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Does a Judge's Religion Influence Decision Making?

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Like many other Americans, judges can have deep-seated religious convictions. Although their religious beliefs certainly do not interfere with their job performance most of the time, judges' religion can occasionally become problematic. Witness, for example, the case of Alabama Supreme Court Chief Justice Roy Moore, who was removed from office in 2003 after he placed a 5,300-pound monument of the Ten Commandments in the rotunda of the state judicial building and refused to remove it despite being ordered to do so. He installed the monument "in order to remind all Alabama citizens of, among other things, his belief in the sovereignty of the Judeo-Christian God over both the state and the church."[1] Religion, and its relationship to judges' attitudes, also comes up in the judicial nomination and confirmation process. This is especially true with regard to the U.S. Supreme Court, which for many years had purported Catholic and Jewish seats.[2]

An emphasis on religion in choosing judges naturally presupposes the existence of a relationship between the particular religion that a judge practices and the judge's decisions.[3] For example, will Jewish judges be more lenient toward criminal defendants than Protestant judges? Will evangelical judges favor the death penalty? One might expect judges, as professionals deciding a large number of cases, to be able to ignore extralegal factors such as their religious beliefs, yet two aspects of judges' religion suggest that it is a significant concern and at least as likely to influence their decisions as jurors' decisions.[4] First, judges are solitary decision makers, so any influence of a judge's religion would not be diluted by countervailing religious (or nonreligious) influences as it would be for one juror among many.[5] Second, judges rule on matters of law as well as determining factual matters. This opens up a new arena for possible religious influence as the legal questions might themselves contain explicit or implicit religious elements (e.g., separation of church and state).

Most of the research that has been conducted on the relationship between judges' religion and their decisions focuses on appellate judges.[6] There is a growing consensus that appellate judges' attitudes and beliefs are important predictors of their decisions.[7] This *attitudinal* model holds that an appellate court, such as the U.S. Supreme Court, "decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices."[8] The attitudinal model is closely related to the *social background* and *extralegal* models of judicial decision making, which encompass a wide variety of demographic and experiential variables, such as religion.[9] Religion is undoubtedly one important factor—albeit only one of many social back-

Footnotes

1. *Glassroth v. Moore*, 335 F.3d 1282, 1284 (11th Cir. 2003).
2. *See, e.g.*, THOMAS KARFUNKEL & THOMAS.W. RYLEY, THE JEWISH SEAT: ANTI-SEMITISM AND THE APPOINTMENT OF JEWS TO THE SUPREME COURT (1978); BARBARA A. PERRY, A "REPRESENTATIVE" SUPREME COURT? THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS (1991); JENNIFER M. LOWE, THE JEWISH JUSTICES OF THE SUPREME COURT REVISITED: BRANDEIS TO FORTAS (1994). There are currently six Catholics (Roberts, Alito, Kennedy, Scalia, Sotomayor, and Thomas), three Jews (Ginsburg, Breyer, and Kagan), and zero Protestants, so religious quotas on the Court appear to be a thing of the past. However, some observers perceived President George W. Bush's nomination of Harriet Miers as an attempt to establish an evangelical seat on the Court. Noam Scheiber, *Merit Scholars*, 233(16) NEW REPUBLIC 6 (2005, Oct. 17).
3. *See, generally*, BRIAN H. BORNSTEIN & MONICA K. MILLER, GOD IN THE COURTROOM: RELIGION'S ROLE AT TRIAL (2009), Ch. 6. The present article is an abbreviated summary of work contained therein.
4. On religion's role in juror decision making, see BORNSTEIN & MILLER, *supra* note 3, Ch. 3-5.
5. This is obviously less true for appellate judges, who decide cases as a group. Although judicial conferences might resemble jury deliberations in some respects, individual judges are nonetheless considerably more autonomous than individual jurors (e.g., each judge can write his or her own opinion).
6. For a discussion of the relationship between trial court judges' religion and their decision making, *see* BORNSTEIN & MILLER, *supra* note 3 at 98; GLEN SCHUBERT, JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH (1964).
7. *See, generally,* Anthony Champagne & Stuart S. Nagel, *The Psychology of Judging,* in THE PSYCHOLOGY OF THE COURTROOM (N.L. Kerr & R.M. Bray eds., 1982); Edie Greene & Lawrence S. Wrightsman, *Decision Making by Juries and Judges: International Perspectives,* in HANDBOOK OF PSYCHOLOGY IN LEGAL CONTEXTS (D. Carson & R. Bull eds., 2003); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993; revised and published in 2002 as THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED).
8. Segal & Spaeth, *supra* note 7 at 65. Segal and Spaeth contrast the attitudinal model with the *legal model* of judicial decision making, whereby the court decides disputes "in light of the facts of the case vis-à-vis precedent, the plain meaning of the Constitution and statutes, the intent of the framers, and a balancing of societal versus constitutional interests." *Id.* at 64.
9. *E.g.*, C. Neal Tate, *Personal Attribute Models of the Voting Behavior of United States Supreme Court Justices: Liberalism in Civil Liberty and Economic Decisions, 1946–1978,* 75 AMER. POL. SCI. REV. 355 (1981); S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947-1956 Terms,* 17 AMER. J. POL. SCI. 622 (1973); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making,* 86 AMER. POL. SCI. REV. 323 (1992); Melinda G. Hall & Paul Brace, *Toward*

ground characteristics—influencing judges' attitudes, values, personalities, and ideologies.[10] The most obvious examples are probably the Catholic Church's stances on abortion and the death penalty, but religion doubtlessly influences case-relevant attitudes in more subtle ways as well.[11]

EMPIRICAL FINDINGS

Several quantitative analyses of appellate court decisions—including, but not limited to, the U.S. Supreme Court—provide support for the attitudinal model in general.[12] Attitudes are important not only in determining the disposition of cases, but also in the selection of cases (i.e., granting of certiorari) and assignment of majority-opinion writing duties.[13] Attitudes are especially likely to matter in certain types of cases or ones in which the appellate court is closely divided.[14] For example, Wrightsman found that ideology (i.e., liberalism vs. conservatism) predicted Supreme Court justices' votes better in cases involving criminal defendants' or prisoners' rights than in other kinds of cases.[15]

Not all of these studies included judges' religion as a social background variable, but several have. Nagel conducted a study of judicial decisions as a function of judges' religion (among other social background variables), using as a sample 313 judges of state and federal supreme courts for the year 1955.[16] There were too few Jewish judges in the sample for comparison purposes, so the comparison was limited to Protestant (mostly Methodist, Presbyterian, Episcopalian, and Baptist) versus Catholic judges. He found that Catholic judges were significantly more likely than Protestant judges to show a liberal voting pattern in nonunanimous cases for 4 (of 15 total) types of cases: those involving criminal matters, business regulation, divorce settlement, and employee injury.[17] Protestant judges were more liberal in none of the case types.

Goldman likewise compared Catholic and Protestant appellate judges, using as a database all nonunanimous decisions by U.S. Courts of Appeals from 1965 through 1971.[18] He categorized the legal issues somewhat differently from Nagel, but the results were generally consistent: Catholic judges were more liberal in certain types of cases, in the sense of being more likely to side with injured persons and to vote for the economic underdog. Protestant judges were never more liberal, and religion exerted no influence in a number of types of cases. Again, there were too few Jewish judges to include in the statistical analyses, but their median scores were more liberal than both Catholics and Protestants for virtually all kinds of cases.

Other studies have focused on a narrower spectrum of cases. For example, Pinello analyzed all published appellate court decisions (state and federal; N = 468) from 1981-2000 that dealt with issues falling under the rubric of "gay rights."[19] The findings varied somewhat depending on the legal issue and type of court (e.g., intermediate appellate court vs. court of last resort), but overall, Jewish judges were relatively liberal compared to Protestant judges, whereas Catholic judges were relatively conservative in dealing with these issues.

Songer and Tabrizi examined the votes of state supreme court justices on three issues—death penalty, gender discrimination, and obscenity—from 1970 to 1993.[20] They classified judges as Evangelical Christian, mainline Protestant, Catholic, or Jewish. Even after controlling for a number of other variables (e.g., party affiliation, prosecutorial experience), judges'

an Integrated Model of Judicial Voting Behavior, 20 AMER. POL. Q., 147 (1992).

10. *See* Champagne & Nagel, *supra* note 7; Stephen M. Feldman, *Empiricism, Religion, and Judicial Decision-making,* 15 WM. & MARY BILL RTS. J. 43 (2006); Raul A. Gonzalez, *Climbing the Ladder of Success: My Spiritual Journal, 27* TEX. TECH L. REV. 1139 (1996); KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995); Ulmer, "Social Background," *supra* note 9. There are several difficulties with attempting to use judges' religious identification as a predictor of their decisions. *See* Tracey E. George, *Court Fixing,* 43 ARIZ. L. REV. 9 (2001). For example, adherents of any religion vary widely in their degree of observance and particular beliefs, often going against their religion's official doctrine (e.g., many American Catholics' pro-choice stance on abortion), and religious groups' status and perspective change over time (e.g., the Catholic church's evolving stance on capital punishment).
11. Recent Catholic nominees for federal judgeships, including Supreme Court nominees, have been questioned about their position on issues where the Catholic Church has taken an official stance, such as abortion and capital punishment. *E.g.*, Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices,* 39 DEPAUL L. REV. 1047 (1990; reprinted in SANFORD LEVINSON, WRESTLING WITH DIVERSITY [2003]); Sanford Levinson, *Is It Possible to Have a Serious Discussion about Religious Commitment and Judicial Responsibilities?* 4 UNIV. ST. THOMAS L.J. 280 (2006). As a rule, they have been evasive and/or relied on legal precedent in responding, refusing to allow their personal beliefs to become part of the process.
12. *E.g.*, GLEN SCHUBERT, THE JUDICIAL MIND REVISITED: PSYCHOMETRIC ANALYSIS OF SUPREME COURT IDEOLOGY (1974); Segal & Spaeth, *supra* note 7; Lawrence S. Wrightsman, *The Psychology of the Supreme Court* (2006).
13. SEGAL & SPAETH, *supra* note 7.
14. WRIGHTSMAN, *supra* note 12.
15. WRIGHTSMAN, *supra* note 12.
16. Stuart S. Nagel, "The Relationship Between the Political and Ethnic Affiliation of Judges, and Their Decision-making," in JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH (G. Schubert ed., 1964); *see also* STUART S. NAGEL, THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE (1969).
17. "More liberal" was defined as voting for the criminal defendant, the administrative agency, the wife, and the employee, respectively.
18. Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited,* 69 AMER. POL. SCI. REV. 491 (1975); *see also* Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961–1964,* 60 AMER. POL. SCI. REV. 374 (1966).
19. DANIEL.R. PINELLO, GAY RIGHTS AND AMERICAN LAW (2003). The cases covered lesbian/gay family matters (including same-sex marriage), sexual orientation discrimination, gays in the military, consensual sodomy and solicitation laws, and free speech/association of gays and lesbians.
20. Donald R. Songer, & Susan J. Tabrizi, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts,* 61 J. POL. 507 (1999).

religion was strongly associated with their voting behavior. Evangelical judges were significantly more conservative than judges from other religious backgrounds in all three types of cases—that is, they more often voted to uphold the death penalty, maintain the gender gap, and restrict free speech in obscenity cases. Jewish judges were consistently the most liberal; mainline Protestant judges were liberal on the death penalty and obscenity, but less so on gender discrimination (though they were still more liberal than evangelical judges). Of the various groups, Catholic judges' behavior varied the most depending on the issue: They were liberal on gender discrimination, in the middle on the death penalty, and nearly as conservative as the evangelical judges on obscenity. Thus, there are differences among Protestant Christian faiths as well as between the major religious classifications.[21] This finding makes sense in light of the wide diversity of beliefs among different Protestant denominations.

The U.S. Supreme Court receives special scrutiny in many respects, and the relationship between judges' personal attributes and their decisions is no exception. At a superficial level, there seems to be little evidence that Supreme Court justices' religion is directly associated with their decisions. Catholic justices have ranged from very conservative (e.g., Butler, Scalia, Thomas, Alito) to very liberal (e.g., Murphy, Brennan), and Perry maintains that "Catholics on the Court have exhibited an exaggerated degree of religious impartiality."[22] For example, Frank Murphy, perhaps the most devout of the 19th and early 20th century Catholic justices, upheld the doctrine of church-state separation even when it went against Church doctrine.[23]

However, empirical studies that have focused on specific issues suggest the existence of a relationship between judges' religion and case outcomes. For example, Ulmer analyzed the voting behavior of the 14 justices who sat on the U.S. Supreme Court from 1947-1956.[24] He found that non-Protestant justices were less likely than Protestant justices to support the government (means of 28% and 48%, respectively).[25] This pattern of findings has been replicated cross-nationally.[26] Catholic U.S. Supreme Court justices differ from their Protestant brethren in some procedural respects as well as on substantive matters in that Catholic justices are more likely to write dissenting opinions.[27]

RECOMMENDED READING

BRIAN H. BORNSTEIN & MONICA K. MILLER, GOD IN THE COURTROOM: RELIGION'S ROLE AT TRIAL (2009).

Edie Greene & Lawrence S. Wrightsman, *Decision Making by Juries and Judges: International Perspectives*, in HANDBOOK OF PSYCHOLOGY IN LEGAL CONTEXTS (D. Carson & R. Bull eds. 2003).

BARBARA A. PERRY, A "REPRESENTATIVE" SUPREME COURT? THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS (1991).

JUDGES' RELIGION AND RELIGIOUS-FREEDOM CASES

The empirical studies described above suggest that judges' religion matters in some types of cases but not others. One might reasonably expect it to matter most in cases that are directly concerned with religion, such as those that deal with the religious-liberties clauses of the First Amendment (i.e., Free Exercise and Establishment). Several studies of judicial decisions in religious-liberties cases have addressed, among other factors, the role played by a judge's own religion.

In what is perhaps the earliest such study, Sorauf analyzed 67 church-state separation cases decided by high appellate courts (both state and federal) from 1951-1971.[28] Sorauf found that judges' religion was strongly associated with their behavior in these cases: "Nothing explains the behavior of the judges in these church-state cases as frequently as do their own personal religious histories and affiliations. Jewish judges vote heavily separationist, Catholics vote heavily accommodationist, and Protestants divide."[29] The pattern was strongest in nonunanimous appellate cases, where Jewish judges voted for separation 82.4% of the time, compared to 56.1% for conservative Protestants (e.g., Baptist, Methodist), 48.7% for liberal Protestants (e.g., Episcopalians, Presbyterians), and 15.6% for Catholics; but the trend was present in unanimous appellate cases and for trial court judges as well.

Yarnold examined all cases in the federal circuit courts from 1970-1990 that concerned religious liberties (N = 1,356).[30] Judges represented a wide range of religions, including

21. By "major religious classifications," we mean the most common taxonomy of Catholic, Protestant, and Jewish. It would be interesting to see where judges from non-Judeo-Christian religions, such as Islam, fall on the spectrum, but no sample to date has included enough such judges for analysis.
22. PERRY, *supra* note 2 at 46.
23. Thomas C. Berg & William G. Ross, *Some Religiously Devout Justices: Historical Notes and Comments,*" 81 MARQ. L. REV. 383 (1998); Harold W. Chase et al., *Catholics on the Court,* Sept. 26 NEW REPUBLIC 13 (1960); JAMES HITCHCOCK, THE SUPREME COURT AND RELIGION IN AMERICAN LIFE (2004).
24. Ulmer, "Social Background," *supra* note 9.
25. Although this result supports the social background model, it should be noted that the sample was relatively small (14 justices), and only 3 of the justices were non-Protestant. Two were Catholic (Murphy and Brennan), and one was Jewish (Frankfurter). In their analysis of Supreme Court voting behavior in civil-rights and economics cases over a longer time period (1916-1988), Tate and Handberg found no difference between Protestant and non-Protestant justices. C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-88,* 35 AMER. J. POL. SCI. 460 (1991).
26. Catholic justices on the Canadian Supreme Court were more liberal than non-Catholic justices in both civil-rights and economics cases. C. Neal Tate & Panu Sittiwong, *Decision Making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations,* 51 J. POL. 900 (1989).
27. S. Sidney Ulmer, *Dissent Behavior and the Social Background of Supreme Court Justices,* 32 J. POL. 580 (1970). The behavior of some of the current Catholic justices, such as Thomas and Scalia, would appear to continue this tradition.
28. FRANK J. SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE (1976).
29. *Id.* at 220.
30. Barbara.M. Yarnold, *Did Circuit Courts of Appeals Judges Overcome Their Own Religions in Cases Involving Religious Liberties? 1970-1990,* 42 REV. RELIGIOUS RES. 79 (2000).

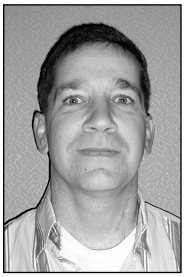
Catholicism, Judaism, and a number of Protestant denominations. The dependent variable was whether the decision was beneficial to religion, in the sense of promoting litigants'—regardless of which side they were on—ability to practice their faith. Yarnold found that, except for Lutherans, all judges (including the nonreligious ones) generally adopted a pro-religion position.[31] However, Catholic and Baptist judges were significantly more likely than other groups to rule in a pro-religion fashion.

Sisk and colleagues partially confirmed these findings in a similar, more recent study that examined all published decisions (N = 729) in religious-liberties cases in the federal courts (district courts and Courts of Appeals) from 1986-1995.[32] They categorized judges as Catholic, mainline Protestant (e.g., Presbyterian, Episcopalian, Methodist), Baptist, Other Christian, Jewish, Other, or having no religious affiliation.[33] In addition to coding judges' religion, they also coded claimants' religion and the religious demographics of the community where the judge maintained chambers (specifically, the Catholic and Jewish percentages in the community, the total adherence rate to any religious group, and a score for the community's religious homogeneity).

They concluded that "the single most prominent, salient, and consistent influence on judicial decision making was religion—religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community."[34] Specifically, Jewish judges and judges from "non-mainstream" Christian denominations (i.e., neither Catholic nor mainline Protestant) were significantly more likely to approve of accommodation requests in free-exercise cases. Jewish judges were also significantly more likely to uphold claims challenging governmental acknowledgment of religion under the Establishment Clause, even when controlling for variables such as party affiliation and ideology.[35] The behavior of Catholic judges was less straightforward. Catholic judges differed from mainline Protestant judges but only in cases raising certain kinds of issues, such as school-accommodation cases (where they were more receptive) and cases challenging government aid to parochial schools (where they were less receptive). With respect to the community variables, Sisk and colleagues found that judges living in more religious communities were more liberal, in the sense of voting for claimants in both free-exercise and establishment cases (i.e., supporting accommodation in the former and separation in the latter).[36] Judges were also more liberal as the percentage of Jews in their community increased.[37]

CONCLUSION

Judging is often portrayed as a dispassionate exercise based on facts and legal precedent; but empirical scholarship on judges shows that psychological, attitudinal, and background factors play a part in the process as well. On the whole, there appear to be systematic differences in judges' decision making as a function of their religion. Jewish judges, on average, are consistently more liberal, arguably because of their stronger identification with the downtrodden and disenfranchised, owing to their own outsider status.[38] Catholic judges' liberalism varies more as a function of the individual (compare, e.g., Brennan vs. Scalia) and the issue, with Catholic judges being more liberal than non-Catholics on some issues but more conservative on others. One explanation of this pattern is that the Catholic Church has taken an explicit position on many social policy issues, to which the majority of pious Catholics adhere. Yet there is no "official Jewish position" on these same issues, freeing Jewish judges to side with the underdog across a range of different types of cases. Evangelical judges are relatively conservative. Mainline Protestants, who serve as the reference group in the majority of studies, are harder to characterize, which is not surprising given the high diversity of denominations and beliefs in such a broad classification. The pattern of findings characterizes both cases where religion is explicitly at issue, as in religious-freedom cases, and cases where religion is totally irrelevant. Thus, religion is yet another factor to consider in trying to understand and predict judges' decisions.



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31. Lutheran judges' tendency to take an anti-religion position in deciding these cases was not statistically significant.
32. Gregory C. Sisk et al., *Searching for the Soul of Judicial Decision Making: An Empirical Study of Religious Freedom Decisions,* 65 OHIO ST. L. J. 491 (2004).
33. Most "other Christians" simply identified themselves as Protestant, whereas "other" religions included Unitarians and Mormons.
34. Sisk et al., *supra* note 32 at 614.
35. *Id.* at 582.
36. *Id.* at 585-91.
37. *Id.* at 590.
38. *See, e.g.*, Ruth B. Ginsburg, *Introduction,* in THE JEWISH JUSTICES OF THE SUPREME COURT REVISITED: BRANDEIS TO FORTAS