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# Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts

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# IDEOLOGY “ALL THE WAY DOWN”? AN EMPIRICAL STUDY OF ESTABLISHMENT CLAUSE DECISIONS IN THE FEDERAL COURTS

Gregory C. Sisk\*

Michael Heise\*\*

*As part of our ongoing empirical examination of religious liberty decisions in the lower federal courts, we studied Establishment Clause rulings by federal court of appeals and district court judges from 1996 through 2005. The powerful role of political factors in Establishment Clause decisions appears undeniable and substantial, whether celebrated as the proper integration of political and moral reasoning into constitutional judging, shrugged off as mere realism about judges being motivated to promote their political attitudes, or deprecated as a troubling departure from the aspirational ideal of neutral and impartial judging. In the context of Church and State cases in federal court, it appears to be ideology much, if not all, of the way down.*

*Alternative ideology variables of Party of Appointing President and Common Space Scores were highly significant and the magnitude of the effect on case outcomes was dramatic. Holding other variables constant, Democratic-appointed judges were predicted to uphold Establishment Clause challenges at a 57.3% rate, while the predicted probability of success fell to 25.4% before Republican-appointed judges. Thus, an Establishment Clause claimant’s chances for success were 2.25 times higher before a judge appointed by a Democratic president than before a judge appointed by a Republican president. Using Common Space Scores as a proxy for ideology, the most liberal judges were predicted to approve such claims at a 62.5% rate, compared with acceptance by the most conservative judges only 23.2% of the time.*

*A religious–secular divide that has become associated with the two major political parties increasingly characterizes our national political discourse about the proper role of religion and religious values in public life. The federal courts may be sliding down into the same “God Gap” that has opened and widened between left and right and between Democrat and Republican in the political realm. Because of its notorious lack of clarity and a*

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*consequently low level of law formality, the Supreme Court's Establishment Clause doctrine has become an attractive nuisance for political judging.*

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## INTRODUCTION

When asked during her confirmation hearings whether hard cases must be decided by “what is in the judge’s heart,”<sup>1</sup> Justice Elena Kagan insisted

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1. *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 103 (2010) [hereinafter *Kagan Nomination Hearing*] (statement of Sen. Jon Kyl, Member, S. Comm. on the Judiciary).

that adjudication by the Supreme Court of both constitutional and statutory cases is “law all the way down.”<sup>2</sup>

In academic circles, this assertion was met mostly by cynicism about the candor of Justice Kagan’s answer or an attempt to reconstruct her answer to fit a nontraditional definition of what constitutes “law.”<sup>3</sup> A few progressive law professors sought to rehabilitate the answer by shifting Justice Kagan’s plain citation of a conventional understanding of “law”<sup>4</sup> toward an alternative conception of “law” that embraces political judgments about constitutional provisions that purportedly incorporate abstract moral principles.<sup>5</sup> In so doing, one defender of Justice Kagan’s response hastened to dismiss as “ludicrous” any suggestion “that a judge can always decide what the law requires without calling on any moral or political convictions or any theory of social justice.”<sup>6</sup> By contrast, more conservative academic

2. *Id.* (statement of Elena Kagan, Solicitor Gen. of the United States).

3. See Eric J. Segall, Commentary, *What Elena Kagan Could Have and Should Have Said (and Still Have Been Confirmed)*, 88 WASH. U. L. REV. 535, 538 (2010) (arguing that Justice Kagan should have said that “the ‘law’ often runs out in difficult constitutional cases,” and therefore “a Justice has no choice but to bring her personal values, experiences, and judgments to the process”); Ann Althouse, *The Kagan Hearings*, ALTHOUSE (June 29, 2010, 7:58 AM), <http://althouse.blogspot.com/2010/06/kagan-hearings.html> (“Kagan [was] forthright: ‘It’s law all the way down.’ . . . A good follow-up question would have been: *But do you think that law includes a component that comes from deep values and human empathy?* The secret answer is: Yes.”). *But see* Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J.L. & POL. 123, 171 (2011) (arguing that even when the law leaves significant room for judges to reach conflicting conclusions in constitutional cases, judges are obliged to “shun[] reliance upon purely personal, non-legal reasons when making their discretionary judgments” and thus such “rulings are, in Justice Kagan’s words, ‘law all the way down’”).

4. See *Kagan Nomination Hearing*, *supra* note 1, at 173 (statement of Elena Kagan, Solicitor Gen. of the United States) (“[S]o to say that something is law all the way down, which is absolutely the case, [is to say] that it would be completely improper for a judge to import personal, or moral, or political preferences into the occasion.”); see also Keith J. Bybee, *Will the Real Elena Kagan Please Stand Up? Conflicting Public Images in the Supreme Court Confirmation Process*, 1 WAKE FOREST J.L. & PUB. POL’Y 137, 147 (2011) (“[Leading newspapers covering the nomination] clearly conveyed the impression that judicial decision making is a matter of impartial principle, and did so primarily by reporting the words of Kagan herself.”); Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court’s Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255, 1255 (2010) (“Nominees of both parties now present themselves as modest and humble servants of the law, respectful of existing precedent and without a desire to move the law in any particular direction.”).

5. Ronald Dworkin, *The Temptation of Elena Kagan*, N.Y. REV. BOOKS, Aug. 19, 2010, at 35, 36 (arguing that it is “‘law all the way down,’” but because some constitutional clauses are drafted in “abstract moral language,” discovering and applying the law requires “a judge [to] rely on moral conviction”); see also Posting of Mark Tushnet, William Nelson Crowell Professor of Law, Harvard Law Sch., to conlawprof@lists.ucla.edu (June 29, 2010), <http://www.mail-archive.com/conlawprof@lists.ucla.edu/msg20140.html> (“[O]f course judging is law all the way down. . . . Of course that doesn’t mean that it’s not, to take two possibilities, politics and empathy all the way down as well—which is why the answer, while accurate, isn’t all that informative.”).

6. Dworkin, *supra* note 5, at 35; see also Lerner & Lund, *supra* note 4, at 1256–57 (“In the legal academy, this traditional ideal [of judging] is considered laughable at best and pernicious at worst.”).

commentators, though attracted to a traditional focus on “law” as the essence of judging, remained skeptical that Justice Kagan’s stated commitment to nonpolitical and restrained judging was authentic and accurately predicted her future judicial behavior.<sup>7</sup>

Based on our recently completed empirical study of Establishment Clause decisions in the lower federal courts, skepticism about the ability of judges to separate political preconceptions from judicial declarations in a high-visibility area with low-rule formality may be warranted. Whether celebrated as a proper integration of political and moral reasoning into constitutional judging, shrugged off as mere realism about judges being motivated to promote their political attitudes, or deprecated as a troubling departure from the aspirational ideal of neutral and impartial judging, the powerful role of political factors in Establishment Clause decisions appears undeniable and substantial. In the context of federal court claims implicating questions of Church and State, it appears to be *ideology* much, if not all, of the way down.

As part of our ongoing empirical examination of religious liberty decisions in the lower federal courts,<sup>8</sup> we study here all digested Establishment Clause decisions by federal court of appeals and district court judges from 1996 through 2005.<sup>9</sup> Not only were our alternative ideology variables of Party of Appointing President and Common Space Scores highly significant (at the  $p < .001$  level), but the magnitude of the effect on case outcomes was dramatic.<sup>10</sup> Holding all other variables constant, Democratic-appointed

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7. See Jonathan Alder, *The Judiciary Committee Grills Elena Kagan*, Response to Topic A, WASH. POST (June 29, 2010, 1:18 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/29/AR2010062902652.html> (“[L]ike successful nominees before her, [Kagan] erred on the side of caution, not candor. . . .”); Rick Esenberg, *No Need to Pretend—She’s a Liberal*, MILWAUKEE JOURNAL-SENTINEL, July 3, 2010, <http://www.jsonline.com/news/opinion/97700799.html> (arguing that Justice Kagan’s background and previous statements suggest that she accepts the liberal view that “judicial discretion is broad” and will “tend to use that discretion to privilege those values emphasized by contemporary progressives”).

8. See Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts* (2011) (working paper); Michael Heise & Gregory C. Sisk, *Religion, Schools, and Judicial Decisionmaking: An Empirical Perspective*, U. CHI. L. REV. (forthcoming 2012) [hereinafter Heise & Sisk, *Religion, Schools, and Judicial Decisionmaking*]; Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. COLO. L. REV. 1021 (2005) [hereinafter Sisk, *Traditional and Minority Religions in the Courts*]; Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743 (2005) [hereinafter Sisk & Heise, *Judges and Ideology*]; Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts* (U. of St. Thomas Legal Studies, Research Paper No. 11-23, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1917057](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917057) [hereinafter Sisk & Heise, *Muslims and Religious Liberty*]; 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).

9. See *infra* Section I.A.

10. See *infra* Sections I.B.1 and I.B.3.

judges were predicted to uphold claims challenging government conduct on Establishment Clause grounds at a 57.3% rate, while the predicted probability of success fell to 25.4% before Republican-appointed judges. Thus, an Establishment Clause claimant’s chances for success were 2.25 times higher before a judge appointed by a Democratic president than one appointed by a Republican president. Using Common Space Scores as a proxy for ideology, the more liberal judges were predicted to approve such claims at a 62.5% rate, compared with acceptance by the more conservative judges only 23.2% of the time.

No other variable—not the judges’ prior legal positions, religion, race, or gender—proved consistently salient in predicting the outcome of claims alleging that governmental conduct crossed the supposed line “separating Church and State” under the Establishment Clause. The statistical significance of a variable measuring precedent (specifically, the reaction of the lower federal courts to the Supreme Court’s landmark decision in *Agostini v. Felton*<sup>11</sup>) reassures us that legal guideposts have continuing force, even when the otherwise malleable doctrine leaves considerable space for extra-legal influences on judging.<sup>12</sup> Nonetheless, the independent significance and substantial size effect of alternative party and ideology-score variables remain striking.

In this particular but leading field of constitutional adjudication, our nation’s judges appear to have separated into the same camps as the national political parties. Since the 1970s, the Democratic Party has become progressively more secular or disassociated from traditional religion and more strongly associated with a separationist approach toward religion and government.<sup>13</sup> During the same period, the Republican Party has attracted growing support from persons with high levels of religious activity and has advocated an accommodationist stance toward religion and religious institutions’ interactions with and influence on government and public policy. Whether categorized as Democrat-versus-Republican or framed as liberal-versus-conservative, a religious–secular divide increasingly characterizes our national political discourse—and perhaps judicial deliberations as well—about the proper role of religion and religious values in public life.

Sometimes a singular episode speaks volumes about the general attitude held within a political–legal movement. Confirmed in the only signed draft of the speech that is now preserved at the White House, and reported contemporaneously by those who were present when it was delivered, Abraham Lincoln’s Gettysburg Address expressed the fervent hope that a “new birth of freedom” following the Civil War would be realized by “this nation, *under God*.”<sup>14</sup> But when printing thousands of pamphlets containing leading constitutional documents, the liberal American Constitution Society opted to

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11. 521 U.S. 203 (1997).

12. See *infra* Sections I.B.4 and II.B.3.

13. See *infra* Section II.A.1.

14. Robert George, *God and Gettysburg*, FIRST THINGS, Aug./Sept. 2010, available at <http://www.firstthings.com/article/2010/07/god-and-gettysburg>.

circulate an earlier, undelivered draft of Lincoln's Gettysburg Address which omitted the words "under God." This peculiar choice of an alternative text is difficult to understand as anything other than the deliberate sanitizing from the speech of a prominent religious reference.<sup>15</sup>

On the other end of the political–legal spectrum, one elected state judge became passionately devoted, above all else, to enshrining a religious symbol in a courthouse. When he rose to head of the state judiciary, he lashed the wheel of the state court system to steer unerringly toward that end, heedless of the shoals of contrary higher court rulings, and ultimately ran his own judicial career aground. After this previously "obscure Alabama trial judge" seized national attention for posting the Ten Commandments and leading Christian prayers in his courtroom, he "rode the wave of publicity to election as chief justice of the Alabama Supreme Court."<sup>16</sup>

Having campaigned as the "Ten Commandments Judge,"<sup>17</sup> Chief Justice Roy Moore installed a two-and-a-half-ton stone monument of the Ten Commandments at the center of the Alabama courthouse rotunda.<sup>18</sup> He defended his display, not merely by reference to the historical importance of the Ten Commandments in American society, but by emphasizing that the monument represented "the revealed law of God."<sup>19</sup> When ordered by a federal court of appeals to remove the monument, Chief Justice Moore pointedly refused, which led to his removal from office by the state judicial ethics panel.<sup>20</sup>

Most thoughtful commentators on the left neither doubt nor denigrate the powerful and appropriate influence of religion on public policy, on matters ranging from the civil rights movement to environmental protection. And few if any conservative thinkers countenance imposing theological doctrines into public policy, although they value the teachings of religious traditions on public matters of morality and culture. Nonetheless, despite what may be substantial agreement among most Americans on general principles, we have seen an increasing tendency in national politics toward secular egalitarianism on the left and overt religious coalition-building on

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15. *But see* Caroline Frederickson, *Debate or Distraction: Why Some Are Fretting Over the ACS Pocket Constitution*, AM. CONSTITUTION SOC'Y FOR LAW & POL'Y (July 20, 2010), <http://www.acslaw.org/acsblog/debate-or-distraction-why-some-are-fretting-over-the-acs-pocket-constitution> (rejecting "the claim that ACS deliberately manipulated the texts out of an alleged anti-God agenda of our organization" and observing that the first document included in the pamphlet, the Declaration of Independence, makes "very clear references to God and 'the Creator'").

16. Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & RELIGION 187, 231–32 (2001).

17. *Glassroth v. Moore*, 335 F.3d 1282, 1285 (11th Cir. 2003), *subsequent determination*, 347 F.3d 916 (11th Cir. 2003).

18. *Id.* at 1284.

19. *Id.* For an exploration of this episode in terms of both conscience and prudence, see Robert K. Vischer, *Professional Identity and the Contours of Prudence*, 4 U. ST. THOMAS L.J. 46, 48–51 (2006).

20. *In re Moore*, No. 33 (Ala. Ct. Jud. Nov. 13, 2003).

the right.<sup>21</sup> While one side of the political spectrum at times appears intent on removing all religious influences and even religious references from public life,<sup>22</sup> the other side sometimes appears eager to inject religious connotations into even the most prosaic of political squabbles.<sup>23</sup>

In a more judicious manner, but no less real and substantial in effect as revealed in our empirical study, the federal courts may be sliding down into the same “God Gap” that has opened and widened between left and right in the political realm. In our study, we have identified a subject of adjudication in which the “classic legal tug”<sup>24</sup> against personal judicial preferences or attitudes has failed to take firm hold. Because of the notorious lack of clarity in the Supreme Court’s Establishment Clause jurisprudence and a consequently low level of law formality, the door to unrestrained political judging has been thrown wide open.<sup>25</sup> With these untoward consequences, the subjectivity of Establishment Clause doctrine has passed the point of tolerability.

## I. RESULTS OF EMPIRICAL STUDY OF ESTABLISHMENT CLAUSE DECISIONS IN THE FEDERAL COURTS, 1996–2005

### A. *Summary Description of Our Establishment Clause Decisions Study and Regression Results*

In this study, we conducted an analysis of decisions made by both federal courts of appeals and federal district courts in cases raising constitutional religious freedom issues.<sup>26</sup> For this phase of the study, we created a data set of all digested decisions by federal district courts and courts of appeals

21. See NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 235 (2005) (“We are, increasingly, a nation divided by God. Although we all believe in religious liberty and almost no one wants an officially established religion, we cannot agree on what the relation between religion and government should be.”).

22. See RICHARD RORTY, *Religion as Conversation-stopper*, 3 *COMMON KNOWLEDGE* 1 (1994), reprinted in *PHILOSOPHY AND SOCIAL HOPE* 168, 169 (1999) (arguing that it should be seen as “bad taste to bring religion into discussions of public policy”).

23. See Andrea Stone, *Congress Latest Battlefield in Annual “War on Christmas” Debate*, AOL NEWS (Dec. 16, 2010, 9:30 PM), <http://www.aolnews.com/2010/12/16/congress-latest-battlefield-in-annual-war-on-christmas-debate> (discussing assertions by Senate Republican leaders that plans for Congress to work through the holiday season were “sacrilegious” and “disrespect[ful of] one of the two holiest of holidays for Christians” (internal quotation marks omitted)).

24. See FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 200 (2007) (referring to the “classic legal tug” on procedural issues that overrides ideological preferences).

25. See *infra* Part II.B.1.

26. Our data set, regression-run results, coding of each decision, coding of each judge, and coding information may be found at Gregory Sisk & Michael Heise, *Empirical Study of Religious Liberty Decisions Study Data*, U. ST. THOMAS (last visited Jan. 20, 2012), <http://courseweb.stthomas.edu/gcsisk/religion.study.data/cover.html>.



resolving an Establishment Clause challenge to governmental conduct from 1996 through 2005.<sup>27</sup> As the decisions were collected, the direction of each judge's ruling, the general factual category of the case, the religious affiliation of the judge, the religious demographics of the judge's community, the judge's ideology, the judge's race and gender, and various background and employment variables for the judge were coded.<sup>28</sup>

As the point of analysis, we examined each judge's ruling in an individual case as a "judicial participation."<sup>29</sup> Each district court judge's ruling was coded separately, as was each vote by one of the multiple judges participating on an appellate panel. Accordingly, the primary focus of our study was the judge rather than the court as an institution or a collective appellate panel<sup>30</sup>—that is, we measured the individual response of each judge to each Establishment Clause claim.

Our decision to include district court judges along with court of appeals judges in this study, and to code both types of judges in the same way on merits decisions, warrants explanation. Scholars are conducting important, cutting-edge research on the district courts through quantitative study of dockets, developments, and rulings at multiple stages of the civil litigation process.<sup>31</sup> Because typically "the nature of district court judges' work is substantially different from that of appellate judges," these scholars tailor their empirical research to the distinct institutional setting of the district court.<sup>32</sup> While admiring this important and ongoing work, we determined,

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27. In our prior study of 1986–1995 religious liberty decisions, we included only published decisions in our data set. Sisk, *Traditional and Minority Religions in the Courts*, *supra* note 8, at 1028, 1034. In so doing, we knowingly "biased our database in favor of decisions that raise highly visible, controversial, landmark, or difficult questions of religious freedom, or at least issues of religious freedom that a judicial actor found particularly interesting and thus worthy of publication." *Id.* at 1049. For this 1996–2005 study, we have expanded the data set to include the set of unpublished but digested opinions available on Westlaw. In addition to 535 judicial participations from published decisions, our data set includes twenty judge votes from decisions that were digested by Westlaw but not published in the reporter system. *See* Sisk & Heise, *supra* note 26.

28. Every decision was independently coded by both a trained law student and one of the authors. For more detailed information about our study, data collection, and coding, see the description published as part of our prior study of religious liberty decisions from 1986 to 1995, Sisk, Heise & Morriss, *supra* note 8, at 530–54, 571–612. The few changes in the selection of variables and coding from the prior study may be found by reviewing our coding and coding information. *See supra* note 26.

29. For further discussion of judicial participations as the data point, see Sisk, Heise & Morriss, *supra* note 8, at 539–41.

30. We did, however, control for the Party of Appointing President of the other judges on a three-judge appellate panel in alternative regression runs, thus conducting a limited exploration of panel effects. *See infra* Section I.B.2.

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

32. Kim et al., *supra* note 31, at 85.

for two reasons, that a separate district court-focused and docket-oriented approach was neither possible nor well suited for this particular study of religious liberty rulings.

First, our study examines religious liberty decisions from 1996 to 2005, while the various federal docket and pleading databases are generally reliable only from 2000.<sup>33</sup> The restricted search options and limited nature of case coding in the federal court docket databases, none of which allowed general searches for all cases raising religious liberty issues, further precluded our effective use of these sources for our study.<sup>34</sup> Accordingly, we placed trial court rulings in the same decisional space as appellate court rulings, requiring us to focus on merits rulings and not preliminary non-merits rulings and to include all digested opinions available on Westlaw, whether or not the opinions had been published in the reporter system.

Second, and more importantly, in the special context of constitutional rulings, the deferential standard of appellate review that ordinarily is applied to a trial court’s factual findings is subject to the “constitutional fact” exception for “factual” disputes that go to the core of a constitutional question.<sup>35</sup> Trial and appellate judges share parallel responsibilities for resolving a constitutional case, including the central constitutional significance of factual assertions, precisely “to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects.”<sup>36</sup> Accordingly, we concluded that expanding our empirical study beyond circuit judges to evaluate the behavior of a larger and more inclusive set of lower federal judges has much merit, especially in the context of constitutional rulings.

Nonetheless, we conducted alternative regression runs to tease out differences in the behavior of district court and court of appeals judges in Establishment Clause cases. A dummy variable for appellate court decisions was highly significant at nearly the .01 level (or 99% probability level) in a negative direction, meaning that appellate rulings were less likely to generate favorable Establishment Clause rulings than were trial

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33. Boyd & Hoffman, *supra* note 31, at 877 n.119, 880.

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

35. See, e.g., Rankin v. McPherson, 483 U.S. 378, 385 n.8 (1987) (responding to the dissent’s objection that the majority “failed to accord adequate deference to the purported ‘findings’” of the trial court by explaining that “any factual findings subsumed in [a constitutional] determination are subject to constitutional fact review” by the appellate court). See generally Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985).

36. *A Woman’s Choice-East Side Women’s Clinic v. Newman*, 305 F.3d 684, 689 (7th Cir. 2002) (“That admixture of fact and law, sometimes called an issue of ‘constitutional fact,’ is reviewed without deference in order to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects.”); see also *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1029 (10th Cir. 2008) (conducting de novo review of district court’s findings on each part of test for Establishment Clause)

court rulings. Holding all other independent variables constant, a court of appeals judge was predicted to rule favorably in an Establishment Clause case at a rate of 34.4%, as compared to 50.0% for district court judges. However, the addition of this control variable for appellate rulings did not alter the significance of any other finding. In addition, we conducted separate regression analyses of district court and court of appeals rulings; we found few substantive differences, and those that are meaningful are discussed at pertinent points in this Article.

We also acknowledge that several studies have found only a small percentage of district court dispositions to be accompanied by a written opinion,<sup>37</sup> which is the data point for our study. For the high-visibility area of Establishment Clause challenges to government interaction with religion, we have reason to believe that the percentage of district court dispositions with written, even published, decisions is much higher. In a spot check of 100 Establishment Clause complaints produced in a search of the Westlaw Pleadings database, we found that nearly three-quarters of the cases did lead to written decisions, most of which were also published. Even so, our search process undoubtedly captured a larger share of the universe of Establishment Clause dispositions in the courts of appeals than in the district courts. Accordingly, the reader might fairly place greater weight on our findings with respect to the courts of appeals than with respect to the district courts.

To be coded as a decision on the merits, a ruling by a district court judge must have accepted or rejected a particular claim in a manner that engaged the merits of the claim, even if the ruling issued by the judge was not a final judgment. Nonmerits justiciability or procedural rulings, however, were excluded.<sup>38</sup> For court of appeals decisions, a ruling was coded as being on the merits if it affirmed or reversed a final judgment by a district court on an Establishment Clause claim or if it remanded the case after evaluating a significant element of the merits of the claim.<sup>39</sup> If a three-judge appellate panel issued a decision that later was reheard en banc (or became the subject of a dissent from the denial of rehearing en banc), each judge was recorded as having cast only one judicial vote, even if a judge participated on both the three-judge panel and the en banc panel (or the dissent from the denial of rehearing).<sup>40</sup>

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37. See, e.g., David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 710 (2007) (finding that 3% of cases in 4 district courts resulted in written decisions); Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUST. SYS. J. 782, 789–90 (1992) (finding that only 5.3% of cases brought before a Minnesota district court received published opinions, though the percentage varied by the type of claim); Margo Schlanger & Denise Lieberman, *Using Court Records for Research, Teaching, and Policymaking: The Civil Rights Litigation Clearinghouse*, 75 UMKC L. REV. 155, 165 (2006) (finding that 8.7% of district court dispositions were accompanied by a written opinion while only 2.3% of district court dispositions were published).

38. See Sisk, Heise & Morriss, *supra* note 8, at 546 (defining a “merits” ruling).

39. See *id.* at 547–48.

40. See *id.* at 552–53.

The dependent variable was the individual judge’s vote in each case, coded as “1” when the Establishment Clause claim was upheld and “0” when it was rejected. (Thus, positive coefficients correlate with approval of the claim and negative coefficients with rejection of the claim.) Because we analyzed the influences of multiple variables, we adopted multiple regression models. Because the dependent variable was dichotomous, we applied logistic regression.<sup>41</sup> Our two primary models (using different proxies for ideology) were nearly identical in the percentage of the overall variation explained and were largely parallel in statistically significant variable correlations.

Our Establishment Clause data set consisted of 555 judicial participations drawn from 238 decisions (133 district court decisions and 105 court of appeals decisions). The Establishment Clause claim was favorably received by the ruling judge 39.8 percent of the time.<sup>42</sup>

TABLE 1.  
REGRESSION ANALYSIS FOR ESTABLISHMENT CLAUSE JUDICIAL  
PARTICIPATIONS, FEDERAL COURTS (1996–2005)

	Party of Appointing President Model	Common Space Score Model
<i>Case Type:</i>		
Private Education	1.493*** (0.396)	1.429*** (0.384)
Public Education—Elementary	0.679 (0.498)	0.639 (0.521)
Public Education—Secondary/ Higher	1.150* (0.461)	1.164* (0.456)
Religious Meetings	1.161** (0.405)	1.126** (0.392)
Religious Symbols	1.202** (0.388)	1.169** (0.419)
<i>Judge Religion:</i>		
Catholic	-0.073 (0.240)	-0.053 (0.236)
Baptist	0.146 (0.556)	0.099 (0.568)

41. *Id.* at 553.

42. In our prior study of lower federal court decisions from 1986 to 1995, claimants were successful in 42.3 percent of the judicial observations. *Id.* at 571.

	<b>Party of Appointing President Model</b>	<b>Common Space Score Model</b>
Other Christian	0.181 (0.460)	0.130 (0.507)
Jewish	0.461 (0.421)	0.463 (0.474)
Other	-0.272 (0.525)	-0.337 (0.490)
None	0.190 (0.224)	0.220 (0.261)
<i>Judge Sex and Race:</i>		
Sex (Female)	-0.337 (0.335)	-0.186 (0.280)
African-American	-0.039 (0.304)	0.093 (0.316)
Asian or Latino	-0.369 (0.515)	-0.145 (0.557)
<i>Judge Ideology or Attitude:</i>		
Party of Appointing President	-1.370*** (0.401)	—
Common Space Score	—	-1.541*** (0.479)
<i>Other Judge Characteristics:</i>		
ABA Rating—Above Qualified	-0.129 (0.156)	-0.097 (0.186)
ABA Rating—Below Qualified	-0.193 (0.231)	-0.242 (0.236)
Seniority on Federal Bench	-0.000 (0.001)	-0.000 (0.001)
Elite Law School	-0.142 (0.222)	-0.083 (0.174)
<i>Judge Employment Background:</i>		
Military	-0.101 (0.320)	-0.090 (0.310)
Government	-0.094 (0.284)	-0.108 (0.266)

	<b>Party of Appointing President Model</b>	<b>Common Space Score Model</b>
State or Local Judge	0.267 (0.212)	0.249 (0.206)
Law Professor	0.171 (0.355)	0.163 (0.360)
<i>Community Demographics:</i>		
Catholic Percentage	0.024** (0.009)	0.016 (0.009)
Jewish Percentage	-0.030 (0.027)	-0.029 (0.029)
Adherence Rate	0.007 (0.016)	0.008 (0.015)
<i>Precedent Variables:</i>		
Agostini	-0.704* (0.330)	-0.579 (0.309)
Zelman	0.049 (0.621)	0.030 (0.607)
Year of Decision	0.005 (0.089)	-0.001 (0.084)
(constant)	-11.396 (177.872)	1.306 (166.726)
pseudo R2	0.119	0.107
percent explained	69.01	68.83
N	555	555

*Note:* Establishment Clause Outcome = 1. Standard error adjusted for twelve clusters in circuits.<sup>43</sup>

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

43. In clustering standard errors at the circuit level, we aimed to account for the effect of circuit precedent and, indirectly, regional variation. Alternatively, we also conducted a regression analysis that clustered standard errors at the judge level (given that several judges produced more than one judicial participation in our study). Finding no substantive differences, we do not separately report that regression table.

## B. Findings on Association of Variables on Establishment Clause Decisions

### 1. Party of Appointing President

Researchers applying quantitative methods to the study of the federal courts long have sought to capture ideological or political influences on attitudes of judicial actors. For decades, the standard political measure for federal judges was the political party of the president that had appointed the judge to the bench.<sup>44</sup> In the past decade, an alternative proxy for judicial preferences has taken hold in the political science discipline, which involves assignment to each judge of a “common space” ideological score, derived from positions on legislative proposals held by appointing presidents and home-state senators of the same political party.<sup>45</sup> In the never-ending search for better metrics of judicial ideology, scholars recently have developed “agnostic” or “behavioral” measures of ideology for the lower federal courts. These measures are derived directly from the actual voting behavior of the judges being studied, rather than by projecting the preferences of external political actors or pronouncing decision outcomes as liberal or conservative.<sup>46</sup>

As a measure of judicial ideology, the Party of Appointing President (Republican or Democrat) proxy is the simplest, most commonly used, most unambiguously reliable (for accurate coding), most frequently verified as a meaningful and stable influence on judges, and the most easily interpreted.<sup>47</sup> Admittedly, this binary measure is too crude and categorical for studies designed to make comparisons of judges’ relative ideologies along a spectrum, and it uncomfortably imports partisan political presumptions into the judicial realm.<sup>48</sup> Nonetheless, we believe it to be valid and well tailored to this particular study. As explained in Section II.A of this Article, with respect to

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44. DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 103–04 (2000) (explaining that in studies of “specific linkages between policy preferences and decision making,” scholars long have employed partisanship as “at least [a] rough surrogate[] for certain policy preferences”); see also James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO ST. L.J. 149, 162 (2003) (describing the line of research since the 1960s indicating “that party affiliation is a significant predictor of voting patterns by federal judges”).

45. See *infra* Section I.B.3.

46. Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL’Y 133, 162, 176–83 (2009) (describing behavioral measures of ideology based on voting by individual judges in sets of cases); Corey Rayburn Yung, *Judged by the Company You Keep: An Empirical Study of the Ideologies of Judges on the United States Courts of Appeals*, 51 B.C. L. REV. 1133, 1137–39 (2010) (reporting that author’s new ideology measure, based on mapping of patterns among judges and identifying voting blocs, better predicted civil rights outcomes than other measures of ideology).

47. See Fischman & Law, *supra* note 46, at 167–68 (suggesting that “[t]he enduring popularity of this measure most likely derives from a combination of” how easy it is “both to observe and to interpret” and the long history of studies finding a “correlation between party of appointing official and judicial ideology”).

48. For critiques of this and other measures of ideology, many of which we offered in our own past work, see *infra* notes 156–159 and accompanying text.

the increasingly sharp divide on Church and State issues in American politics,<sup>49</sup> the political party is the most pertinent political category for our study.<sup>50</sup> For that reason, the parallel Party of Appointing President proxy variable is the right tool for this job. Moreover, we employed an alternative ideology measure, the Common Space Scores, in a comparison model<sup>51</sup> that confirmed the robustness of the ideological association found in our study.

For each judge casting a vote in an Establishment Clause case, appointment by a Republican president was coded as “1” and appointment by a Democratic president as “0.” Of the 555 judicial participations in our study, 314 (56.6 percent) were by Republican-appointed judges and 241 (43.4 percent) were by Democratic-appointed judges.

By convention among social scientists, statistical significance is generally set at the .05 level (or 95 percent probability level), which thus is the standard by which we declare that an observed correlation between variables is unlikely to be the result of mere chance.<sup>52</sup> In our study, the Party of Appointing President variable is statistically significant at a higher level than the minimum standard, meaning that our confidence in the finding of association is also greater. By reporting that the variable for Party of Appointing President is statistically significant at the .001 level (or 99.9 percent probability level), we mean that the probability is less than 1 in 1,000 that the observed association between this independent variable and the outcome of Establishment Clause decisions is a product of random variation.

Still, as Professor Frank Cross reminds us, “[T]he reader should not place undue importance on a finding of statistical significance, because such a finding shows a correlation between variables but by itself does not prove the substantive significance of that correlation.”<sup>53</sup> Importantly, Cross emphasizes that “[o]ne must also consider the magnitude of the association.”<sup>54</sup> And in the case of the Party of Appointing President variable in our study, the effect size<sup>55</sup> on the outcome dependent variable is substantial and indeed dramatic.

49. See *infra* Section II.A.1–2.

50. Building on our prior work involving religious affiliation influences on federal judges, we plan to conduct a particularized study in the near future on the interaction between party and religious affiliation, such as whether Catholic or Jewish judges appointed by Republican presidents respond differently to Establishment Clause claims than those of other religions appointed by Republican presidents or those of the same religion appointed by Democratic presidents.

51. See *infra* Section I.B.3.

52. ALAN AGRESTI & BARBARA FINLAY, *STATISTICAL METHODS FOR THE SOCIAL SCIENCES* 154 (4th ed., 2009) (explaining that social scientists generally “do not regard the evidence against [the null hypothesis] as strong unless  $P$  is very small, say,  $P < .05$  or  $P < .01$ ”).

53. CROSS, *supra* note 24, at 4.

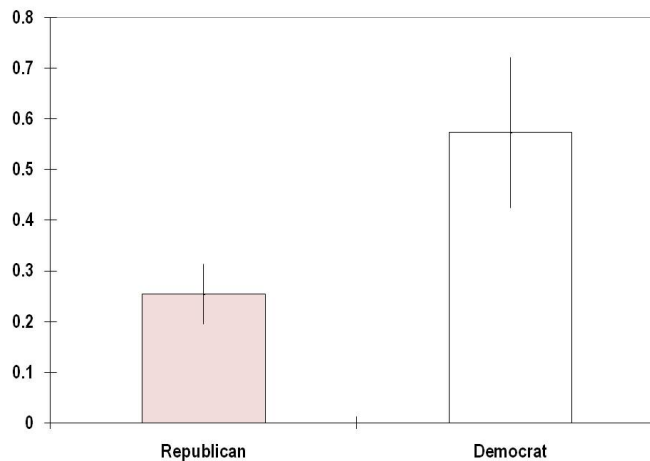
54. *Id.*

55. By “effect size,” we mean a particular “measure of the strength of association between two variables.” See Fredrick E. Vars, *Rethinking the Indefinite Detention of Sex Offenders*, 44 CONN. L. REV. 161, 184 (2011).



As shown in Figure 1, 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 was 25.4%, while the probability that a Democratic-appointed judge would uphold the claim was 57.3%—a marginal difference of 31.9%. Thus, an Establishment Clause claimant’s likelihood of success was predicted to be 2.25 times higher before a Democratic-appointed than before a Republican-appointed judge.

FIGURE 1.  
PREDICTED PROBABILITY OF POSITIVE VOTE BY JUDGE  
ON ESTABLISHMENT CLAUSE CLAIM, BY PARTY OF APPOINTING  
PRESIDENT (1996–2005)



The vertical lines in Figure 1 represent the 95 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 value falls.”<sup>56</sup> As Lee Epstein, Andrew Martin, and Matthew Schneider explain, “Such is the reality of the statistical world: We can never be certain about our best guesses (i.e., inferences) because they themselves are based on estimates. We can, however, report our level of uncertainty (e.g., a confidence interval) about those guesses.”<sup>57</sup>

Thus, while our best estimate is that a Republican-appointed judge is 25.4% likely to rule favorably on an Establishment Clause claim, the actual probability could be as low as 19.5% or as high as 31.3%—that is, we are 95% confident that the true probability value falls inside this interval. Similarly, while we predict that a Democratic-appointed judge would up-

56. ROBERT M. LAWLESS ET AL., *EMPIRICAL METHODS IN LAW* 239 (2010).

57. LEE EPSTEIN, ANDREW D. MARTIN & MATTHEW M. SCHNEIDER, *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 *VAND. L. REV.* 1811, 1814 (2006).

hold an Establishment Clause claim 57.3% of the time, the actual probability could be as low as 42.4% or as high as 72.1%. Because the probability that the comparative values would appear both in the higher end of the interval for a Republican-appointed judge and in the lower end of the interval for a Democratic-appointed judge is much lower than 5%, we are confident that the margin is higher, probably much higher, than the 11.1% difference between the low and high ends of these two confidence intervals.<sup>58</sup>

When we examined district court decisions in a separate regression run, the party variable just barely slipped out of statistical significance (to the .054 level) while the ideology-score variable dropped well outside significance (above the .25 level). By contrast, in our separate regression run for court of appeals decisions, both the party and common-space score variables remained highly significant (at the .001 and .004 levels respectively). Thus, while some evidence of a partisan influence remains for federal trial judges, subject to the cautions raised earlier,<sup>59</sup> our confidence in the association for federal appellate judges is stronger, a finding which is consistent with the hypothesis that appellate judges experience greater freedom of movement in deciding cases than do trial judges.

When examining non-unanimous decisions by the appellate courts (with 234 observations from 45 out of 105 appellate cases),<sup>60</sup> the rates of success before Republican- and Democratic-appointed judges leaped even further apart. As shown in Figure 2, holding all other independent variables constant at their means, the predicted probability that a Republican-appointed appellate judge would vote to uphold an Establishment Clause claim in a non-unanimous decision was a paltry 13.2%,<sup>61</sup> while the probability that a Democratic-appointed appellate judge would uphold the claim was an overwhelming 70.5%—a margin of 57.3%.<sup>62</sup> When judges in appellate decisions were divided about the right outcome, the predicted chance of success for an Establishment Clause claimant was more than five times greater before a Democratic-appointed judge than before a Republican-appointed one.

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58. Looking at the raw frequencies in this study, Democratic-appointed judges upheld 54.7% of Establishment Clause claims and Republican-appointed judges upheld 28.3%. That the predicted rate after regression and holding other variables constant is only somewhat higher (a margin of 31.9% compared to 26.4%) suggests that the party variable association with the outcome dependent variable is strong and not substantially affected by other variables in the model.

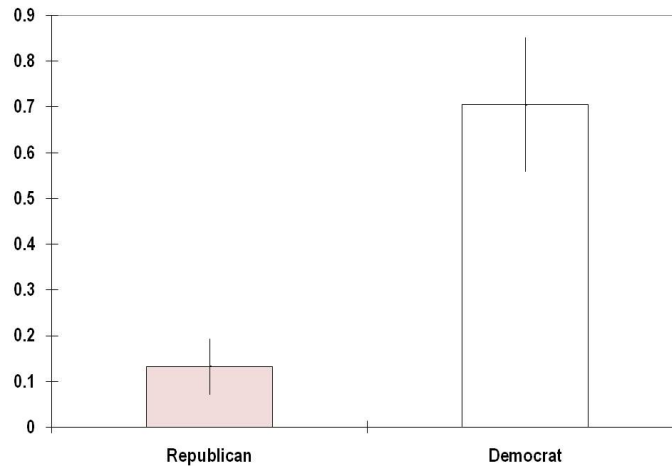
59. See *supra* notes 31-37 and accompanying text.

60. The 234 judicial observations in the 45 non-unanimous appellate cases include not only those cast in three-judge panels but also the more numerous votes cast by judges deciding Establishment Clause cases after an en banc circuit hearing.

61. The 95% confidence interval for predicted success rate before a Republican-appointed court of appeals judge in a non-unanimous decision ranges from 7.1% to 19.3%. On 95% confidence intervals, see *supra* notes 56–58 and accompanying text.

62. The 95% confidence interval for predicted success rate before a Democratic-appointed court of appeals judge in a non-unanimous decision ranges from 55.9% to 85.2%.

FIGURE 2.  
 PREDICTED PROBABILITY OF POSITIVE VOTE BY JUDGE ON ESTABLISHMENT  
 CLAUSE CLAIM, BY PARTY OF APPOINTING PRESIDENT (NON-UNANIMOUS  
 APPELLATE DECISIONS) (1996–2005)



These findings of a partisan cast to Establishment Clause decisions in the lower federal courts are consistent with prior empirical studies. Professors C.K. Rowland and Robert Carp, in their comprehensive 1996 study of district court judges, found a difference between Democratic- and Republican-appointed judges of 24% on religion cases generally.<sup>63</sup> In our prior study of federal district and court of appeals judges in published Establishment Clause cases decided between 1986 and 1995, we also found the Party of Appointing President variable to be statistically significant by a margin, in terms of raw frequencies, of 18%.<sup>64</sup> Looking more closely at the 1986–1995 data, and holding other variables constant, Republican-appointed judges during that period were predicted to rule in favor of an Establishment Clause claim at a rate of 34.4%,<sup>65</sup> while Democratic-appointed judges were predicted to do so 53.3% of the time.<sup>66</sup> Thus, while the finding of a correlation is not new, the divergence between Republican- and Democratic-appointed federal judges in Church and State cases appears to be getting wider.

63. C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 40 (1996).

64. Sisk & Heise, *Judges and Ideology*, *supra* note 8, at 767. *See also infra* notes 256–260, accompanying text, and Figure 8.

65. The 95% confidence interval for predicted success rate before a Republican-appointed judge in the 1986–1995 data set ranged from 26.0% to 42.7%.

66. The 95% confidence interval for predicted success rate before a Democratic-appointed judge in the 1986–1995 data set ranged from 41.1% to 65.4%.

## 2. Party of Appointing President and Appellate Panels (Panel Effects)

In the past decade, empirical research into the federal courts of appeals has turned increasingly to the interactions among judges sitting on panels, typically measuring differences in decision outcomes by alternating configurations of three-judge panels among judges appointed by presidents of different parties. The “panel effects” subfield of judicial decisionmaking studies got its jump-start more than a decade ago with the pioneering works of Professors Richard Revesz,<sup>67</sup> Frank Cross, and Emerson Tiller.<sup>68</sup> Both the Revesz study and the Cross and Tiller study found that the party-based composition of panels was significantly associated with variations in the voting behavior of circuit judges reviewing administrative agency actions. In a study of a larger set of federal appellate cases falling into multiple issue categories, Cass Sunstein and his collaborators described panel effects in terms of the following: (1) “ideological amplification,” when a judge sitting with two other judges from the same political party is more likely to vote in a stereotypically partisan direction, or (2) “ideological dampening,” when a judge from one party sitting with two judges from a different party is less likely to vote in an ideological direction.<sup>69</sup>

As some scholars have reported, this field of study has become “increasingly contentious”<sup>70</sup> as the presence, extent, nature, and operative characteristics of panel effects, as well as study designs and explanatory theories, are increasingly and sharply debated. Findings that an appellate judge’s vote is influenced by the other judges serving on the same panel have been variously attributed<sup>71</sup> to the positive value of the information exchanged during collegial deliberation,<sup>72</sup> a pragmatic aversion to preparing a dissent by the judge whose preferences leave him or her in the minority,<sup>73</sup> the threat that a judge who is from a different party than the other two panel members may “blow the whistle” if the majority were to depart from the

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67. Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

68. See Frank B. Cross & Emerson H. Tiller, Essay, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998).

69. See CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? 8–11 (2006).

70. Derek J. Linkous & Emerson H. Tiller, Response, *Panel Effects, Whistleblowing Theory, and the Role of Legal Doctrine*, 158 U. PA. L. REV. PENNUMBRA 83, 83 (2009), <http://www.pennumbra.com/responses/11-2009/LinkousTiller.pdf>.

71. For a summary of the competing theories put forward by scholars to explain panel effects, see Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1329–38 (2009), and Joshua B. Fischman, *Understanding Voting Behavior in Circuit Court Panels*, NW. L. SCH. SEARLE CENTER 2–3 (Aug. 11, 2010), [http://www.law.northwestern.edu/searlecenter/papers/Fischman\\_voting\\_behavior.pdf](http://www.law.northwestern.edu/searlecenter/papers/Fischman_voting_behavior.pdf).

72. See Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1641, 1661 (2003).

73. See RICHARD A. POSNER, HOW JUDGES THINK 32–34 (2008).

constraints of doctrine to indulge political preferences,<sup>74</sup> strategic accounts responsive to the preferences of the Supreme Court or the full circuit,<sup>75</sup> and group psychology that pressures the minority judge to conform.<sup>76</sup> While most scholars have placed partisan configurations on three-judge panels at the center of such studies, scholars have begun to explore other characteristics, including gender<sup>77</sup> and race.<sup>78</sup> Moreover, Professor Joshua Fischman recently reexamined data sets from several studies and found that the variations in judge's votes associated with appellate panels actually "result[] from colleagues' votes rather than their *characteristics*"—that is, a judge is moved toward the votes of other judges by the norm of consensus, irrespective of the presumed preferences of the other judges, whether based on party, gender, race, or other characteristics.<sup>79</sup>

Because we have focused in this study on a more fully specified model of variables that may influence decisions of religious liberty cases in the lower federal courts (with the ideology variables being but one part of the overall study), and because we include both appellate and trial judges (as well as judge votes on en banc panels), we do not expect here to make a major contribution to the literature on panel effects. Nonetheless, so that the potential amplifying or dampening effects of party influences on judges would not be neglected, we did include rough measures of panel characteristics in alternative regression runs in an attempt to tease out panel effects on Establishment Clause decisions.

For every judge participating on a three-judge appellate panel,<sup>80</sup> we coded for the addition of one Republican-appointed judge, two

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74. See Cross & Tiller, *supra* note 68, at 2159–61, 2171–72.

75. Kim, *supra* note 71, at 1328, 1368.

76. See SUNSTEIN ET AL., *supra* note 69, at 67–69.

77. See, e.g., Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 324 (2004) (“[In employment discrimination cases] male judges vote more liberally when one woman serves on a panel with them.”); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1778 (2005) (finding that a male judge was twice as likely to rule for the plaintiff in sexual harassment or sex discrimination cases if a woman judge was on the panel).

78. See Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 4, 34–37 (2008) (finding a 20 percent higher probability that a white judge will vote in favor of a voting rights claim when sitting on a panel with an African-American judge).

79. Fischman, *supra* note 71, at 3–4; see also Joshua B. Fischman, *Estimating Preferences of Circuit Judges: A Model of “Consensus Voting”*, J.L. & ECON. (forthcoming) (manuscript at 2), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1361348](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1361348) (analyzing the desire for consensus among judges and the effect on appellate panels). But see Sean Farhang & Gregory Wawro, *Indirect Influences of Gender on the U.S. Court of Appeals: Evidence from Sexual Harassment Law*, COLUM. U., <http://www.columbia.edu/~gfw10/FarhangWawroIndirectEffectsMay2010.pdf> (last visited Jan. 20, 2012) (finding significant gender-based panel effects in sexual harassment cases).

80. In coding these variables, we included all three-judge appellate panels, including those that preceded an en banc rehearing and those that were the subject of dissents from denial of rehearing en banc, but only the members of the original three-judge panel were coded for investigation of panel effects.

Republican-appointed judges, one Democratic-appointed judge, and two Democratic-appointed judges.<sup>81</sup> By excluding district court judges (other than district court judges sitting by designation on a three-judge appellate panel),<sup>82</sup> dissents from denial of rehearing en banc, and judges who served on an en banc panel but not the original three-judge panel, the number of judicial participations in this part of the study dropped from 555 to 287.<sup>83</sup> Of the 101 three-judge panels examined in this part of the study, 78.2 percent had mixed compositions, and 21.8 percent were made up of three judges appointed by presidents of the same party.

Although the coefficients for our panel effects variables point in the predicted direction—adding Democratic-appointed judges is positive for the Establishment Clause outcome dependent variable, while adding Republican-appointed judges is negative—none of these variables achieved statistical significance at the .05 level or even marginal significance at the .10 level.<sup>84</sup> Thus, our results on this limited panel effects investigation preclude

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81. See Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1530–32 (2008) (using variables for one and two additional Democratic-appointed judges as control variables for the partisan composition of a panel). We ran each of these four variables in separate regression runs because we found them to be overlapping and collinear. Panels on which the coded judge was joined by two additional Republicans (or Democrats) obviously also included one additional Republican (or Democrat). And if a panel included two additional Republicans, then it obviously could not include any additional Democrats (and vice versa).

82. In this study, we did not exclude district court judges sitting on a three-judge appellate panel by designation but reported the full population of judges who actually decided appellate cases. (District court judges did not sit on en banc appellate panels.) District court judges sitting by designation accounted for only 17 of the 422 overall appellate judicial votes in Establishment Clause cases. District court judges served on 17 of the 101 three-judge panels, with 6 of those 17 being divided panels. Recent empirical work on district court judges sitting by designation in a large sample of appellate cases found that, in 83% of cases, “district court judges are no different than regular sitting court of appeals jurists when it comes to the influence of their fellow panelists.” Paul M. Collins, Jr. & Wendy L. Martinek, *The Small Group Context: Designated District Court Judges in the U.S. Courts of Appeals*, 8 J. EMPIRICAL LEGAL STUD. 177, 194–95 (2011). In the 17% of the cases in which there was found to be a statistically significant difference, the influence of the ideology of other panel members on a designated district court judge was more than three times greater than on court of appeals judges, although the actual margin of difference was still substantively small; for example, when the other two panel members were highly conservative, a district court judge sitting by designation was predicted to be 4% more likely to cast a conservative vote, while a court of appeals judge sitting on a panel with similarly coded conservative judges was only 1.3% more likely to reach a conservative outcome. *Id.* at 195.

83. Although these observations came from 101 three-judge panels, the total number of judges on these panels who were coded on the merits for Establishment Clause votes came to 287, because some judges on those panels concurred or dissented on separate grounds that did not resolve the merits of the claim.

84. In sum, the probability that there is no variation between the predicted rates of a positive judicial vote on an Establishment Clause claim with or without an additional Democratic- or Republican-appointed judge on a panel is greater than 5% or even 10%. To give the reader a sense of the size effect of the correlation, despite the lack of statistical significance, our best estimate is that the addition of a Democratic-appointed judge to a panel would have increased the predicted probability that a judge would vote in favor of the Establishment

any confident conclusion that judges shifted their votes toward the presumed preferences of other colleagues on three-judge panels. In the particular context of Establishment Clause decisions, judges appear to have gone out the same door through which they came in, regardless of partisan mix on panels.

### 3. Common Space Scores (Judge Ideology)

As an alternative measure of judicial ideology, and to further test the robustness of a political or ideological influence in Establishment Clause decisions in the lower federal courts, we also coded each district and court of appeals judge for Common Space Scores.

Professors Keith Poole and Howard Rosenthal originally developed the NOMINATE Common Space Score measure of ideological preferences for members of Congress, placing all aspects of legislative voting into the same ideological dimension along a liberal–conservative continuum.<sup>85</sup> Subsequently, Professors Micheal Giles, Virginia Hettinger, and Todd Peppers adapted this measure for judges, by assigning the NOMINATE Common Space Score for the home-state senator to a federal judge being appointed to a vacancy in that state when the senator is of the same party as the president (thus assuming that senatorial courtesy applies) and otherwise assigning to the judge the score of the president.<sup>86</sup> Giles, Hettinger, and Peppers explain how the scores are calculated as follows:

Scores on this dimension are scaled from –1 for most liberal to +1 for most conservative. Absent senatorial courtesy the measure of senatorial preferences is assigned a value of zero [and the President’s score is substituted]. If senatorial courtesy is operative and there are two senators of the President’s party in a state, senatorial preferences are measured as the mean of the common space scores of the senators.<sup>87</sup>

Political scientists have come to regard Common Space Scores as “the state-of-the-art measure for the preferences of US Court of Appeals judg-

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Clause claim from 27.7% to 39.4%. However, as expected because the variable is not statistically significant, the 95% confidence intervals overlap considerably, with the upper end of the interval for the scenario with no additional Democratic-appointed judge rising to 37.1% and the lower end of the interval for the scenario with an additional Democratic-appointed judge beginning at 28.7%. On 95% confidence intervals, see *supra* notes 56–58 and accompanying text.

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

86. Micheal Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623 (2001); see also Fischman & Law, *supra* note 46, at 173–76 (describing and evaluating Common Space Scores as measure of judicial ideology); Sisk & Heise, *Judges and Ideology*, *supra* note 8, at 783–91 (describing and critiquing the Common Space Score measure).

87. Giles, Hettinger & Peppers, *supra* note 86, at 631.

es.”<sup>88</sup> The Common Space Score measure reflects the reality that different presidents of the same political party have different political preferences, as is also true of different home-state senators of the same party who play a role in judicial appointments. Moreover, Common Space Scores, which lie along a continuum, plainly are superior to the limited, two-sided Party of Appointing President variable for examining the relative ideology of judges; for example, one can apply the scores to identify the ideological mean on an appellate panel or to measure the ideological distance between a panel and the circuit as a whole or a superior court.<sup>89</sup> While Common Space Scores have been used successfully as a reliable and valid measure, some studies that included ideology proxies as part of a more fully specified model of other judge-specific variables have found Common Space Scores to be largely interchangeable with the Party of Appointing President proxy that continues to be the convention in the legal academy.<sup>90</sup>

Although the Common Space Score spectrum ranges from -1 (extremely liberal) to 1 (extremely conservative), real-world political actors, especially those elected to the presidency and the United States Senate, are unlikely to fall at the extremes. Likewise, given that judicial Common Space Scores are derived from the legislative-based scores of appointing presidents and home-state senators, the district and circuit judges included in our study do not fall across the entire spectrum. The most liberal score in our set of judges is -0.626; the most conservative is 0.656; and the mean is 0.067 (just slightly right of center).

Figure 3 maps the judges in the Establishment Clause study by density at each one-tenth incremental position on the Common Space Score continuum. Judges are distributed across the full range from -0.6 to 0.6. While there are substantial bands of judges who fall near the 0 point (the middle or moderate position), the largest clusters of judges fall around the -0.5 and 0.5 marks; that is, the solidly (but not extremely) liberal and conservative point positions.

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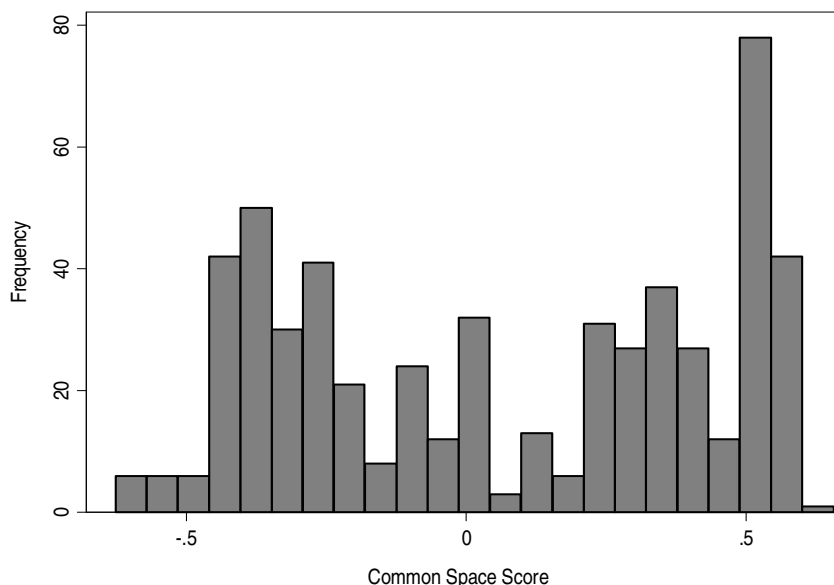
88. Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 306 (2007).

89. See, e.g., Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study*, 2012 UTAH L. REV. (forthcoming) (manuscript at 23–24); Micheal W. Giles, Thomas Walker & Christopher Zorn, *Setting a Judicial Agenda: The Decision to Grant En Banc Review in the U.S. Courts of Appeals*, 68 J. POL. 852, 854 (2006).

90. Fischman & Law, *supra* note 46, at 204; Sisk & Heise, *Judges and Ideology*, *supra* note 8, at 788–89. *But see* Micheal Giles, Virginia A. Hettinger & Todd Peppers, *Measuring the Preferences of Federal Judges: Alternatives to Party of the Appointing President* 10 (2002) (working paper) (finding that the Common Space Score measure “clearly out-perform[s] simple reliance on the party of the appointing president”).



FIGURE 3.  
DENSITY/FREQUENCY OF IDEOLOGY COMMON SPACE SCORES BY  
JUDGE (555 JUDICIAL OBSERVATIONS); LIBERAL < 0; CONSERVATIVE > 0



One of the major drawbacks of the Common Space Score proxy for judicial ideology is that the results are difficult to interpret and the real-world meaning of a particular point on the spectrum may not be intuitive for either the empirical scholar or the nonexpert reader.<sup>91</sup> At the risk of misleading the reader into seeing our results as direct reports on the behavior of specific judges, we try here to put a face on the Common Space Score metric by gathering a few prominent federal appellate judges into broad score cohorts.

On the conservative (or positive sign) side of the Common Space Score continuum, Judge (now Professor) Michael McConnell and Judge Alex Kozinski received scores between 0.3 and 0.4; Judges Frank Easterbrook, Edith Jones, and (now Justice) Samuel Alito received scores between 0.5 and 0.6; Judge Richard Posner was scored right at the middle point, with 0. On the liberal (or negative sign) side, Judges Richard Arnold, José Cabranes, and Guido Calabresi received scores between -0.2 and -0.3; Judge (now Justice) Sonia Sotomayor was scored between -0.3 and -0.4; and Judges Diane Wood and Stephen Reinhardt received scores between -0.4 and -0.5.

However, the reader should understand that the findings in our study are based on analyses of aggregate data and thus do not support a prediction (or report a past record) of how any individual judge has or will decide cases.

91. Fischman & Law, *supra* note 46, at 175 (observing that the results produced with Common Space Scores “are less intuitive and more difficult to interpret”).

Moreover, the graph presented below in Figure 4 is based on average predicted probabilities for each incremental step in the scores, while holding other variables constant, and is not a report of frequencies of individual judge voting.

As Giles, Hettinger, and Peppers reported when they initially adapted the Common Space Score to judicial studies, the Common Space Score is highly correlated with the Party-of-Appointing-President variable (at .825).<sup>92</sup> Thus, using the Common Space Scores as an alternative allows us to solidify our findings and verify in more than one way that ideology is correlated with the dependent variable and that the magnitude of that effect is substantial.

In these respects, our findings are confirmed. As with the Party-of-Appointing-President variable, the Common Space Score ideology proxy was highly significant at the .001 level. Just as being appointed by a Republican president was negatively associated with a positive vote on an Establishment Clause claim, being scored conservative on the Common Space Score continuum was likewise negatively associated with a positive vote. Moreover, the magnitude of the effect on the dependent variable was quite substantial. Holding all other variables constant at their means, the more liberal judges under the Common Space Score measure (at  $-0.6$ ) were predicted to uphold Establishment Clause claims at a 62.5 percent rate, while the more conservative judges (at  $0.6$ ) were predicted to uphold such claims at a 23.2 percent rate.

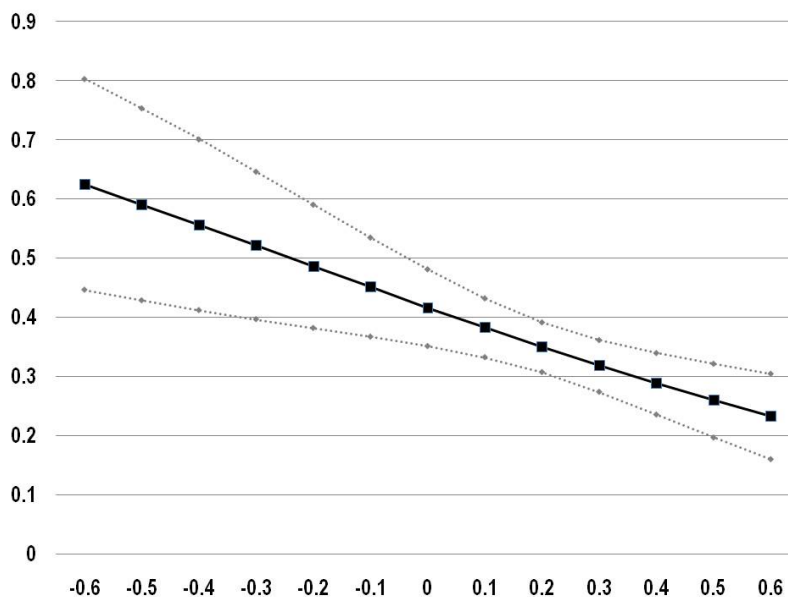
In Figure 4, we generate the average predicted probabilities of a positive vote on an Establishment Clause claim for each Common Space Score in the range from  $-0.6$  to  $0.6$ , at increments of  $0.1$ , while holding the other independent variables constant. The solid darker line in the middle is the best estimate of the average predicted probability for that increment in the Common Space Score. The lighter broken lines, which appear above and below, are the higher and lower parameters of the 95 percent confidence intervals for the average predicted probability at each one-tenth increment of the Common Space Score continuum.<sup>93</sup>

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92. Giles, Hettinger & Peppers, *supra* note 90, at 5–6.

93. On 95 percent confidence intervals, see *supra* notes 56–58 and accompanying text.

FIGURE 4.  
 PREDICTED PROBABILITY OF POSITIVE VOTE BY JUDGE ON ESTABLISHMENT  
 CLAUSE CLAIM (1996–2005), BY COMMON SPACE SCORE INCREMENTS;  
 LIBERAL < 0; CONSERVATIVE > 0



#### 4. Precedent, Case Type, and Other Variables

*Precedent Variables:* We included two mandatory precedent variables, as measures of traditional legal influences on Establishment Clause decisions in the lower federal courts: (1) *Agostini v. Felton*,<sup>94</sup> in which the Supreme Court overturned two prior precedents and approved government provision of remedial education services on the premises of parochial schools; and (2) *Zelman v. Simmons-Harris*,<sup>95</sup> in which the Supreme Court upheld a school voucher program that included private religious schools.

As reported in Table 1, the *Agostini* variable was significant in the model including Party of Appointing President as the ideology variable (while the *Zelman* variable was not significant in either model). Our study thereby confirms the continuing importance of legal factors in fully understanding judicial decisionmaking. In Section II.B.3 of this Article, we further discuss the *Agostini* decision, the magnitude of the effect of this precedent variable as evidence of the importance of law in judicial decisionmaking, and examine whether the Supreme Court's clarification of Establishment Clause doctrine may constrain political judging in this area.

94. 521 U.S. 203, 235–37 (1997).

95. 536 U.S. 639 (2002).

*Case-Type Variables:* We included Case-Type control variables to ensure that any relationship discovered between other independent variables and the dependent variable was not an “artifact” of some correlation between that variable and a general factual type of case.<sup>96</sup> The six Case-Type dummy variables were:<sup>97</sup>

- (1) Private Education (31 or 5.6% of observations);
- (2) Public Education—Elementary (77 or 13.9%);
- (3) Public Education—Secondary/Higher (106 or 19.1%);
- (4) Religious Meetings (in public facilities) (50 or 9%);
- (5) Religious Symbols (on public property or for public entities) (155 or 27.9%); and
- (6) Other (136 or 24.5%).

If none of these Case-Type variables had proven to be significant, that would have suggested an error in our selection of the appropriate control variables. In fact, as shown in Table 1 above, four of the five Case-Type variables—Private Education, Public Education-Secondary/Higher, Religious Meetings, and Religious Symbols included in the regression runs<sup>98</sup>—were statistically significant in both the Party of Appointing President and Common Space Score models.

Because legal doctrine develops in response and by specific reference to factual contexts, such that the application of a legal rule or standard turns to a greater or lesser extent on the defined factual category into which a case falls, the significance of these Case-Type variables may provide some evidence of the legal model at work. Nonetheless, we do not offer these particular findings as substantial evidence in support of the legal model of judging. Our Case-Type variables were defined with a greater breadth than would lend themselves to direct integration into most doctrinal formulas. We are reluctant to place much interpretive weight upon the inclusion of these control variables in a statistical model.

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96. As Donald Songer and Susan Tabrizi have explained,

[In a study of evangelical Christian judges and rulings in death penalty, gender discrimination, and obscenity cases,] [t]he case facts employed in each model below are primarily viewed as control variables to insure that any associations discovered between religion and judicial decisions are not an artifact of some correlation between particular types of cases and the concentration of particular religions in regions giving rise to those types of cases.

Donald R. Songer & Susan J. Tabrizi, Research Note, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. POL. 507, 517 (1999).

97. For a discussion of Case Type control variables and a further description of them as used in our prior study of Establishment Clause decisions, see Sisk, Heise & Morriss, *supra* note 8, at 573–74.

98. The sixth Case Type dummy variable (“Other”) was omitted as the reference variable.

*Religious Demographic Variables:* Finally, we note the interesting and statistically significant association with the outcome variable of one of our study's community demographic variables—the percentage of Catholics in the population of the metropolitan area in which the judge has his or her chambers. The correlation points in a surprising direction that, upon further reflection, we believe may indicate that this variable actually is an indirect proxy for—and further confirmation of the salience of—partisan or ideological influences in this context.

In addition to identifying the judge's individual religious affiliation, we also included three variables designed to measure the religious demographics of the community in which the judge works (by the county in which the judge has chambers): the percentage of Catholic adherents compared to the entire population (Catholic Percentage); the percentage of Jewish adherents in the population (Jewish Percentage); and the religious adherence rate overall that serves as a proxy for the general religiosity of that community (Adherence Rate). The source of the religious demographic data in our study is the 2000 survey conducted by the Glenmary Research Center, *Religious Congregations & Membership: 2000*, which is based on reports from 149 religious bodies broken down by region and county.<sup>99</sup> Given that the year 2000 falls directly in the middle of the period for our study (1996–2005), the Glenmary study offered the most contemporaneous and comprehensive measure of religious demographics for our purposes. As we have written previously, “Because judges as human actors and social beings live and work in a particular social milieu, the religious context or atmosphere of that community may influence a judge's perception of legal claims that implicate religion or that involve appeals to religious adherence.”<sup>100</sup>

As reported in Table 1 above, the Catholic Percentage variable was significantly and positively associated with the Establishment Clause claim outcome dependent variable at the .01 level in the model that included Party of Appointing President (but fell outside of significance at the .05 level in the model using Common Space Scores, moving to marginal significance at the .07 level). Interestingly, the association is not in the direction we hypothesized, which was that a higher Catholic demographic would move community attitudes (and the judge situated in that community) to be more favorable toward interactions between government and religious institutions (especially in government-aid cases, many of which involve government aid to students attending Catholic parochial schools). Accordingly, we expected the Catholic Percentage variable, if significant, to be correlated with a rejection of Establishment Clause claims.

On further consideration, we realize that this may be an example of a confounding unmeasured variable. A confounding variable is an omitted variable that is correlated with the observed independent variable (here,

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99. DALE E. JONES ET AL., GLENMARY RESEARCH CENTER, RELIGIOUS CONGREGATIONS & MEMBERSHIP IN THE UNITED STATES 2000 (2002).

100. Sisk, Heise & Morriss, *supra* note 8, at 585. For more on including religious characteristics of the community in empirical studies, including judicial decisionmaking, see *id.*

Catholic Percentage) and has an effect on the dependent variable (here, the outcome in Establishment Clause cases). As discussed subsequently in Section II.A.1 of this Article, Catholics in the United States have moved from loyal support for the Democratic Party to political independence and even marginal support for the Republican Party. However, the metropolitan Northeast historically has been dominated by Catholicism<sup>101</sup> (and northern urban areas also tend to have higher rates of Catholic adherence), which are precisely the areas in which the Democratic Party retains the strongest affiliation and electoral success. Moreover, as with most other religious communities, there are ideological differences among Catholics, with more liberal Catholics more likely to be situated in those Northeastern and northern urban centers.<sup>102</sup> Thus, our attempt to measure the influence of Catholic demographics may indirectly have captured an unmeasured association with Democratic Party affiliation or support or general liberal ideology in metropolitan communities. Given that the Democratic Party is increasingly associated with a strict separationist position on Church and State issues, we would predict that communities with higher Democratic Party demographics would be correlated, if at all, with a more favorable attitude toward Establishment Clause challenges.

If we are correct in this speculation, the significance of the Catholic Percentage variable in our study could be further confirmation of the political divide on Church and State matters that has permeated the judiciary and which is the central theme of this Article. In future stages of our ongoing study of religious liberty decisions, we should include a party affiliation or party vote variable for each county, perhaps along with regional or population density measures, so as to control for and independently examine the separate influences of religious and political demographics.

## II. WHY HAVE POLITICAL DIFFERENCES AMONG FEDERAL JUDGES EMERGED SO POWERFULLY IN ESTABLISHMENT CLAUSE CASES?

With the first clause of the First Amendment to the Constitution directing that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,”<sup>103</sup> the role of religion in public life has been a subject of priority and controversy since the founding of the Republic. However, resolution by the courts of disputes at the intersection of religious activity and state action is of relatively recent vintage. Only a little more than sixty years ago, and more than 150 years after the Constitution was ratified, the Supreme Court first applied the Establishment Clause of the First Amendment to action by state and local governments in

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101. Christopher G. Ellison, Jeffrey A. Burr & Patricia L. McCall., *Religious Homogeneity and Metropolitan Suicide Rates*, 76 SOC. FORCES 273, 277–78 (1997).

102. See EARL BLACK & MERLE BLACK, *DIVIDED AMERICA* 105–07 (2007) (describing the traditional concentrations of liberal Catholics, among other Democratic constituencies, in New York City, Baltimore, Boston, Philadelphia, and Pittsburgh).

103. U.S. CONST. amend. I.

*Everson v. Board of Education*.<sup>104</sup> And it has been less than half a century since the Supreme Court applied the Establishment Clause to remove officially sponsored prayer from public schools in *Engel v. Vitale*.<sup>105</sup>

From the beginning of the modern Supreme Court's Establishment Clause jurisprudence, a tension has persisted between acknowledging the long and vital role that religion has played in the public and private lives of Americans and resisting an integration of religion with the mechanisms of government. Professor Thomas Berg describes the Supreme Court's pioneering *Everson* decision as having "a split personality."<sup>106</sup> On the one hand, the Court drew a clear line against a "tax in any amount, large or small, [that would be] levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."<sup>107</sup> In sweeping language, the Court said, "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."<sup>108</sup> On the other hand, the *Everson* majority did approve reimbursing parochial school children for bus transportation from public funds. By "extending . . . general state law benefits to all its citizens," the state would not "hamper its citizens in the free exercise of their own religion."<sup>109</sup> In offering to citizens the benefits of public welfare legislation, the state "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*."<sup>110</sup>

The same dichotomy of jurisprudential perspectives is manifest today. Nearly sixty years after *Everson*, a plurality of the Supreme Court described the Court's long and conflicting series of decisions as "Januslike, point[ing] in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation's history. . . . The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom."<sup>111</sup>

Professor Scott Idleman summarizes the conflicting perspectives in this way:

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104. 330 U.S. 1 (1947).

105. 370 U.S. 421 (1962). For the background and impact of *Engel* and the school prayer decisions, see generally Thomas C. Berg, *The Story of the School Prayer Decisions: Civil Religion Under Assault*, in *FIRST AMENDMENT STORIES* 193 (Richard Garnett & Andrew Kopelman eds., 2012).

106. Thomas C. Berg, *Lemon v. Kurtzman: The Parochial School Crisis and the Establishment Clause*, in *LAW AND RELIGION: CASES IN CONTEXT* 153, 155 (Leslie Griffin ed., 2010).

107. *Everson*, 330 U.S. at 16.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Van Orden v. Perry*, 545 U.S. 677, 683 (2005).

[A key] subsurface variable in the jurisprudence of the religion clauses is the perceived relationship between religion and society . . . . Specifically, does one tend to view the presence or influence of religion, or of a particular religion, as either necessary, irrelevant, or deleterious to the proper functioning and prosperity of society and politics? Alternatively stated, does one believe—intuitively, or perhaps empirically—that religion is overall a positive, neutral, or negative factor in American life?<sup>112</sup>

*A. The Partisan Political Division in the United States  
on Matters of Church and State*

1. The Emergence of the “God Gap” Between Republicans  
and Democrats in National Politics

As the Supreme Court began taking an ever more prominent role in drawing a constitutional line between what it regarded as valid public interaction with religion or religious institutions and invalid government entanglement with religion, a strong reaction in the political realm was inevitable. In 1962, when the Court invalidated prayer in public schools, Senator Sam Ervin of North Carolina retorted, “I should like to ask whether we would be far wrong in saying that in this decision the Supreme Court has held that God is unconstitutional and for that reason the public school must be segregated against Him?”<sup>113</sup> Throughout the 1960s and into the 1970s, highways throughout the United States, especially in the South, were lined with “Impeach Earl Warren” billboards, a protest movement against liberal judicial rulings that gained momentum from the political backlash to the Court’s school prayer decision.<sup>114</sup>

As often is the case with sharply contested policy questions in the United States, the political reaction to the presence of religious influences in public life eventually divided along partisan lines—although the partisan divide was slow to emerge. As Professors Louis Bolce and Gerald De Maio describe it, the general consensus in American politics on traditional Judeo-Christian values “was shattered in 1972 when the Democratic Party was captured by a faction whose cultural reform agenda was perceived by many (both inside and outside the convention) as antagonistic to traditional religious values.”<sup>115</sup> Over the next three decades, those who seldom or never attended religious services gravitated toward the Democratic Party, while Americans

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112. Scott C. Idleman, *The Underlying Causes of Divergent First Amendment Interpretations*, 27 *MISS. C. L. REV.* 67, 83 (2007).

113. SUSAN DUDLEY GOLD, *ENGEL V. VITALE: PRAYER IN THE SCHOOLS* 103 (2006).

114. Berg, *supra* note 105, at 211; *see also* THE TIMES WERE A CHANGIN’: THE SIXTIES READER 221 (Irwin Unger & Debi Unger eds., 1998) (“One of the right-wing icons of the decade was the ubiquitous ‘Impeach Earl Warren’ billboard, sponsored by the far right John Birch Society and displayed across Dixie and in parts of the North.”).

115. Louis Bolce & Gerald De Maio, *Secularists, Antifundamentalists, and the New Religious Divide in the American Electorate*, in *FROM PEWS TO POLLING PLACES: FAITH AND POLITICS IN THE AMERICAN RELIGIOUS MOSAIC* 251, 256 (J. Matthew Wilson ed., 2007).



with high levels of religious participation became an increasingly central part of the Republican Party constituency.

By 2007, Bolce and De Maio could report that, over the four preceding presidential elections, “the religious gap separating secularists and traditionalists was more important than other social and demographic cleavages in the electorate: It was much larger than the gender gap and more significant than any combination of income, education, marital status, age, and regional groupings.”<sup>116</sup>

During most of the twentieth century, evangelical Protestants as a group voted Democratic, occasionally crossing party lines to support a Republican presidential candidate, such as when a Catholic was nominated by the Democratic Party in 1960 and when a cultural liberal was the Democratic nominee in 1972.<sup>117</sup> Beginning in the 1980s, however, committed evangelical Christians have become ever more loyal to the Republican Party.<sup>118</sup> In 1944, white evangelical Protestants gave Democratic President Franklin Roosevelt a solid majority with over 55 percent of their votes; by 2004, white evangelical Protestants gave Republican President George W. Bush more than three-quarters of their votes.<sup>119</sup>

Catholics were a stalwart Democratic constituency for more than three-quarters of the last century. From a high point of 63 percent white Catholic affiliation with the Democratic Party in 1960 (when John F. Kennedy became the first and thus far only Catholic to win the White House), Catholic identification with the Democratic Party remained at majority or near-majority status until after 1976.<sup>120</sup> At the end of a period of general decline, white Catholic support for the Democratic label fell to 30 percent in 2004 (even as another Catholic, John Kerry, was nominated by that party for the presidency).<sup>121</sup>

Looking beyond voting behavior, Professors Clem Brooks and Jeff Manza have found that, in recent decades, both evangelical Protestants and Catholics have shifted their partisan affiliation away from the Democratic Party and, more or less, toward the Republican Party: “Whereas evangelicals have deepened their relatively Republican pattern of identification, Catholics have moved from strong relative identification with the Democratic Party to a more independent orientation.”<sup>122</sup>

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116. *Id.* at 265.

117. GEOFFREY LAYMAN, *THE GREAT DIVIDE: RELIGIOUS AND CULTURAL CONFLICT IN AMERICAN PARTY POLITICS* 43, 183–85, 192 (2001).

118. *Id.* at 186–201.

119. JOHN C. GREEN, *THE FAITH FACTOR* 39 (2007).

120. Stephen T. Mockabee, *The Political Behavior of American Catholics: Change and Continuity*, in *FROM PEWS TO POLLING PLACES: FAITH AND POLITICS IN THE AMERICAN RELIGIOUS MOSAIC*, *supra* note 115, at 81, 83–85.

121. *Id.* at 84 tbl.4.1, 85. On the contrast between Catholic support for Kennedy in 1960 and for Kerry in 2004, see David E. Campbell, *A House Divided? What Social Science Has to Say about the Culture War*, 15 *WM. & MARY BILL RTS. J.* 59, 65–67 (2006).

122. Clem Brooks & Jeff Manza, *A Great Divide? Religion and Political Change in U.S. National Elections, 1972–2000*, 45 *Soc. Q.* 421, 442 (2004); *see also* Harold W. Stanley &

The movement toward the Republican Party has been especially pronounced for the most religiously observant Americans. “All else equal,” Professor William Galston writes, “the more often individuals attend church, the more likely they are to regard themselves as conservatives and vote Republican.”<sup>123</sup> In the 2000 and 2004 presidential elections, nearly two-thirds (63 and 64 percent respectively) of those who attended religious services more than once a week, along with large majorities (57 and 58 percent) of those who attended once a week, voted for the Republican candidate.<sup>124</sup>

In a recent and sophisticated survey of “religious intensity” and social and political views, the Pew Forum on Religion & Public Life found the following trend: “Across a variety of religious traditions, those who say that religion is very important in their lives, express a more certain belief in God, or pray or attend worship services more frequently tend to be much more conservative in their political outlook and more Republican in their party affiliation.”<sup>125</sup>

During this same period, the Democratic Party has become the political home for secularists, who have become a key constituency in the party.<sup>126</sup> Although the point of departure may have been the 1972 Democratic Party Convention that nominated George McGovern, the secularist tinge among Democratic Party activists has only deepened in the ensuing decades. By 1992, fewer than a third of first-time delegates to the Democratic Convention attended church regularly, fewer than a quarter of first-time delegates and approximately one-quarter of all Democratic delegates found religion to be highly salient in their lives, and more than 60% of all Democratic delegates qualified as secularist in outlook.<sup>127</sup> 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% of each) for the Democratic candidate.<sup>128</sup> In 2004, those margins increased to 67% and 62% respectively.<sup>129</sup>

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Richard G. Niemi, *Partisanship, Party Coalitions, and Group Support, 1952–2004*, 36 *PRESIDENTIAL STUD. Q.* 172, 180 (2006) (“Declining Democratic partisanship among Catholics and regular church-goers was also matched by increasing identification with Republicans.”).

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

124. *2000 National Election Exit Poll Results*, ABCNEWS.COM, [http://abcnews.go.com/sections/politics/2000vote/general/exitpoll\\_hub.html](http://abcnews.go.com/sections/politics/2000vote/general/exitpoll_hub.html) (last visited Jan. 20, 2012); *2004 U.S. President National Exit Poll Results*, CNN.COM, <http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html> (last visited Jan. 20, 2012).

125. PEW FORUM ON RELIGION & PUB. LIFE, *U.S. RELIGIOUS LANDSCAPE SURVEY 19* (2008), available at <http://religions.pewforum.org/pdf/report2-religious-landscape-study-full.pdf>.

126. See KOHUT ET AL., *supra* note 123, at 3.

127. LAYMAN, *supra* note 117, at 107, 108 fig.3.2, 109, 124.

128. *2000 National Election Exit Poll Results*, *supra* note 124.

129. Compare *id.* (2000 margins), with *2004 U.S. President National Exit Poll Results*, *supra* note 124 (2004 margins).

To be sure, the Democratic Party and progressive political campaigns continue to draw the support of many persons of religious faith.<sup>130</sup> As an important and longstanding example, Jews in the United States have long been closely identified with both the Democratic Party and a separationist approach to Church and State issues. Professor Stephen Feldman has described American Jews as a “prototypical religious outgroup” that as a matter of principle has “strongly advocate[d] for the strict separation of church and state.”<sup>131</sup> However, even among Jews, a “Devotional Divide”<sup>132</sup> has emerged in political affiliation, with a growing percentage of Jews who attend synagogue weekly voting Republican, along with an overwhelming proportion of the small but growing Orthodox Jewish community.<sup>133</sup> Still, the political left has not yet resolved into an exclusively secularist political movement in the United States.<sup>134</sup> Nonetheless, those with a secularist worldview, or at least those with “weak[er] religious attachments,”<sup>135</sup> increasingly have been drawn toward that side of the political spectrum. As Professor Geoffrey Layman concludes, the “core support” for the Democratic Party consists of “secularists, Jews, and the less committed members of the major religious traditions.”<sup>136</sup>

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130. See generally STEVEN H. SHIFFRIN, *THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS* 3–4 (2009) (advocating greater engagement in American politics by religious progressives on expressly religious premises, while acknowledging that “the secular Left is believed to dominate the Democratic Party”). In a survey of political attitudes in 2010, the Pew Research Center identified two Democratic-leaning typologies of voters who remain highly religious: “New Coalition Democrats,” a majority of whom are minorities and who are both highly religious and financially stressed, and “Hard-Pressed Democrats,” who are blue-collar, struggling financially, and very religious. PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *BEYOND RED VS. BLUE: POLITICAL TYPOLOGY* 15–16 (2011), available at <http://people-press.org/files/legacy-pdf/Beyond-Red-vs-Blue-The-Political-Typology.pdf>.

131. Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 238, 246 (2003); see also Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 58 (1996) (“As a small minority within an overwhelmingly Christian nation, Jews generally favored a policy of stringent separationism, rather than one of nondiscrimination against particular sects.”).

132. See David E. Campbell, *supra* note 121, at 64 (describing the difference in religious activity associated with political affiliation as the “Devotional Divide”).

133. See Jay Lefkowitz, *The Election and the Jewish Vote*, COMMENT., Feb. 2005, at 61, 64 (reporting that 40% of Jews who attend synagogue weekly and 69% of Orthodox Jews voted for Republican George W. Bush in 2004, compared to only 18% of Jews who rarely or never attend synagogue).

134. See Galston, *supra* note 123, at 319; KOHUT ET AL., *supra* note 123, at 74.

135. See Michael Hout & Claude S. Fischer, *Why More Americans Have No Religious Preference: Politics and Generations*, 67 AM. SOC. REV. 165, 179 (2002) (suggesting in a study of religious preferences, not including a focus on political party affiliation, that the “re- religiously tinged political atmosphere not only brought some religious people out of apathy into politics but also pushed some moderate and liberal Americans with weak religious attachments away from religion”).

136. LAYMAN, *supra* note 117, at 107.

In 2008, President Obama’s campaign made concerted overtures to religious voters,<sup>137</sup> and much was made of the fact that a majority of Catholic voters overall (without controlling for religious commitment) supported the Democratic candidate for the first time in several presidential election cycles.<sup>138</sup> However, the 2008 exit polls suggest that the so-called “God Gap” between the parties remained in force, if slightly diminished. A majority (55%) of those who attended religious services weekly or more voted for the Republican, while three-quarters (75%) of those with no religion and more than two-thirds of those who never attended religious services voted for the Democrat.<sup>139</sup> And the “God Gap” certainly was evident in the 2010 midterm elections for the House of Representatives, with Republicans winning a solid majority from Catholics, Protestants, and weekly church attendees (54%, 59%, and 58% respectively), while more than two-thirds (68%) of those with no religious affiliation voted Democratic.<sup>140</sup>

To further illustrate the difference, as shown in Figure 5 prepared by Bolce and De Maio, while the religious divide in partisan identification was only 15 percentage points in 1988, the gap in partisan affiliation between secularists (most of whom identify with the Democratic Party) and traditional religionists (most of whom identify with the Republican Party) grew to 66 percentage points in 2004.<sup>141</sup>

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137. See Michael Gerson, Op-Ed., *Obama’s New Culture War over Government’s Role*, WASH. POST, Oct. 5, 2010, at A15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/04/AR2010100404560.html> (“As a candidate, it was a measure of Barack Obama’s political innovation and ambition that he set out to win religious voters, including evangelical Christians. . . . During the campaign, Obama’s brand of progressivism was refreshingly free of secularism.”).

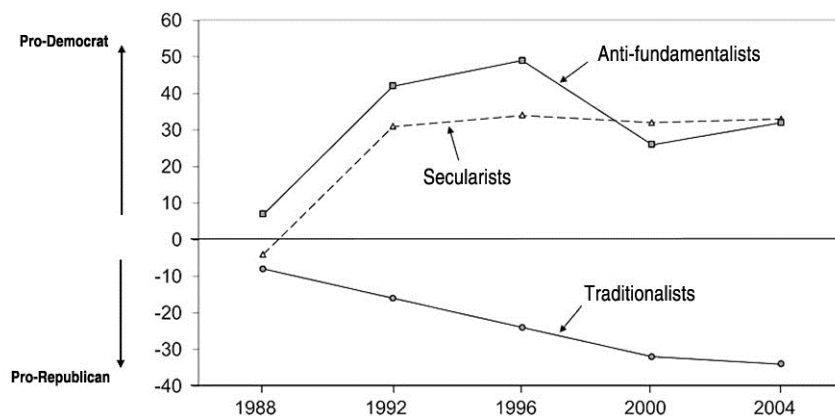
138. See *2008 Presidential Election National Exit Poll*, CNNPOLITICS.COM, <http://www.cnn.com/ELECTION/2008/results/polls/#val=USP00p2> (last visited Jan 20, 2012).

139. *Id.*; see also John C. Green & Scott Clement, *Much Hope, Modest Change for Democrats: Religion in the 2008 Presidential Election*, PEW FORUM ON RELIGION & PUB. LIFE (Aug. 11, 2010), <http://pewforum.org/Politics-and-Elections/Much-Hope-Modest-Change-for-Democrats-Religion-in-the-2008-Presidential-Election.aspx> (finding that “the contours of religion and politics were the same in 2008 as in 2004,” and that “the large gaps in the electorate that had developed along religious lines in earlier elections persisted in 2008”).

140. *2010 U.S. House of Representatives National Exit Poll*, CNNPOLITICS.COM, <http://www.cnn.com/ELECTION/2010/results/polls/#USH00p1> (last visited Jan. 20, 2012); see also Daniel Burke, *Have Democrats Lost Faith in Faith-Based Outreach?*, RELIGION NEWS STORIES (Nov. 3, 2010), [http://www.religionnews.com/index.php?/rnstext/have\\_democrats\\_lost\\_faith\\_in\\_faith\\_based\\_outreach](http://www.religionnews.com/index.php?/rnstext/have_democrats_lost_faith_in_faith_based_outreach) (reporting that the Democratic Party’s “hard-won gains among religious voters are largely gone”).

141. Bolce & De Maio, *supra* note 115, at 264, 265 & fig.10.1.

FIGURE 5.  
THE RELIGIOUS DIVIDE IN PARTY IDENTIFICATION (1988–2004)<sup>142</sup>



As Professors John Green and Laura Olson put it, “[T]he division between weekly attending White born-again Protestants and religiously unaffiliated voters was nearly 56 percentage points in 2004, rivaling the size of the electoral gap between Whites and Blacks.”<sup>143</sup>

With particular pertinence to our study on Establishment Clause cases, the national platforms of the two parties confirm the sharp partisan dichotomy on the propriety of a vibrant religious presence in public life.<sup>144</sup>

142. This chart is reprinted by permission from Bolce & De Maio, *supra* note 115, at 265. Copyright 2007 by Georgetown University Press. Louis Bolce and Gerald De Maio, “Secularists, Antifundamentalists, and the New Religious Divide in the American Electorate.” In *From Pews to Polling Places: Faith and Politics in the American Religious Mosaic*, J. Matthew Wilson, Editor, p. 265. Reprinted with permission. [www.press.georgetown.edu](http://www.press.georgetown.edu).

143. Laura R. Olson & John C. Green, “Gapology” and the 2004 Presidential Vote, in *BEYOND RED STATE, BLUE STATE: ELECTORAL GAPS IN THE TWENTY-FIRST CENTURY AMERICAN ELECTORATE 4* (Laura R. Olson & John C. Green, eds., 2008).

144. Some scholars fairly question the broader proposition that Americans are sharply and contentiously divided, arguing instead that “there is actually widespread agreement, or at least a fairly comfortable majority view, about religion’s place in politics.” Richard W. Garnett, “Modest Expectations”?: *Civic Unity, Religious Pluralism, and Conscience*, 23 *CONST. COMMENT.* 241, 257 (2006) (reviewing NOAH FELDMAN, *DIVIDED BY GOD* (2005) and KEVIN SEAMUS HASSON, *THE RIGHT TO BE WRONG* (2005)). Professor Richard Garnett suggests,

[M]ost people in America probably think . . . that the institutions of religion and government should be separate, but also that religious faith remains an important part of both individual and social life, one that—consistent with the reality of pluralism and a commitment to the rights of minorities—does and should play a role in shaping our culture and institutions.

*Id.* Indeed, most Americans may fall into a critical mass of general consensus; although rather than bridging the gap between religionists and seculars, the center of gravity of the American population as a whole may be located closer to the pro-religion side of the spectrum. See Louis Bolce & Gerald De Maio, *The Divisiveness Rationale and Negative Reference Group Associations in Church-State Controversies*, in *RELIGION, POLITICS, AND AMERICAN IDENTITY: NEW DIRECTIONS, NEW CONTROVERSIES* 109 (David Gutterman & Andrew Mur-

Although religious references appear in the platforms of both parties, words such as “God” and “prayer” appear regularly in Republican Party platforms,<sup>145</sup> while “religion” or “religious” are most likely to appear in Democratic Party platforms as planks calling for religious freedom around the world or opposing discrimination on multiple bases of which religion is but one.<sup>146</sup> Since 1972, every Republican Party platform has called for the return of prayer to schools and Republican platforms frequently have approved the public display of the Ten Commandments,<sup>147</sup> while the terms “prayer” and “Ten Commandments” have never appeared in Democratic Party platforms during this period.<sup>148</sup> With some frequency, the Republican Party platform has inveighed against “judicial rulings which attempt to drive faith out of the public arena,”<sup>149</sup> while the Democratic Party on at least one occasion has

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phy, eds., 2006) (“One of the reasons most Americans do not oppose organized religious groups’ participating in the political process is that most do not think that religion’s influence on political life is particularly harmful.”). In any event, the political science and sociology literature surveyed above confirms that most political activists in the two major parties, who are also those involved in making political appointments and litigating disputes, stand at greater distances from one another on questions of Church and State than do most Americans.

145. See, e.g., 2004 REPUBLICAN PARTY PLATFORM: A SAFER WORLD AND A MORE HOPEFUL AMERICA 1 (2004), available at [http://www.presidency.ucsb.edu/papers\\_pdf/25850.pdf](http://www.presidency.ucsb.edu/papers_pdf/25850.pdf); 2008 REPUBLICAN PLATFORM i, ii, 45, 54 (2008), available at [http://www.presidency.ucsb.edu/papers\\_pdf/78545.pdf](http://www.presidency.ucsb.edu/papers_pdf/78545.pdf); REPUBLICAN PARTY PLATFORM OF 1996, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25848>.

146. See, e.g., DEMOCRATIC PARTY PLATFORM OF 1996, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29611>; DEMOCRATIC PARTY PLATFORM OF 2000, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29612>; REPORT OF THE PLATFORM COMMITTEE: RENEWING AMERICA’S PROMISE 40, 52 (2008), available at [http://www.presidency.ucsb.edu/papers\\_pdf/78283.pdf](http://www.presidency.ucsb.edu/papers_pdf/78283.pdf). But see STRONG AT HOME, RESPECTED IN THE WORLD: THE 2004 DEMOCRATIC NATIONAL PLATFORM FOR AMERICA 2, 19, available at [http://www.presidency.ucsb.edu/papers\\_pdf/29613.pdf](http://www.presidency.ucsb.edu/papers_pdf/29613.pdf) (twice referring to “one nation under God”).

147. 2004 REPUBLICAN PARTY PLATFORM: A SAFER WORLD AND A MORE HOPEFUL AMERICA, *supra* note 145, at 77, 82 (school prayer and Ten Commandments); 2008 REPUBLICAN PLATFORM, *supra* note 145, at 44–45, 53 (school prayer and display of Ten Commandments); REPUBLICAN PARTY PLATFORM OF 1972, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25842> (school prayer); REPUBLICAN PARTY PLATFORM OF 1976, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25843> (school prayer); REPUBLICAN PARTY PLATFORM OF 1980, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25844> (school prayer); REPUBLICAN PARTY PLATFORM OF 1984, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25845> (school prayer); REPUBLICAN PARTY PLATFORM OF 1988, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25846> (school prayer); REPUBLICAN PARTY PLATFORM OF 1992, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25847> (school prayer); REPUBLICAN PARTY PLATFORM OF 1996, *supra* note 145 (school prayer); REPUBLICAN PARTY PLATFORM OF 2000, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25849> (school prayer and Ten Commandments).

148. Cf. DEMOCRATIC PARTY PLATFORM OF 1996, *supra* note 146 (The Platform “applaud[s] the President’s work to ensure that children are not denied private religious expression in school,” without mentioning prayer).

149. 2008 REPUBLICAN PLATFORM, *supra* note 145, at 53; see also 2004 REPUBLICAN PARTY PLATFORM: A SAFER WORLD AND A MORE HOPEFUL AMERICA, *supra* note 145, at 77

expressed its approval of “church/state separation and of the Supreme Court decisions forbidding violations of those principles.”<sup>150</sup> Thus, on questions of law and religion, the two political parties, in their official pronouncements, tend to fall into the two camps labeled by Professor Noah Feldman as “values evangelicals” and “legal secularists.”<sup>151</sup>

## 2. The Percolation of the Partisan Divide on Church and State into Judicial Decisions

The question remains: has “our torpidly over-stimulated political culture,”<sup>152</sup> particularly on questions of law and religion, percolated into judicial deliberations? As the results of our empirical study suggest,<sup>153</sup> the divide appears to be deep and wide between federal court judges appointed by presidents of different parties in Establishment Clause cases decided between 1996 and 2005.

Our ideology variables—Party of Appointing President and Common Space Scores (applied alternatively in separate regression models)—were highly significant at the  $p < .001$  level. And the magnitude of the effect was substantial as well. Judges appointed by Democratic presidents were predicted to uphold Establishment Clause claims at a 57.3 percent rate, while judges appointed by Republican presidents were predicted to rule in favor of such claims at only a 25.4 percent rate. Thus, an Establishment Clause claimant was more than twice as likely to prevail before a Democratic-appointed as compared to a Republican-appointed judge.

This partisan gulf of 32 percentage points in Establishment Clause case outcomes is about three times higher than the typical 10 percent (or less) margin in outcomes reached by Republican-appointed compared to Democratic-appointed judges found in empirical studies of the federal courts that include a variety of case types, even when those cases are likely to have an ideological flavor and only published opinions are examined.<sup>154</sup> As Cass

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(“[W]e condemn judicial activists and their unwarranted and unconstitutional restrictions on the free exercise of religion in the public square.”).

150. *Text of 1984 Democratic Party Platform*, 40 CONG. Q. ALMANAC 73B–106B (1984), available at <http://library.cqpress.com/cqalmanac/cqal84-856-25733-1150986>.

151. FELDMAN, *supra* note 21, at 7–8 (internal quotation marks omitted).

152. Marc O. DeGirolami, *The Handmaid of Politics*, 26 J.L. & RELIGION 641, 645 (2011) (reviewing STEVEN H. SHRIFFIN, *THE RELIGIOUS LEFT AND CHURCH-AND-STATE RELATIONS* (2009)).

153. *See supra* Part I.B.1.

154. *See, e.g.*, ROWLAND & CARP, *supra* note 63, at 34 (finding a difference of 10% to 13% between Democratic-appointed and Republican-appointed judges for all types of cases); SUNSTEIN ET AL., *supra* note 69, at 8–13 (finding that Democratic-appointed federal appellate judges cast “stereotypically liberal” votes about 12% more of the time than Republican-appointed judges, on “a number of controversial issues that seem especially likely to reveal divisions”); Ronald Stidham, Robert A. Carp & Donald R. Songer, *The Voting Behavior of President Clinton’s Judicial Appointees*, 80 JUDICATURE 16, 19–20 (1996) (concluding that Clinton’s appointees have demonstrated moderate decisional tendencies and finding small

Sunstein, David Schkade, Lisa Michelle Ellman, and Andres Sawicki remarked on publication of their prominently reported study on ideological influences on federal appellate judges, even “where party differences are statistically significant, they are usually not huge.”<sup>155</sup> Based on our findings in the context of Establishment Clause cases, however, describing the party differences as “huge” is certainly fair commentary.

In our previous writings, we repeatedly expressed dissatisfaction with “the concept of ideology as presently applied in empirical work regarding the courts.”<sup>156</sup> We have critiqued the common employment of measures of “ideology” based on political party associations or the mainstream labeling of liberal and conservative, questioned the use of ideology proxies that project on judges a mathematical construct derived from the preferences of outside political actors, challenged the one-dimensional plotting of ideology along the continuum of left to right in coding of case outcomes and judge attitudes, and generally bemoaned the imposition of a political dichotomy on to the courts in empirical models.<sup>157</sup> In general, we have protested that “[t]he empirical evidence cannot justify elevating the assumed ideological or partisan affiliations of judges above such traditional measures of judicial temperament as legal experience, quality of legal reasoning, respect for other actors in the legal process, and integrity.”<sup>158</sup> And we have hardly been alone in our critiques.<sup>159</sup>

But on this occasion, the potency of the political correlation cannot be gainsaid. And, while we agree that Party of Appointing President is “a crude proxy for judicial ideology,”<sup>160</sup> that partisan measure appears to be quite valid in the study of Establishment Clause decisions in the lower federal courts, indeed more of a surrogate than a mere proxy.

By accepting the explanatory power of a partisan variable for judicial decisionmaking in this particular context, we do not mean to suggest that

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differences in “liberal” voting rates, generally under 10% across categories of cases, for both district and court of appeals judges).

155. SUNSTEIN ET AL., *supra* note 69, at 12.

156. Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 892 (2008) (reviewing FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* (2007)).

157. See Sisk & Heise, *Judges and Ideology*, *supra* note 8, at 784–85, 793; Sisk, *supra* note 156, at 892–93.

158. Sisk & Heise, *Judges and Ideology*, *supra* note 8, at 794.

159. See e.g., Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1918–22 (2009) (addressing the failure of empirical studies to “[m]eaningfully [d]efine and [m]easure ‘[i]deology’”); Fischman & Law, *supra* note 46, at 137–213 (addressing the theoretical and methodological difficulties in defining, measuring, and analyzing ideology as an influence on judges, concluding that an ideology measure based on the actual behavior of judges in deciding cases offers advantages in several contexts of empirical study); Yung, *supra* note 46, at 1135–36 (critiquing the Party of Appointing President and Common Space Score ideology proxies).

160. Michael A. Livermore, Response, *Realist Lawyers and Realistic Legalists: A Brief Rebuttal to Judge Posner*, 59 DUKE L.J. 1187, 1192 (2010).



federal judges in our study ruled as they did in order to toe the party line, align their actions with the party's national platform, or ingratiate themselves with fellow partisans.<sup>161</sup> Republican- and Democratic-appointed judges presumably were not drawn toward one or the other outcome in Establishment Clause cases simply because that was the Republican or Democratic preference. As Joshua Fischman and David Law explain, "[P]roxy variables such as party of appointment should not be misinterpreted as *causal* variables."<sup>162</sup>

Rather, persons with underlying attitudes and political perspectives that were likely to move them toward the religious accommodation side of the Establishment Clause divergence were also more likely to be appointed to the federal bench by a Republican administration. Judges who by prior disposition leaned toward the separationist side were more likely to be in a position to be regarded for a judicial appointment by a Democratic administration. When the major political parties are so sharply divided and visibly associated with opposing viewpoints on a question as prominent as the legitimate relationship between religion and the government (or public policy), and, crucially, when the absence of constraining legal doctrine leaves judges without clear guideposts in resolving Establishment Clause disputes, a judge's preexisting party-correlated attitude is more likely to surface.

Objectors understandably may interject that they personally know Democratic-appointed federal judges who are faithful religious observers and who embrace a robust role for religion in public life, or they may point to Republican-appointed judges who are thoroughly secular in outlook. Professor Raymond Wolfinger's aphorism that "the plural of anecdote is data"<sup>163</sup> may be correct in a descriptive sense. Nonetheless, the more reliable, cumulative information generated by larger data sets drawn from a wide population regularly reminds the empirical researcher that certain anecdotal experiences may not be representative of the whole.<sup>164</sup>

Moreover, we acknowledge (and are gratified) that party or ideology are not perfect predictors. Even in this study, judges did not fall strictly into political patterns, and legal factors in the form of precedent continued to be salient. Our study cannot legitimately be adduced as evidence that any individual judge is influenced by ideology or preexisting party-based attitudes. Our study should not be used to predict whether a specific judge or panel will vote a certain way in a particular Establishment Clause case. Nonethe-

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161. Judge Patricia Wald similarly rejects the assumption, apparently indulged by some empirical scholars, "that judges intentionally act in alignment with the party from which they sprung." Patricia M. Wald, *Colloquy, A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 240 (1999).

162. Fischman & Law, *supra* note 46, at 170.

163. Fred Shapiro, *Quotes Uncovered: What's the Plural of Anecdote?*, FREAKONOMICS (Apr. 29, 2010, 2:00 PM), <http://www.freakonomics.com/2010/04/29/quotes-uncovered-whats-the-plural-of-anecdote> (internal quotation marks omitted).

164. See AGRESTI & FINLAY, *supra* note 52, at 359 ("Sometimes you hear people give anecdotal evidence to attempt to disprove causal relationships . . . . An association does not need to be perfect, however, to be causal.").

less, the aggregate data subjected to multivariate regression analysis confirms the powerful impact of party and ideology on federal judges as a group (or two groups—that is, Republican appointees and Democratic appointees) in this field of adjudication.

Two other pieces of evidence from our study hint at the emergence of a “God Gap” inside the federal judiciary, which parallels the division already prevailing in national party politics:

First, of the 555 judicial participations included in our study, 15 participations by Republican-appointed judges and 40 participations by Democratic-appointed judges were by those with no religious affiliation. The ratio of observations with judges having no religious affiliation was nearly four times higher for Democratic appointees (16.6 percent) than Republican appointees (4.8 percent).

Federal judges have been asked repeatedly during the appointment process and by judicial biographers and researchers for information about their beliefs and affiliations. During the confirmation process, judicial nominees are asked to disclose membership in organizations, including churches, synagogues, and other faith-based groups. Along with other researchers, we have reviewed biographical information and confirmation records for indications of religious affiliation, including memberships, speeches, and writings. Thus, a judge coded as having no religious affiliation is not simply someone who is private about personal beliefs but rather someone who apparently has not belonged to or been active with any religious organization. Although some of these unaffiliated judges may have personal religious or spiritual beliefs, the apparent absence of any involvement with an organized community of faith may be consistent with a separationist perspective on Church and State matters—in other words, regarding religious beliefs as strictly private and personal and not appropriately adduced in the public dimension of human life.<sup>165</sup>

We hasten to caution that this limited evidence by itself does not bear great weight. More than 80 percent of Democratic-appointed judges in the observations in our study reported a religious affiliation, so labeling this category of jurists collectively as secularist would be wildly inaccurate and, for many, insulting. Moreover, our independent variable for nonreligiously affiliated judges was not statistically significant in our regression. We cannot report that a greater share of religiously unaffiliated judges among Democratic appointees plays a significant role in the partisan disparity of outcomes in Establishment Clause cases. On the other hand, we cannot exclude the possibility that, if we could look beyond denominational identification to worship frequency or other religious behaviors,<sup>166</sup> judges

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165. Sisk, Heise & Morriss, *supra* note 8, at 578.

166. See John C. Blakeman & Christopher P. Bank, Presentation at Western Political Science Association Annual Meeting, The Religiosity of Federal District Judges: Preliminary Results from a Pilot Study of the Sixth Federal Circuit 26 (2009), available at [http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/3/1/7/4/3/p317437\\_index.html](http://www.allacademic.com/meta/p_mla_apa_research_citation/3/1/7/4/3/p317437_index.html) (describing preliminary study of religious beliefs and behaviors of federal judges and hypothesizing

might display some of the same differences in devotional intensity that are correlated with different political outlooks among the population generally.

Second, examining the raw frequencies of outcomes in Establishment Clause cases when separated by presidential cohort, we find indirect evidence of a changing trend over time in the attitudes on Church and State issues by appointees of different presidents.<sup>167</sup> As shown in Figure 6, judges appointed by President Johnson rejected Establishment Clause claims at a fairly high rate, not much different than that of judges appointed by Presidents Nixon, Ford, and Reagan. Judges appointed by Presidents Carter and Clinton upheld more than a majority of such claims, with Clinton judges voting in favor of such claims at a rate nearly 20 percentage points higher than Johnson judges. Judges appointed by Republican presidents have consistently turned away the substantial majority of Establishment Clause claims, with the rejection rate spiking up under judges appointed by President George W. Bush.

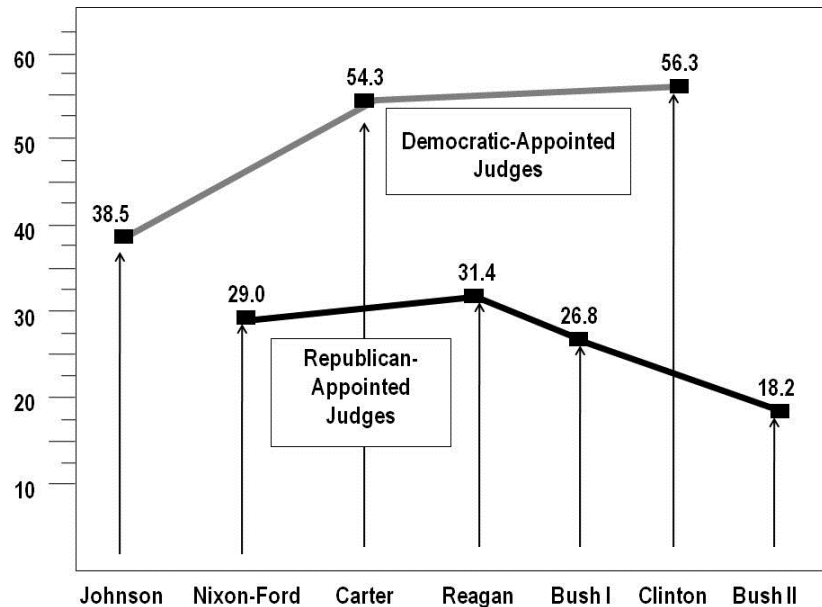
Caution should be exercised in reviewing these comparative rates because during the 1996–2005 period of our study, the number of judicial participations by judges appointed by Presidents Johnson (13) and Nixon and Ford (31) and even Carter (70) is, not surprisingly, smaller than the number by judges appointed by Presidents Reagan (153), George H.W. Bush (97), and Clinton (158). Given that this study ended at the midpoint of the George W. Bush Administration, the number of judicial participations included from that cohort (33) is also small. In addition, the rates reported here are raw frequencies from our data, rather than predicted rates after controlling for the independent effect of presidential cohorts through multivariate regression.

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that “the congregational context of a district judge’s religious life [may] correlate[] with his or her views on the religious liberty clauses in the First Amendment”).

167. In our prior study of religious liberty decisions in the lower federal courts for the period 1986–1995, we found that judges appointed by Presidents Eisenhower, Kennedy, and Johnson were significantly more likely to be associated with a Pro-Secular Model constructed from both Free Exercise and Establishment Clause decisions. Sisk & Heise, *Judges and Ideology*, *supra* note 8, at 768–69. When we published that earlier study, we speculated that judges appointed during this era spent their formative years in the practice of law and on the federal bench (from the 1940s to the early 1970s) at the highwater mark of the Supreme Court’s separationist approach to Establishment Clause cases. That Pro-Secular Model is not directly parallel, although it overlaps, with the Establishment Clause stage of the present study, because the Pro-Secular Model in that prior study was defined not only by favorable responses to Establishment Clause claims but also by negative responses to Free Exercise claims (and the latter constituted a much larger proportion of the decisions in the model). In any event, notably, the Eisenhower, Kennedy, and Johnson judges had been appointed by presidents of both parties, which is consistent with our current hypothesis that the partisan divide on Church and State issues did not emerge until the period in which judges were being appointed by Presidents Carter and Reagan and thereafter.

FIGURE 6.  
 FREQUENCY OF POSITIVE VOTE ON ESTABLISHMENT CLAUSE CLAIM BY  
 PRESIDENTIAL COHORT OF JUDGES (1996–2005)



In any event, we present the narrative of the partisan division between highly committed religious believers and more secular-leaning citizens in American politics not because it may be replicated in the personal religious behavior or religion-based perspectives of individual federal judges (although, as noted, we do find preliminary evidence to that effect). Rather, and more importantly, because the division on the proper role of religion in public life has sharpened along partisan lines over the past three decades, these attitudes are likely to filter into appointment of judges, which always has been and is increasingly part of the partisan political process. As Galston notes about political division generally, “A feedback loop [may emerge] that mutually reinforces polarized comportment up and down the political food-chain . . . .”<sup>168</sup> Thus, as party leaders, grassroots party activists, and party-affiliated politicians mutually reinforce the party’s positions on issues of Church and State, these positions inevitably play a role in identifying nominees to the federal courts.

As a result, a more welcoming approach to the influences of faith on public policy is likely to be found in Republican Party officeholders and among Republican presidential appointees, while a more secular worldview

168. Galston, *supra* note 123, at 317; see also Brooks & Manza, *supra* note 122, at 434 (finding that, for evangelicals, higher levels of religious participations were correlated with stronger support for Republican candidates).

will tend to prevail among Democratic Party politicians and especially Democratic appointees to executive offices including the Office of the White House Counsel and the Department of Justice. When a particular party holds the presidency, the political appointees making decisions about judicial nominations, as well as the home-state senators of the same party, are likely to fall into predictable partisan ways on the general subject of religion and public life.

While we earnestly may hope that such partisan-correlated attitudes are checked by the judicial role, and that constraints of law should suppress personal preferences in most cases, the strongest of underlying attitudes are likely to persist, even if subdued. When we add in a legal doctrinal environment that either countenances reliance on such preferences or leaves judges with little or nothing else on which to draw, then those preexisting preferences may emerge and influence decisionmaking. Thus, the political gap on Church and State matters in the United States polity may provide a partial explanation for why judges appointed by presidents of the same party tend to lean in the same direction when addressing Establishment Clause controversies. Importantly, the partisan or ideological pull on judges can affect judicial outcomes only if the legal doctrine (or lack thereof) leaves room for judges to step beyond legal parameters and rely on nonlegal values.

For that reason, the story of political judging by lower federal court judges in Establishment Clause cases only begins with the saga of the powerful and apparently far-reaching influence of the “God Gap” in American politics. The story continues as a tragic tale about the Supreme Court’s failure to articulate a consistent theory behind the Establishment Clause and prescribe a coherent set of legal rules or carefully bounded standards that constrain the discretion of judges when applying that law to the facts in new cases.

#### B. *The Intolerable Subjectivity of Establishment Clause Doctrine*

Even when a judge sincerely wishes to leave his politics at the courtroom door, if he finds no law to apply to a case, the judge still must resolve the dispute and so must fall back on some nonlegal measure or extralegal thesis by which to decide the case.<sup>169</sup> If the subject is one as controversial, prominent, and subject to divergent opinion as the role of religion and religious influences in public life, the judge left to draw on nonlegal values will be hard-pressed not to trend toward his own personal views. As Justice Scalia said in the context of substantive due process, but in words that apply with equal force to the adjudication of claims under the Establishment Clause, judges are unlikely to be constrained from political judging by “a

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169. Cf. Michael Boudin, Response, *A Response to Professor Ramseyer, Predicting Court Outcomes Through Political Preferences*, 58 DUKE L.J. 1687, 1688 (2009) (“Policy often matters in deciding cases, but it is usually policy attributable to Congress or to public policy reflected in case law, common sense, and the values of the community. [So w]here exactly should judges look when existing law stops short?”).

variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor.”<sup>170</sup>

Some scholars defend balancing tests and multifactor analytical approaches in constitutional adjudication as preserving the “judgment” element of the judge’s work, while insisting that such analytical methods are properly characterized as law and may be applied in a manner distinct from political value choices. For example, Professor Todd Pettys recently challenged what he calls “the legitimacy dichotomy’s insistence that judges either apply the clearly expressed will of the sovereign people or commit the cardinal sin of judging by deciding cases based upon their own personal preferences.”<sup>171</sup> Instead, he maintains, judicial discretion in constitutional cases “leaves judges with significant room to construct conflicting lines of argument and still honorably claim that they each are doing ‘law,’ devoid of reliance upon personal, non-legal premises.”<sup>172</sup>

At least in the Establishment Clause field, the empirical evidence may suggest otherwise. Whatever judges may tell themselves when exercising that broad range of judicial “discretion” left open by ill-defined constitutional doctrine and how ever they may describe the nature of their reasoning in official opinions, the collective bottom line in Establishment Clause cases correlates too strongly with personal preferences and political leanings for any contrary pretense. When “significant room” is opened for judicial discretion, at least in such a highly contested and politically prominent area of constitutional law as Church and State, judges are likely to end up “rel[ying] upon personal, non-legal premises.”<sup>173</sup> We are skeptical that allotting capacious discretion to judges in resolving such constitutional controversies will, as Pettys assures us, still “honor the public’s instinctive distinction between law and politics.”<sup>174</sup> Instead, by conferring a wide ambit for judicial discretion in controversial Establishment Clause cases, the Supreme Court offers judges the constant temptation to engage in that “cardinal sin” of deciding cases by personal preferences and ideological leanings.

Addressing judicial interpretation of statutory language, Professor Lawrence Solan recently spoke to the concerns of those who prefer “a crisp rule

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170. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3058 (2010) (Scalia, J., concurring) (addressing whether the Second Amendment right to keep and bear arms should be incorporated against the states through substantive due process). *But see* RONALD DWORKIN, *LAW’S EMPIRE* 256 (1986) (saying that judges’ “own moral and political convictions” must be “directly engaged” to determine “what the law of their community, properly understood, really is”); POSNER, *supra* note 73, at 9 (“[L]aw is shot through with politics and with much else besides that does not fit a legalist model of decision making.”); Richard A. Posner, *Response, Some Realism about Judges: A Reply to Edwards and Livermore*, 59 *DUKE L.J.* 1177, 1182 (2010) (“[L]aw is suffused with politics (in the ideological rather than the partisan sense . . .). Constitutional law . . . is political in the sense of being the product not of orthodox legal materials (authoritative text plus precedents) but of the values, political in a broad (but sometimes in a rather narrow) sense, of the Justices.”).

171. Pettys, *supra* note 3, at 127.

172. *Id.* at 142.

173. *Id.* at 176.

174. *Id.* at 127.

of law conveyed in language that we can understand and comply with,” recognizing that “interpretive gaps” allow “the personal values of the individual judge [to] seep in to the . . . analysis.”<sup>175</sup> In most cases of statutory interpretation that reach the courts, Solan maintains that the language is sufficiently clear and judges are properly sensitive to the judicial role and thus “the residue of unrestrained political judgment is well within tolerable limits.”<sup>176</sup> In modern Establishment Clause jurisprudence, by contrast, the capacity for “unrestrained political judgment” appears to exceed “tolerable limits.”<sup>177</sup>

### 1. The Incoherence of the Supreme Court’s Establishment Clause Jurisprudence

Professor Steven Gey remarked that the amorphous nature of Establishment Clause doctrine “is best described as a nightmare for lower court judges trying to ascertain what analysis the Supreme Court wants them to apply in a particular case.”<sup>178</sup> The lower courts have also admitted confusion:

The United States Supreme Court repeatedly has recognized there can be no precise Establishment Clause test capable of ready application, and therefore has resisted confining such sensitive analyses to “any single test or criterion.” . . . To the extent the Supreme Court has attempted to prescribe a general analytic framework within which to evaluate Establishment Clause claims, its efforts have proven ineffective. Indeed, many believe the Court’s modern Establishment Clause jurisprudence is in “hopeless disarray,” and in need of “[s]ubstantial revision.”<sup>179</sup>

Professor Stephen Smith reports that “[p]robably the most common adjective used in descriptions of the contemporary jurisprudence of religious freedom is ‘incoherent.’”<sup>180</sup>

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175. LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES* 3 (2010).

176. *Id.* at 5.

177. *But see* Kent Greenawalt, *Fundamental Questions About the Religion Clauses: Reflections on Some Critiques*, 47 *SAN DIEGO L. REV.* 1131, 1149 (2010) (“The fact that lower courts will reach different conclusions from each other about borderline situations [in Religion Clause cases] is moderately troubling, but the resulting differential treatment is not a major social problem, and those raising constitutional claims will certainly prefer occasional uncertainty to rules that render their claims totally ineffective.”).

178. STEVEN G. GEY, *RELIGION AND THE STATE* 293 (2d ed. 2006) (“[S]ome lower courts have simply thrown up their hands and resorted to applying several different tests in each case.”).

179. *Bauchman ex rel. Bauchman v. West High Sch.*, 132 F.3d 542, 550–51 (10th Cir. 1997) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678–79 (1984); *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J. concurring); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part and dissenting in part)).

180. Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 *HARV. L. REV.* 1869, 1871 (2009) (reviewing KENT GREENAWALT, *DISCOURSE IN THE DUSK* (2008)) (quoting Stephen G. Gey, *Vestiges of the Establishment Clause*, 5 *FIRST AMENDMENT L. REV.* 1, 4 (2006)).

For an example of the Supreme Court’s episodic, arguably capricious, approach to Establishment Clause doctrine, we may look profitably to the Court’s announcement on the very same day in 2005 of conflicting decisions on public displays of the Ten Commandments. Given the largely indistinguishable factual circumstances behind these two cases, Professor William Van Alstyne comments that “[a] more vivid example of the severe doctrinal schism splintering the Court into factions, and even shards, would be difficult to imagine.”<sup>181</sup>

First, in *McCreary County v. ACLU of Kentucky*,<sup>182</sup> the majority in an opinion by Justice Souter held that the placement of the text of the Ten Commandments in county courthouses was “an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction.”<sup>183</sup> Applying the much-maligned *Lemon* test,<sup>184</sup> the Court ruled that there was no valid secular purpose to justify the display, even with the post-lawsuit steps taken by the counties to supplement the display with other historical American documents.<sup>185</sup> Although joining the majority opinion, Justice O’Connor wrote separately to emphasize her alternative “endorsement” test for the Establishment Clause, concluding that the counties’ display of the Ten Commandments “conveys an unmistakable message of endorsement [of a set of religious beliefs] to the reasonable observer.”<sup>186</sup> Justice Scalia in dissent, joined by three other members of the Court at least in part, argued that “the Court’s oft repeated assertion that the government cannot favor religious practice is false” and criticized the majority’s adoption of a “heightened requirement that the secular purpose ‘predominate’ over any purpose to advance religion.”<sup>187</sup>

Second, in its opinion in *Van Orden v. Perry*,<sup>188</sup> rendered on the same day as *McCreary*, the Court accepted a forty-year-old granite monument to the Ten Commandments on a state’s capitol grounds as consistent with the Establishment Clause.<sup>189</sup> Chief Justice Rehnquist’s plurality opinion for four members of the Court set aside the *Lemon* test as “not useful” in resolving the case, cited the nation’s long history of official recognition of the role of God and religion in American life, and observed that “acknowledgments of the role played by the Ten Commandments in our Nation’s heritage are

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181. William Van Alstyne, *Ten Commandments, Nine Judges, and Five Versions of One Amendment—The First*. (“Now What?”), 14 WM. & MARY BILL RTS. J. 17, 19 n.10 (2005).

182. 545 U.S. 844 (2005).

183. *McCreary*, 545 U.S. at 869.

184. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (setting forth a balancing test for Establishment Clause cases that evaluates whether the government action (1) has a secular purpose, (2) has a primary effect that does not advance or inhibit religion, and (3) improperly fosters an excessive entanglement with religion). For a discussion of the *Lemon* test, see *infra* notes 214–216 and accompanying text.

185. *McCreary*, 545 U.S. at 869–74.

186. *Id.* at 883–84 (O’Connor, J., concurring).

187. *Id.* at 885, 901 (Scalia, J., dissenting).

188. 545 U.S. 677 (2005).

189. *Van Orden*, 545 U.S. at 681.



common throughout America.”<sup>190</sup> Justice Scalia in concurrence echoed his own dissent in *McCreary*:

I would prefer to reach the same result by adopting an Establishment Clause jurisprudence that is in accord with our Nation’s past and present practices, and that can be consistently applied—the central relevant feature of which is that there is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.<sup>191</sup>

Justice Thomas, also writing separately, called for the Court to “return to the original meaning of the Clause,” under which the Establishment Clause does not apply to or constrain the states.<sup>192</sup>

Justice Breyer provided the fifth vote for the majority in *Van Orden*. He focused on what he saw as the “context of the display” on the capitol grounds and concluded that “the context suggests that the State intended the display’s moral message . . . to predominate” over the religious statement.<sup>193</sup> Explaining his shift from disapproval of a Ten Commandments display in *McCreary* to acceptance in *Van Orden*, Justice Breyer said that “the Court has found no single mechanical formula that can accurately draw the constitutional line in every case” and declared that in borderline cases there is “no test-related substitute for the exercise of legal judgment.”<sup>194</sup>

Justice Stevens, who authored the majority opinion in *McCreary*, was in the dissent in *Van Orden*, arguing that “[t]he message transmitted by [the state’s Ten Commandments] display is quite plain: This State endorses the divine code of the ‘Judeo-Christian’ God.”<sup>195</sup> Justice Souter also dissented, declaring the following:

[T]he Establishment Clause requires neutrality as a general rule . . . . A governmental display of an obviously religious text cannot be squared with neutrality, except in a setting that plausibly indicates that the statement is not placed in view with a predominant purpose on the part of government either to adopt the religious message or to urge its acceptance by others.<sup>196</sup>

Also dissenting, Justice O’Connor reiterated her concurrence in *McCreary*,<sup>197</sup> which applied an “endorsement” test for the Establishment Clause.<sup>198</sup>

Bemoaning the “unintelligibility of this Court’s precedent,” Justice Thomas warned in *Van Orden* that, “either in appearance or fact, adjudica-

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190. *Id.* at 686–88.

191. *Id.* at 692 (Scalia, J., concurring).

192. *Id.* at 693 (Thomas, J., concurring).

193. *Id.* at 701–02 (Breyer, J., concurring in judgment).

194. *Id.* at 699–700.

195. *Id.* at 707 (Stevens, J., dissenting).

196. *Id.* at 737 (Souter, J., dissenting) (citations omitted).

197. *Id.* at 737 (O’Connor, J., dissenting).

198. *See supra* note 186 and accompanying text.

tion of Establishment Clause challenges turns on judicial predilections.”<sup>199</sup> Indeed, fifteen years earlier, Circuit Judge Frank Easterbrook predicted that “[I]ine drawing in this area will be erratic and heavily influenced by the personal views of the judges.”<sup>200</sup>

The empirical evidence we report in this Article suggests that Establishment Clause–case decisionmaking presents more than the mere appearance that personal political views influence judging. When judges plainly are deciding cases in a legal vacuum by inevitable resort to personal political presuppositions, public faith in the rule of law and the impartiality of the courts is undermined.<sup>201</sup>

## 2. The Need for Higher Law Formality to Depoliticize Establishment Clause Adjudication

Some degree of judicial discretion is inevitable and often salutary. Even aside from instances where the law is unavoidably or unfortunately (rather than intentionally) indeterminate, Professor Pauline Kim explains that “discretion may reflect certain value trade-offs as well: choosing flexibility over certainty by selecting a standard rather than a bright-line rule; or allocating certain powers to trial courts, rather than appellate courts, by establishing a deferential standard of review.”<sup>202</sup>

Judges engaged in the early stages of articulating law in a novel field or addressing new statutory questions may need the space opened by discretionary standards<sup>203</sup> to develop better rules over time on the basis of experience.<sup>204</sup> Fact-intensive questions, such as those presented to trial courts on both the merits and procedural questions, may best be resolved by ensuring that judges are able to sculpt fact-specific, circumstantial answers.

199. *Van Orden*, 545 U.S. at 697 (Thomas, J., concurring).

200. *Harris v. City of Zion*, 927 F.2d 1401, 1425 (7th Cir. 1991) (Easterbrook, J., dissenting).

201. See Michael J. Gerhardt, *Constitutional Humility*, 76 U. CINN. L. REV. 23, 24, 46–48 (2007) (criticizing aspects of Chief Justice Roberts’s analogy of judging to umpiring while acknowledging that the “analogy was brilliant because it tapped into a popular, if not dominant, belief in our culture about how judges should perform”—namely, that most Americans “want their judges to follow the law, wherever it takes them, and not to legislate from the bench or substitute their personal preferences for those which are embodied in the law”); Lerner & Lund, *supra* note 4, at 1256 (referring to “the existence of deep popular expectations about the distinction between law and politics”).

202. Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 388 (2007).

203. See Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (“A legal directive is ‘standard’-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.”).

204. See *Pierce v. Underwood*, 487 U.S. 552, 562 (1988) (holding that the question of whether the federal government’s position in litigation lacked “substantial justification” so as to be liable for the prevailing party’s attorney’s fees in a case presented “a multifarious and novel question, little susceptible, for the time being at least, of useful generalization, and likely to profit from the experience that an abuse-of-discretion rule will permit to develop” (internal quotation marks omitted)).

When individual rights are at stake, as in free speech or free exercise of religion cases, judges need the freedom of judgment to investigate the specific circumstances and analyze the strength of the claim from the bottom up, because applying categorical rules in such cases may effectively discriminate by mistakenly treating different cases as though they are the same.<sup>205</sup> Discretion persists, Kim says, “because social needs demand some measure of flexibility in the application of legal rules, and because institutional values argue for allocating different types of power between different levels of the judiciary.”<sup>206</sup>

In contrast with adaptable case-by-case standards, “rules set a predetermined condition that allows for little discretion [and thereby] generally provide better ex ante certainty, predictability, and fairness across cases . . . .”<sup>207</sup> Recognizing that perfect determinacy in the law is seldom possible, rules are still more likely to provide clear guideposts to judges, prevent ad hoc rationalization, and limit reliance on attitudes or preferences (political, economic, social, or moral).

Rather than a simple dichotomy, the terms “rules” and “standards” actually describe a continuum. For example, a standard may be defined to elevate certain factors, exclude other factors, or “attach such fixed weights to the multiple factors it considers that it resembles a rule.”<sup>208</sup> Greater formality may be achieved in a given legal doctrine not only by adoption of strict rules but also by fortifying the boundaries of standards, crystallizing the relevant factors, solidifying key elements, and articulating presumptions. Importantly, when devising or adjusting a rule or a standard, the judge should look to the direction given by the source of law that confers the power of adjudication on the judge.<sup>209</sup>

Professor Kathleen Sullivan writes that “the real question is not whether the Court should exercise discretion in constitutional interpretation, but rather how much and by what means the Court should try to keep its discretion in check.”<sup>210</sup> On what subjects of adjudication should judges be allowed more freedom of action within the wider parameters of standards

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205. See Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 8, at 56–57 (suggesting that in religious free exercise cases where empirical evidence shows a disadvantage for Muslim claimants, “individuated analysis, while resisting categorical generalizations . . . may advance more equitable and properly differentiated treatment of each religious claimant, Muslim or otherwise”).

206. Kim, *supra* note 202, at 442.

207. Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 15–20 (2011) (addressing the comparative benefits and costs of standards versus rules); see also Sullivan, *supra* note 203, at 58 (“A legal directive is ‘rule’-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts.”).

208. Sullivan, *supra* note 203, at 61.

209. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183–84 (1989) (“[T]he extent to which one can elaborate general rules from a statutory or constitutional command depends considerably upon how clear and categorical one understands the command to be, which in turn depends considerably upon one’s method of textual exegesis.”).

210. Sullivan, *supra* note 203, at 57.

and on what matters should judges be more tightly constrained by the prescription of rules? When are standards or balancing tests<sup>211</sup> appropriate; how much discretion should be allocated in such areas; which factors are legitimately weighed in the balance; what comparative weights among those factors are most fitting; and what signals should alert the reviewing court to an abuse of that discretion? What positive values might be promoted by cur-tailing discretion? And what negative effects are exacerbated by continuing discretion?

Discretion may be unavoidable and even healthy in a legal system but, as Cass Sunstein says, “a legal system can certainly make choices about how much discretion it wants various people to have.”<sup>212</sup> And Sunstein continues, “[T]he choice between rules and rulelessness [often should be made] on the basis of a contextual inquiry into the aggregate level of likely errors and abuses.”<sup>213</sup>

In its 1971 decision in *Lemon v. Kurtzman*,<sup>214</sup> the Supreme Court articulated a three-part test for determining whether a government has violated the Establishment Clause: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”<sup>215</sup> As Professor Michael Paulsen has lamented, “[T]he ambiguity of the test left the Court leeway to interpret each prong in various ways, producing a bewildering patchwork of decisions as the justices engaged in a tug-of-war over the interpretation of the test.”<sup>216</sup>

In “the area of religious freedom,” Professor Thomas Berg advises that “balancing and case by case decisionmaking hold particular dangers.”<sup>217</sup> As Berg explains, “Religion is a matter on which people, judges included, tend to have gut feelings that often are inarticulate but nevertheless can powerfully affect their outlooks.”<sup>218</sup> Indeed, Professor Michael McConnell once attributed “[m]uch of the incoherence” of the Supreme Court’s Establishment Clause doctrine “to the Justices’ assumption in particular cases that they understand the proper relation between church and culture, and to read that understanding into the Constitution.”<sup>219</sup>

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211. See *id.* at 57 (explaining that balancing tests correspond to standards).

212. Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 960 (1995).

213. *Id.* at 1012.

214. 403 U.S. 602 (1971).

215. *Lemon*, 403 U.S. at 612–13 (citing *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

216. Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 801 (1993).

217. Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 701 (1997).

218. *Id.*

219. Michael W. McConnell, *Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence*, 42 DEPAUL L. REV. 191, 221 (1992).

For these reasons, as Berg says, “[c]ase by case, intuitive judgments about [religion clause] matters are likely to be unacceptably subjective.”<sup>220</sup> Other scholars also have protested that “[b]alancing tests are notoriously subjective”<sup>221</sup> and, in this particular field of law, “leave[] in the judiciary far too much unguided discretion that was never conferred [by the text of the Establishment Clause].”<sup>222</sup>

In certain areas, the benefits of more determinate rules or regulated standards outweigh the costs incurred by removing the freedom of movement that judges enjoy under broader discretionary standards. Prescription of rules for judges is more likely to force extralegal factors and personal attitudes out of bounds. In a study of Voting Rights Act litigation in the federal courts of appeals, Professors Adam Cox and Thomas Miles found that “ideological divisions in judicial voting patterns are more pronounced in the standard-like second step [of the doctrinal sequential framework for determining unlawful vote dilution] than in the evaluation of the more rule-like factors [at the first stage.]”<sup>223</sup> Accordingly, their findings “indicate that rules indeed may, to a greater extent than standards, limit discretion and suppress ideological disagreement among judges.”<sup>224</sup>

As Kim says, where a particular legal directive in a particular field of law should fall on the continuum between open-ended standards and fixed rules “is essentially an argument about the values served or defeated by permitting discretion.”<sup>225</sup> Elevating the impartiality of the judiciary and reducing the influence of extralegal attitudes should, we submit, be given some priority among those values. When an important and visible realm of adjudication has become infected with political judging, the cure may well

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220. Berg, *supra* note 217, at 701.

221. Lawrence B. Solum, *Pluralism and Public Legal Reason*, 15 WM. & MARY BILL RTS. J. 7, 22 (2006).

222. Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 621–22.

223. Cox & Miles, *supra* note 81, at 1495; *see also* Robert C. Longstreth, *Does the Two-Prong Test For Determining Applicability of the Discretionary Function Exception Provide Guidance to Lower Courts Sufficient to Avoid Judicial Partisanship?*, U. ST. THOMAS L.J. (forthcoming 2011) (finding no substantial difference between Republican- and Democratic-appointed federal appellate judges in applying explicit first prong of test for discretionary function exception to Federal Tort Claims Act, but finding that Democratic-appointed judges rejected application of exception by a rate nearly three times higher than Republican-appointed judges on the indefinite second prong).

224. Cox & Miles, *supra* note 81, at 1537; *see also* Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 326–27 (2007) (“[W]e model a judicial hierarchy where political control is exercised by higher courts over lower courts through the choice between *determinate* doctrines (highly specified, rule-like directives) and *indeterminate* doctrines (weakly specified, standard-like directives).”).

225. Kim, *supra* note 202, at 416.

require withdrawing or reducing discretion and heightening the formality of the governing adjudicatory regime.<sup>226</sup>

### 3. Restoring the “Classic Legal Tug”<sup>227</sup> in Establishment Clause Cases

In a recent succinct essay, which speaks directly to judicial enforcement of the Establishment Clause, Professor Richard Garnett asks the following question:

Even if “the rule of law” is not *only* a “law of rules,” is it troubling to think that resolving disputes about matters so important and basic as the place of religion in public life, and the connections and boundaries between religious and political authorities, depends on the deployment of imperfect, incomplete doctrine by judges who will not always be as learned and sensible to “complex, often conflicting values” [that are identified by scholars as reflected in the Establishment Clause]?<sup>228</sup>

Suggesting that “the better course is to find (somehow) some bright-line, on-off ‘rules’ and ‘tests,’ ”<sup>229</sup> Garnett argues “not only that judges should be *deferential*—applying a ‘rule of clear mistake’—when evaluating legislative action in light of the establishment clause, but that they should settle for constructing and enforcing only those clear and straightforwardly administrable rules that are essential to vindicating the clause’s core, clear meaning and guarantees.”<sup>230</sup>

In our study, we included precedent variables to explore whether the Supreme Court’s tightening of doctrine in the Establishment Clause field may

226. Cf. Cox & Miles, *supra* note 81, at 1525 (finding empirical results “consistent with the prediction that ideological disagreements will be more intense under standards than rules”).

227. See Cross, *supra* note 24, at 200; see also Sisk, *supra* note 156, at 896 (“Empirical scholarship can show us where the judicial system is reasonably effective in exerting a ‘classic legal tug’ against personal judicial preferences or attitudes, and where it falters.”).

228. Richard W. Garnett, *Judicial Enforcement of the Establishment Clause*, 25 CONST. COMM. 273, 274 (2008) (footnote omitted) (referring to Kent Greenawalt’s statement that “the [religion] clauses reflect such complex, often conflicting, values, that no tests can do them justice” (quoting 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 52 (2008))).

229. *Id.* at 277; see also Solum, *supra* note 221, at 15–16, 22 (arguing that “pluralism—religious and moral division—gives us reason to affirm an ideal of public legal reason that is best instantiated in the practice of legal formalism,” such that judges would “resolve cases on the basis of legal texts without reference to underlying values” by applying such factors as precedent, plain meaning, structure, original meaning, and general default rules).

230. Garnett, *supra* note 228, at 275 (footnote omitted); see also Thomas B. Griffith, Essay, *Was Bork Right About Judges?*, 34 HARV. J.L. & PUB. POL’Y 157, 165 (2011) (referring to “judicial humility” as “an indispensable temperament for a judge in our system”). *But see* Salazar v. Buono, 130 S. Ct. 1803, 1840 (2010) (Stevens, J., dissenting) (“[I]n the Establishment Clause context, we do not accord any special deference to the legislature on account of its generic advantages as a policymaking body, and the purpose test is not ‘satisfied so long as any secular purpose for the government action is apparent’” (quoting McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 865 n.13 (2005) (emphasis added))).

constrain judicial discretion and suppress political judging. By adopting what we believe may prove to be a new “jurisprudential regime”<sup>231</sup> for adjudication of Establishment Clause challenges for government aid for religious persons or institutions, the Supreme Court may be shifting away from nondeferential and open-ended balancing and moving toward more rule-like guideposts in combination with deference to the political branches. As explained below, we find that the Court’s recalibration of Establishment Clause doctrine has made a measurable difference in outcomes in the lower federal courts but has not (yet) reduced political or ideological disparities among ruling judges in the lower federal courts.

In *Agostini v. Felton*,<sup>232</sup> the Supreme Court overruled two prior decisions and approved aid to students in religious schools when “allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.”<sup>233</sup> Overturning its own prior decision in that very ongoing line of litigation along with a companion decision,<sup>234</sup> the Supreme Court ruled that the government could offer remedial education to students who attend religious school by providing public schoolteachers to teach after hours in those religious school classrooms.<sup>235</sup> No longer would school districts be required to take expensive and awkward steps to remove such public remedial instruction to off-campus sites in order to avoid supposed excessive entanglement with religion.<sup>236</sup>

Professors Mark Richards and Herbert Kritzer postulate that the Supreme Court establishes legal directives through a “jurisprudential regime”—that is, “a key precedent, or a set of related precedents, that structures the way in which the Supreme Court justices evaluate key elements of cases in arriving at decisions in a particular legal area.”<sup>237</sup> Professors Barry Friedman and Andrew Martin similarly describe “Law” in the Supreme Court as “serv[ing] what we might call a ‘channeling’ function rather than a ‘constraining’ one,” in which the Court uses legal doctrine to “organize[] the decision of future cases.”<sup>238</sup> Kritzer and Richards applied that concept to the Supreme Court’s *Lemon* test<sup>239</sup> for the Establishment Clause in an empirical study which found that, while not dictating outcomes in a mechanical way,

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231. See Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002). For more on jurisprudential regimes, see *infra* notes 237–251 and accompanying text.

232. 521 U.S. 203 (1997).

233. *Agostini*, 521 U.S. at 231.

234. The two decisions overruled were *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

235. *Agostini*, 521 U.S. at 218–36.

236. *Id.* at 230.

237. Richards & Kritzer, *supra* note 231, at 308.

238. Barry Friedman & Andrew D. Martin, *Looking for Law in All the Wrong Places: Some Suggestions for Modeling Legal Decision-Making*, in *WHAT’S LAW GOT TO DO WITH IT?* 143, 146 (Charles Geyh ed., 2011).

239. On the *Lemon* test, see *supra* notes 214–216 and accompanying text.

the *Lemon* regime “served to provide a framework for the decisions in Establishment Clause cases decided over the last 30 years.”<sup>240</sup>

According to Richards and Kritzer, the “key to validating the existence of jurisprudential regimes is change by the Supreme Court in basic factors associated with decision making in a particular legal area.”<sup>241</sup> Because our study is focused on the lower federal courts, we have not applied the Kritzer–Richards statistical methodology to verify that the Supreme Court itself has embraced the *Agostini* decision as a “jurisprudential regime change,” which would be revealed by shifts in the patterns of factors used or discounted by the Court in structuring subsequent Establishment Clause decisions.<sup>242</sup> However, looking both at the definitive change articulated by the Court in the *Agostini* decision itself and the impact of that change on the lower federal courts as found in our study, *Agostini* may be a game changer or at least a substantial step in that direction.

First, the Supreme Court in *Agostini* clearly announced a change by explicitly overruling two prior decisions as “no longer good law.”<sup>243</sup> While the Court did not wholly abandon the *Lemon* test, the *Agostini* decision set narrower bounds on that balancing approach by declaring that one set of factors no longer created a presumption of an Establishment Clause violation and two other factors strongly supported the validity of government interaction with religion or religious institutions. A plurality of the Court later described these changes: “In *Agostini* . . . we brought some clarity to our case law, by overruling two anomalous precedents (one in whole, the other in part) and by consolidating some of our previously disparate considerations under a revised test.”<sup>244</sup>

In *Agostini*, the Court rejected prior presumptions that (1) placing public employees on parochial school grounds has the impermissible effect of advancing religion because those public employees would be “tempted to inculcate religion” and (2) administrative cooperation between public authorities and religious schools confirmed an excessive entanglement between government and religion.<sup>245</sup> Moreover, the Court articulated new presumptions that neutrality and equality in providing government aid were major steps toward avoiding constitutional infirmity. The Court emphasized that the government aid at issue was distributed pursuant to secular, nonreligious criteria and was provided on equal terms to religious

240. Herbert M. Kritzer & Mark J. Richards, Research Note, *Jurisprudential Regimes and Supreme Court Decisionmaking: The Lemon Regime and Establishment Clause Cases*, 37 LAW & SOC’Y REV. 827, 839 (2003).

241. Richards & Kritzer, *supra* note 231, at 309.

242. See Kritzer & Richards, *supra* note 240, at 833–38; Herbert M. Kritzer & Mark J. Richards, *Taking and Testing Jurisprudential Regimes Seriously: A Response to Lax and Radner*, 72 J. POL. 285 (2010) (explaining statistical testing for jurisprudential regime shift).

243. *Agostini v. Felton*, 521 U.S. 203, 209, 236 (1997).

244. *Mitchell v. Helms*, 530 U.S. 793, 807 (2000) (plurality opinion).

245. *Agostini*, 521 U.S. at 222–35; see also *Mitchell*, 530 U.S. at 808 (plurality opinion) ([O]ur cases had pared somewhat the factors that could justify a finding of excessive entanglement.”).



and secular beneficiaries.<sup>246</sup> When government aid is provided equally to all beneficiaries on religiously neutral terms, the Court stated that “the aid is less likely to have the effect of advancing religion” and thus is more likely to be upheld against an Establishment Clause challenge.<sup>247</sup> In sum, the Court held, “our Establishment Clause law has ‘significant[ly] change[d]’ since” the earlier decision now overruled.<sup>248</sup>

Many religion clause scholars suggest that the *Agostini* decision and its progeny have provided greater stability to the Supreme Court’s Establishment Clause doctrine, at least on questions of government aid, even if that change in course came late and still more ballast is needed. Professor Michael McConnell describes “the trajectory toward a ‘neutrality’ interpretation of the Establishment Clause” as having been interrupted by the two decisions that were overruled by *Agostini*, decisions that had “greatly confus[ed] the doctrinal picture.”<sup>249</sup> Professor Thomas Berg cites the “unbroken string of decisions approving particular forms of aid since the early 1980s,” including *Agostini*’s overruling of “separationist decisions from the 1970s,” as setting a “trend [that] is obviously away from separation and toward a principle of treating religious entities equally in evaluating aid.”<sup>250</sup> Noting the Court’s increasing focus on “equality as the lodestar of Establishment Clause decisions involving funding questions,” Professor Paul Horwitz suggests that “[i]t is fair to say . . . that the caselaw in this area is more stable now than it has been for some time, and less controversial.”<sup>251</sup>

Second, *Agostini* has produced a measurable change in the response of lower federal courts to Establishment Clause claims arising after 1997. In our model of Establishment Clause cases that includes Party of Appointing President as the ideology proxy variable, the *Agostini* precedent variable is statistically significant at the .05 level.<sup>252</sup> In our alternative model with

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246. *Agostini*, 521 U.S. at 231.

247. *See id.*; *see also Mitchell*, 530 U.S. at 810, 813 (plurality opinion) (describing the “principles of neutrality and private choice” as the two “primary criteri[a]” for determining the validity of government aid against an Establishment Clause challenge).

248. *See Agostini*, 521 U.S. at 237.

249. Michael W. McConnell, *State Action and the Supreme Court’s Emerging Consensus on the Line between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681, 689 (2001).

250. Thomas C. Berg, *Race Relations and Modern Church-State Relations*, 43 B.C. L. REV. 1009, 1023 n.95 (2002).

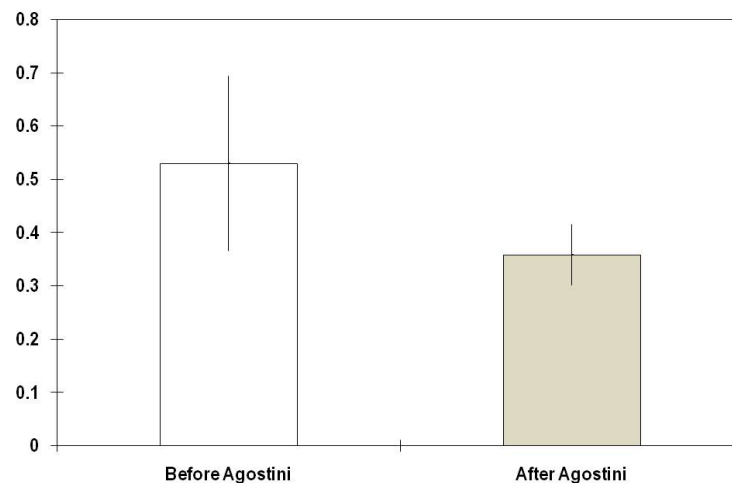
251. PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* xv n.22 (2011).

252. We also included a precedent variable for the Supreme Court’s 2002 decision in *Zelman v. Simmons-Harris*, 536 U.S. 639, 648, 653 (2002), which upheld as “neutral” a school voucher program that allowed poor children in failing public schools to choose educational alternatives including private religious schools. The *Zelman* precedent variable did not approach statistical significance. We postulate that, while *Zelman* may have been the culmination of the Court’s shift to a neutrality approach for government aid in Establishment Clause cases, the doctrinal heavy lifting had already been accomplished in *Agostini*. Thus, the lower court judges may have already readjusted their responses to Establishment Clause claims and did not need to significantly recalibrate those responses after *Zelman*.

Common Space Scores as the ideology proxy, the *Agostini* variable slips out of significance but barely so (to slightly above the .06 level) as not to undermine the salience of this finding.

Holding all other independent variables constant in our Party of Appointing President model, our best estimate is that the success rate for Establishment Clause claimants fell from 53.0%<sup>253</sup> to 35.8%<sup>254</sup> with the intervention of the Supreme Court’s *Agostini* precedent. However, we acknowledge that there is greater uncertainty about the magnitude of the size effect for the *Agostini* variable, given that the 95% confidence intervals for the two predictions do overlap.<sup>255</sup>

FIGURE 7.  
PREDICTED PROBABILITY OF SUCCESS FOR ESTABLISHMENT CLAUSE CLAIMS,  
BEFORE AND AFTER *AGOSTINI V. FELTON* (1996–2005)



253. The 95% confidence interval for predicted success rate before *Agostini* ranges from 36.6% to 69.4%. On 95% confidence intervals, see *supra* notes 56–58 and accompanying text.

254. The 95% confidence interval for predicted success rate after *Agostini* ranges from 30.1% to 41.5%.

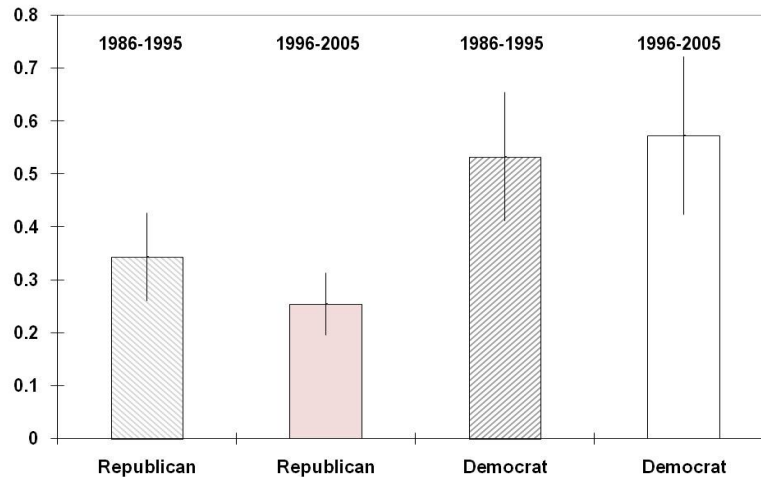
255. Contrary to the conventional wisdom, even among many statisticians, the overlap of the 95 percent confidence intervals for the predicted probabilities of success before and after *Agostini* does not mean that the *Agostini* variable lacks a statistically significant correlation at the .05 level with the outcome dependent variable in our Party-of-Appointing-President model. Even with the confidence intervals overlapping, the probability is well below 5 percent that the actual predicted success value before *Agostini* lies in the very lower bottom of that interval and, simultaneously, the actual predicted success value after *Agostini* lies in the very top of that interval. See Peter C. Austin & Janet E. Hux, *A Brief Note on Overlapping Confidence Intervals*, 36 J. VASCULAR SURGERY 194, 194 (2002); see also Epstein, Martin & Schneider, *supra* note 57, at 1815 n.12 (“[W]hile the confidence intervals for these two predictions overlap, there is still a statistically significant difference between the predictions.”).

Subject to that caution, our best estimate points to a substantial margin of 17 percent between the rates of favorable judicial response to Establishment Clause claims in the lower federal courts before and after the Supreme Court's decision in *Agostini*. That translates into nearly a one-third decline in the success rate for claimants. While a change in outcomes overall is hardly the only way to measure the impact of a new Supreme Court precedent, our findings do confirm that the Court's adjustment of doctrine has made a difference, even in a field of adjudication that has been notoriously difficult to manage.

Unfortunately, while *Agostini* may have flattened the overall success rate for Establishment Clause claims generally, that precedent has not (yet) muted the political influences on outcomes in the lower federal courts. Indeed, the period following the *Agostini* decision has witnessed a widening of the gulf between Republican-appointed and Democratic-appointed judges in response to Establishment Clause claims.

In Figure 8, we chart the predicted probability of a favorable ruling on an Establishment Clause claim by Party of Appointing President over two successive ten-year periods—the period of 1986–1995 (the subject of our prior study of religious liberty decisions) and the period of 1996–2005 (the subject of our present study). Because the two data sets employ somewhat different models (as we refined the variables for the most recent study period and included digested as well as published opinions), the comparisons are not exact. Moreover, we cannot readily combine the data so as to pivot the comparison precisely at the June 23, 1997 date of the *Agostini* decision, although we compare two equivalent ten-year time periods. For the 1986–1995 time period, all of the judicial observations of course predate *Agostini*, while for the 1996–2005 time period, 85.6 percent of the judicial observations postdate *Agostini*, thus allowing us to roughly capture trends before and after this landmark precedent.

FIGURE 8.  
 PREDICTED PROBABILITY OF POSITIVE VOTE BY JUDGE ON ESTABLISHMENT  
 CLAUSE CLAIM, BY PARTY OF APPOINTING PRESIDENT AND BY TIME PERIOD  
 (1986–1995 and 1996–2005)



As illustrated in Figure 8, when holding all other independent variables constant, the predicted probability of a positive ruling on Establishment Clause claims by Republican-appointed judges fell substantially between the two periods, from a rate of 34.4%<sup>256</sup> during the 1986–1995 period to a rate of only 25.4%<sup>257</sup> during the 1996–2005 period. But for Democratic-appointed judges, the predicted probability of a favorable ruling on an Establishment Clause claim actually increased from the pre-*Agostini* period to the primarily post-*Agostini* period, although only slightly from a rate of 53.3%<sup>258</sup> during the 1986–1995 period to a rate of 57.3%<sup>259</sup> during the 1996–2005 period.<sup>260</sup>

256. The 95% confidence interval for predicted success rate before a Republican-appointed judge in the 1986–1995 data set ranged from 26.0% to 42.7%. On 95% confidence intervals, see *supra* notes 56–58 and accompanying text.

257. The 95% confidence interval for predicted success rate before a Republican-appointed judge in the 1996–2005 data set ranged from 19.5% to 31.3%.

258. The 95% confidence interval for predicted success rate before a Democratic-appointed judge in the 1986–1995 data set ranged from 41.1% to 65.4%.

259. The 95% confidence interval for predicted success rate before a Democratic-appointed judge in the 1996–2005 data set ranged from 42.4% to 72.1%.

260. Nor has the political difference faded even in the particular context of education, in which the *Agostini* case arose. In a forthcoming article focused on religious liberty claims (under both the Free Exercise and Establishment Clauses) that arose in public or private elementary and secondary schools, we find that a Republican-appointed judge is predicted to vote in a pro-religion direction at a rate of 59.0%, while the probability for a Democratic-appointed judge is 30.1%—a difference of nearly two-fold. Heise & Sisk, *Religion, Schools, and Judicial Decisionmaking*, *supra* note 8.

The diverging margin in success rates for Establishment Clause claims before judges appointed by presidents of the two parties spread from 18.9% to 31.9% between these two periods. Between 1986 and 1995, an Establishment Clause claimant had about a one-and-a-half times greater likelihood of prevailing before a Democratic-appointed judge than before a Republican-appointed one. By 1996 to 2005, that higher likelihood of success before a Democratic-appointed as compared to a Republican-appointed judge had grown to two-and-a-quarter times.

In sum, the political gulf on Establishment Clause outcomes in the lower federal courts is growing, despite the intended clarifying effect of *Agostini*. Some might argue that the source of that expanding gap appears to be on the Republican side, where a more pronounced drop in favorable responses to such claims has emerged between the two studied time periods, while the response of Democratic-appointed judges has remained more stable during these two time periods. But that interpretation fails to account for the expectation that Establishment Clause-claim success rates in the lower federal courts presumably should be falling in light of developments in Supreme Court Establishment Clause precedent, while Democratic-appointed judges instead have been moving in the opposite direction. On the one hand, perhaps judges appointed to the federal bench by more recent Republican presidents, such as President George W. Bush (see Figure 6), may have increasingly favorable attitudes toward religion in public life. On the other hand, perhaps Republican appointees have been more faithful in following the Supreme Court's change in course on Church and State matters, reflected in cases such as *Agostini*, while Democratic appointees have been reluctant to follow suit and confer greater deference to the political branches on the propriety and form of public acknowledgment of or interaction with religion (see Figure 7). Most likely, the answer lies somewhere in between. In any event, the Supreme Court's Establishment Clause doctrine continues to afford ample room for political judging.

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If, as Professor Frederick Schauer writes, “values [that] often go by the name of the Rule of Law” include “predictability of result, uniformity of treatment (treating like cases alike), and fear of granting unfettered discretion to individual decision-makers even if they happen to be wearing black robes,”<sup>261</sup> then Establishment Clause jurisprudence does not advance the rule of law. To defend the rule of law and insist that the Supreme Court develop doctrine in a manner that sets meaningful, and meaningfully *legal*, guideposts for future decisions, one need not subscribe to what Brian Leiter

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261. FREDERICK SCHAUER, *THINKING LIKE A LAWYER* 35 (2009). *But see id.* at 195 (“[S]ome Rule of Law values are served by precise, predictable, and understandable rules, [while] others are served by relatively open-ended standards that will allow judges and other official decision-makers the discretion to do justice in the individual case.”).

rightly characterizes as “Vulgar Formalism,”<sup>262</sup> or what Professors Frank Cross and Blake Nelson similarly describe as the “naïve legal model.”<sup>263</sup>

By any account of a legal model—vulgar, naïve, sophisticated, or refined—the Supreme Court’s collective approach to Establishment Clause cases fails to satisfy. By neglecting to provide sufficient direction to the lower federal courts, either by prescription of objective rules or articulation of legal standards that can be weighed and applied other than by political metrics, the Supreme Court’s Establishment Clause jurisprudence adds up to a case of judicial malpractice.

#### CONCLUSION

For legal scholars such as ourselves who adhere to impartiality in judging as an aspirational ideal and view the rule of law as demanding something more than political policy choices made by lawyers in robes, the ineluctable conclusion that the outcomes of Establishment Clause cases in federal court are determined more by ideology than any other factor might be seen as a cause for despair. As long-time observers of the federal courts, we have maintained our confidence that federal judges sincerely and with substantial success strip themselves of political allegiances and ideological presuppositions and suffuse themselves in a legal environment.<sup>264</sup> Given the results of our study, our critics are likely to see our stubborn insistence on the possibility of law-based, nonpolitical judging, even in the face of such powerful empirical evidence, as wishful thinking or further proof of our naïveté.

We acknowledge that law is not perfectly determinate in every case, that judicial discretion is inevitable and even healthy in appropriate circumstances and when encircled by legal boundaries, and that judges are human beings who bring their life experiences and general perspectives to the task. At the same time, we agree with Professor Brian Tamanaha that “excessive skepticism about judging” itself becomes deleterious:

No one thinks that law is autonomous and judging is mechanical deduction, and rare is the informed jurist who thinks that judges are engaged in the single-minded pursuit of their personal preferences . . . . There is a vast

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262. Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue?*, 16 *LEGAL THEORY* 111, 111 (2010) (internal quotation marks omitted) (describing “Vulgar Formalism” as the “idea that judicial decision-making involves nothing more than mechanical deduction on the model of the syllogism” (internal quotation marks omitted)).

263. Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 *NW. U. L. REV.* 1437, 1437 (2001) (internal quotation marks omitted); cf. Edwards & Livermore, *supra* note 159, at 1916 (“Deciding cases according to law and precedent, rather than personal political or ideological predilections, does not require judges to embrace the simpler and less defensible view that law absolutely dictates outcomes.”).

264. See BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 118–19 (2010) (“For legally oriented judges, the law is not chains or ropes they are trying to wriggle out of but rather guideposts they are actively searching for and following to reach their destination.”).

difference in operation and consequences between a system that instructs judges to “Decide what you think right” and one that instructs judges to “Decide in accordance with the law.” There is a vast difference between individual judges who decide cases in terms of the outcome they prefer, manipulating the legal rules to justify that outcome, and judges who strive to produce the legally correct decision.<sup>265</sup>

Viewed across the larger landscape of judging in the lower federal courts, the empirical evidence does not direct a verdict that ideology has supplanted the legal model. Studies that explore large numbers of cases in a diverse array of subject-matter fields have not found that “any extralegal factor—ideology, judicial background, strategic reaction to other institutions, the nature of litigants, or the makeup of appellate panels—explains more than a very small part of the variation in outcomes.”<sup>266</sup> As Professor Frank Cross summed up from his comprehensive study of federal appellate judges, while ideology does sometimes correlate with judicial behavior, “the measured effect size for ideology is always a fairly small one.”<sup>267</sup>

Even in our present study, which involves a politically sensitive and publicly prominent field of constitutional law, party and ideology are not perfect predictors of outcomes in Establishment Clause cases in the lower federal courts.<sup>268</sup> We stand by our previous summation: “The growing body of empirical research on the lower federal courts . . . reveals that ideology explains only a relatively modest part of judicial behavior and emerges on the margins in controversial and ideologically contested cases.”<sup>269</sup>

None of this should distract our attention from the glaring partisan dichotomy that has emerged in Establishment Clause cases decided in the lower federal courts. Indeed, as Tamanaha rightly admonishes, it is prudent not to exaggerate the political nature of judging precisely so that we can “sound a genuine alarm when judges truly are deciding in a highly political fashion.”<sup>270</sup>

Unfortunately, in its Establishment Clause rulings, the Supreme Court has failed to clearly define its reasoning in majority opinions, revealed a

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265. *Id.* at 197.

266. Sisk, *supra* note 156, at 877; *see also* CROSS, *supra* note 24, at 9, 28, 165–68, 228–29 (finding in a comprehensive study of federal appellate decision-making that ideology was a weaker influence than legal factors); Jason J. Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841, 856–57 (2006) (finding no significant ideological influence in a study of all nonunanimous cases decided by one federal circuit over a several-year period).

267. CROSS, *supra* note 24, at 38.

268. *Cf.* Stephen B. Burbank, *On the Study of Judicial Behaviors: Of Law, Politics, Science and Humility* 13–14 (Univ. of Pa. Law Sch., Public Law & Legal Theory Research Paper Series, Research Paper No. 09-11, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1393362](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1393362) (“The relationship between ‘law’ and ‘judicial politics’ may be obscured by the occasional failure of scholars to confine descriptions of their results, and their claims, to the judges, courts and cases in fact studied. . .”).

269. Sisk & Heise, *Judges and Ideology*, *supra* note 8, at 746.

270. TAMANAHA, *supra* note 264, at 152.

multiplicity of theoretical approaches in a multitude of opinions that do not coalesce into a single theme, fostered uncertainties about legitimate sources for discerning the governing legal rules, and frequently offered vague generalities rather than articulating clear standards for adjudication. In this way, the Supreme Court’s Establishment Clause jurisprudence invites even the most conscientious of judges to draw deeply on personal reactions to religious symbols and political attitudes about religious influence on public institutions or policies. Sadly, the Court’s Establishment Clause doctrine has become an attractive nuisance for political judging.



