' "[73] As Elizabeth Drescher reports, those who choose to not be affiliated with a religious institution are "[uncomfortable] with the labels."[74] She explains that "all Nones are not the same—very often by wide margins."[75] Joel Thiessen and Sarah Wilkins-Laflamme advance the "understanding that religious nones come in all shapes and

[73] ELIZABETH DRESCHER, CHOOSING OUR RELIGION: THE SPIRITUAL LIVES OF AMERICA'S NONES 5 (2016); *see also* Nancy Leong, *Negative Identity*, 88 S. CAL. L. REV. 1357, 1357 (2015) (stating that "negative identities," including atheist, "are meaningful to group members, add value to society, and thus deserve legitimacy and respect").

[74] DRESCHER, *supra* note 73, at 5.

[75] *Id.* at 21.

sizes: involved seculars, inactive nonbelievers, inactive believers, the spiritual but not religious, and religiously involved believers."[76]

Tim Clydesdale and Kathleen Garces-Foley propose a four-part "typology" of Nones:[77]

> "Indifferent Secularists" account for 54 percent majority of the young American adults among the Nones.[78]
> "Unaffiliated Believers" are 17 percent of young adults.[79]
> "Spiritual Eclectics" are also 17 percent.[80]
> "Philosophical Secularists," who seek to "replace a religious worldview with an equivalent non-religious belief system,"[81] are the smallest contingent at 12 percent of young adults.[82]

We must, then, exercise caution in making assumptions about attitudes toward religion and interactions between government and religious institutions based solely on an individual's choice not to affiliate with a particular religion. As Ryan Burge warns, putting all the Nones into "one box" then "places someone who actively tries to convert people away from religion in the same category as someone who just doesn't think about matters of faith that much at all."[83] In fact, the overwhelming majority of Nones are not "ardent secularists" but rather range from those who believe in a spiritual realm to those who are indifferent to matters of religion.[84]

We expect that federal judges who are not affiliated with a religion are more likely to fall into the "Indifferent Secularist" or "Inactive Nonbeliever" catchall than into an "ardent" or

---

[76] JOEL THIESSEN & SARAH WILKINS-LAFLAMME, NONE OF THE ABOVE: NONRELIGIOUS IDENTITY IN THE US AND CANADA 171 (2020).

[77] TIM CLYDESDALE & KATHLEEN GARCES-FOLEY, THE TWENTYSOMETHING SOUL: UNDERSTANDING THE RELIGIOUS AND SECULAR LIVES OF AMERICAN YOUNG ADULTS 145 (2019); *see also* DRESCHER, *supra* note 73, at 28–29 (outlining a wide set of categories, including but not limited to: Atheists, Weak and Soft Agonistics, Secular Humanists, Seculars, Spiritual, Spiritual-But-Not-Religious, Neopagan, Nothing-in-Particular, All of the Above, and None of the Above).

[78] CLYDESDALE & GARCES-FOLEY, *supra* note 77, at 155–56.

[79] *Id.*

[80] *Id.* at 155.

[81] *Id.* at 145.

[82] *Id.* at 155–56.

[83] RYAN P. BURGE, THE NONES: WHERE THEY CAME FROM, WHO THEY ARE, AND WHERE THEY ARE GOING 96 (2021).

[84] CLYDESDALE & GARCES-FOLEY, *supra* note 77, at 143–44; *see also* Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1120 (2011) (confirming the number of truly nonbelievers is very small, perhaps 2 percent atheist and 3 percent agnostic).

"militant" secularist category. Given the controversies that would rise in the federal judicial appointment process if a president were to nominate someone who was actively opposed to religion and affirmatively advocated an atheistic worldview, we expect that few if any such persons would be nominated and even fewer confirmed. Thus, the federal judges who fall into the Nones box are even more likely to be among the substantial majority of unaffiliated Americans who believe in God but not organized religion or who are secular in general approach but apathetic toward religion.

4. Locating the "Nones" in the Establishment Clause Debate

The conventional wisdom holds that we have entered a historical period of an intensifying division in politics and culture between those holding powerfully to traditional religious values and those who have a liberal secular worldview. Mark Movsesian describes the situation in this way:

> Over the past two decades, American religion has become polarized between two groups, the Nones, who reject organized religion as authoritarian and hypocritical, especially with respect to sexuality, and the Traditionally Religious, who continue to adhere to organized religion and to traditional religious teachings, especially with respect to sexuality. Each group views the other's values as threatening and incomprehensible.[85]

Researchers on American Nones have also observed "vitriolic public tensions between the religiously affiliated and unaffiliated in the United States."[86] However, they note that this "battle for cultural authority and legitimacy" between "devout theologically conservative religious adherents" and "a growing religious none segment who are evermore committed to a secular orientation to society" tends to flourish when both contingencies are side-by-side.[87] Thus, negative attitudes by Nones toward conservative religious views are more likely in those regions of the country where those with conservative religious views are in the majority or plurality.[88]

---

[85] Mark L. Movsesian, Masterpiece Cakeshop *and the Future of Religious Freedom*, 42 HARV. J.L. & PUB. POL'Y 711, 713 (2019) (footnote omitted).

[86] THIESSEN & WILKINS-LAFLAMME, *supra* note 76, at 177.

[87] *Id.* at 23.

[88] *See id.* at 173.

Our prior research on federal court decisions on the Free Exercise Clause found evidence suggesting that religion indeed can be a source of conflict between religious traditionalists and secular progressives.[89] In our first phase of study for 1986 to 1995, we found that adherents to traditionalist Christian faiths, notably Catholics and Baptists, entered the courthouse door at a distinct disadvantage in seeking Free Exercise religious accommodations.[90] One of us suggested, "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."[91]

Conspicuously, however, this conflict between the religiously devout and the religiously unaffiliated has been largely confined to the arena of religious requests under Free Exercise principles for exemptions from generally applicable laws. Indeed, the particular focus of controversy has been a collision between anti-discrimination norms favored by secular liberals and claims for exemption by traditionalist religious believers.[92] One of us has suggested that when religious traditionalists "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."[93]

That same polarization between religious traditionalists and Nones may not extend into the general realm of government interaction with religion and religious entities, such as religious symbols in public life, inclusion of religious entities as the beneficiaries of government programs, or a public high school graduation in a religious venue. And, indeed, our results for the Nones that ascend to the federal bench support that hypothesis.

---

[89] Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. COLO. L. REV. 1021, 1024 (2005).

[90] *Id.* at 1037–46.

[91] *Id.* at 1038.

[92] Movsesian, *supra* note 85, at 742.

[93] Sisk, *supra* note 89, at 1041–42. In our separate empirical analysis of Free Exercise cases from 2006-2015, the Nones variable for judge background did not approach significance, but it did point in the expected negative direction of opposition to Free Exercise accommodations. Michael Heise & Gregory C. Sisk, *Approaching Equilibrium in Free Exercise of Religion Cases? Empirical Evidence from the Federal Courts*, 64 ARIZ. L. REV. 989, 1042 (2022).

As discussed previously,[94] it is a mistake to assume that someone who falls into the general and undifferentiated category of a None is a "militant secularist" who is "bent on keeping religion completely out of the public sphere."[95] Indeed, "inactive nonbelievers seem to be the largest group by a sizeable margin."[96] For most Nones, then, a choice to avoid religious affiliation or a discomfort with organized religion does not connote a hostility to religion or to those people and institutions that are religious. Clydesdale and Garces-Foley express "surpris[e]" at "how positively [twentysomething Nones] view 'churches and synagogues today' and 'mainstream religion.' "[97] Many have "benign views of churches and synagogues."[98]

Consider belief in expansive equality as being a signature characteristic of the Nones.[99] Nones would tend to vigorously oppose an exemption for a traditional religious believer from a law prohibiting discrimination in commercial services on the basis of sexual orientation. But Nones might accept equal inclusion of religious entities among others in receiving government benefits or allowance of tax credits. Drescher describes many Nones as "spiritually and socially cosmopolitan in their embrace of all manner of difference."[100] That "cosmopolitan equanimity" to accept and "deal with the differences"[101] may well encompass religious difference, even to the point of accepting, but declining affiliation with, religious institutions.

Moreover, the recently emerged Nones have not been a party to the inter-religious conflicts that have run through history among Catholics, Protestants, and Jews. The Nones might be less likely to take offense from government acknowledgment of Christianity's previously dominant place in American culture, such as seen in the celebration of Christmas as a holiday or a public display of Christian imagery during that season.

---

[94] *See supra* Section II.D.3.

[95] *See* Michael Rosenfeld, *Constitutionalism and Secularism: A Western Account*, *in* HANDBOOK ON CONSTITUTIONS AND RELIGION 13 (Susanna Mancini ed., 2019), https://ssrn.com/abstract=3360688 [https://perma.cc/XB5K-XDB2] (describing different models for managing the relationship between church and state).

[96] THIESSEN & WILKINS-LAFLAMME, *supra* note 76, at 172.

[97] CLYDESDALE & GARCES-FOLEY, *supra* note 77, at 37.

[98] *Id.*

[99] Movsesian, *supra* note 85, at 713.

[100] DRESCHER, *supra* note 73, at 249.

[101] *Id.* at 61.

In other words, while radically egalitarian and thus opposed to any departure from equality norms, the Nones should not be viewed as assuming the historical role of religious minorities in demanding expungement of religion from every aspect of public life. When it comes to religious symbolism appearing in a public venue or religious groups having access to public benefits on equal terms, the Nones may be indifferent or even accepting. The religiously unaffiliated truly are what Movsesian calls "spiritual '[i]ndependents,' "[102] which means they are not readily conscripted to a militantly secular view of the public square.

And, again, those without a religious affiliation who navigate the federal judicial confirmation process are especially unlikely to be in the smaller "ardent" or "militant" segment of the Nones.[103]

On religion and the public square, Jay Wexler offered the following hypothesis:

> [A]lthough the question is an empirical one with no clear answer yet, it is at least possible that a religiously diverse public square might result in more toleration and mutual respect among those who hold different beliefs and create the conditions for a more stable social peace than pure separationism.[104]

Our study provides some preliminary empirical evidence that the Nones, at least those sitting on the federal bench, share that insight.

III. COMMUNITY RELIGIOUS DEMOGRAPHICS AND ESTABLISHMENT CLAUSE DECISIONS

In both of our models for Establishment Clause cases, we included three religious demographic variables: the percentage of the population of the judge's home state that were Catholic, Jewish, or Non-Religiously-Affiliated. The source of the data was the Pew Research Institute's Religious Landscape Study—which dates to 2014—thus falling within our study period of 2006 to 2015.[105]

---

[102] Movsesian, *supra* note 85, at 724.

[103] CLYDESDALE & GARCES-FOLEY, *supra* note 77, at 143–45; *see also supra* Section II.D.3.

[104] Jay Wexler, *Secular Invocations, the First Amendment, and the Promise of Religious Pluralism*, 26 ROGER WILLIAMS U. L. REV. 620, 622 (2021).

[105] *Religious Landscape Study*, PEW RSCH. CTR., https://www.pewforum.org/religious-landscape-study [https://perma.cc/39KS-SQCD] (last visited Jan. 29, 2023).

Running parallel to our finding on judges who individually were without religious affiliation, our study found that judges from states with a higher religiously-unaffiliated, Nones, demographic are also more likely to reject an Establishment Clause claim.[106]

To provide a rough illustration of the size of this demographic effect, we have calculated—based on raw frequencies lacking multivariate controls—the outcome rate in Establishment Clause cases for those in which judges hailed from states with especially low percentages of Nones compared to those from states with especially high numbers of Nones.

Judges from states with only 12 to 14 percent of Nones in the population accounted for thirty-three observations in 2006 through 2015. The outcome in Establishment Clause cases for these low Nones states climbed to 45.5%, compared to the overall success rate on Establishment Clause claims of 37.6% overall.

Judges from states with 31 to 37 percent Nones in the population accounted for 38 observations. For these judicial participations from these high-density Nones states, the positive reception of Establishment Clause claims drops to 31.6%.

Thus, when it comes to positive judicial receptions to Establishment Clause claims, the disparity between judges from those states with the highest number of Nones (45.5% approval) and those with the lowest number of Nones (31.6%) approaches 14 percent in margin.

Note that this community demographic variable is parallel to our judge religious background variable only in the theme of lack of religious affiliation and correlation with a reduced positive outcome in Establishment Clause cases. But the variables are not identical in who is being measured or duplicative of one another. As we noted earlier, the so-called Nones among individual judges in our study were not more likely to come from states with higher numbers of Nones in the population. The mean percentage of religiously unaffiliated in the community for all judges (23.7%) is nearly identical to that for the judges without a religious affiliation (23.5%).

As we have written previously, "[b]ecause judges as human actors and social beings live and work in a particular social milieu, the religious context or atmosphere of that community

---

[106] This Nones demographic variable was significant in our Common Space score model and fell just out of significance (at $p<0.060$) for our Party-of-Appointing-President model.

may influence a judge's perception of legal claims that implicate religion or that involve appeals to religious adherence."[107]

As with the initial reaction to our results on judges without a religious affiliation, it may be surprising that judges from states with a lower religious adherence rate would be predicted as more likely to reject Establishment Clause claims. As explained above, however, we postulate that judges among the Nones may be independent in outlook and tolerant of full religious participation in the public square on the same equal basis as others. [108]

Moreover, as Joel Thiessen and Sarah Wilkins-Laflamme suggest, while a greater tension may be present where the Nones are a small minority compared to a dominant traditionalist Christian majority, "we can expect, on average, there to be higher rates of inactive nonbelievers in regions with higher rates of religious nones."[109] Where the unaffiliated are both in larger numbers and have higher rates of general indifference to religion, they may find little to offend in acknowledgment of religion in public life or participation of religious institutions in public programs.

In addition, this finding for 2006 to 2015 is consistent with a finding from our study of an earlier period that approached the question from the opposite direction. For 1986 to 1996, we found that judges from localities with a *higher* religious adherence rate were significantly more likely to *uphold* Establishment Clause claims.[110] We suggested at the time:

> Because a strong overall level of religious adherence in a community emphatically is not the equivalent of uniformity of beliefs, such a community in fact may combine a high level of religious devotion with some appreciation of religious diversity, which might move that community both to be receptive to religious dissenters and to be skeptical of governmental actions that appear to elevate one form of religious tradition above others.[111]

The opposite might similarly and consistently be true. As a state experiences an overall decline in religious adherence and a correlated rise in the numbers of those not affiliated, the occasions for inter-religious conflict might fade as well. Not only

---

[107] Sisk et al., *Searching for the Soul*, *supra* note 1, at 585.
[108] See *supra* Section II.D.
[109] THIESSEN & WILKINS-LAFLAMME, *supra* note 76, at 173.
[110] Sisk et al., *Searching for the Soul*, *supra* note 1, at 589.
[111] *Id.* at 590.

might such a region see a reduction in government interaction with religion, but when an interaction does occur, it may not be readily mapped onto the conventional cultural divides in separation of Church and State.

CONCLUSION

For the first time in empirical studies of federal judges, we find that judges without a religious affiliation were significantly more likely to rule in a particular way on a legal dispute about Church and State. Moreover, the direction of that influence cuts in what may seem to be a counter-intuitive direction. The growing number of federal judges who do not affiliate with organized religion were significantly more likely to reject an Establishment Clause claim for the period of 2006 through 2015. And the margin was substantial, with judges among the Nones upholding only about 25 percent of claims, while the other judges with religious affiliations approved 40 percent of Establishment Clause challenges.

We are drawn toward an interesting possibility and perhaps an unexpected opportunity. Those who stand outside of the traditional Church and State antagonists—that is, those who are not embedded within the historical tensions among Protestants, Catholics, and Jews—may be less likely to be offended by inclusion of religious entities in public programs or a religious reference or icon in a public setting. Perhaps a diverse and tolerant secularity might help lower the temperature on religious disputes in public life, at least to the extent it involves acknowledgement and inclusion of religious believers and institutions as part of the American landscape.