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## Law and Religion in U.S. Legal Scholarship: An Empirical Examination, 2008–2012

*James Cleith Phillips\**

### INTRODUCTION

A study of trends in legal scholarship has two benefits. First, it is a window into the soul of law professors, students, and legal practitioners. What legal scholars of all stripes choose to write on, and the positions they take, provide solid evidence of their priorities and values. Second, legal scholarship has an impact on the real world. Law journal articles are cited by judges in decisions,<sup>1</sup> are used to formulate policy in Washington, D.C. and in state capitols, and sometimes seep into the consciousness (and vocabulary) of the average American.<sup>2</sup> And what legal scholars write about finds its way into the classroom, influencing the next generation of lawyers, policymakers, and judges.

To date, no empirical study has ever systematically analyzed how legal scholars are treating religion.<sup>3</sup> This is odd, given this nation's

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1. Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court's Use of Legal Scholarship*, 106 NW. U. L. REV. 995 (2012); Daniel L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345 (2011). For an opposing view that legal scholarship is increasingly irrelevant, see Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) and Richard A. Posner, *Law, Knowledge, and The Academy: Legal Scholarship Today*, 115 HARV. L. REV. 1314 (2002).

2. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1993).

3. Much of the recent legal scholarship analyzing how legal scholars are treating religion has focused on its increasingly empirical orientation rather than its substantive focus. See Shari Seidman Diamon & Pam Mueller, *Empirical Legal Scholarship in Law Reviews*, 6 ANN. REV. LAW SOC. SCI. 581 (2010); Tom Ginsburg & Thomas J. Miles, *Empiricism and the Rising Incidence of Coauthorship in Law*, 2011 U. ILL. L. REV. 1785 (2011).

traditionally strong religious orientation<sup>4</sup> and the fact that currently, four out of every five Americans view religion as “somewhat important” to “very important” in their lives.<sup>5</sup> This study seeks to examine articles that address issues pertaining to law and religion published in law journals in the United States over a recent five-year period.<sup>6</sup> A Westlaw search initially identified 2,830 articles.<sup>7</sup> I narrowed the results to include only articles that primarily or substantively focused on the legal aspects of religion, resulting in a total of 1,383 articles.<sup>8</sup> While an average of 277 articles per year may seem like a substantial number, given that in 2012 there were almost 1,000 law journals in the United States, each publishing from a half

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4. Often considered the most perceptive observer of the United States during the early Republic, Alexis de Toqueville noted:

[I]n America, one of the freest and most enlightened nations in the world, the people fulfill with fervor all the outward duties of religion. On my arrival in the United States the religious aspect of the country was the first thing that struck my attention; and the longer I stayed there, the more I perceived the great political consequences resulting from this new state of things. In France I had almost always seen the spirit of religion and the spirit of freedom marching in opposite directions. But in America I found they were intimately united and that they reigned in common over the same country.

ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 394 (Francis Bowen ed., Henry Reeve trans., vol. I, 4th ed., Cambridge, 1864).

Alexis de Toqueville also noted that “[i]n America religion is perhaps less powerful than it has been at certain periods and among certain nations; but its influence is more lasting.” *Id.* at 399. Furthermore, “[i]n the United States the influence of religion is not confined to the manners, but it extends to the intelligence of the people.” *Id.* at 389.

5. PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY: RELIGIOUS BELIEFS AND PRACTICES, 23 (JUNE 2008), <http://religions.pewforum.org/pdf/report2-religious-landscape-study-full.pdf> [hereinafter PEW].

6. Thus, articles published by foreign law journals were not analyzed, nor were articles dealing with religion but not the intersection of civil law and religion (one would think such an intersection would always occur given that the articles were published in law journals, but occasionally that was not the case). Hence, for example, articles on religious law within a faith were not coded if there was not a tie to the civil law.

7. The search was performed in Westlaw’s JLR database, with the following search terms: ATLEAST3("RELIGIOUS LIBERT!") ATLEAST3("RELIGIOUS FREEDOM") ATLEAST3("FREEDOM OF RELIGION") ATLEAST3("FREE EXERCISE") ATLEAST3("CHURCH AND STATE") ATLEAST3("ESTABLISHMENT CLAUSE") ATLEAST3("ESTABLISHMENT OF RELIGION") ATLEAST3("RELIGIOUS ESTABLISHMENT") & da(aft 2007 & bef 2013).

8. Transcripts of panel discussions were not coded given the multitude of speakers and viewpoints; neither were short case notes or book reviews that were merely descriptive in nature.

dozen to five dozen articles, notes, and essays annually, 277 articles per year is a drop in the ocean of legal scholarship. It is unclear how this number of law journal articles focused on law and religion stacks up to articles about other weighty legal issues particularly areas of the law with two clauses of the Constitution devoted to them.<sup>9</sup>

In short, while only covering five years, this study finds that when portraying religion in a positive light, as compared to a problematic, ambivalent, or neutral portrait, articles are published in less prestigious journals. Similarly, articles end up in lower-ranked law journals when they call for accommodating, protecting, or strengthening religious freedom, or loosening restriction on the separation of church and state, compared to articles arguing for the opposite. Additionally, articles dealing with Native American religions or Islam are more likely to portray religion positively when compared to articles dealing with Catholicism or religion in general. Furthermore, professors are the most likely to treat religion neutrally or ambivalently, practitioners are the most likely to treat religion positively, and students are the most likely to treat religion as problematic. Since today's law journal article can become tomorrow's law, these findings may provide an insight into the future treatment of religion in the American legal system.

The Article will proceed as follows. Part I will provide the results, looking at articles in the two areas of religious legal scholarship—free exercise and the separation of church and state—as well as looking at types of law schools and legal scholars. Part II will provide caveats, with Part III discussing possible areas of exploration in future research. The Article then concludes.

## I. RESULTS

The 1,383 articles were coded based on how they portrayed religion: as something primarily positive, as something both positive and problematic (mixed) or neutral, or as something primarily problematic. Many of the articles focused on the clash of religious liberty claims and other rights, such as the following:

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9. U.S. CONST. amend. I. Not to mention the significance of the topic from society's perspective where majorities of the populace view religion as positive and important in their lives. *See infra* Graph 2.

- Pharmacists' religious liberty and women's reproductive rights;<sup>10</sup>
- Churches' attempts to expand their property or add onto existing buildings and cities' control of its land and zoning laws;<sup>11</sup>
- Exorcisms and torts brought against church members for harms suffered by the exorcism;<sup>12</sup>
- Polygamy and women's and children's rights;<sup>13</sup>
- Parents' religious liberty and children's need for medical treatment;<sup>14</sup>
- Religious business owners and sexual orientation anti-discrimination laws;<sup>15</sup>

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10. See, e.g., Jennifer E. Spreng, *Pharmacists and the Duty to Dispense Emergency Contraceptives*, 23 ISSUES IN L. & MED. 215 (2008); Catherine Grealis, Note, *Religion in the Pharmacy: A Balance Approach to Pharmacists' Rights to Refuse to Provide Plan B*, 97 GEO. L.J. 1715 (2009); Maria Teresa Weidner, Note, *Striking a Balance between Faith and Freedom: Military Conscientious Objection as a Model for Pharmacist Refusal*, 11 J. GENDER RACE & JUST. 369 (2008).

11. See, e.g., Shelby D. Green, *Zoning In and Out Churches: Limits on Municipal Zoning Powers by the Religious Land Use and Institutionalized Persons Act*, 37 REAL EST. L.J. 163 (2008); Mathew Baker, Comment, *RLUIPA and Eminent Domain: Probing the Boundaries of Religious Land Use Protection*, 2008 BYU L. REV. 1213; Samuel A. Green, Note, *The Intersection of Zoning Regulations, Religious House Meetings, and the Constitution*, 48 WASHBURN L.J. 133 (2008).

12. See, e.g., Shari-Ann Harris, Note, *Lay a Hand on Me, Brother: Why Definitional Balancing and Consent Doctrine Should Apply to the Religious False Imprisonment and Assault Claims in Pleasant Glade Assembly of God v. Schubert*, 11 RUTGERS J. L. & RELIGION 406 (2010).

13. See, e.g., Mark Strasser, *Marriage, Free Exercise, and the Constitution*, 26 LAW & INEQ. 59 (2008); Brittany Nilson, Note, *Yearning for Zion Ranch Raid: Lowering the Standard of Proof for the Termination of Parental Rights*, 75 BROOK. L. REV. 305 (2009).

14. See, e.g., Kyra R. Wagoner, Note, *Mandating the Gardasil Vaccine: A Constitutional Analysis*, 5 IND. HEALTH L. REV. 403 (2008).

15. See, e.g., Ashlie C. Warnick, *Accommodating Discrimination*, 77 U. CIN. L. REV. 119 (2008); Roy Whitehead, Jr., Walter Block & Patrick C. Tinsley, *Christian Landlords and the Free Exercise Clause: An Economic and Philosophical Analysis of Discrimination*, 33 OKLA. CITY U. L. REV. 115 (2008).

- Parents' religious liberty and the state interest in educating children;<sup>16</sup>
- Paying tithing and bankruptcy laws;<sup>17</sup>
- Churches' religious liberty and anti-discrimination laws in employment contexts.

If an article generally argued that religious liberty claims were violating some other right, the exercise of religion was creating some injury to others, or the intertwining of religion and the state was harmful or negative in some way, then the article was coded as viewing religion as problematic.<sup>18</sup> If the article generally argued that religious liberty was important, a fundamental freedom, created other goods, etc., it was coded as positive.<sup>19</sup> If both these views were relatively equally put forth by the author, or the author really did not take a position on religion, then the article was coded as mixed or neutral.<sup>20</sup> Graph 1 shows the overall percentages of articles that fell into each category.

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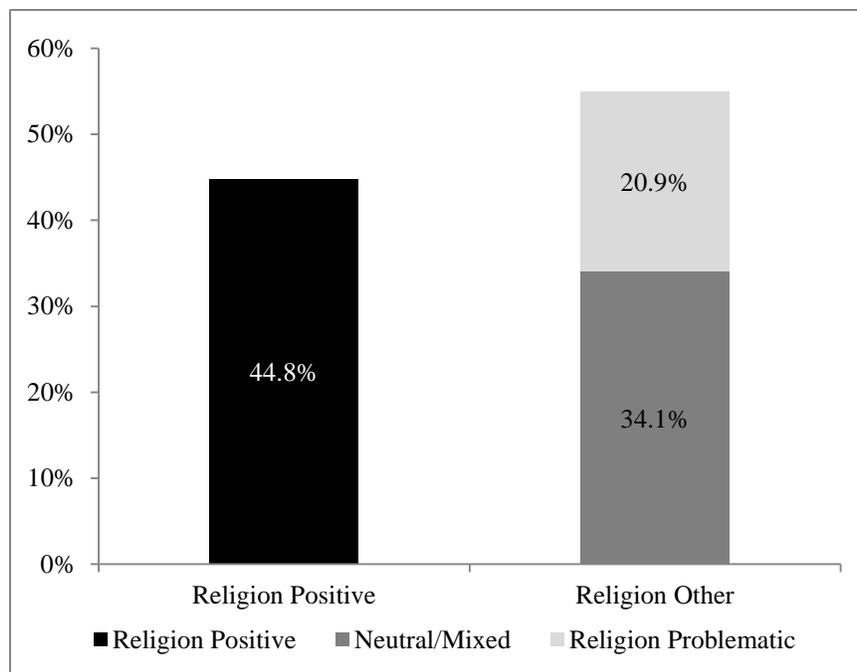
16. See, e.g., Risha K. Foulkes, *Abstinence-Only Education and Minority Teenagers: The Importance of Race in a Question of Constitutionality*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 3 (2008); Yuval Simchi-Levi, *Amending the Massachusetts Parental Notification Statute*, 14 CARDOZO J. L. & GENDER 759 (2008).

17. See, e.g., Lawrence A. Reicher, Comment, *Drafting Glitches in the Religious Liberty and Charitable Donation Projection Act of 1998: Amend Section 548(A)(2) of the Bankruptcy Code*, 24 EMORY BANKR. DEV. J. 159 (2008).

18. See, e.g., Amanda L. Allen, Comment, *A Plan C for Plan B: A Feminist Legal Response to the Ways in Which Behind-the-Counter Emergency Contraception Fails Women*, 11 N.Y. CITY L. REV. 401 (2008);

19. See, e.g., Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313 (2008); Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43 (2008).

20. See, e.g., Paul E. McGreal, *Social Capital in Constitutional Law: The Case of Religious Norm Enforcement through Prayer at Public Occasions*, 40 ARIZ. ST. L.J. 585 (2008); Steven Wilf, *The Ten Commandments Cases: A View from Within*, 40 CONN. L. REV. 1329 (2008).

*Graph 1. Treatment of Religion in American Legal Scholarship*

For a country historically known for its highly religious citizenry in comparison to other Western democracies, it is surprising to note that over half of the articles did not view religion as predominantly positive.<sup>21</sup> One in five articles in U.S. legal scholarship took a position that found religion to be problematic. This finding held relatively constant over the five years examined, indicating, at least for this small snapshot in time, no particular trend.<sup>22</sup>

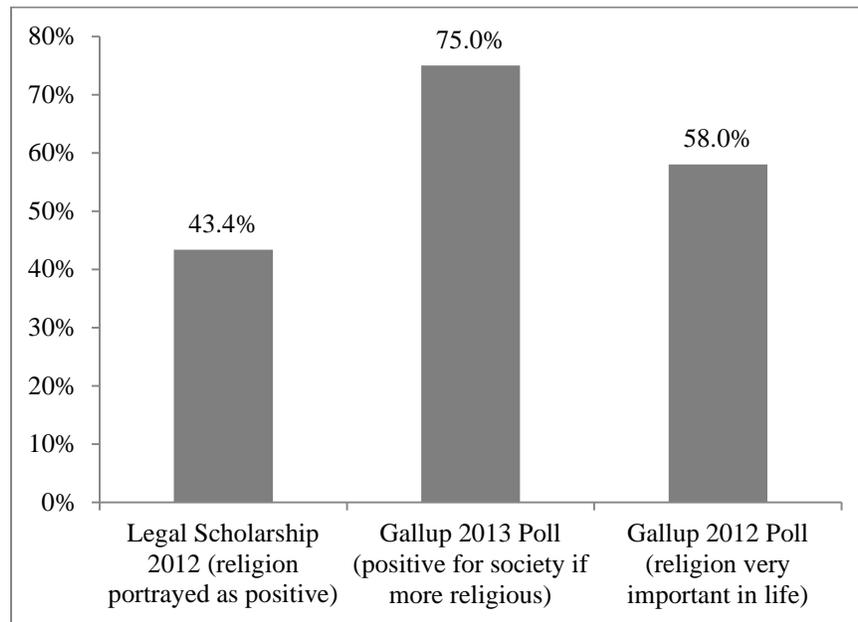
This trend of less than half of law journal articles portraying religion as something positive clashes with trends evident in polling

21. Of course, one could view the data more positively—only about one in five articles viewed religion in a problematic light.

22. In 2008, the percentage of articles coded positive was 45.9%, and the percentage in 2012 was 43.4%; in 2008, the percentage of articles coded neutral/mixed was 30.5%, while in 2012 it was 35.3%; and in 2008, the percentage of articles coded as viewing religion as problematic was 22.6%, while in 2012 it was 21.3%. Such movement across the categories is minimal and likely nothing more than statistical noise.

of the American public.<sup>23</sup> As can be seen in Graph 2, the general public views religion more positively and as more important than legal scholars discussing religion, to the degree that this study's findings on a narrower question can be compared to public opinion polls.

*Graph 2. Treatment of Religion in American Legal Scholarship versus American Public Opinion<sup>24</sup>*



23. Comparing the views of law professors, students, and practitioners with the general public may seem akin to an apples-to-oranges comparison since those associated with the law are a sub-group of the American population who systematically differ in their levels of education (which is specialized and relevant to the issue studied). Looking at differences between law students and other graduate professional students (business, medicine, etc.), law professors and other academics, and legal practitioners and other professionals with graduate training may show the impact of law school and legal professionalization on views toward religion, if one can get past the problem of self-selection effects. However, that is a different concern. The reality is that those in the legal profession (practitioners and academics), regardless of why they hold the views they do, have a significant impact on the development of law and policy toward religion in the United States.

24. *Religion*, GALLUP, <http://www.gallup.com/poll/1690/religion.aspx#1>; *Americans Say More Religion in U.S. Would be Positive*, GALLUP, June 3, 2013, <http://www.gallup.com/video/162860/americans-say-religion-positive.aspx>.

A clear gap emerges, though this comparison is made with two very strong caveats. First, law professors were not surveyed in the way that respondents were by Gallup. Thus, unlike a general question about how important religion is in one's life, this study looks at the treatment of religion, often when it is in conflict with something else. Had legal scholars been surveyed with just a general question that did not pit religion against other values, it is quite possible the percentage of responses would have been closer to Gallup's survey of the general public. However, as noted in footnote 23, law professors are not the most representative group of Americans. Also, in defense of this somewhat strained comparison, in legal scholarship one is generally expected to make some kind of argument or end with a normative position. So while not a perfect proxy, positions taken in legal scholarship provide somewhat of a view into the heart and mind of the authors. After all, they are free to write on whatever they want, taking any position they please.

Second, this study's findings ignore the opinions on religion of legal scholars who do not write on religion, as compared to the Gallup surveys that can be generalized to the population as a whole. Still, legal scholars tend to write on what is important to them, though it is unclear what views legal scholars who are not interested enough in religion to write about it would have on religion: they may be more ambivalent. However, legal scholars who write on religion are more likely to be those influencing students, the legal community, and the public at large through their views on the subject. After all, legal scholars who do not write about religion and thus are not legal experts on the topic are less likely to give lectures on the topic, teach courses on the subject, or express opinions in more broadly disseminated formats, such as interviews to the media, op-eds, blog posts, etc.<sup>25</sup>

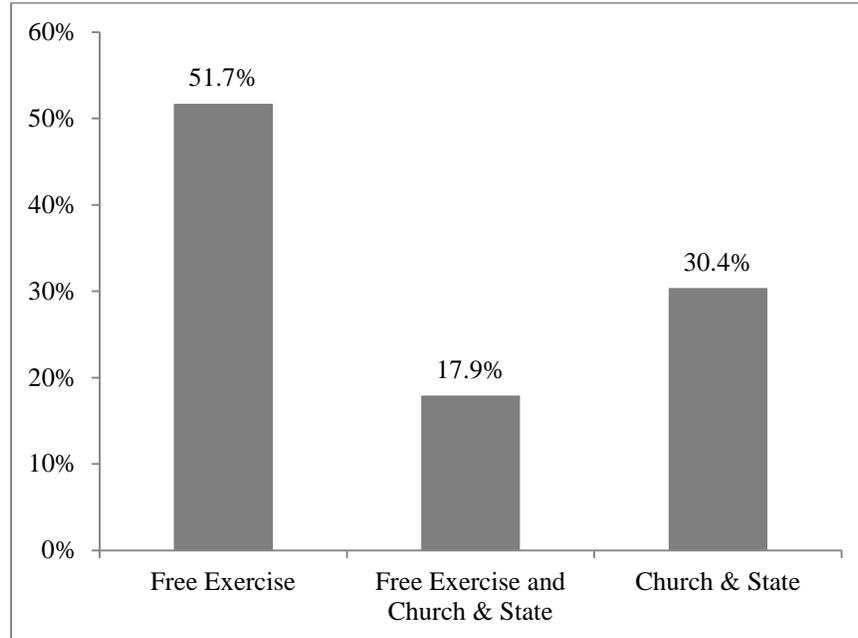
Religion and the law is a broad topic, and following the First Amendment's division of religion into two distinct clauses, legal scholarship on law and religion tends to fall into one of three categories: religious liberty, the separation of church and state, or a mixture of both. As can be seen in Graph 3, it is clear that the free

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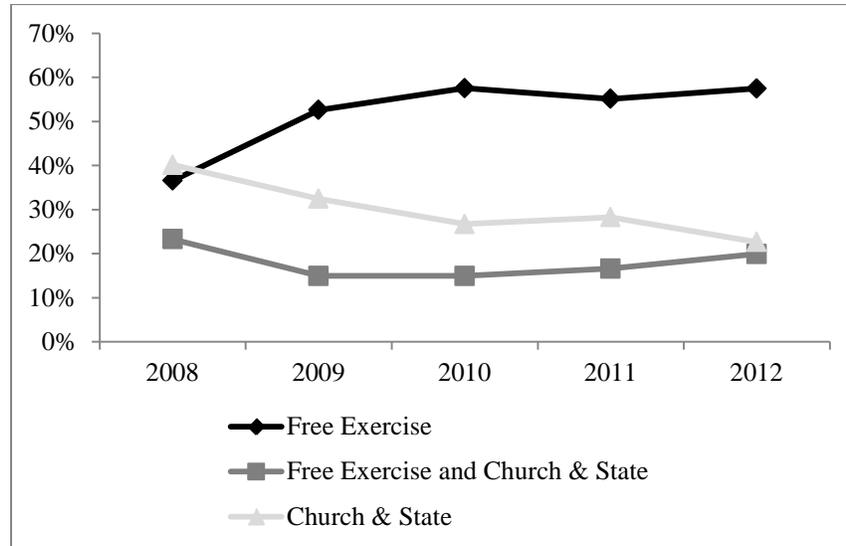
25. It is true that in conversation a legal scholar could express an opinion on any topic, legal or otherwise, but personal conversations have much less influence on the public overall and, when speaking outside of one's area of expertise, tend to carry less persuasive weight.

exercise of religion dominated scholarly attention during the time period of this study.

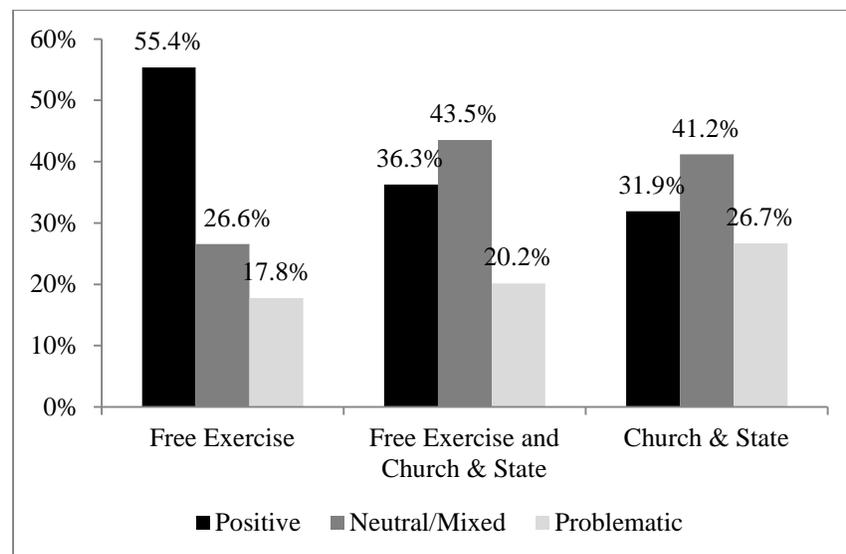
*Graph 3. Area of Law and Religion for 2008–2012*



Just over half of the scholarship evaluated in this study dealt solely with the free exercise of religion (51.7%), and slightly over two-thirds focused on it (69.6%—some articles focused on both free exercise and church and state issues). As for trends, while the proportion of articles combining both free exercise and church and state remained relatively steady over the five years observed in this study, articles looking at just the free exercise of religion have increased over time, and articles solely focusing on church and state have decreased. It is not clear if this is part of a larger trend, or if 2008 was merely an anomaly, altering what are otherwise relatively flat trends for the other four years (Graph 4).

*Graph 4. Area of Law and Religion Across Years*

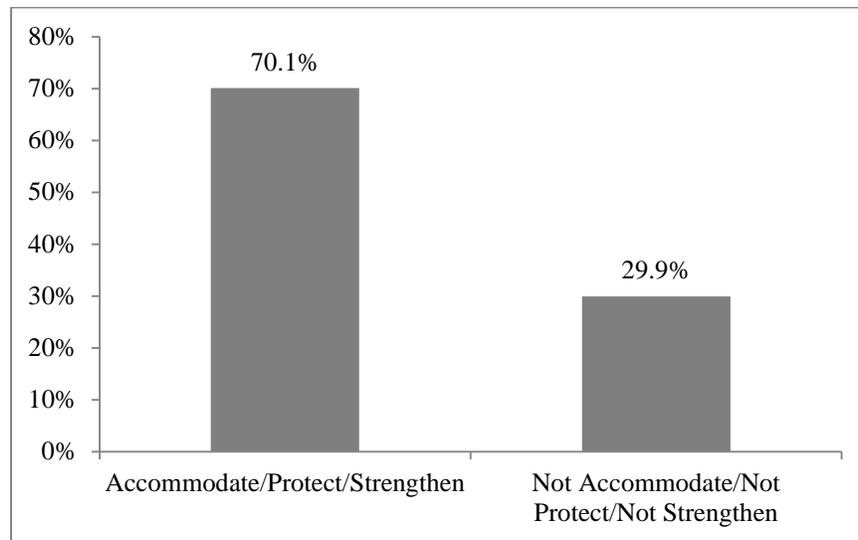
Combining views towards religion and the area of law and religion allows for a more nuanced view (Graph 5).

*Graph 5. Area of Law and Views Toward Religion*

Religion is seen least positively when dealing with matters of church and state and most positively when dealing with religious liberty. Also, religion is much more likely to be treated neutrally or in a mixed manner when focusing on church and state or the combination of church and state and free exercise issues. This is likely because concerns about the establishment of religion often invoke issues of minority faiths and thus can pit a majority religion against a minority one.

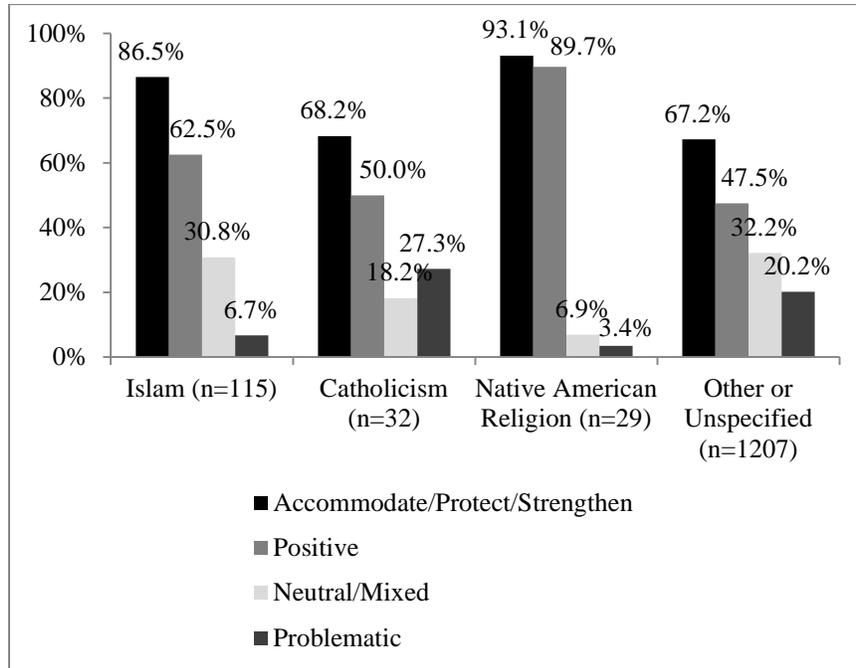
When dealing with religious liberty, Graph 6 shows what percentage of the time scholars are calling for the protection, strengthening, or accommodation of free exercise versus arguing that it either does not need to be protected, strengthened, or accommodated, or it needs to be limited to mitigate some other harm.

*Graph 6. Legal Treatment of Religious Liberty*



The thirty percent of religious liberty articles that do not call for the free exercise of religion to be accommodated, protected, or strengthened generally deal with some kind of clash of rights, as mentioned previously. Also, when authors deal with specific faiths, the arguments regarding the legal treatment of religious liberty differ depending on which religion is the focus (Graph 7).

Graph 7. Legal Treatment of Religious Liberty by Faith



Articles about Native American religions (93.1%) and Islam (86.5%) overwhelmingly call for free exercise to be accommodated, protected, or strengthened, whereas calls to accommodate the religious liberty of Catholicism (68.2%) and other faiths, or just religious liberty in general<sup>26</sup> (67.2%), while still a strong majority, are less predominant.<sup>27</sup> Likewise, Native American religions and Islam are portrayed more favorably than Catholicism and other faiths or religion in general.<sup>28</sup>

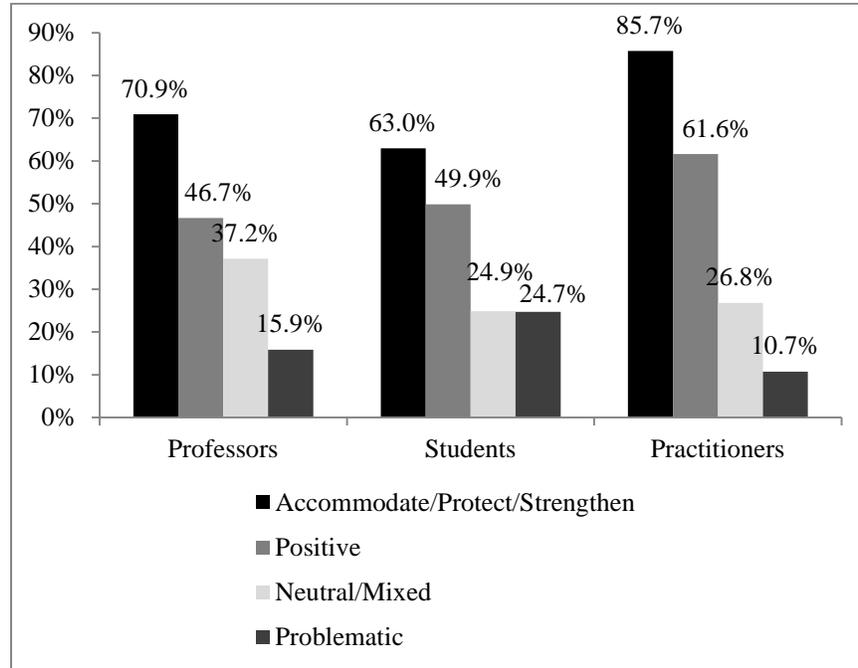
26. This is predominantly Christianity, either specifically or by implication, since it is the majority religion in the United States. Often scholars seemed to be implying that they were referencing Christianity, but it was not explicit, such as speaking about churches rather than places of worship. Judaism was coded for, but I only found 14 articles, making analysis problematic due to the small sample size.

27. These differences between the treatment based on accommodation, protection, and strengthening of Islam and Native American religions as compared to Catholicism and other faiths or religious liberty in general are statistically significant when performing ordinary least squares (OLS) regression analysis.

28. The differences in positive or negative treatment between Islam and Native

Graph 8 explores the possibility that different types of authors (law professors<sup>29</sup> versus law students versus legal practitioners<sup>30</sup>) view the legal treatment of religious liberty and religion within free exercise claims differently.

*Graph 8. Type of Author, the Legal Treatments of Religious Liberty & View of Religion in the Free Exercise Context*



Practitioners are more likely to argue for the accommodation, protection, or strengthening of free exercise claims, as well as to view religion positively when writing on free exercise as compared to professors and students. This is not that unusual given that practitioners writing on religious liberty are more likely to be

American religions on the one hand and Catholicism and other faiths or religious liberty in general on the other are statistically significant when performing OLS regression analysis.

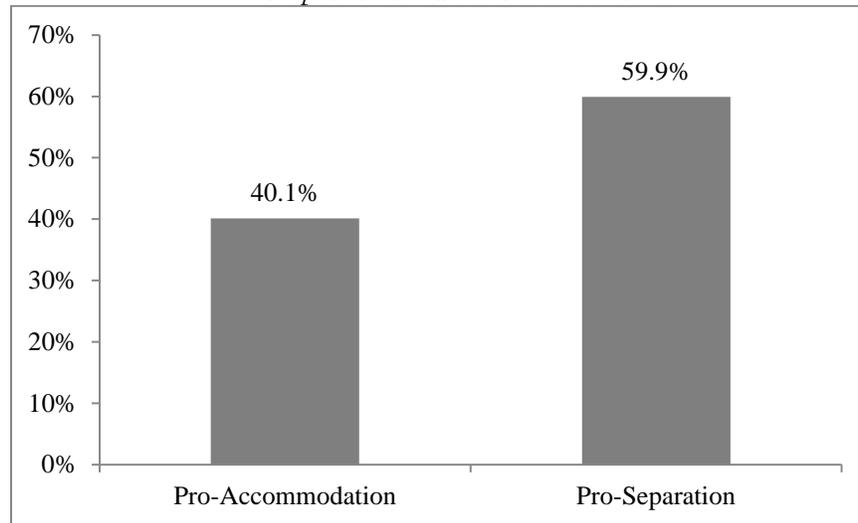
29. This includes visiting professors, visiting assistant professors, lecturers, adjunct faculty, clinical faculty, and emeritus professors.

30. This includes lawyers, law clerks, judges, and other professional or non-academic authors.

advocates working in that particular field. Also, professors are the most likely to be neutral or mixed in their assessment of religion in the area of free exercise, which may reflect the ability of the academia to make more nuanced arguments.

Turning to issues of church and state, Graph 9 shows the portion of articles where scholars are either calling for an increased separation of religion and government, stating that the current levels of separation should not be eroded, or stating that religion-friendly government is problematic versus arguing either that the current status of some intertwining of the two is not problematic or that the government needs to be more religion-friendly. These two positions in the literature are generally referred to as separationist and accommodationist, respectively (this is admittedly confusing since the term “accommodation” is also referred to in the free exercise context).<sup>31</sup>

*Graph 9. Views toward Church and State*



31. Scholars often distinguish separationist positions that are due to hostility to religion or secularist views from those due to other concerns, such as judicial restraint. Likewise, accommodation of religious free exercise can occur for more than just a pro-religious rationale. However, in reality, it is not clear that the reason matters if the effect is equivalent. For example, it is probably of little comfort to members of minority faiths with unusual or socially unacceptable religious practices that Justice Scalia's opinion in *Employment Division v. Smith*, 494 U.S. 872 (1990), was motivated by concerns about judicial activism rather than animus towards religion—the impact on accommodation was the same.

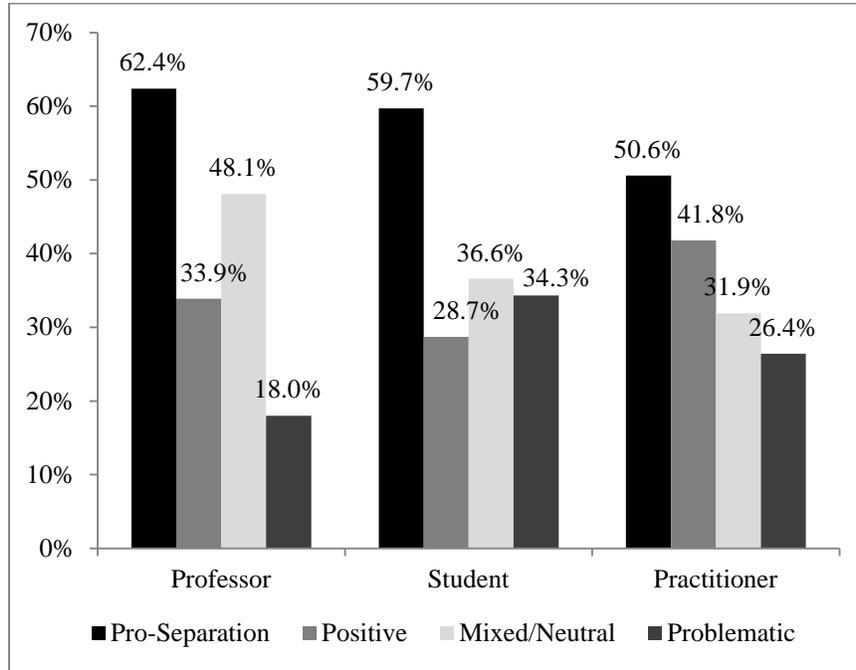
While it seems that there is a clear majority view when it comes to church and state issues, the reasons why legal scholars take a separationist view is more complicated. Some legal scholars see the government as secular and decry any support of or influence by religion. Similarly, some lament what they perceive to be religious motives in government policy. Others, though, fear the impact of religion-friendly government on minority faiths or non-believers. Thus, whether or not free exercise issues are raised simultaneously with church and state issues results in a statistically significant divergent pattern as to whether a pro-separation position is taken: 55.7% of articles argued for the separation of church and state when there are no free exercise issues involved, and 66.9% took the pro-separation position when free exercise issues are involved.<sup>32</sup> Therefore, in general, recent legal scholarship is more tolerant of religion-friendly government when there are no free exercise issues implicated.

Divergent patterns also emerge when looking within the church and state context at the type of author (Graph 10).

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32. Probit regression model of establishment clause articles with whether or not the article took a no separation (accommodation) position as the dependent variable and whether a free exercise issue was raised as the independent variable ( $p = .004$ ).

Graph 10. Type of Author, View of Religion, and Position Towards Separation in the Church and State Context



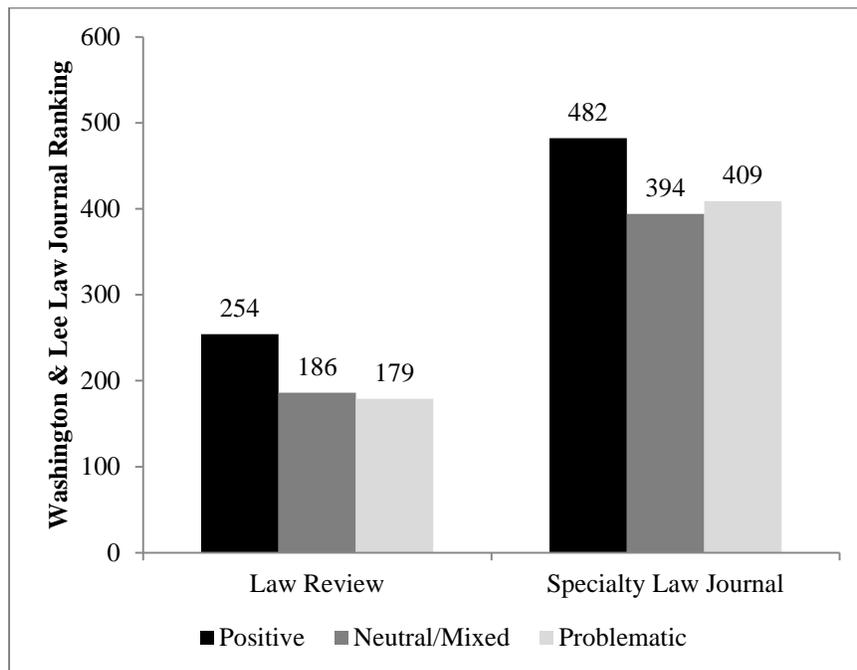
Patterns similar to the free exercise context emerge. Professors are the most likely to be separationist, though students are not far behind, and practitioners are the least likely. Also, professors are the most likely to portray religion in a mixed or neutral manner, with students taking the least positive view of religion and practitioners taking the most positive. Interestingly, professors were the least likely to view religion as purely problematic in the context of church and state.

It is possible that the market of legal scholarship rewards certain arguments over others.<sup>33</sup> Graph 11 looks at the average rank of a

33. It is also possible that certain arguments tend to be made by higher quality scholars, and therefore result in better scholarship, but given that there are good scholars on both sides of religion debates, this seems less likely. Furthermore, OLS regression analysis where the ranking of the institution of the author, as proxy for quality, was included showed that even after controlling for author quality, articles treating religion as positive were published in less prestigious journals, and that finding was statistically significant. Institutional rankings were taken from the annual *U.S. News and World Report Law School Rankings*. The annual ranking

journal<sup>34</sup> for articles based on the type of journal,<sup>35</sup> as well as the view towards religion (a lower rank is a more prestigious journal).

*Graph 11. Average Rank of Journal and View towards Religion*



Whether in law reviews or in specialty journals, when legal scholarship treats religion positively in either free exercise or church and state scenarios, it ends up in a less prestigious journal.<sup>36</sup> Since decisions of hiring and tenure can hinge on the prestige of the journals one has published in, this appears to put pro-religion scholars at a professional disadvantage. When looking just at the

was matched to the year the article was published; hence, the rankings that came out in 2008 were used for an article published in 2008.

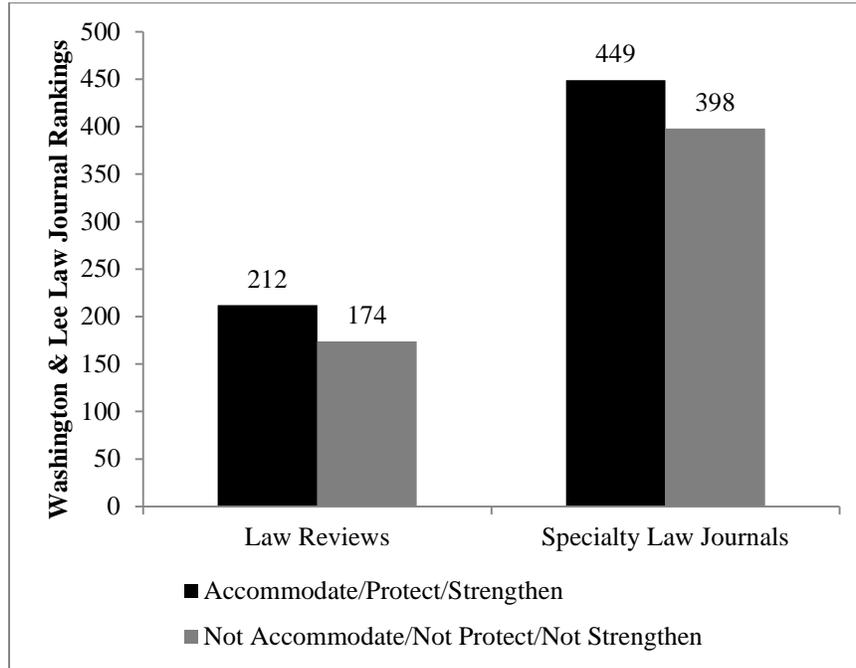
34. Law journal rankings were obtained from the Washington and Lee Law Journal Rankings database. *Law Journals: Submissions and Ranking, 2006-2013*, WASH. & LEE U. SCH. L.: L. LIBR., <http://lawlib.wlu.edu/LJ/> (last visited Mar. 13, 2015).

35. Specialty journals are ranked lower than a school's flagship law review, so it is necessary to separate these in order to avoid comparing apples to oranges.

36. These differences are statistically significant when performing OLS regression analysis.

legal treatment of free exercise issues, a similar trend emerges (Graph 12).

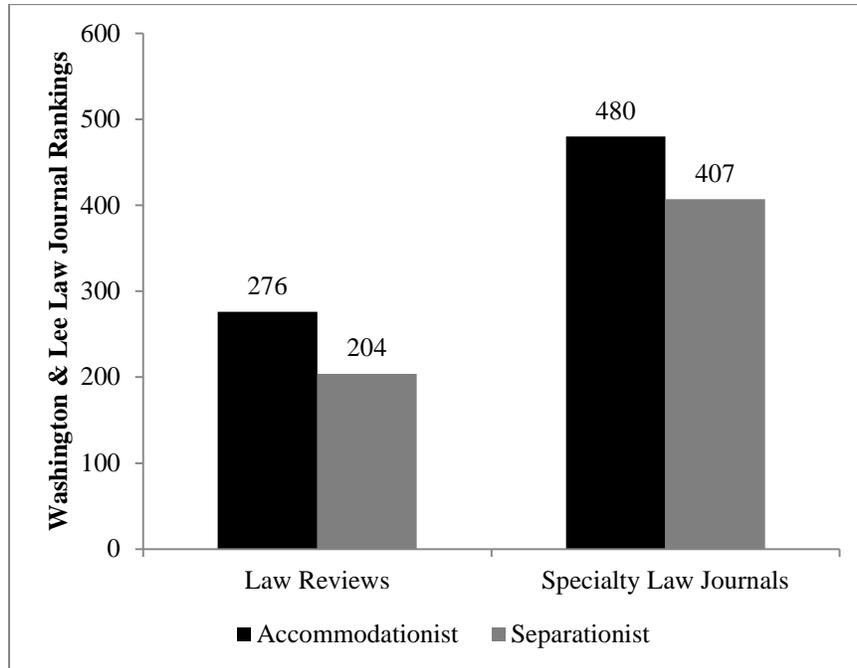
*Graph 12. Average Rank of Journal and Legal Treatment in Free Exercise*



Legal scholarship, whether in law reviews or specialty law journals, that argues that religious liberty should *not* be accommodated, protected, or strengthened is being published in more prestigious journals than scholarship that argues that religious liberty should be accommodated, protected, or strengthened.<sup>37</sup>

Graph 13 likewise looks at the ranking of the journal in which an article is published depending on which position it takes regarding church and state.

37. After controlling for the quality of the author (the ranking of the author's institution) and whether or not the author is a professor, this difference approaches statistical significance ( $p = .073$ ) in OLS regression. This analysis excludes practitioners since they do not have a school ranking. If school rank is not incorporated into the model, thus including practitioners, the difference achieves statistical significance ( $p = .036$ ).

*Graph 13. Average Rank of Journal and Legal Treatment in Church & State*

When scholars are publishing articles calling for continued or stricter separation of church and state, their work is being published in more prestigious law reviews and specialty law journals than articles that take a looser separation or accommodationist perspective. This might be a spurious correlation, however, if authors who take accommodationist perspectives write articles of lower quality, thus explaining placement in less prestigious journals. By controlling for author quality via the proxy of the *U.S. News* law rank of the author's institution (which excludes practitioners and non-law professors and students from the analysis), a regression model of church and state articles shows that even after controlling for author quality, taking an accommodationist/loose separation position is associated with a less prestigious journal (Table 1).

*Table 1. OLS Regression of Journal Rank on School Rank and Accommodationist Position in Church and State Scholarship*

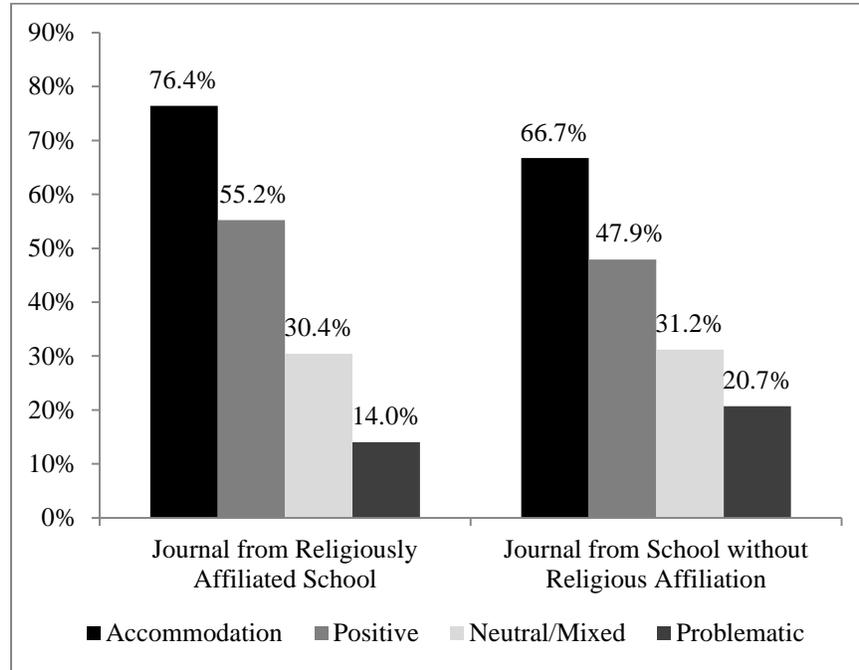
<b>n = 505</b>	<b>Coefficient (Standard Error)</b>
<b>School Rank</b>	1.60* (.19)
<b>Accommodationist Position</b>	44.60* (21.78)
<b>Specialty Journal</b>	201.77* (22.22)
<b>Constant</b>	60.22* (21.53)
<b>Adjusted R Squared</b>	0.2199
<b>F Statistic</b>	48.36*
<b>SER</b>	237.88

\* = statistical significance ( $p < .05$ )

Specifically, an author who takes an accommodationist position in church and state issues will be associated with publishing in a journal ranked about 45 positions “lower” (i.e., less prestigious) than an author from the same institution who takes a separationist position, even after controlling for the type of journal.

Finally, is there a difference between the treatment of religion in articles published by journals at law schools with a religious affiliation compared to law schools lacking a religious affiliation? Just over a quarter of law schools have some kind of religious affiliation (26.4%). As can be seen in Graph 14, religious schools tend to publish a higher portion of articles viewing religious liberty as positive and a lower portion of articles portraying religion as problematic in the free exercise context, and vice versa.

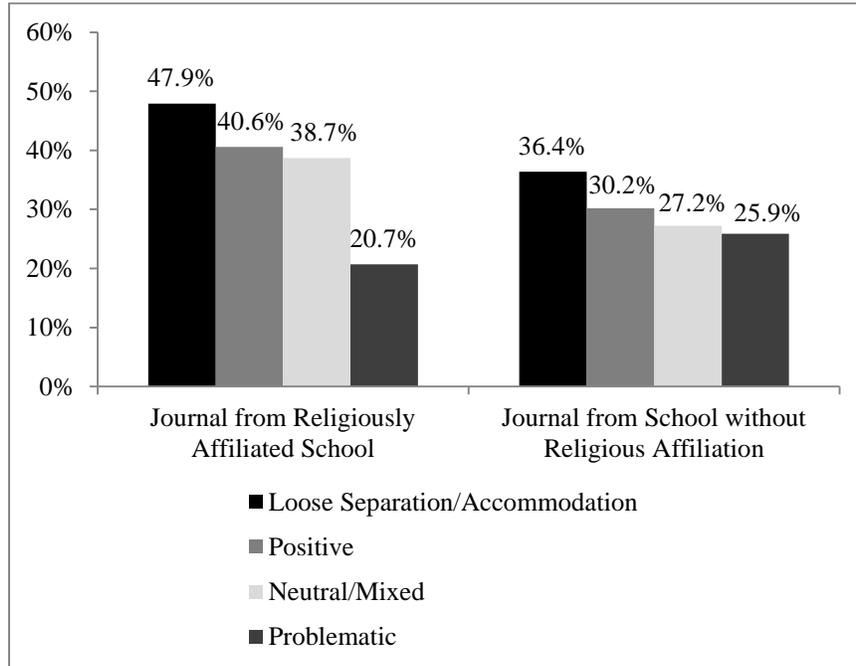
*Graph 14. Treatment of Religion and Religious Affiliation of Journal's Law School in Free Exercise Scholarship*



While there is no real difference between journals from religiously affiliated schools and those published by schools lacking religious affiliation when it comes to the percentage of articles portraying religion in a neutral or mixed manner, there are differences in the remaining areas.<sup>38</sup> One finds similar, though less positive, patterns in church and state scholarship (Graph 15).

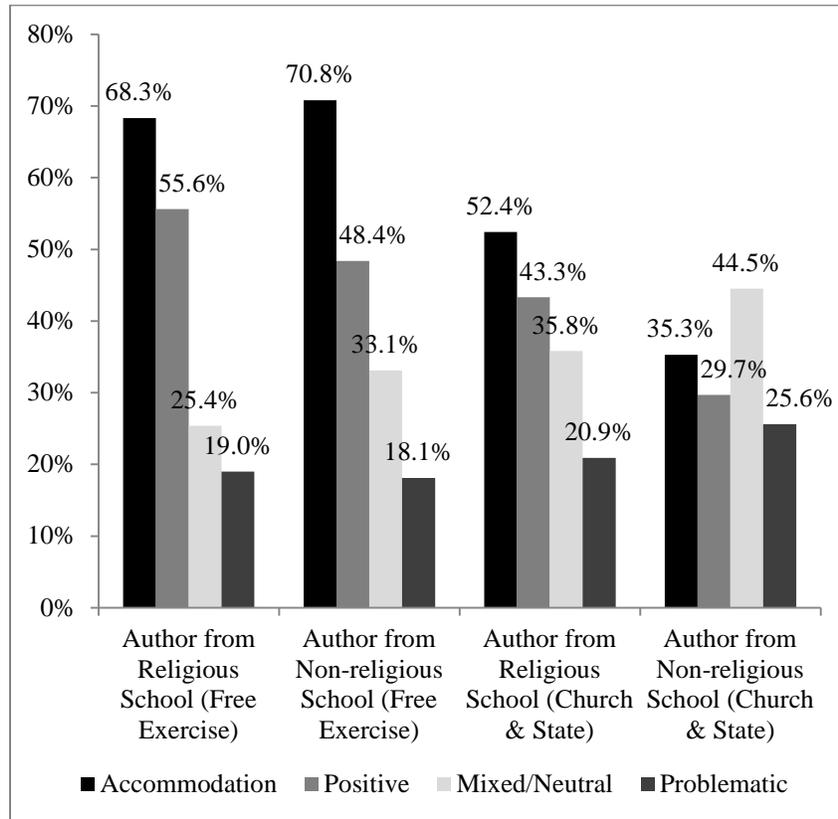
38. These differences between the two school types in the areas of accommodation and positive and problematic treatment of religion/religious liberty are statistically significant when running a probit regression model.

*Graph 15. Treatment of Religion and Religious Affiliation of Journal's Law School in Church & State Scholarship*



Not surprisingly, journals from religiously affiliated schools publish a higher percentage of articles that take a more positive view of religion in church and state issues and argue for a more accommodationist/loose separation position, as compared to journals from schools lacking religious affiliation.

Alternatively, instead of looking at differences based on the religious affiliation of the journal's school, one can look at differences based on whether an author was from a school with a religious affiliation (Graph 16).

*Graph 16. Treatment of Religion and Religious Affiliation of Author's Law School*

Whereas there is little difference between whether an author's institution is religiously affiliated and the percentage of articles in which the article's author argues for accommodation of free exercise claims (with authors from non-religious schools, oddly, slightly more prone to accommodations), a healthy gap exists regarding views on separation in the arena of church and state. Across both subject areas, authors from religiously affiliated schools were more likely to view religion as positive and less likely to view it in a mixed or neutral manner, with the gaps again more apparent in church and state issues.

In reality, religiously affiliated schools are not equally affiliated with their respective religions. Some schools are imbued with a strong, faith-based mission, such as Notre Dame or Brigham Young University, while other schools are more nominally affiliated, such as Duke. Additionally, some faiths take different perspectives on social, political, and legal issues. A 2004 study used expert judging to score religiously affiliated law schools from 0 to 1 on what the authors refer to as a “conservatism index.”<sup>39</sup> This measure was a combination of two criteria:

- “The extent to which the law school, as an institution, is understood to support and foster the affiliated religion’s perceived positions on contemporary cultural/moral issues. The phrase ‘contemporary cultural/moral issues’ includes abortion, homosexuality, other sexual and reproductive ‘freedoms,’ parental rights (and other issues of the traditional family structure), euthanasia, and the death penalty.”<sup>40</sup>
- The extent to which the affiliated religion’s perceived positions on contemporary cultural/moral issues are understood to be ‘conservative,’ ‘traditional,’ or ‘orthodox.’”<sup>41</sup>

This measure is clearly problematic. A school could strongly “support and foster the affiliated religion’s perceived positions” while simultaneously having very liberal or progressive views, thus giving the school a score in the middle. Likewise, a school might not support or foster the affiliated faith’s views, but the affiliated faith could be very “conservative, traditional, or orthodox,” again giving

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39. Monte N. Stewart & H. Dennis Tolley, *Investigating Possible Bias: The American Legal Academy’s View of Religiously Affiliated Law Schools*, 54 J. LEGAL EDUC. 136, 144 (2004). The authors had three individuals “with substantial experience in American legal education” separately judge each of the 44 religiously affiliated law schools on a scale of 1-100 on three dimensions. For more on expert judging, see, for example, MARY A. MEYER & JANE M. BOOKER, *ELICITING AND ANALYZING EXPERT JUDGMENT* (2001).

40. *Id.*

41. *Id.*

the school a score in the middle. Obviously, those schools' scores, while roughly equivalent, represent very different things.<sup>42</sup>

Still, this measure has some value for this study. Many of the "contemporary cultural/moral issues" upon which the schools were evaluated are issues that often clash with religion in legal scholarship. And "conservative, traditional, or orthodox" faiths tend to take different positions regarding religion in free exercise or establishment arguments as compared to faiths not considered conservative, traditional, or orthodox. Also, there tends to be a high degree of correlation between the "conservativeness" of a faith and the degree to which that faith promotes its views. Thus, if the expert coding was high in validity (i.e., actually measured what it claimed to be measuring), then there should be a correlation between a school's score and the percentage of pro-religion and free exercise accommodation positions taken by its faculty and students. Table 3 reports this information (not all of the religiously-affiliated schools examined in this study have a conservative index score because some were not included in the 2004 study).

42. On the issues of homosexuality and abortion, for example, religious faiths in America differ significantly. PEW, *supra* note 5, at 144, 147.

*Table 2. American Religious Traditions' Views on Homosexuality*

	Homosexuality should be <i>discouraged</i> by society	Abortion should be <i>illegal</i> in most or all cases	Number of observations
Jehovah's Witnesses	76%	77%	215
Latter-day Saints	69%	71%	556
Evangelical Christians	64%	61%	9472
Muslims	61%	48%	1050
Historically Black Protestant Churches	46%	46%	1995
Hindus	37%	24%	257
Orthodox Church	37%	30%	363
Mainline Protestants	34%	32%	7470
Catholics	30%	45%	8054
Other Christians	20%	19%	129
Unaffiliated	20%	24%	5048
Jews	15%	14%	682
Buddhists	12%	13%	411
Other faiths	8%	17%	449

*Table 3. Religiously-affiliated Law Schools' "Conservative Index,"<sup>43</sup>  
Percentage of Pro-Religion Articles & Percentage of Free Exercise Accommodation  
Articles*

Law School	Conservative Index	% Pro-Religion	% Accommodation
Regent University	.918	84.6% (n = 13)	90.0% (n = 10)
Brigham Young University	.903	56.7% (n = 30)	90.0% (n = 20)
Campbell University	.810	75.0% (n = 4)	100.0% (n = 2)
Mississippi College	.766	40.0% (n = 5)	0.0% (n = 1)
Pepperdine University	.723	66.7% (n = 12)	85.7% (n = 7)
University of Notre Dame	.708	71.9% (n = 32)	90.9% (n = 22)
Catholic University of America	.684	90.0% (n = 10)	100.0% (n = 6)
Gonzaga University	.681	100.0% (n = 3)	100.0% (n = 1)
Samford University	.640	No observations	No observations
St. Thomas University (MN)	.562	66.7% (n = 9)	100.0% (n = 9)
St. Thomas University (FL)	.562	100.0% (n = 2)	100.0% (n = 1)
Valparaiso University	.490	57.1% (n = 7)	80.0% (n = 5)

43. *Id.* at 145.

<b>Yeshiva University (Cardozo)</b>	.468	20.0% (n = 25)	28.6% (n = 21)
<b>Mercer University</b>	.467	16.7% (n = 6)	33.3% (n = 3)
<b>Baylor University</b>	.450	66.7% (n = 3)	0.0% (n = 1)
<b>Marquette University</b>	.450	60.0% (n = 5)	33.3% (n = 3)
<b>Saint Louis University</b>	.423	60.0% (n = 10)	60.0% (n = 5)
<b>Creighton University</b>	.412	0.0% (n = 1)	No observations
<b>University of Detroit Mercy</b>	.394	0.0% (n = 2)	0.0% (n = 1)
<b>Seattle University</b>	.360	50.0% (n = 4)	75.0% (n = 4)
<b>St. John's University</b>	.330	63.6% (n = 11)	80.0% (n = 10)
<b>Loyola University (New Orleans)</b>	.311	25.0% (n = 4)	75.0% (n = 4)
<b>Touro College</b>	.307	50.0% (n = 2)	100.0% (n = 1)
<b>Seton Hall University</b>	.298	66.7% (n = 15)	76.9% (n = 13)
<b>Boston College</b>	.275	33.3% (n = 9)	66.7% (n = 6)
<b>University of Dayton</b>	.271	50.0% (n = 2)	100.0% (n = 1)
<b>Villanova University</b>	.260	50.0% (n = 4)	100.0% (n = 3)
<b>Loyola Marymount Law School</b>	.250	33.3% (n = 3)	0.0% (n = 2)

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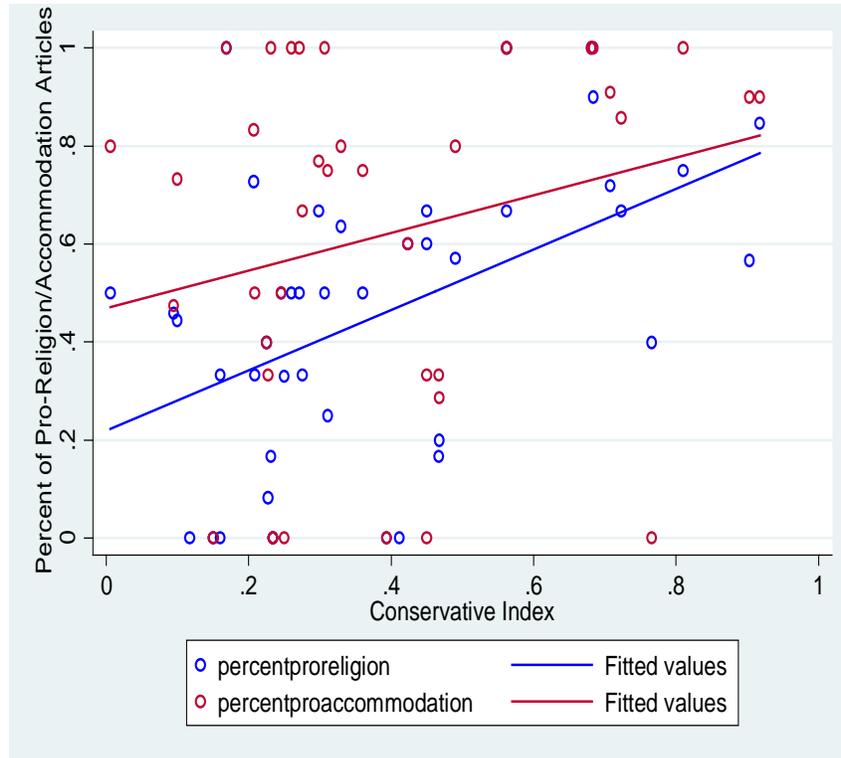
<b>Santa Clara University</b>	.248	No observations	No observations
<b>Oklahoma City University</b>	.246	50.0% (n = 2)	50.0% (n = 2)
<b>St. Mary's University</b>	.234	0.0% (n = 2)	0.0 (n = 2)
<b>University of Tulsa</b>	.234	0.0% (n = 1)	0.0% (n = 1)
<b>Duquesne University</b>	.231	16.7% (n = 6)	100.0% (n = 1)
<b>Capital University</b>	.227	8.3% (n = 12)	33.3% (n = 6)
<b>DePaul University</b>	.225	40.0% (n = 5)	40.0% (n = 5)
<b>Fordham University</b>	.208	33.3% (n = 6)	50.0% (n = 4)
<b>University of San Diego</b>	.207	72.7% (n = 11)	83.3% (n = 6)
<b>Texas Wesleyan University</b>	.169	100.0% (n = 4)	100.0% (n = 3)
<b>Southern Methodist University</b>	.160	33.3% (n = 3)	No observations
<b>Loyola University (Chicago)</b>	.160	0.0% (n = 1)	No observations
<b>Hamline University</b>	.150	0.0% (n = 1)	0.0% (n = 1)
<b>University of San Francisco</b>	.117	0.0% (n = 1)	No observations
<b>Emory University</b>	.100	44.4% (n = 18)	73.3% (n = 15)
<b>Georgetown University</b>	.095	44.0% (n = 25)	47.4% (n = 19)

<b>American University</b>	.006	50.0% (n = 6)	80.0% (n = 5)
<b>Ave Maria University</b>	NA	72.7% (n = 11)	71.4% (n = 7)
<b>Barry University</b>	NA	33.3% (n = 6)	100.0% (n = 1)
<b>Chapman University</b>	NA	No observations	No observations
<b>Duke University</b>	NA	25.0% (n = 12)	55.6% (n = 9)
<b>Faulkner College</b>	NA	42.8% (n = 7)	50.0% (n = 6)
<b>Liberty University</b>	NA	66.7% (n = 9)	66.7% (n = 6)
<b>Ohio Northern University</b>	NA	0.0% (n = 1)	No observations
<b>Willamette University</b>	NA	40.0% (n = 5)	100.0% (n = 3)

There does appear to be a relationship between the “conservative index” and pro-religion and pro-free exercise accommodation positions.<sup>44</sup> This is more clearly seen in the scatterplot below, as a higher value on the conservative index is associated with a higher proportion of pro-religion or pro-free exercise accommodation articles from schools (Graph 17).

44. The relationship between the conservative index and the pro-religion dichotomous variable approaches statistical significance in a probit regression model ( $p = .079$ ), with higher values on the conservative index associated with a higher percentage of pro-religion articles. The relationship between the conservative index and the pro-free exercise accommodation dichotomous variable is statistically significant in a probit regression model ( $p < .001$ ), with higher values on the conservative index associated with a higher percentage of pro-free exercise accommodation articles.

Graph 17. Relationship between Religiously Affiliated Schools' "Conservative Index" and Pro-Religion/Free Exercise Accommodation Articles



An additional way to look at schools is by their interest in religion, measured by the sheer number of articles about religion and law, divided by the size of the school as measured by full-time enrollment. Table 4 ranks the top 10 schools based on this measure of interest in law and religion.<sup>45</sup>

45. It is true that one school's religion-interest measure could be driven by one prolific scholar, but it is not clear why this means that the ranking is any less of a measure of the overall interest at the school as opposed to the spread of the interest among faculty and students.

*Table 4. Top Ten Law Schools with Respect to Interest in Law & Religion*

<b>Rank, School, &amp; (2012 <i>U.S. News</i> Ranking)</b>	<b>Ratio x 100</b>	<b>Total Articles</b>
<b>1. Brigham Young University (44)</b>	71.4	30
<b>2. University of Notre Dame (23)</b>	58.7	32
<b>3. Rutgers University-Camden (91)</b>	49.8	28
<b>4. Liberty University (Unranked)</b>	34.9	9
<b>5. Regent University (Unranked)</b>	32.9	13
<b>6. University of Alabama (21)</b>	32.9	16
<b>7. Capital University (Unranked)</b>	29.9	12
<b>8. Ave Maria University (Unranked)</b>	28.8	11
<b>9. Catholic University of America (80)</b>	24.9	10
<b>10. Seton Hall University (64)</b>	24.8	15

Not surprisingly, eight of the top ten schools have a religious affiliation. Of the two that do not, one—Rutgers-Camden—publishes a journal on law and religion. Interestingly, none of the top ten ranked schools (or even the top twenty) from the influential *U.S. News* law school rankings made this top ten list. And only two from the top twenty-five (Alabama and Notre Dame) and just one more from the top fifty (BYU) cracked the top ten. Additionally, four of this top ten list are not even ranked in the top 150 schools by *U.S. News*. Thus, it appears that faculty and students at the nation's

most prestigious law schools are, on average, less interested in writing in the area of law and religion as compared to those at less prestigious schools.

## II. CAVEATS

This study misses one of the avenues of legal scholarship: books. However, most legal scholarship is to be found in law journal articles, and often books are a compilation or extension of law journal articles, so the omission should not drastically impact the findings. Also, this study was limited to a short time period and thus cannot address whether the past five years are an anomaly or fit within a larger trend. Finally, due to the fact that the articles were entirely coded by the author, inter-coder reliability could not be measured.

## III. POTENTIAL FUTURE RESEARCH

Given this is just a small snapshot of observational data, future research could move in several directions. First, the number of years of legal scholarship could be expanded, allowing one to see longer-term trends. Second, one could look at legal scholarship cited by the U.S. Supreme Court, U.S. Circuit Courts of Appeal, and state supreme courts to see what scholarship is being cited (if any) in pro-free exercise versus anti-free exercise decisions. This would begin to get at what impact legal scholarship is having in this area of law. Third, one could look more specifically at the sub-area of law and policy and how religious liberty is being treated at a more micro-level. For example, when dealing with the clash between reproductive rights and religious liberty, or LGBT rights and religious liberty, where often the situation is framed as a zero-sum game, how is religious liberty treated? Fourth, while somewhat tangential, one could do a survey of law journal editors' views on religious liberty since they are the gatekeepers as to what gets published and where.

## CONCLUSION

It is unclear whether this snapshot of the past five years is part of a larger trend or not. But within those five years, some findings clearly emerge. When authors take a positive view of religion

compared to viewing religion as problematic or a mix of the two (or taking no stance whatsoever), then such scholarship ends up in less prestigious law journals. Likewise, when scholars argue for the accommodation, protection, or strengthening of religious freedom, or for loosening the restrictions on the separation of church and state, their work ends up in lower-ranked academic publications. Also, not all religious liberty claims are treated the same by legal scholars, with Native American religions and Islam being given preferred status compared to Catholicism or religion in general. Journals and authors from religiously affiliated schools tend to publish more articles that are pro-free exercise and view religion as positive. Finally, different types of authors in the area of free exercise treat religious liberty differently, with professors the most likely to be neutral or mixed, practitioners the most likely to be positive, and students the most likely to view religion as problematic.<sup>46</sup>

The question, then, is so what? Why do these findings potentially matter? Law schools have long claimed that their primary purpose is to train students to “think like a lawyer.” But law students may be also learning what to think about certain topics and issues. Anecdotally, at least, the positions law professors take in their writing often seep (or are thrust) into their teaching. It would seem plausible, given law professors position of authority, as well as ability to persuade, that they are at least able to nudge, if not dramatically shift, students’ views to a position closer to the one they hold (and maybe cherish). A recent study of first-year law students from Yale Law School provided some evidence that depending on the educational background of the professor (economics versus humanities training), which was a proxy for a professor’s views, law students gravitated more towards either valuing efficiency or equality.<sup>47</sup> If law professors today take a rather dim view of religion,

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46. This may be a generational effect as 18–29 year olds, of all American adults, are the least likely to (1) be affiliated with a religion, (2) have an intense religious affiliation, (3) attend weekly services, (4) read scriptures weekly, (5) pray daily, (6) consider religion very important, (7) believe in God, (8) agree there are absolute standards of right and wrong, and (9) disapprove of the Supreme Court’s decision banning the required reading of the Lord’s Prayer or Bible verses in public schools. PEW RESEARCH CENTER, RELIGION AMONG THE MILLENNIALS 1, 5, 6, 8, 10, 12, 22, 24 (February 2010), <http://www.pewforum.org/uploadedFiles/Topics/Demographics/Age/millennials-report.pdf>.

47. Raymond Fisman, Shachar Kariv & Daniel Markovits, *Exposure to Ideology and*

and of accommodating its free exercise in particular, then the lawyers of tomorrow may do so as well.

But the consequences may be even more significant. If George Washington<sup>48</sup> and John Adams<sup>49</sup> and other early Americans<sup>50</sup> were correct—that our Constitutional government sits on the backs of a religious citizenry—then having most of our nation’s legal scholars

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*Distributional Preferences*, (July 19, 2009) (working paper), available at <https://www0.gsb.columbia.edu/mygsb/faculty/research/pubfiles/4967/Exposure%20to%20Ideology.pdf>.

48. George Washington, Washington’s Farewell Address to the People of the United States, 106th Congress, 2nd Session, Senate Document No. 106-21 (Washington D.C. 2000).

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in the courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

*Id.* at 20.

49. Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (11 October 1798), in *REVOLUTIONARY SERVICES AND CIVIL LIFE OF GENERAL WILLIAM HULL* (New York, 1848) at 265–66.

[W]e have no government armed with power, capable of contending with human passions, unbridled by morality and religion. Avarice, ambition, revenge and licentiousness would break the strongest cords of our Constitution, as a whale goes through a net. Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.

*Id.* (there are some differences in the version that appeared in 9 *THE WORKS OF JOHN ADAMS* (Boston, 1854), at 228–29, most notably the words “or gallantry” instead of “licentiousness”).

50. See TOQUEVILLE, *supra* note 4, at 390–91.

Religion in America takes no direct part in the government of society, but it must be regarded as the first of their political institutions; for if it does not impart a taste for freedom, it facilitates the use of it. Indeed, it is in this same point of view that the inhabitants of the United States themselves look upon religious belief. I do not know whether all Americans have a sincere faith in their religion—for who can search the human heart?—but I am certain that they hold it to be indispensable to the maintenance of republican institutions. This opinion is not peculiar to a class of citizens or to a party, but it belongs to the whole nation and to every rank of society.

*Id.*

be indifferent or hostile to religion and its accommodation may erode the foundation upon which our Republic rests.<sup>51</sup>

And then not just religious liberty loses—all liberties do.<sup>52</sup>

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51. Seventy-seven percent of Americans see religion as losing its influence on American life, but seventy-five percent feel it would be good for society if America was more religious. See Frank Newport, *Americans Say More Religion in U.S. Would Be Positive* (Gallup video posted June 3, 2013), <http://www.gallup.com/video/162860/americans-say-religion-positive.aspx>.

52. See John Adams, Letter to Zabdiel Adams, 21 June 1776, [http://www.founding.com/founders\\_library/pageID.2144/default.asp](http://www.founding.com/founders_library/pageID.2144/default.asp) (“Statesmen, my dear Sir, may plan and speculate for Liberty, but it is Religion and Morality alone, which can establish the Principles upon which Freedom can securely stand. The only foundation of a free Constitution is pure Virtue, and if this cannot be inspired into our People in a greater Measure than they have it now, They may change their Rulers and the forms of Government, but they will not obtain a lasting Liberty. They will only exchange Tyrants and Tyrannies.”); TOQUEVILLE, *supra* note 4, at 55 (“Liberty regards religion as its companion in all its battles and its triumphs,—as the cradle of its infancy, and the divine source of its claims. It considers religion as the safeguard of morality, and morality as the best security of law, and the surest pledge of the duration of freedom.”).

