

# Is U.S. Legal Scholarship “Losing [Its] Religion”<sup>1</sup> Or Just Playing Favorites?: An Empirical Investigation, 1998–2012

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## *Abstract*

*The place of religion in America is changing. This paper seeks to understand that change in a narrow but influential context: legal scholarship. Focusing on the time period after the Supreme Court struck down RFRA as applied to the states and a flurry of state-level RFRA's in the mid 2010's, the study examines nearly 1300 law review articles to present a quantitative intellectual history. The study finds that religion is portrayed increasingly less positively over the period, based on a five-point positivity scale created for the study. The paper also finds that some faiths are portrayed more positively (Native American religions, Islam, Judaism, and other non-Christian faiths) than others (general Christianity, Catholicism, and other specific Christian faiths). Additionally, whereas scholars urge accommodating Judaism, Islam, and other non-Christian religions about four-fifths of the time, and Native American religions 95% of the time, they only advocate for accommodating Christianity generally or specific Christian faiths about two-thirds of the time. Further, after controlling for other factors, law review articles discussing Christianity generally appear to be published in journals 50 rankings less prestigious than articles discussing religion generally. What is more, in the context of torts or LGBT rights, religion is portrayed as most problematic and calls for accommodating religion are at their lowest. In the contexts of RFRA, land use, and prisoner's rights, religion is portrayed most positively and arguments for accommodation are at their highest. Likewise, while legal scholars advocate for greater separation of government and religion less in the*

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1. R.E.M., *Losing My Religion*, on OUT OF TIME (Warner Bros. Records Inc. 1991).

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*areas of children (48%), prisoners (31%), and education (50%), they advocate for such separation more so in the contexts of reproductive rights (83%), LGBT rights (77%), healthcare (71%), and marriage (71%). Given the influence of legal scholarship on the development of the law, today’s law review article could be tomorrow’s legal doctrine or legislation.*

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## I. INTRODUCTION

Something is going on with religion in America. Over the past quarter-century, religion’s place in society and its intersection with law and with politics has shifted dramatically, going from being an issue that generally drew bipartisan support to now resulting in sharp partisan line-drawing.<sup>2</sup> As background for this article’s narrower focus on legal scholarship, one example and some data will suffice to illustrate.<sup>3</sup> First, the Supreme Court’s decision in *Employment Division v. Smith*,<sup>4</sup> where the Court found two Native Americans’ religious rights to smoke peyote did not survive a state law preventing drug use under the Free Exercise Clause of the U.S. Constitution, was “nearly universal[ly]” condemned.<sup>5</sup> As a result, two of the most politically progressive members of the U.S. Senate—Chuck Schumer and Ted Kennedy—proposed the Religious Freedom Restoration Act of 1993 (RFRA).<sup>6</sup> RFRA was supported by the American Civil Liberties Union (ACLU), passed the House by a *unanimous* voice vote, was approved by the Senate 97–3, and was signed into law by Democratic President Bill Clinton, who spoke of it in glowing terms.<sup>7</sup> But now, when states attempt to pass mini-RFRA’s applicable at the state level that are nearly identical to similar laws passed in the 1990s, or RFRA is invoked to resist the Affordable Care Act’s contraceptive mandate, passionate opposition is raised, including by many who previously voted for or supported RFRA.<sup>8</sup> For example, the Democratic governor of Connecticut in 2015 banned state employees from traveling to Indiana because of Indiana’s

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2. See Paul Horwitz, *Religion and American Politics: Three Views of the Cathedral*, 39 U. MEM. L. REV. 973, 975–76 (2009) (“Religious belief, which was once so widespread and so widely shared as to be a common and uninteresting trait, has become increasingly contestable . . . . [T]he relationship between religion and American politics must thus assume the perspective of religion in an age of *contestability* . . . . [P]oliticians have moved religion to the foreground as a way of reaching voters of different faiths and beliefs.”).

3. See *infra* notes 4–13 and accompanying text.

4. 494 U.S. 872 (1990).

5. Bruce Abramson, *The Decline—and Fall?—of Religious Freedom in America*, MOSAIC (Aug. 3, 2015), <http://mosaicmagazine.com/essay/2015/08/the-decline-and-fall-of-religious-freedom-in-america/>.

6. Abramson, *supra* note 5; see Religious Freedom Restoration Act (RFRA) of 1993 42 U.S.C. §§ 2000bb to 2000bb-4 (2012), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997) (laying out that neutral federal or state laws that burden religious exercise are subject to strict scrutiny).

7. Abramson, *supra* note 5.

8. *Id.*

recently passed state RFRA, which actually provided less protection to religious freedom than did Connecticut’s own RFRA passed in the 1990s.<sup>9</sup>

Further, survey data show that religion has less importance for Americans.<sup>10</sup> For example, Americans are not only increasingly less likely to have a denominational affiliation—labeled “nones” by religious scholars—but about half of this growing population (the largest group being young adults) has “a genuine antipathy toward organized religion.”<sup>11</sup> This, understandably, spills over into the public’s view towards religious liberty, particularly the rising generation, which is the segment of the population least concerned about religious freedom.<sup>12</sup> As one legal scholar observed, “fewer people today seem to recognize or care about the immediate need for legal protections rooted in the free exercise of religion.”<sup>13</sup>

This trend has concerned various religious and thought leaders.<sup>14</sup> For instance, in 2010 while president of the U.S. Conference of Catholic Bishops, Cardinal Francis George warned of “threats to religious freedom in America that are new to our history and to our tradition.”<sup>15</sup> A Christian publication argued that the twenty-first century would be “very secular and religiously antagonistic,” especially towards Christianity, with antagonism toward that

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9. See David E. Bernstein, *How Anti-Discrimination Became a Religion, and What It Means for Judaism*, MOSAIC (Aug. 8, 2016), <https://mosaicmagazine.com/response/2016/08/how-anti-discrimination-became-a-religion-and-what-it-means-for-judaism/>.

10. U.S. Public Becoming Less Religious, Pew Research Center (Nov. 3, 2015), <http://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/> (finding that the percentage of adults who believe in God, pray daily, or regularly go to church has declined in recent years).

11. ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* 7, 75–80, 558–61, 566 (2012).

12. See Matthew Brown, *Half of Americans Worry about Their Own Religious Freedom*, DESERET NEWS (Jan. 29, 2013), <https://www.deseretnews.com/article/865571669/Evangelicals-most-concerned-about-religious-freedom-in-US.html> (“[T]he demographic least concerned about religious liberty in America was so-called Millennials — adults born after 1984 — with only about one-fifth saying they were very concerned that religious freedom restrictions will grow in the next five years.”).

13. JOHN D. INAZU, *CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE* 22 (2016).

14. See *infra* notes 15–20 and accompanying text.

15. Cardinal Francis George, President of the U.S. Conference of Catholic Bishops and Archbishop of Chicago, Forum Address at Brigham Young University: Catholics and Latter-day Saints: Partners in the Defense of Religious Freedom (Feb. 23, 2010), [https://speeches.byu.edu/talks/francis-george\\_catholics-latter-day-saints-partners/](https://speeches.byu.edu/talks/francis-george_catholics-latter-day-saints-partners/).

faith “ris[ing] to levels many of us have not believed possible in our lifetimes.”<sup>16</sup> An associate professor of history warned of increasing anti-Semitism and threats to religious liberty, not only of American Jews but of all faiths.<sup>17</sup> Leaders of The Church of Jesus Christ of Latter-day Saints have lately increasingly warned of a greater need to protect religious freedom.<sup>18</sup> And one legal commentator went so far as to describe the current climate revealing “a growing anti-religious bigotry in the United States . . . . For three decades people of faith have watched a systematic and very effective effort wage in the courts and the media to drive them from the public square and to delegitimize their participation in politics as somehow threatening.”<sup>19</sup> But are these various “the-sky-is-falling” warnings accurate, or perspectives born from the tendency of people committed to a position to see otherwise neutral events as hostile?<sup>20</sup> Or perhaps are these trends a reflection of religious rights historically dominating other rights, which are not getting equal treatment?

These societal and political trends are beyond the scope of this study. Rather, against this societal and political backdrop comes the underlying question motivating this study: what is going on with religion in legal academia, specifically, legal scholarship?<sup>21</sup> In other words, is religion now a divisive topic in the writings of legal academics? Or has legal scholarship resisted the trends in American society and politics? One could imagine either question being answered yes.

On the one hand, law and politics are often closely connected—legal realists might even say synonymous (or at least inseparable).<sup>22</sup> What is more, political views influence legal decision-making,<sup>23</sup> perhaps legal decision-

16. Michael Spencer, *The Coming Evangelical Collapse*, THE CHRISTIAN SCIENCE MONITOR (Mar. 10, 2009), <https://www.csmonitor.com/Commentary/Opinion/2009/0310/p09s01-coop.html>.

17. See Abramson, *supra* note 5.

18. Peggy Fletcher Stack, *LDS Leaders Preach about Religious Freedom, but Utah Mormons Don't See it as Biggest Concern, Poll Shows*, SALT LAKE TRIBUNE (Sept. 28, 2016), <http://www.sltrib.com/home/4404807-155/lds-leaders-warn-of-eroding-religious>.

19. HUGH HEWITT, A MORMON IN THE WHITE HOUSE? 242–43 (2007).

20. In the context of the media, this phenomenon is called the hostile media effect. See Lauren Feldman, *Hostile Media Effect*, in THE OXFORD HANDBOOKS ONLINE 549–564 (Kate Kenski & Kathleen Hall Jamieson (2017)).

21. See *supra* notes 1–3 and accompanying text.

22. See William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 710 (1991) (“[C]ritical legal realists, who argued that all law is politics and thereby impugned the neutrality and legitimacy of law.”).

23. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) (measuring the impact of political ideology on Supreme

making’s biggest influence, according to some scholars.<sup>24</sup> Further, American law schools, which produce the bulk of legal scholarship in this country (be it from law professors or law students), are often seen as tilting to one side of the political spectrum in America.<sup>25</sup> And not only have law professors been more than willing to wade into political issues, including letters opposing politically-appointed administration officials,<sup>26</sup> but legal scholars’ political ideology also predicts conclusions in their legal scholarship.<sup>27</sup>

Looking anecdotally at five of the most recent major cases on law and religion from the U.S. Supreme Court—*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Holt v. Hobbs*, 135 S. Ct. 853 (2015); and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017)—amicus briefs filed by law professors appear on both sides of each case,<sup>28</sup> except for *Holt*, a

Court Justices’ votes); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2007) (documenting the impact of political ideology on federal circuit court judges).

24. See Andrew D. Martin, Kevin M. Quinn, Theodore W. Ruger & Pauline T. Kim, *Competing Approaches to Predicting Supreme Court Decision Making*, 2 PERSP. ON POL. 761, (2004); Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004).

25. See, e.g., Adam Bonica, Adam S. Chilton & Maya Sen, *The Political Ideologies of American Lawyers* 28–30 (Harvard Kennedy Sch., Working Paper No. RWP15-049, 2015) (“The most striking result . . . is that all 14 top law schools have distributions that lean to the left.”).

26. See, e.g., Sari Horwitz, *More than 1,100 Law School Professors Nationwide Oppose Session’s Nomination as Attorney General*, WASH. POST (Jan. 3, 2017), [https://www.washingtonpost.com/world/national-security/more-than-1100-law-school-professors-nationwide-oppose-sessionss-nomination-as-attorney-general/2017/01/03/dbf55750-d1cc-11e6-a783-cd3fa950f2fd\\_story.html?noredirect=on&utm\\_term=.4a0c4b33efb4](https://www.washingtonpost.com/world/national-security/more-than-1100-law-school-professors-nationwide-oppose-sessionss-nomination-as-attorney-general/2017/01/03/dbf55750-d1cc-11e6-a783-cd3fa950f2fd_story.html?noredirect=on&utm_term=.4a0c4b33efb4).

27. See generally Adam S. Chilton and Eric A. Posner, *An Empirical Study of Political Bias in Legal Scholarship*, 44 J. LEGAL STUD. 277 (2015).

28. Compare Brief for Professor Eugene Volokh, et al. as Amici Curiae Supporting Petitioner, *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp’t Opportunity Comm’n*, 565 U.S. 171 (2012) (No. 10-553), 2011 WL 3919718, with Brief for Law and Religion Professors as Amici Curiae Supporting Respondents, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Emp’t Opportunity Comm’n*, 565 U.S. 171 (2012) (No. 10-553), 2011 WL 3532698; compare Brief for Church-State Scholars Frederick Mark Gedicks et al., as Amici Curiae Supporting Petitioner, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (Nos. 13-354, 13-356), 2014 WL 333891, with Brief for Constitutional Law Scholars as Amici Curiae Supporting Respondents, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (Nos. 13-354, 13-356), 2014 WL 356639; compare Brief for Gerard V. Bradley and Eight Other Constitutional Law Scholars as Amici Curiae Supporting Petitioner, *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (No. 12-696), 2013 WL 4011039, with

case where seemingly liberal political interests and conservative political interests may have aligned with a Muslim prisoner seeking to protect his religious liberty.<sup>29</sup>

On the other hand, there is at least arguably some daylight between law and politics. Further, the ideals of academic scholarship are objectivity rather than advocacy.<sup>30</sup> Perhaps legal scholars view religion more dispassionately than the public or politicians.<sup>31</sup> But that is an open question—one this study seeks to gain more traction on if it cannot be fully answered here.<sup>32</sup> And this article’s quantitative intellectual history of what may be a turning point in American legal and political history matters because while it’s unclear whether the legal ivory tower directly influences societal debates, its surely influences the law, both in the courts and in legislatures.<sup>33</sup>

This study thus covers the important time period of 1998–2012.<sup>34</sup> It does so for a couple of reasons. First, more generally, this covers the core of the period between the initial uncontroversial passage of RFRA in 1993 and the recent uproar over similar state-level RFRA’s in 2015, providing a little time before and after these bookend events.<sup>35</sup> Second, more specifically, this study

Brief for Erwin Chemerinsky & Alan Brownstein as Amici Curiae Supporting Respondents, *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (No. 12-696), 2013 WL 5323367, and Brief for Law Professors as Amici Curiae Supporting Respondents, *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (No. 12-696), 2013 WL 5461834; compare Brief for Law and Religion Practitioners as Amici Curiae Supporting Petitioner, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (No. 15-577), 2016 WL 1639722, with Brief for Legal and Religious Historians as Amici Curiae Supporting Respondent, *Trinity Lutheran Church of Columbia, Inc.*, 136 S. Ct. 891 (2016) (No. 15-577), 2016 WL 3667052.

29. See Brief for Islamic Law Scholars as Amici Curiae Supporting Petitioner, *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (No. 13–6827), 2014 WL 2465964.

30. Chilton & Posner, *supra* note 27, at 304–05 (“Our empirical results do not prove that all of legal scholarship is biased. Our coders were unable to classify numerous articles with high confidence.”).

31. See Kevin F. Ryan, *Lex et Ratio: A Nation Under God*, 32 VT. B.J. 6, 6 (2007) (“[M]any Americans speak comfortably of their faith and our leaders regularly succumb to the urge to chatter about their religious beliefs. Still like politics at the dinner table, the ties between religion and who we are as a nation seem a topic best avoided or skirted, dodged rather than discussed, in polite legal or scholarly company.”).

32. See discussion *infra* Section II.

33. Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HAST. L.J. 739, 789 (1985) (noting that Justice Cardozo “found law review articles of conspicuous utility in the performance of [his] duties” and that law reviews are “a mine for legislative drafting bureaus”).

34. See *infra* p. 154–55.

35. See discussion *infra* Section II.



starts in 1998, one year after the Supreme Court rejected RFRA’s application to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997) and before the slew of recent Supreme Court cases on religious issues started in 2012.<sup>36</sup> The reason this study covered those years rather than 1997–2011 is because legal scholarship is generally not published the same year it is written, so a one-year lag is provided on the front end and going until 2012 means it’s unlikely anything occurring in 2012 will show up in legal scholarship that year.

Several theoretical models are relevant to the potentially changing landscape of religion in the United States, and thus the treatment of religion in legal scholarship.<sup>37</sup> Some scholars have long advocated Secularization Theory, the view that society is gradually growing less religious, though there are variations on this theme.<sup>38</sup> In general, the theory argues that “the functions that religion served in the past are in modern times being fulfilled by more rational scientific institutions, which do a superior job at fulfilling these functions.”<sup>39</sup> Thus, the theory predicts “religion’s influence will decline or perhaps move from the public sphere to the private sphere.”<sup>40</sup>

Modernization Theory, the political science version of Secularization Theory, makes a similar but distinct argument: economic modernization and its processes, such as urbanization, higher literacy rates, science, nationalism, and political ideology, “will inevitably lead to the decline of religion as a relevant social factor.”<sup>41</sup> Yet some take a more nuanced view, arguing that because “[r]eligion is a dynamic, diverse, and multifaceted phenomenon . . . exist[ing] in a society that is constantly changing and evolving,” that “[b]oth secularization and its opposite, sacralization, are occurring.”<sup>42</sup>

Finally, an alternative theoretical model is the “supply-side” or “religious economies” model, which “argues that regulations restrict the supply of religion by changing the incentives and opportunities for religious producers (re-

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36. See *supra* note 28 and accompanying text.

37. See *infra* notes 39–45 and accompanying text.

38. Rebecca R. French, *Lamas, Oracles, Channels, and the Law: Reconsidering Religion and Social Theory*, 10 *YALE J.L. & HUMAN.* 505, 508 (1998) (Secularization theory posits that societies move from a sacred religious framework to a secular privatized state in which the role and influence of religion eventually decrease and disappear.”).

39. JONATHAN FOX, *A WORLD SURVEY OF RELIGION AND THE STATE* 15 (2008).

40. *Id.*

41. *Id.* at 15–16.

42. *Id.* at 20.

religious leaders and organizations) and the viable options for religious consumers (members of religious organizations).<sup>43</sup> This economics-based perspective posits that religious organizations, due to government restrictions, face “increase[d] entry and operating costs,” whereas for potential members of a faith, “religious choices are reduced and they face inflated costs when joining groups not condoned by the state.”<sup>44</sup>

Religious freedom is often thought of occurring on a spectrum of greater to lesser quantities, but that arguably oversimplifies the world.<sup>45</sup> A more complicated and accurate three-dimensional model based on the work of Durham and Scharffs, may provide more traction as to why there are governments (and views) that create environments of more or less religious freedom.<sup>46</sup> Imagine three continuums: secularity, hostility towards religion, and neutrality among religions.<sup>47</sup> If we simply view each dimension as having a low or a high value, that provides eight possibilities.<sup>48</sup> The table below explores these.<sup>49</sup>

*Table 1. Possibilities of Three-Dimensional Religious Liberty Model*

<b>Secularity</b>	<b>Hostility</b>	<b>Neutrality</b>	<b>Example/Real-world Manifestation</b>
High	High	High	Communism (all religions are bad)
High	High	Low	Some religions worse
High	Low	Low	Low neutrality might be incompatible with low hostility
High	Low	High	Some people’s view of the U.S.
Low	High	High	Perhaps not possible
Low	High	Low	Theocracy where state religion is a sham to control all religion
Low	Low	High	Pluralistic religious government

43. BRIAN J. GRIM & ROGER FINKE, *THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE 21ST CENTURY* 6–7 (2011).

44. *Id.* at 7.

45. See, e.g., Mark Cheney, *Are You a Believer? Take The Dawkins Test.*, BIG THINK (Mar. 29, 2012), <https://bigthink.com/think-tank/atheism-easter-atheister/> (“Do you believe in God? Sometimes this question warrants more than just a *yes* or *no* answer. To categorize one’s own beliefs about the possibility of the existence of a deity, Dawkins proposed ‘spectrum of probabilities’ . . .”).

46. See W. COLE DURHAM, JR. & BRETT G. SCHARFFS, *LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES* 125 (2d ed. 2019).

47. *Id.*

48. See *infra* Table 1.

49. See *infra* Table 1.

Low	Low	Low	Benevolent theocracy
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Thus, both theocratic and aggressively secular government systems can stifle religious freedom (though such is mediated through the dimensions of hostility and neutrality).<sup>50</sup> In other words, as far as picking winners, government is problematic when it either picks one faith or endorses anti-faith and smothers religion.<sup>51</sup> Thus, secularization can facilitate or hinder religious liberty, depending on the baseline, but only to the extent it reduces hostility towards religion or increases neutrality among religions (or both).<sup>52</sup> And the government’s relationship with religion, in the extremes, can be to enforce a monopoly, or to regulate it out of existence (or at least the public square).<sup>53</sup> Between those extremes, are several scenarios where religious liberty flourishes best.<sup>54</sup> So, from a theoretical perspective, some, at least those noted above, perceive American society, including politics and law, to be moving further towards hostility to religion, though whether that is “inadvertent insensitivity” or outright hostility may be somewhat in the eye of the beholder.<sup>55</sup> (Ironically, one history professor even described our country as experiencing “The Rise of the Secular Theocracy.”)<sup>56</sup>

What about the views of the legal intelligentsia?<sup>57</sup> Surely few groups in the United States have as large an influence on trends in law and religion as those producing legal scholarship.<sup>58</sup> Legal scholarship influences courts, legislatures, and executive branch policymakers.<sup>59</sup> Those producing legal schol-

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50. DURHAM & SCHARFFS, *supra* note 46.

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.*

55. *See id.*

56. Wilfred M. McClay, *The Rise of the Secular Theocracy*, MOSAIC (Aug. 15, 2016), <https://mosaicmagazine.com/response/2016/08/the-rise-of-the-secular-theocracy/>.

57. The idea of studying the treatment of religion in a branch of scholarship is not new. A previous study looked at major international relations academic journals from 1980 to 1999 to see the extent that scholars in that field considered religion to be an important influence on international relations and found that religion was almost never considered. *See* Daniel Philpott, *The Challenge of September 11 to Secularism in International Relations*, 55 *WORLD POL.* 66, 69 (2002).

58. *See, e.g.*, Robin West & Danielle Citron, *On Legal Scholarship*, THE ASS’N OF AM. L. SCHS., <https://www.aals.org/current-issues-in-legal-education/legal-scholarship/> (last visited Aug. 27, 2018).

59. *See id.* (“Normative legal scholarship aims to influence judges, lawyers, legislators or regulators to reform, interpret, or preserve existing law to make the world more just.”).

arship often serve in government, advise politicians, work for judges, or become such themselves.<sup>60</sup> If we are to get a glimpse where law and religion in this country are heading, trends in legal scholarship provide as accurate a forecast as any other source—and arguably the most insight.<sup>61</sup> For example, years before courts were generally willing to find a constitutional right to same-sex marriage, legal scholars were debating that question with many advocating for the right.<sup>62</sup> Eventually, those academic arguments influenced the law, even if not directly cited by courts.<sup>63</sup>

Some have argued that “[t]oday, an increasing number of scholars and activists say that religion is not so special after all.”<sup>64</sup> And there is anecdotal evidence supporting such a claim.<sup>65</sup> One relatively recent book published by Oxford University Press, written by an American law professor, and entitled *Freedom from Religion*, argues that “[s]ociety is at risk from religious extremism,” and thus “[c]ontemporary religious extremism leaves decision-makers and the public alike with no choice but to re-contour constitutionally granted rights as they pertain to religion and [religious] speech.”<sup>66</sup> A 2016 book written by an American law professor and published by Princeton University

60. See, e.g., Elena Kagan, *Richard Posner, The Judge*, 120 HARV. L. REV. 1121, 1121 (2007) (Volumes have been written . . . about Richard Posner, the legal scholar and thinker. . . . Richard Posner, of course, is not only a theorist. He is also a practitioner—a federal appellate judge sitting on the Court of Appeals for the Seventh Circuit.”).

61. See *infra* notes 62–63 and accompanying text.

62. See, e.g., Yuvraj Joshi, *The Trouble with Inclusion*, 21 VA. J. SOC. POL’Y & L. 207, 207–08, 228–241 (2014) (discussing same-sex-marriage prior to the Supreme Court’s ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which found that marriage is a fundamental right that is guaranteed to same-sex-couples); Lynne Marie Kohm, *Rethinking Mom and Dad*, 42 CAP. U. L. REV. 441, 446–47 (2014).

63. Arguments made by Petitioner in *Obergefell* and various amici briefs in support of Petitioner in *Obergefell* rely on legal scholarship. Reply Brief of Petitioners at \*9, *Obergefell v. Hodges*, 135 S. Ct. 2584, No. 14-556 (2015); Brief for Anti-Defamation League as Amici Curiae Supporting Petitioners, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004712; Brief for Gary J. Gates as Amici Curiae Supporting Petitioners, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 15-556, 14-562, 14-571, 14-574), 2015 WL 1021451; Brief for Marriage Equality USA as Amici Curiae Supporting Petitioners, *Obergefell v. Hodges* 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1022683; Brief for The Leadership Conference on Civil and Human Rights et al. as Amici Curiae Supporting Petitioners, *Obergefell v. Hodges* 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1022681.

64. Michael W. McConnell, *Is Religion Special?*, DESERET NEWS (Nov. 20, 2011, 1:16 AM), <https://www.deseretnews.com/article/700199256/Is-religion-special.html>.

65. See *infra* note 66–67 and accompanying text.

66. AMOS N. GUIORA, *FREEDOM FROM RELIGION* 27, 39 (2009).

Press, engages in its titular inquiry—*Why Tolerate Religion?*<sup>67</sup> The book’s answer is that religion in itself does not require the special treatment the First Amendment affords it.<sup>68</sup> As another law professor reviewing the book noted, its author “is not a crank, nor, within the academic world, is he out of the mainstream.”<sup>69</sup>

Of course, these two books are but anecdotal evidence. This Article seeks to add more rigorous evidence of the view of American legal scholars regarding religion and the law by examining scholarship over a fifteen-year time period—specifically, analyzing law journal articles published during the period that touch on law and religion in the U.S. context.<sup>70</sup> No other study has fully undertaken this task.<sup>71</sup> But this paper is not an attempt to test any hypotheses or prove any theories, such as secularization. Rather, its aim is much more modest—to describe trends in legal scholarship during a seeming watershed period in American society for the area of law and religion. It will thus explore various questions in a sort of quantitative intellectual history. Given how much we are in the dark about this area—how little is known about how legal scholarship deals with religion—there is value in just answering the various descriptive questions the paper poses. The paper leaves to others any attempts to pick a theoretical winner as to why these trends may be occurring.

This paper will proceed as follows: Part II will discuss the research questions and the methodology of collecting and coding the relevant data;<sup>72</sup> Part III will analyze the data and discuss the results;<sup>73</sup> Part IV will discuss caveats and consequences;<sup>74</sup> and then Part V will conclude.<sup>75</sup>

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67. See BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013).

68. *Id.* at 66–67.

69. Michael W. McConnell, *Why Protect Religious Freedom?*, 10 *CHRISTIAN LAW* 15, 15 (2014). For a full review of Leiter’s book, see Michael W. McConnell, *Why Protect Religious Freedom?*, 123 *YALE L. J.* 770 (2013).

70. See *infra* Part II.

71. But see James C. Phillips, *Law and Religion in U.S. Legal Scholarship: An Empirical Examination, 2008–2012*, 2014 *BYU L. REV.* 635 (2014). A previous study approached the same question, but it was limited to a five-year period, and suffered from the double methodological deficiency of having the author be the sole coder; there should have been at least two coders, and neither should have been the person familiar with the study’s research questions. See *id.* at 666.

72. See *infra* Part II.

73. See *infra* Part III.

74. See *infra* Part IV.

75. See *infra* Part V.

## II. RESEARCH QUESTIONS, DATA &amp; METHODOLOGY

The overarching question driving this study is how does U.S. legal scholarship portray (or treat) religion in a legal context? But there are many subsidiary questions related to this broad one:

1. What types of legal contexts (free exercise vs. establishment) comprise religious scholarship and does this change over time?
2. Is religion portrayed more or less positively over time or depending on the legal context (free exercise vs. establishment)?
3. Is religion portrayed differently depending on the type of author (professor, student, or practitioner), and does this change over time?
4. What religions are represented in legal scholarship, and are some religions treated more positively than others?
5. What is associated with arguments for greater (or less) accommodation of religious beliefs and separation of religion and government?

Likewise, given that legal scholars, like anyone else, respond to rewards and punishments, legal publications could encourage or discourage particular portrayals of religion based on whether an offer of publication is extended.<sup>76</sup> This could result in overall trends where portraying religion as more or less positive can provide authors with more or less prestigious publication outlets.<sup>77</sup> Thus, a subsidiary research question is:

6. Is the portrayal of religion related to the ranking of the law journal?

Thereafter, one final question is discussed:

7. Is religion portrayed differently depending on the non-religious legal issue addressed (tax law, children, sexual orientation, etc.)?

The legal database Westlaw was used to find law journal articles dealing with law and religion in the American context.<sup>78</sup> Westlaw has over 1000 law

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76. Cf. Jeffrey L. Harrison & Amy R. Mashburn, *Citations, Justifications, and the Troubled State of Legal Scholarship: An Empirical Study*, 3 TEX. A&M L. REV. 45, 46 (2015) (“[F]ortunes (tenure, salaries, grants, chairs, travel opportunities, accolades from colleagues, etc.) will be largely dependent on placement of their research publications and citations to them.”).

77. See Phillips, *supra* note 71, at 635 (“[W]hen portraying religion in a positive light, as compared to a problematic, ambivalent, or neutral portrait, articles are published in less prestigious journals.”).

78. THOMSON REUTERS WESTLAW EDGE, [https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=\(sc.Default\)](https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default)).

journals that can be searched, covering almost all if not all law journals published in the United States (as well as a few foreign journals).<sup>79</sup> Additionally, Westlaw is the predominant legal database used by the legal profession, meaning that it's what courts use when doing research.<sup>80</sup> Using the same database that courts and lawmakers use establishes credibility for the implications of this study's findings. Searches were done in Westlaw's "Law Reviews & Journals" subsection of its "Secondary Sources" database.<sup>81</sup> The search parameters were designed to be especially broad so that results were over inclusive.<sup>82</sup> Generally, each year returned around 3,000 results.<sup>83</sup> These results were ranked by Westlaw according to relevance based on the search parameters.<sup>84</sup>

To test whether the relevance of the search results correlated with the relevance of the types of articles necessary for this study, coders initially looked at every tenth article until they exhausted the search results. After getting beyond roughly the first few hundred results, only a few "hits" were useable for the study, indicating the relevance ranking by Westlaw was a good proxy for the relevance of articles for this study.<sup>85</sup> Thereafter, due to finite time and

79. See *Law Reviews & Journals*, THOMSON REUTERS WESTLAW EDGE, [https://www.westlaw.com/Browse/Home/SecondarySources/SecondarySourcesLibrary?transition-Type=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Browse/Home/SecondarySources/SecondarySourcesLibrary?transition-Type=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0) (listing over 1,000 searchable journals).

80. *Legal Databases: Comparative Analysis*, CENTER FOR RESEARCH LIBRARIES: GLOBAL RESOURCE NETWORK, <https://www.crl.edu/collections/topics/legal-databases-comparative-analysis> (last visited May 9, 2019).

81. *Id.*

82. For example, the search for the year 2004 looked like this: 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") ATLEAST4(WORSHIP) ATLEAST5(CHURCH) ATLEAST3(SYNAGOGUE) ATLEAST3(MOSQUE) ATLEAST3(PRAYER) ATLEAST4(FAITH) ATLEAST3("RELIGIOUS BELIEF") ATLEAST5(RELIGIO!) & DA(aft 2003 & bef 2005).

83. Specifically: 1998 (2,946 results); 2000 (2,939); 2002 (2,976); 2004 (3,224); 2006 (3,398); 2008 (3,448); 2010 (3,529); 2012 (3,376).

84. *Westlawnext Q&A Session: What Happened to ResultsPlus?*, LEGAL SOLUTIONS BLOG (June 23, 2010), <https://blog.legalsolutions.thomsonreuters.com/legal-research/westlawnext-qa-session-what-happened-to-resultsplus/> (noting that search results are ranked by relevance).

85. For example, in 1998, looking at every tenth article in the first 500 articles yielded a 66% relevance rate, articles 501–1000 a 12% relevance rate, articles 1001–1500 an 8% relevance rate, articles 1501–2000 a 6% relevance rate, and articles 2001–2946 a 0% relevance rate. Similarly, looking at articles in the year 2000, examining every article from 1–100 yielded a 64% relevance rate, 101–

resources and the immense amount of time it would take to look at thousands of articles only to find they lacked relevance, coders examined only the first few hundred results from a search. Having the coders select which articles were relevant also served an important methodological function: it prevented the bias of the author, who had already conducted a pilot study,<sup>86</sup> from unintentionally affecting the selection process.

Articles were excluded from the study if they were primarily about law and religion outside of the U.S. domestic context, barely mentioned law and religion, or were more descriptive in nature. These exclusions covered mainly articles about law and civil religion in foreign countries, articles about religious law or just religion, publications that were just describing cases or simply reviewing books without doing more, and articles primarily on other topics.

The first year studied was 1998. Thereafter, every even year was selected up through 2012 (2000, 2002, 2004, 2006, 2008, and 2010).<sup>87</sup> The reason for skipping odd years was to provide greater coverage to maximize the ability to see a trend given finite resources that made coding each year of the fifteen-year period not practical.<sup>88</sup>

The research utilized four coders overall.<sup>89</sup> The author did not participate in the coding other than providing initial training so as not to inadvertently bias the results.<sup>90</sup> The coders were law students and came from two law schools: Brigham Young University and the University of Illinois at Champagne-Urbana. Two were women and two were men. Each year studied was

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200 a 59% relevance rate, and looking at every tenth article in 201–500 yielded a 27% relevance rate, 501–1000 a 12% relevance rate, 1001–1500 a 6% relevance rate, and 1501–2939 a 0% relevance rate.

86. The author’s preliminary study was published in the Brigham Young University Law Review in 2014. Phillips, *supra* note 71.

87. For an example of skipping years of data to provide broader coverage, see, e.g., Gregoary A. Caldeira, John R. Wright, & Christopher J. Zorn, *Organized Interests and Agenda Setting in the U.S. Supreme Court Revisited*, 7th Annual Conference on Empirical Legal Studies 4 (July 17, 2012) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2109497n](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2109497n)(looking at data from the Supreme Court from terms in 1968, 1982, 1990, and 2007).

88. Because coders were paid, there was a limit on how much coding could be done.

89. Ron Artstein & Massimo Poesio, *Bias Decreases in Proportion to the Number of Annotators*, in PROCEEDINGS OF FG-MoL 2005: THE 10<sup>TH</sup> CONFERENCE ON FORMAL GRAMMAR AND THE 9<sup>TH</sup> MEETING ON MATHEMATICS OF LANGUAGE EDINBURGH (James Rogers ed., 2005), <https://web.stanford.edu/group/cslipublications/cslipublications/FG/2005/FGMoL05.pdf#page=151> (recommending the use of multiple annotators/coders as a means to control individual bias).

90. See generally Simon N. Young, *Bias in Research Literature and Conflict of Interest: An Issue for Publishers, Editors, Reviewers and Authors, and It is Not Just About the Money*, 34 J. PSYCHIATRY NEUROSCIENCE 412 (2009) (discussing bias and conflicts of interest for authors of research literature).



coded by two coders. The two coders were matched up after taking an initial survey on their views on religion so that coders with differing views were coding the same article rather than two coders with similar views. The coders worked independently of each other. Thus, each article was coded by two coders.

The following characteristics of the article were coded or recorded (see Appendix for coding guide)<sup>91</sup>:

- *Citation*
- *Year of publication*
- *Type of article* (article, note, comment, symposium, book review, etc.)
- *Rank of journal*<sup>92</sup>
- *Publishing school* (where applicable)
- *Author Type*<sup>93</sup> (law professor,<sup>94</sup> non-law academic, law student, non-law student, lawyer,<sup>95</sup> other professional)
- *Author School* (if applicable)
- *Author School Rank* (if applicable)
- *Legal Sub-area of Article*<sup>96</sup>
- *Religion Article Discusses*<sup>97</sup>
- *Free Exercise*<sup>98</sup> *Implicated* (yes or no)

91. See *infra* Appendix.

92. See *infra* Appendix. The Washington and Lee University Law Library computes annual rankings for law journals. See *W&L Law Journal Rankings*, W&L LAW, <https://managementtools4.wlu.edu/LawJournals/>. Because it only goes back to 2003, this study used 2003 for the previous years included (1998, 2000, and 2002).

93. When there were multiple authors on an article, the first author’s type was used. Initially this study planned on collecting additional information on the authors, including year of bachelor’s degree, but the amount of time spent on collecting and coding the data meant this additional information, which seemed less important, had to be dropped from collection.

94. This included adjunct faculty, visiting professors, fellows, deans, and any type of full-time law professor, tenure-track or otherwise. See *infra* Appendix.

95. This included judges and clerks. See *infra* Appendix.

96. Such as tax, employment, healthcare, etc. See *infra* Appendix.

97. This was broken into the following categories: General (which included if multiple distinct religions were being discussed); Christianity (generally, not specific Christian denominations); Catholicism; Judaism (lumping together all types); Native American Religions; Islam (lumping together all types); Other Christian (this included Christian Science, Baptist, Episcopalian, LDS/Mormon, FLDS, Amish, Lutheran, and Jehovah’s Witnesses); Other Religions (this included Rastafarian, Buddhist, Santaria, Sikh, and Scientology); and Atheism. See *infra* Appendix.

98. The First Amendment of the United States Constitution states, “Congress shall make no

- *Establishment of Religion*<sup>99</sup> Implicated (yes or no)
- *Treatment of Religion* (positive, neutral/mixed, problematic)
- *Accommodation of Religion was Advocated* (yes, uncertain/partially, no)
- *Separation of Church and State Advocated* (yes, uncertain/partially, no)

Coding content analysis can occur in one of two basic ways: coding manifest content and coding latent content.<sup>100</sup> Manifest content is that which is readily apparent and can be counted, such as the number of times an article on law and religion uses the term *harmful*.<sup>101</sup> However, while coding manifest content is easily replicable by others given its objective nature (thereby achieving reliability),<sup>102</sup> it may not adequately measure what it claims to be measuring (thereby lacking validity)<sup>103</sup> and thus fails the expected precision and accuracy required for evaluating qualitative measurements.<sup>104</sup> On the other hand, latent analysis looks at “underlying meaning” and is more holistic and subjective.<sup>105</sup> This type of analysis also has trade-offs; for example, a coder may be less likely to miscode if they can take into account all of the information, but there may also be less consistency among coders given the subjective nature.<sup>106</sup>

Determining how religion is being portrayed, whether free exercise or establishment issues are implicated, and whether accommodation or separation

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law . . . prohibiting the free exercise [of religion].” U.S. CONST. amend. I. Free exercise issues involve religious freedom or liberty—the ability of one to not just worship, but to live one’s religion outside of the confines of a church/synagogue/mosque and the home. *See, e.g.*, *Sherbet v. Verner*, 374 U.S. 398, 404 (1963) (recognizing violation of free exercise rights because state punishment was based on plaintiff’s practice of her religion).

99. The First Amendment of the United States Constitution states, “Congress shall make no law respecting the establishment of religion . . . .” U.S. CONST. amend. I. Establishment issues are often referred to as the separation of church and state, and in modern jurisprudence usually deal with religious influence on government and government endorsement of or aid to religion. *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 672–73 (1984).

100. *See* EARL BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 335–37 (13th ed. 2012).

101. *Id.* at 336.

102. *Id.* at 148 (“[R]eliability is a matter of whether a particular technique, applied repeatedly to the same object, yields the same result each time.”).

103. *Id.* at 151 (“[V]alidity refers to the extent to which an empirical measure adequately reflects the real meaning of the concept under consideration.”).

104. *Id.* at 148 (“When social scientists construct and evaluate measurements . . . they pay special attention to two technical considerations: reliability and validity.”).

105. *Id.* at 336.

106. *Id.* (recognizing the difficulty of applying consistent standards across an analysis).

was being argued for is more appropriate for latent analysis given the admittedly subjective nature of these categories and the nuances of legal arguments.<sup>107</sup> As a result of the subjective nature of coding latent content and in order to handle disagreement between coders for categories with answers that could be placed on a continuum—for example, the treatment, accommodation, and separation categories—the answers of the coders were averaged. To try and minimize the potential that two independent coders merely have the same bias, creating a false consensus as to the underlying reality of the coding material, the author surveyed coders’ views on religion beforehand, and matched coders with more positive views of religion with those with less positive views of religion.

A further word of explanation on the treatment of religion category. An article was coded as treating religion as positive if it characterized religion as a benefit, a good, something positive, or something that needed to be protected, defended, or strengthened.<sup>108</sup> On the other hand, an article was coded as treating religion as something problematic if it mainly focused on how religion would infringe another right, inflict some harm on others, or have some negative consequence.<sup>109</sup> Articles that did not appear to characterize religion in either way, or that roughly characterized religion in both ways, were coded as neutral or mixed, respectively.<sup>110</sup>

Additionally, coders were instructed that if the article dealt with the free exercise of religion/religious liberty, then they should code “yes” for the accommodation category if the article called for the accommodation of religious beliefs or the strengthening or protection of religious liberty, and a “no” if it did not.<sup>111</sup> Similarly, if the article dealt with the establishment of religion/the separation of church and state, then the coders were instructed to code “yes”

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107. *Id.* (recognizing that the latent content method is better for realizing the underlying meaning of communications).

108. *See infra* Appendix.

109. *See infra* Appendix. While the determination of whether religion is problematic can often be objectively assessed, whether one views that problematic portrayal as itself problematic is rather subjective and contextual. For instance, few people have any issue with a discussion condemning a religion advocating the killing of one’s neighbor. But that is still treating religion as problematic. On the other hand, a discussion of how a pharmacist’s religion prevents her from dispensing contraceptives to customers, and thus infringes on the reproductive rights of those customers (and possibly also their health) would also be treating religion as problematic, but there the underlying religiously-motivated behavior may be less universally condemned.

110. *See infra* Appendix.

111. *See infra* Appendix.

for the separation category if the article called for a stricter separation, or advocated not moving towards a looser standard of separation of church and state, and a “no” if the article called for a looser separation (sometimes called more accommodation of religion by government<sup>112</sup>) or advocated not moving to a stricter separation.<sup>113</sup>

### III. RESULTS AND ANALYSIS

A total of 1,292 articles were found to fit the study’s parameters and were coded—approximately 160 per year.<sup>114</sup> This part of the paper will present the relevant results to answer the research questions noted above.

#### A. *General Area of Law and Religion*

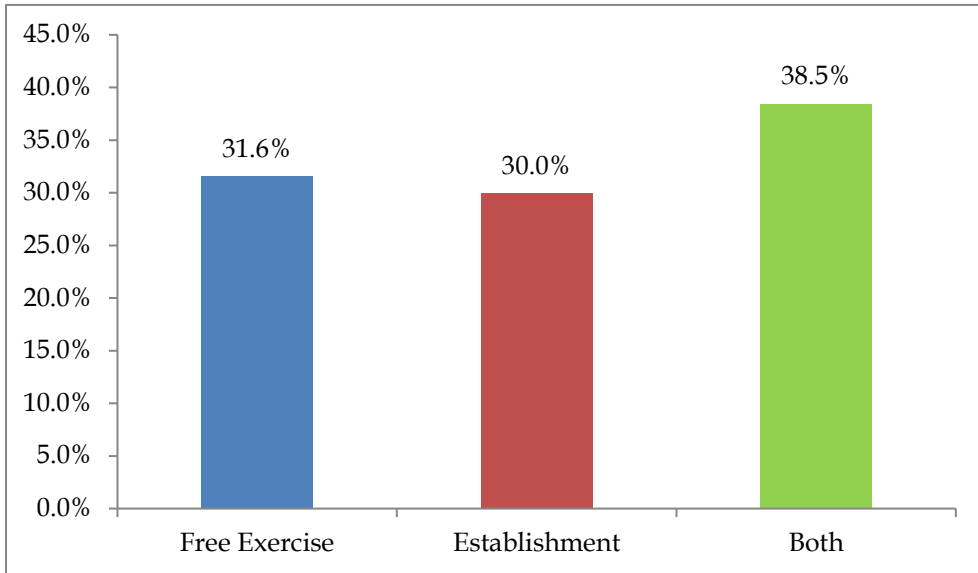
The first research question regards what types of legal contexts (free exercise vs. establishment) comprise religious scholarship and does this change over time. Graph 1 provides the breakdown of the portion of articles dealing with free exercise issues versus establishment issues versus both.

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112. More accommodation of religion by government is different than accommodating free exercise claims. Michael P. Bobic & John R. Vile, *Accommodationism and Religion*, The First Amendment Encyclopedia (2017), <https://www.mtsu.edu/first-amendment/article/825/accommodationism-and-religion> (“Accommodationists assert that in the First Amendment the framers intended to promote cooperation between government and religion, not neutrality or government hostility toward religion. . . . According to accommodationists’ interpretation, the First Amendment permits governmental actions that promote religion, but not religious institutions.”).

113. See *infra* Appendix.

114. James C. Phillips, Data Collection of Religious Legal Scholarship: 1998-2012 (November 1, 2019) (unpublished data collection) (on file with author).

*Graph 1. Articles by Type of Religious Issue*

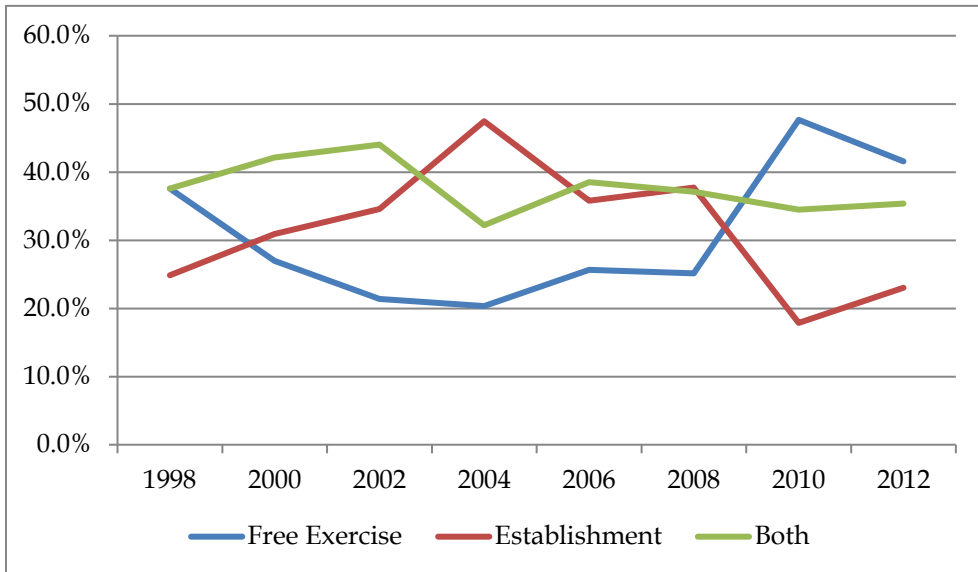
As can be seen, about a third of the articles focused on free exercise issues, a third focused on establishment issues, and a third focused on both.<sup>115</sup> The segment with both religious issues usually occurs in articles in one of two scenarios: either “establishment” of one religion threatens the free exercise of other religions, or an issue of free exercise, such as providing a religious exemption to a law, is framed as the establishment of religion.

*Graph 2* explores the type of religious issue addressed over the time period studied:

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115. *See supra* Graph 1.

Graph 2. Articles by Type of Religious Issue Over Time



No real pattern emerges.<sup>116</sup> The variations in percentages likely mean for this time period, that the focus of legal scholarship responded to hot topics, which don't always implicate the same general type of law and religion issue.

### B. Treatment of Religion

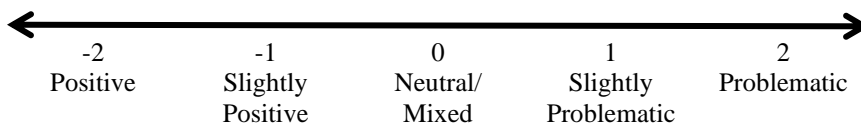
Regardless of what general area of law and religion is implicated, of greater import for the purpose of this Article is how religion is treated. The second research question asked whether religion was treated more or less positively over time or depending on the legal religious context (free exercise vs. establishment). This section first reports the results, then reports validation measures to the positivity scale.

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116. See *supra* Graph 2.

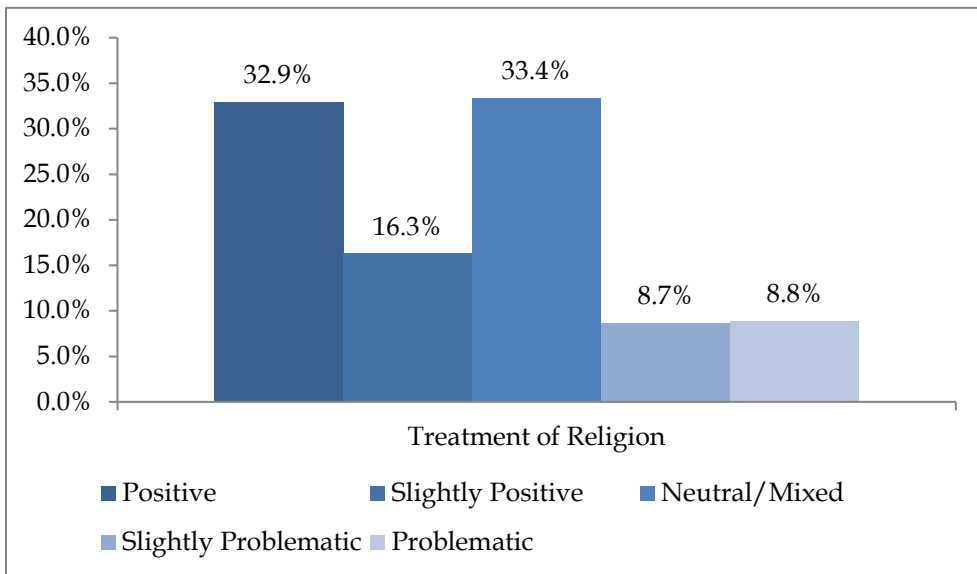
1. Analysis of treatment

To measure the treatment of religion, each article was coded by two independent coders, with each deciding whether the article was treating religion mostly positively (+1), in a neutral or mixed manner (0), or as mostly problematic (-1). Then, the coders’ classifications for each article were added together to create the following five-point ordinal scale:



Based on this scale, one finds the following across the period-of-time studied:

*Graph 3. Treatment of Religion by Category*



Nearly half the time religion is characterized as positive (49.2%).<sup>117</sup> Less

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117. *See supra* Graph 3. This includes both the positive category and the slightly positive category. *See supra* Graph 3.

than a fifth of the time (17.5%) it is portrayed as more problematic.<sup>118</sup> These results could be surprising, depending on one’s prior expectations. On the one hand, religious freedom is a constitutionally-protected right,<sup>119</sup> and legal scholars are generally solicitous of constitutional rights.<sup>120</sup> This might explain why there are more positive than problematic articles. On the other hand, legal scholarship, while often more prone to advocacy than scholarship in other fields, is still scholarship rather than a brief being filed in a court.<sup>121</sup> Objectivity, or at least the air of it, is a criterion of being an academic, and it also makes a person more credible and persuasive.<sup>122</sup> Such objectivity should likely point towards an even bigger portion of articles falling under the neutral/mixed designation. However, while a third do, many still fall on the positive side.<sup>123</sup> Perhaps this is reflective of a society that still, on average, views religion more positively than not.<sup>124</sup>

The next findings answer part of this study’s first question: whether the average portrayal of religion changes over time.<sup>125</sup> In other words, can any trend be detected over time?<sup>126</sup> Is the treatment of religion consistent over the fifteen-year time period studied, or is it moving in a particular direction?<sup>127</sup> As a baseline, the average treatment value on the five-point scale from 1998–2012 was .56, about halfway between neutral/mixed and slightly positive.<sup>128</sup>

118. See *supra* Graph 3. This includes both the problematic and slightly problematic categories.

119. U.S. CONST. amend. I.

120. See Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1135 n.11 (1995) (noting that the percentage of law review articles and notes on constitutional topics was 54% in 1993).

121. Cf. Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L. J. 1205, 1208 (1981) (“Legal scholarship today has three forms, for which I have been unable to develop non-invidious labels. The first is traditional legal advocacy, the second is advocacy augmented with concepts drawn from nonlegal fields of thought, and the third is the study of law as a phenomenon. . . . Most of the articles published as legal scholarship constitute what I have called traditional legal advocacy.”).

122. See Gregory Mitchell, *Empirical Legal Scholarship as Scientific Dialogue*, 83 N.C. L. REV. 167, 167–68 (2004) (noting that peer review journals seek objectivity but even so, articles are biased).

123. See *infra* Graph 3.

124. See, e.g., 4. *Views on Religion and Politics*, PEW RESEARCH CENTER (May 10, 2017), <http://www.pewforum.org/2017/05/10/views-on-religion-and-politics/> (“In most of the countries surveyed, roughly half or more say religious institutions strengthen morality in society, bring people together and strengthen social bonds, and plan an important role helping the poor and needy.”).

125. See *supra* p. 152–53 (outlining research questions).

126. See *supra* p. 152–53 (outlining research questions).

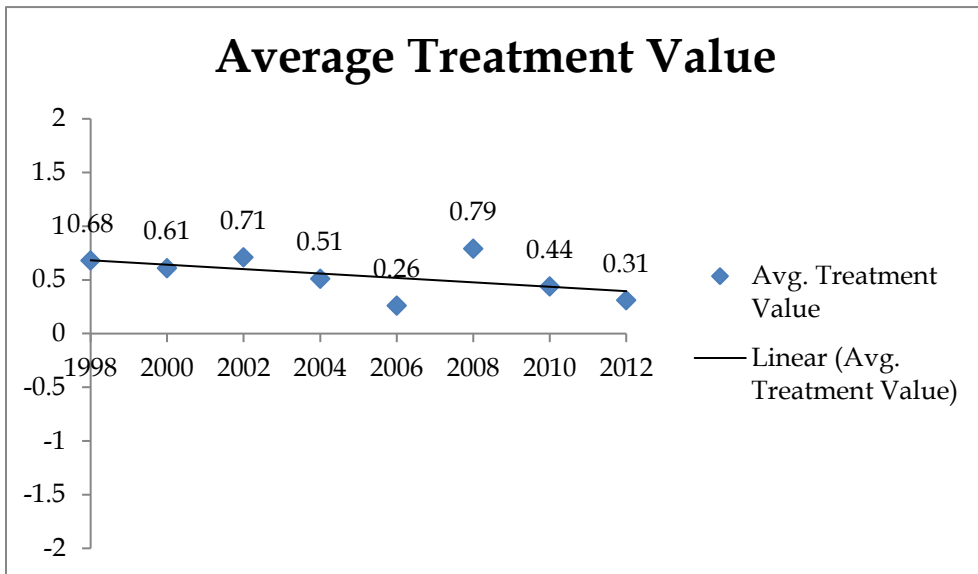
127. See *supra* p. 152–53 (outlining research questions).

128. See *infra* Graph 4; see also Phillips, *supra* note 114. The average treatment value for each year was calculated by summing the treatment value for all of the articles and then dividing that sum by the number of articles.



As the graph below shows, a modest downward trend does emerge over time.<sup>129</sup>

Graph 4. Treatment of Religion Over Time



The yearly averages are admittedly dynamic, with a couple of outliers, particularly 2008.<sup>130</sup> However, there is an unmistakable decline that indicates religion is portrayed less positively in American legal scholarship in more recent years as compared to earlier years in the time period studied.<sup>131</sup> This trend, while not necessarily substantively large (a decrease of .02 per year), is statistically significant.<sup>132</sup> Unfortunately, the data cannot speak to whether this negative slope is consistent with the trend before 1998. Nor would it be wise to extrapolate beyond 2012, as the trend could flatten, decline more

129. See *infra* Graph 4.

130. See *supra* Graph 4.

131. See *supra* Graph 4.

132. Phillips, *supra* note 114. I ran a univariate regression, which is nothing more than correlation analysis, with treatment as the dependent variable and year as the independent variable. This is not panel data since each year's articles differ from the next. See *supra* notes 79–91. In addition, the year variable was statistically significant ( $p = .007$ ) with a coefficient of  $-.02$  (robust standard error =  $.0075$ ;  $F = 7.40$ ;  $SER = 1.27$ ,  $n = 1292$ ). See Phillips, *supra* note 114.

steeply, or even reverse course. Yet similar to the way an increasing portion of the politic viewed religion as at least sometimes problematic in the last quarter century, legal scholarship appears to be doing the same.<sup>133</sup>

One can further look at treatment of religion by overlaying the area of law and religion, which taps into the second research question as to whether religion is portrayed differently based on legal context.<sup>134</sup> It would make sense that in the area of free exercise, religion may be treated more positively than in the area of establishment.<sup>135</sup> When both are implicated, treatment is more likely to be mixed.<sup>136</sup> The graph below explores this:

*Graph 5. Average Treatment Value by Area*



133. See, e.g., Hannah Fingerhut, *Millennials' View of News Media, Religious Organizations Grow More Negative*, PEW RESEARCH CTR. (Jan. 4, 2016), <http://www.pewresearch.org/fact-tank/2016/01/04/millennials-views-of-news-media-religious-organizations-grow-more-negative/> (“Since 2010, Millennials’ rating of churches and other religious organizations has dipped 18 percentage points.”); *supra* Graph 4.

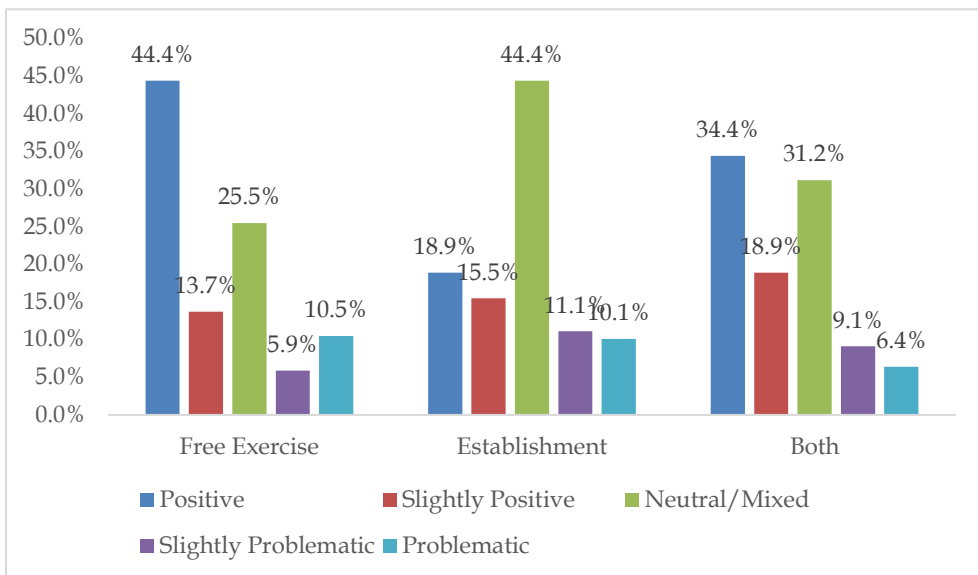
134. See *supra* pp. 152–53 (outlining research questions).

135. See *infra* Graph 5; see also Phillips, *supra* note 71, at 645 (“Religion is seen least positively when dealing with matters of church and state and most positively when dealing with religious liberty.”).

136. See *infra* Graph 5; see also Phillips, *supra* note 114.

Since this is on a scale of 2 to -2, the differences are significant, at least between free exercise and establishment scholarship where the gap is just over 0.5.<sup>137</sup> Legal scholarship portrays religion most positively when discussing it in the context of free exercise (or religious liberty), and least positively when in the context of establishment issues (or the separation of church and state).<sup>138</sup> When discussing both issues, the portrayal of religion falls understandably in between the treatments of free exercise or establishment alone, though interestingly, much closer to the portrayal in the pure free exercise context.<sup>139</sup> Another way to look at this is by examining the distribution of treatment values within each area, as the graph below does<sup>140</sup>:

Graph 6. Distribution of Treatment Values by Area



As expected, in a pure free exercise context compared to the other two, religion is most likely to be positively portrayed, whether just looking at the

137. See *supra* Graph 5.

138. See *supra* Graph 5.

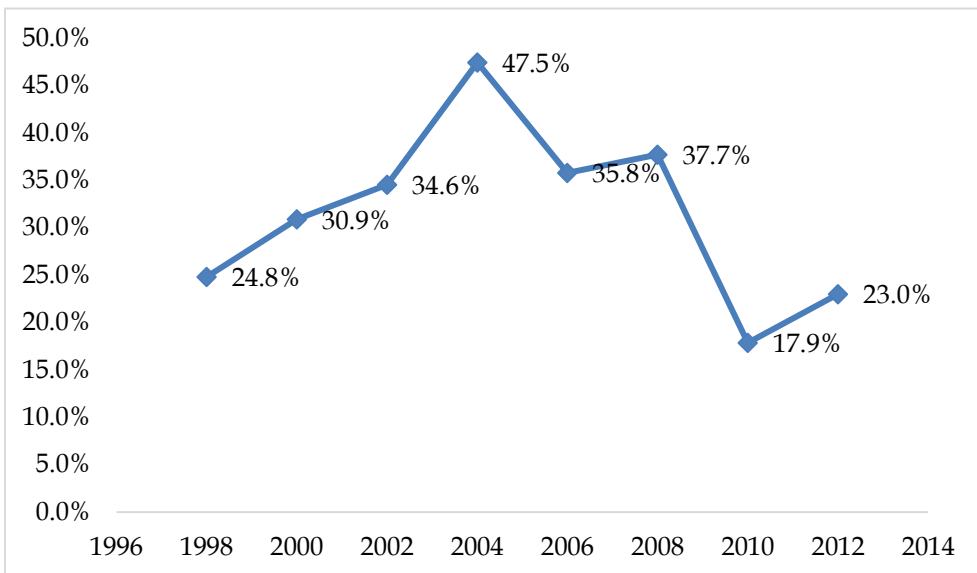
139. See *supra* Graph 5.

140. See *infra* Graph 6; see also Phillips, *supra* note 114.

percent of positive values, or the combined positive and slightly positive values.<sup>141</sup> Contrary to expectations, rather than in the context of both free exercise and establishment where one might think religion is most likely to be portrayed in a mixed fashion, it is in a pure establishment setting where religion is more often treated in a mixed or neutral way.<sup>142</sup>

Of course, since religion tends to be treated less positively in a pure establishment context,<sup>143</sup> a trend overall towards treating religion less positively could be related to an increased percentage of articles dealing purely with establishment issues.<sup>144</sup> The graph below explores this:

*Graph 7. Percentage of Pure Establishment Articles Over Time*



However, no clear trend of pure establishment articles making up an increasing portion of law journal articles on law and religion emerges.<sup>145</sup> Thus,

141. See *supra* Graph 6; see also Phillips, *supra* note 114.

142. See *supra* Graph 6.

143. See *supra* Graph 5; see also Phillips, *supra* note 114.

144. See *infra* Graph 7; see also Phillips, *supra* note 114.

145. See *supra* Graph 7; see also Phillips, *supra* note 114.

the number of pure establishment articles cannot explain the trend to treat religion less positively.<sup>146</sup>

## 2. Validity of measure

One concern with the law students’ coding is the holistic, potentially subjective nature of their determinations.<sup>147</sup> While there was an attempt to mitigate this by pairing coders who had different views on religion and averaging their values,<sup>148</sup> some kind of external check on the validity of their coding would increase confidence in the findings.<sup>149</sup> To accomplish this, a random number generator created a random sample by selecting 30 articles from each of two groups: those articles where the coders agreed the author treated religion positively (a value of 2 on the scale), and those articles where the coders agreed the author treated religion as problematic (a value of -2 on the scale).<sup>150</sup> These articles were then analyzed using LIWC2015 software. LIWC2015 attempts to quantify psychometric properties of texts based on word usage.<sup>151</sup> For example, *crying*, *grief*, and *sad* all belong to the “Sadness” subcategory of the “Negative emotion” category, which is also a part of the broader the “Emotional Tone” summary language variable.<sup>152</sup> The LIWC Anger category, for instance, contains “230 anger-related words and word stems.”<sup>153</sup>

To the extent authors are promoting or defending religion, one would expect their overall emotional tone to be more positive than authors arguing religion is problematic. This is what the LIWC2015 analysis found: the sample of religion-is-positive articles was more positive in emotional tone than the sample of religion-is-problematic articles, and the difference was statistically significant.<sup>154</sup> This difference appeared to be driven not by the two different

146. Compare Graph 4 (negative trend in treatment of religion over time) with Graph 7 (no significant trend in percentage of pure establishment articles over time).

147. See *supra* notes 100–10 and accompanying text.

148. See *supra* p. 154–55.

149. See *infra* notes 150–54 and accompanying text.

150. A random sample of 30 from the purely positive group was 7.1% of that group’s total (425), and a random sample of 30 from the purely problematic group of 26.3% of that group’s total (114).

151. JAMES W. PENNEBAKER, ET AL., THE DEVELOPMENT AND PSYCHOMETRIC PROPERTIES OF LIWC2015 (2015), [http://liwc.wpengine.com/wp-content/uploads/2015/11/LIWC2015\\_LanguageManual.pdf](http://liwc.wpengine.com/wp-content/uploads/2015/11/LIWC2015_LanguageManual.pdf).

152. See *id.* at 3.

153. *Id.* at 8.

154. See *infra* Table 2.

types of articles varying on positive emotion words, but on negative emotion words, particularly anger and sadness subcategories.<sup>155</sup>

Interestingly, the overall emotional tone of both types of articles was negative.<sup>156</sup> On the LIWC2015 0–100 scale, 50 is ambivalent emotionally, while a score less than 50 “suggest a more negative emotional tone.”<sup>157</sup> As shown in Table 2, positive articles had an emotional tone score of 45.05, while problematic articles had a emotional tone score of 37.22.<sup>158</sup> These results provide independent validation of the coders’ choices, providing at least some level of validity to this study’s results.<sup>159</sup> In other words, when the coders classified an article as treating religion positively, such articles were also independently deemed to be more positive in emotional tone by the LIWC software—and one would expect the two measures to be correlated.

Table 2. Emotional Tone Difference between Positive & Problematic Sampled Articles

Article Type	Emotional Tone	Positive Emotion	Negative Emotion	Anxiety	Anger	Sadness
Positive	45.05 (2.40)	2.33 (.11)	1.31 (.08)	.19 (.03)	.50 (.03)	.21 (.02)
Problematic	37.22 (2.47)	2.31 (.08)	1.75 (.16)	.24 (.02)	.64 (.06)	.29 (.04)
Difference	7.83*	.02	-.44**	-.05 <sup>160</sup>	-.15*	-.08*

\* =  $p \leq .05$  (using difference of means test); \*\* =  $p \leq .01$

155. See *infra* Table 2. There was no statistically meaningful difference on the anxiety dimension. See *infra* Table 2.

156. See *infra* Table 2.

157. See *Interpreting LIWC Output*, LIWC, <https://liwc.wpengine.com/interpreting-liwc-output/> (last visited May 10, 2019). For comparison, blogs tend to have a slightly positive tone (54.5); expressive writing (38.6) and novels (37.06) tend to have negative tones similar to the religion-is-problematic articles; and the NY Times’ slightly negative emotional tone (43.61) is similar to the religion-is-positive articles. See PENNEBAKER ET AL., *supra* note 151, at 10.

158. See *infra* Table 2.

159. Also of note, LIWC2015’s measure of the analytic properties of the two types of articles showed no statistically significant difference, with both (problematic = 94.6; positive = 95.3) scoring higher than the analytic value of NY Times writing (92.6). See Pennebaker, et al., *supra* note 151, at 10.

160.  $p = .115$

Additionally, as a further validity check, some basic comparative corpus linguistic analysis was performed on the two different samples.<sup>161</sup> Specifically, the study ran a collocate analysis using AntConc software.<sup>162</sup> A collocate is a corpus linguistic term for a word neighbor since words often appear in proximity to other words.<sup>163</sup> For example, we expect *dark* to appear more often near the words *night* or *light* than we do near the words *perfume* or *sigh*. A look at the twenty most frequent collocates near *religion*, *religious*, *religiosity*, and *faith* in the two samples showed some differences.<sup>164</sup>

Table 3. Top Twenty Collocates of Positive & Problematic Sampled Articles

Positive n = 551067				Problematic n = 402505			
	Collocate	Freq.	Per million		Collocate	Freq.	Per million
1.	freedom	374	678.7	1.	government	285	708.1
2.	exercise	366	664.2	2.	exercise	237	588.8
3.	free	273	495.4	3.	freedom	210	521.7
4.	beliefs	252	457.3	4.	organizations	187	464.6
5.	institutions	209	379.3	5.	court	175	434.8
6.	government	207	375.6	6.	free	158	392.5
7.	speech	174	315.8	7.	establishment	137	340.4
8.	liberty	171	310.3	8.	law	136	337.9
9.	belief	165	299.4	9.	schools	114	283.2
10	schools	163	295.8	10	liberty	110	273.3
11	employee	162	294.0	11	state	99	246.0
12	corporate	151	274.0	12	public	90	223.6
13	court	148	268.6	13	belief	89	221.1
14	state	144	261.3	14	institutions	83	206.2

161. See *infra* pp. 169–70.

162. See *AntConc Homepage*, LAURENCE ANTHONY’S WEBSITE, <http://www.laurence-anthony.net/software/antconc/> (last visited May 10, 2019).

163. See JOHN RUPERT FIRTH, PAPERS IN LINGUISTICS, 1934-1951 11 (1957)

164. These top twenty collocate lists ignored “stop” words, which are common words that generally do not provide any linguistic insights such as “the” or “an.” The word span was five words to the left and right of the four target words.

15	establishment	139	252.2	15	beliefs	82	203.7
16	<i>protection</i>	133	241.4	16	<i>school</i>	80	198.8
17	law	121	219.6	17	<i>clause</i>	78	193.8
18	public	114	219.6	18	<i>practice</i>	75	186.3
19	<i>first</i>	108	196.0	19	<i>endorsement</i>	74	183.8
20	<i>land</i>	103	186.9	20	<i>exemption</i>	73	181.4

Note = italicized collocates indicate not shared

There is obviously significant overlap in the top twenty collocates, as the two different types of articles shared fourteen collocates.<sup>165</sup> What is interesting is how some of the shared collocates diverge in frequency and which collocates are not shared.<sup>166</sup> For example, *freedom*, *free*, and *liberty* are all more frequent<sup>167</sup> in the positive articles as compared to the problematic articles.<sup>168</sup> Similarly, *belief* and *beliefs* are also more common in the positive articles than the problematic articles.<sup>169</sup> Furthermore, the word *institutions* occurs more frequently in the positive articles compared to the problematic articles.<sup>170</sup>

On the other hand, the problematic articles emphasize *government*, *court*, and *law* more than the positive articles.<sup>171</sup> In addition, problematic articles mention *establishment* more often than positive articles.<sup>172</sup> As for collocates not shared, positive articles use *speech*, *employee*, *corporate*, *protection*, *first*, and *land*, whereas problematic articles use *organizations*, *school*, *clause*, *practice*, *endorsement*, and *exemption*.<sup>173</sup> Thus, while these articles may be talking about the same topics, the collocate analysis illustrates that the angle used to approach religion is different.<sup>174</sup> This provides further evidence that the coders' judgments as to how religion was being treated in the articles has validity.<sup>175</sup>

165. See *supra* Table 3; see also Phillips, *supra* note 114.

166. See *supra* Table 3.

167. Measured in frequency per million words.

168. See *supra* Table 3 (frequency of collocates).

169. See *supra* Table 3.

170. See *supra* Table 3.

171. See *supra* Table 3.

172. See *supra* Table 3.

173. See *supra* Table 3.

174. See *supra* Table 3.

175. See *supra* notes 89–113 (discussing coding methodology).



C. *Type of Author*

While the trend over time is to portray religion less positively, what about the type of author that is writing legal scholarship (the third research question)?<sup>176</sup> Do law professors tend to treat religion the same as law students or lawyers?<sup>177</sup> Below is a table showing the portion of articles written by each of the six types of authors:<sup>178</sup>

*Table 4. Frequency and Percent of Articles by Author Type*

<b>Author Type</b>	<b>Frequency</b>	<b>Percent</b>
<b>Law Professor</b> <sup>179</sup>	548	42.7%
<b>Other Academic</b>	38	3.0%
<b>Law Student</b>	518	40.3%
<b>Other Student</b>	4	0.3%
<b>Lawyer</b> <sup>180</sup>	166	12.9%
<b>Other Professional</b>	11	0.9%

As expected, legal scholarship is primarily written by law professors and law students—at least legal scholarship on religion.<sup>181</sup> Given that a small percentage of authors write about law and religion from outside the law,<sup>182</sup> the author type analysis that follows focuses on the three law-related categories: law professors, law students, and lawyers.<sup>183</sup>

Law professors, law students, and lawyers do tend to portray religion differently:<sup>184</sup>

176. See *supra* p 117 (introducing third research question).

177. See *supra* p 117.

178. See *infra* Table 4; see also Phillips, *supra* note 114.

179. “Law Professor” includes adjunct faculty, visiting professors, fellows, deans, and any type of law professor, tenure-track or otherwise.

180. In addition to practicing attorneys, “Lawyer” includes judges and clerks.

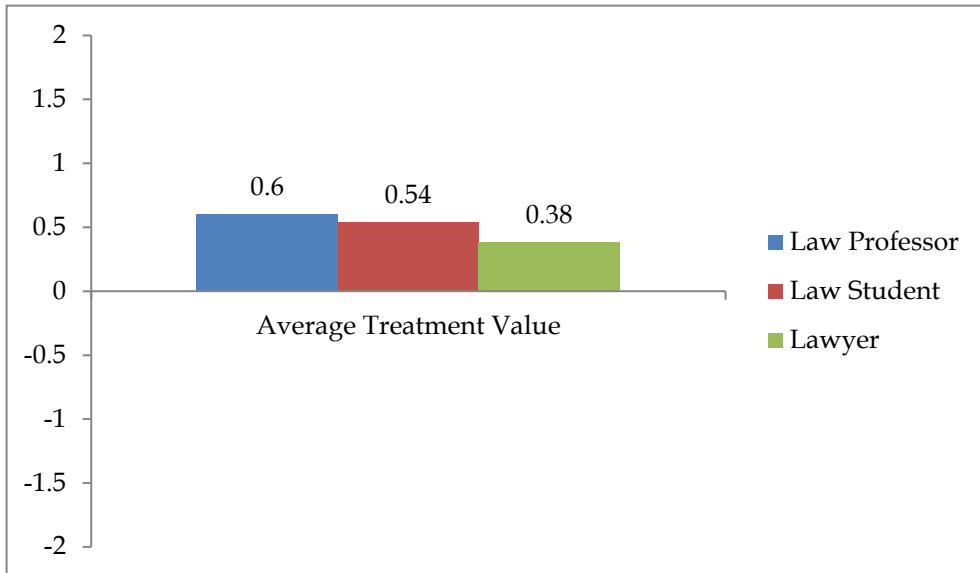
181. See *supra* Table 4; see also Phillips, *supra* note 114.

182. See *supra* Table 4 (showing that 4.2% of articles were written by academics, students, and professionals outside the law).

183. See *supra* Table 4

184. See *infra* Graph 8; see also Phillips, *supra* note 114.

Graph 8. Average Treatment Value by Author Type



The slight difference here between law professors and law students is not statistically significant.<sup>185</sup> The difference between law professors and lawyers is statistically significant,<sup>186</sup> while the difference between law students and lawyers approaches statistical significance.<sup>187</sup>

If society is changing its view of religion, and this trend is most prominently manifest in young adults, then we would expect law students to treat

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185. See *supra* Graph 8; see also Phillips, *supra* note 114 (using a two-sample t test with equal variances ( $p = .22$ )).

186. See *supra* Graph 8; see also Phillips, *supra* note 114 (using a two-sample t test with equal variances ( $p = .03$ )).

187. See *supra* Graph 8; see also Phillips, *supra* note 114 (using a two-sample t test with equal variances ( $p = .08$ )).

religion as more problematic than law professors given they are likely, on average, younger.<sup>188</sup> However, this intuition is challenged by the average treatment value of lawyers,<sup>189</sup> who arguably are closer to law professor in age than law students.<sup>190</sup> Of course, lawyers writing legal scholarship may have different motivations and norms than law professors and students—they are likely to be even more prone to engaging in advocacy in the guise of scholarship. Yet it is not clear which way that actually cuts as far as an average treatment value since a neutral/mixed score is zero, and lawyer’s value is closest to zero.<sup>191</sup> The average treatment value for lawyers could be a function of the distribution of values, with more at the extremes that cancel each other out.<sup>192</sup> The next graph explores the distribution of treatment values for each author type.<sup>193</sup>

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188. See Fingerhut, *supra* note 133 (explaining more negative views about religion among young people). The average age of lawyers and judicial officers is 46.7 years. *Lawyers, & Judges, Magistrates, & Other Judicial Workers*, DATA USA, <https://datausa.io/profile/soc/2310XX/> (last visited May 23, 2019) [hereinafter DATA USA]. The mean average age of law school applicants is much lower—between 26 and 27 years. Kim Dustman & Ann Gallagher, *Analysis of ABA Law School Applicants by Age Group: 2011–2015*, LAW SCH. ADMISSION COUNCIL (Jan. 2017), [https://www.lisac.org/docs/default-source/data-\(lsac-resources\)-docs/analysis-applicants-by-age-group.pdf](https://www.lisac.org/docs/default-source/data-(lsac-resources)-docs/analysis-applicants-by-age-group.pdf).

189. See *supra* Graph 8 (explaining that law professors have a more positive treatment of religion with a treatment value of .6 compared to law students who have a treatment value of .54, while lawyers—who generally are of the same age as law professors—have a treatment value closer to neutral at .38).

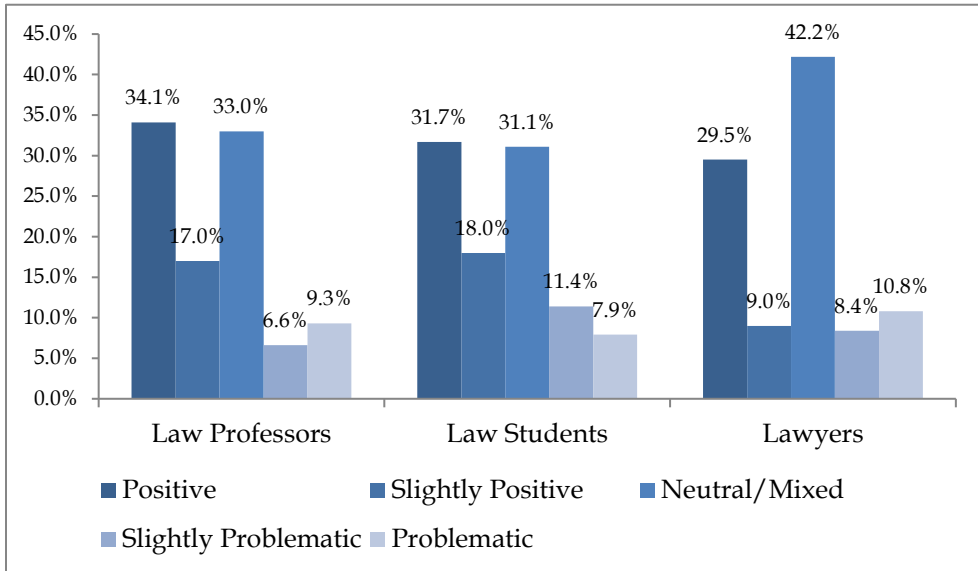
190. Compare DATA USA, *supra* note 188 with Dustman & Gallagher, *supra* note 189, at 1.

191. See *supra* Graph 8; see also Phillips, *supra* note 114.

192. See *infra* Graph 9; see also Phillips, *supra* note 114.

193. See *infra* Graph 9.

Graph 9. Distribution of Treatment Values by Author Type



The graph above shows that lawyers have a value closer to zero not because extreme positions average to a neutral/mixed value, but because they, more than law professors or law students, tend to portray religion in a neutral or mixed manner.<sup>194</sup> This cuts against the stereotype of lawyers being advocates, and to the extent academia is about being neutral or “balanced” in portraying opposing positions,<sup>195</sup> this data show lawyers to be perhaps the most “academic” of these three groups.<sup>196</sup>

Furthermore, is there also some kind of trend over time with the way these

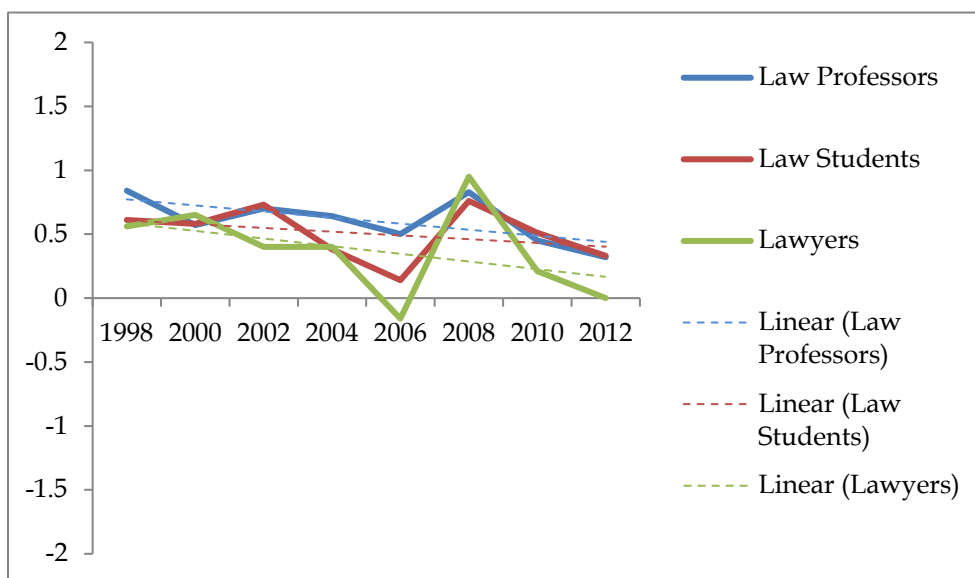
194. See *supra* Graph 9; see also Phillips, *supra* note 114.

195. *Contra* Arthur Selwyn Miller, *The Myth of Objectivity in Legal Research and Writing*, 18 CATH. U. L. REV. 290, 291 (1969) (“Relatively little attention has been accorded in legal literature to an analogous, but in many respects equally important, matter: the extent to which scholarly commentary can be ‘neutral,’ or ‘objective’ or ‘unbiased’ or ‘impartial.’ The assumption apparently is that the person who labors in Academia has some sort of special credentials and operates in a kind of special medium that permits him to transcend the very human limitations of his brethren in private practice or on the bench or in government. . . . [This] proposition is untenable.”).

196. See *supra* Graph 9; see also Phillips, *supra* note 114.

different types of authors are portraying religion?<sup>197</sup>

Graph 10. Average Treatment of Religion Over Time by Author Type



All three author types exhibit a downward trend, meaning that their treatment of religion moved more toward the problematic side of the scale over the course of the time examined.<sup>198</sup> As far as the steepness of the slope, law professors and lawyers exhibit a rather similar trajectory (lawyers just started with lower values), and law students have a slightly flatter slope, meaning they are decreasing at a slighter lower rate.<sup>199</sup> Still, these trends are largely indistinguishable.<sup>200</sup>

197. See *infra* Graph 10.

198. See *supra* Graph 10.

199. See *supra* Graph 10.

200. See *supra* Graph 10.

*D. Type of Religion*

Another area of inquiry is whether all religions are treated equally—this Article’s fourth research question.<sup>201</sup> The dominant faith—Christianity generally<sup>202</sup>—might be portrayed more positively than minority faiths,<sup>203</sup> or vice versa.<sup>204</sup> Some faiths may be more acceptable, popular, or non-threatening in the way they are viewed or portrayed.<sup>205</sup> Certainly some faiths have a history of being persecuted at different times in this country, such as Catholics, Jews, Native Americans, and Latter-day Saints.<sup>206</sup> Other faiths have only recently either gained sufficient numbers or been connected to important events to gain attention in the public eye, such as Islam.<sup>207</sup> The table below shows which religions legal scholarship focused on in the dataset.<sup>208</sup>

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201. See *supra* p. 152 (presenting the fourth research question).

202. *Religious Landscape Study: Religions*, PEW RESEARCH CTR., <https://www.pewforum.org/religious-landscape-study/> (last accessed May 25, 2019) (finding that 70.6% of Americans fall under some form of Christianity).

203. See *How Americans Feels About Religious Groups*, PEW RESEARCH CTR. (July 16, 2014), <http://www.pewforum.org/2014/07/16/how-americans-feel-about-religious-groups/> (stating Jews, Catholics, and Evangelicals are rated more positively than Atheists and Muslims).

204. See *Americans Express Increasingly Warm Feelings Towards Religious Groups*, PEW RESEARCH CTR. (Feb. 15, 2017), <http://www.pewforum.org/2017/02/15/americans-express-increasingly-warm-feelings-toward-religious-groups/> (showing that young adults view Buddhists, Catholics, Hindus, and Jews more favorably than Evangelical Christians and Mainline Protestants).

205. *Cf. id.* (“Religious groups rated more warmly by those with personal connections.”).

206. Kenneth C. Davis, *America’s True History of Religious Tolerance*, SMITHSONIAN MAG. (Oct. 2010), <https://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/> (highlighting history of religious persecution against Catholics, Jews, Latter-day Saints, and natives).

207. Jennifer Williams, *A Brief History of Islam in America*, VOX (Jan. 29, 2017, 5:52 PM), <https://www.vox.com/2015/12/22/10645956/islam-in-america> (“The terrorist attacks of September 11, 2001, were a watershed moment in the history of Islam in America. . . . It changed the nature of Muslim relations in the United States. . . . The 9/11 attacks, as well as the subsequent wars in Iraq and Afghanistan, also bred American interest in Islam and the Middle East, including in academia and government. As college courses, news specials, documentaries, and books proliferated, millions of Americans became educated about the religion, people, traditions, and historical lands of Islam.”).

208. See *infra* Table 5; see also Phillips, *supra* note 114.

Table 5. Frequency and Percentage of Articles by Religion

Religion Type	Frequency	Percent
<b>General Religion</b>	826	63.9%
<b>General Christianity</b>	243	18.8%
<b>Catholicism</b>	66	5.1%
<b>Other Christian</b> <sup>209</sup>	47	3.6%
<b>Judaism</b>	20	1.6%
<b>Islam</b>	41	3.2%
<b>Native American</b>	37	2.9%
<b>Other Religion</b> <sup>210</sup>	10	0.8%
<b>Atheism</b>	2	0.2%

Religion was discussed in a general matter about two-thirds of the time.<sup>211</sup> Given that the nation is predominantly Christian, much of the General Religion category will implicitly deal with Christianity.<sup>212</sup> Furthermore, the General Christianity category does not include when specific denominations were addressed.<sup>213</sup> If we reconfigure the categories to reflect this and compare them to recent polls on the religious make-up of the American population, what is the result?<sup>214</sup>

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209. Christian Science, Baptist, Episcopalian, LDS/Mormon, FLDS, Amish, Lutheran, and Jehovah Witness. See Phillips, *supra* note 114.

210. Rastafarian, Buddhist, Santaria, Sikh, and Scientology. See Phillips, *supra* note 114.

211. See *supra* Table 5.

212. See *Religious Landscape Study*, *supra* note 202.

213. See *supra* Table 5; see also Phillips, *supra* note 114.

214. Compare *supra* Table 5 (percentage of articles by religious type) with *infra* Table 6 (religious affiliation according to polls); see also Phillips, *supra* note 114.

Table 6. Religious Affiliation Measured by Various Polls

Religion	ABC News Poll June 2016 <sup>215</sup>	Pew Religious Landscape Study <sup>216</sup>	Gallup Poll Dec 2015 <sup>217</sup>
<b>Christianity</b>	83%	70.6%	75.2%
<b>Other Religion</b>	4%	5.9%	5.1%
<b>No Religion</b>	13%	22.8%	19.6%
<b>Catholic</b>	22%	20.8%	n/a
<b>Other Christian</b>	61%	49.8%	n/a
<b>Judaism</b>	n/a	1.9%	n/a
<b>Islam</b>	n/a	0.9%	n/a

It is not quite an apples-to-apples comparison to look at what type of religion legal scholarship is focused on and what Americans profess their religious faith to be.<sup>218</sup> But it does show which religions capture the attention of legal scholars more, are more likely to be controversial, or are involved in the intersection of law and religion.<sup>219</sup> Not surprisingly, given domestic and foreign events during this time period, Islam is overrepresented in legal scholarship compared to the overall Muslim population by about 256%.<sup>220</sup>

Regardless of how often a particular religion is addressed in legal scholarship, are religions treated the same?<sup>221</sup> In other words, are some religions more likely to be treated positively in legal scholarship than others? The graph below shows the average treatment value for each religious category

215. Gary Langer, *Poll: Most Americans Say They're Christian*, ABC NEWS (July 18, 2016), <http://abcnews.go.com/US/story?id=90356>.

216. *Religious Landscape Study*, *supra* note 202. The Pew Religious Landscape Study “surveys more than 35,000 Americans from all 50 states.” *Id.*

217. Frank Newport, *Percentage of Christians in U.S. Drifting Down, but Still High*, GALLUP (Dec. 24, 2015), <http://www.gallup.com/poll/187955/percentage-christians-drifting-down-high.aspx>.

218. *Compare supra* Table 5 (percentage of articles by religious type) *with supra* Table 6 (religious affiliation according to polls); *see also* Phillips, *supra* note 114.

219. *Compare supra* Table 5 (percentage of articles by religious type) *with supra* Table 6 (religious affiliation according to polls); *see also* Phillips, *supra* note 114.

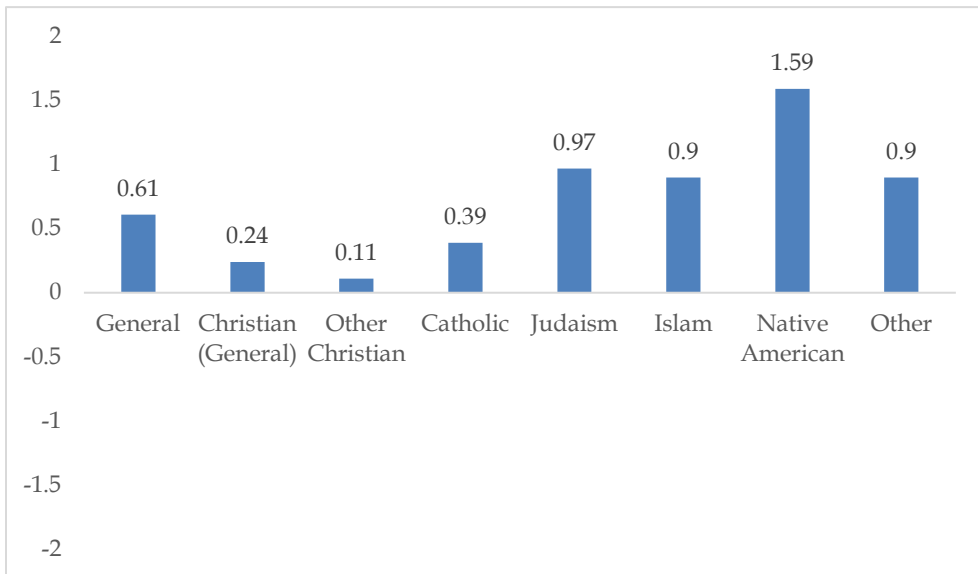
220. This was calculated by subtracting the percentage of the American population identifying with Islam (0.9%) from the percentage of articles in U.S. legal scholarship focusing on Islam (3.2%), and then dividing the difference (2.3) by 0.9. *See supra* Tables 5 & 6.

221. *See supra* p. 152 (presenting research questions).



noted above (except for atheism, which only had two observations).<sup>222</sup>

*Graph 11. Average Treatment Value by Religion*



Religions do not appear to be portrayed equally—while all are on the positive side of the scale, some are much more so than others.<sup>223</sup> Christianity, whether generally or dealing with specific denominations (Catholicism or other Protestant or non-Protestant denominations), is treated the least positively in legal scholarship.<sup>224</sup> But are these differences statistically significant? The grid below shows which differences are statistically significant using a two-sample t-test with equal variances (yellow highlighted cells indicate statistical significance; orange indicates approaching statistical significance).<sup>225</sup>

222. See *infra* Graph 11; see also Phillips, *supra* note 114 (showing the average treatment value by religion in legal scholarship).

223. See *supra* Graph 11; see also Phillips, *supra* note 114.

224. See also Phillips, *supra* note 114.

225. See *infra* Table 7; see also Phillips, *supra* note 114.

Table 7. Statistical Significance of Differences Between Portrayal of Religions

	Christian (General) mean=.24 n=243	Other Christian mean=.11 n=47	Catholicism mean=.39 n=66	Judaism mean=1 n=20	Islam mean=.9 n=41	Native American mean=1.59 n=37	Other mean=.9 n=10
General mean=.61 n=826	t=-4.05 p<.0001	t=2.67 p<.01	t=-1.34 p=.09	t=1.39 p=.08	t=1.47 p=.07	t=4.77 p<.0001	t=-.73 p=.23
Christian (General)		t=.67 p=.25	t=-.85 p=.20	t=-2.67 p<.01	t=-3.2 p<.001	t=-6.47 p<.0001	t=-.16 p=.053
Other Christian			t=1.06 p=.15	t=2.52 p<.01	t=2.84 p<.01	t=5.71 p<.0001	t=1.53 p=.065
Catholicism				t=-1.80 p=.038	t=-2.0 p=.027	t=-4.85 p<.0001	t=-1.0 p=.15
Judaism					t=.33 p=.37	t=-2.61 p<.01	t=.21 p=.42
Islam						t=3.17 p<.01	t=.01 p=.50
Native American							t=1.98 p=.027

Looking at the chart, the difference between Native American religions and all other religions is statistically significant ( $p \leq .05$ ).<sup>226</sup> Islam and Judaism are higher than any of the three Christian categories by statistically significant levels (and lower than Native American religions), but they are not different than other religions and only approach statistical significance ( $p \leq .10$ ) in relation to religion generally.<sup>227</sup> The three Christian categories are not different from each other in a statistically significant way, but they are lower than all of the other religion categories at levels that either obtain or approach statistical significance.<sup>228</sup>

Why this is the case is unclear, though there are several possibilities. It could be because legal scholars are less likely to be Christian, and thus more likely to view Christianity in a mixed or problematic light.<sup>229</sup> For instance, a 1996–97 survey of law professors showed that only 32.3% considered themselves Protestant, with another 13.7% identifying as Catholic—or just 46% of

226. See *supra* Table 7; see also Phillips, *supra* note 114.

227. See *supra* Table 7; see also Phillips, *supra* note 114.

228. See *supra* Table 7; see also Phillips, *supra* note 114.

229. See *infra* notes 230–32 and accompanying text.

law professors identifying as Christian.<sup>230</sup> In 2013, the percentage of law professors estimated to be Christian was similar: 46.7%.<sup>231</sup> Likewise, Americans ages eighteen to twenty-nine (the age range of the overwhelming majority of law students)<sup>232</sup> had the lowest percentage identifying as Christian (62%) in 2015.<sup>233</sup> But, just because a population is less likely to identify with a specific religion does not necessarily mean it will be more likely to view that religion less positively.<sup>234</sup> For instance, few legal scholars claim a Native American religion.<sup>235</sup> Yet, Native American religions are overwhelming portrayed positively in legal scholarship in the United States from 1998–2012.<sup>236</sup>

An alternative but related explanation could be political. Law professors are much more likely to identify as liberal than conservative.<sup>237</sup> Likewise, Christians, as compared to Muslims, Jews, and Native Americans, are more likely to identify as conservatives.<sup>238</sup> If an author’s political views lead her to view certain religious faiths more positively or negatively than others, than this could explain the different treatment noted above.<sup>239</sup> That would also require law students and lawyers to be more liberal than conservative, which appears to be the case.<sup>240</sup> Furthermore, it would require those with liberal ideologies to view Christianity less positively than Judaism, Islam, and Native

230. See James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 HARV. J.L. & PUB. POL’Y 89, 109 (2016) (Table 2).

231. *Id.* at 145 (Table 13).

232. Dustman & Gallagher, *supra* note 188, at 1.

233. Newport, *supra* note 217 (“Religious Identification in the U.S., 2008–2015”).

234. See *infra* text accompanying notes 235–36.

235. Lindgren, *supra* note 230, at 145 (Table 13). The numbers are so low that we do not have specific data on Native American religions or Islam; there is only specific data for the category “other religion,” which is just over 1%. *Id.* (showing 1.3% of law professors in 2013 identify as “other religion”).

236. See *supra* Graph 11 (finding the highest positive treatment value is for Native American religions); see also Phillips, *supra* note 114.

237. See, e.g., Lindgren, *supra* note 230, at 145–46 (11.0% of law professors identify as Republican compared to 81.9% who identify as Democrats); see also James C. Phillips, *Why Are There So Few Conservatives and Libertarians in Legal Academia? An Empirical Exploration of Three Hypotheses*, 39 HARV. J.L. & PUB. POL’Y 153, 162 (2016); James C. Phillips, *Political Discrimination and Law Professor Hiring*, 12 N.Y.U. J. L. & LIBERTY 560, 603–04 (2019).

238. See *Religious Landscape Study: Political Ideology*, PEW RESEARCH CTR., <http://www.pewforum.org/religious-landscape-study/political-ideology/> (last visited May 26, 2019). For example, 21% percent of Jews and 22% of Muslims identify as conservative compared to 61%, 55% of Evangelical Protestants, and 34%–37% of other Christian groups. *Id.*

239. See *supra* Graph 11; see also Phillips, *supra* note 114.

240. See generally Adam Bonica et al., *The Political Ideologies of American Lawyers*, 8 J. LEGAL ANALYSIS 277 (2016).

American religions (this could be manifest either in a neutral or mixed view of Christianity and a positive view of these other minority faiths, a neutral or mixed view of these other faiths and a problematic view of Christianity, or some other combination that creates a disparity in how one views Christianity compared to these other religions).<sup>241</sup>

A third explanation is that because Christianity is the dominant religion in the United States,<sup>242</sup> it is thus more likely to be involved in an establishment issue—an area of law where religion tends to be viewed less positively.<sup>243</sup> On the other hand, some Christian denominations—Catholics, Jehovah Witnesses, and Latter-day Saints, for example—have historically suffered persecution and are often viewed as somewhat distinct from Christianity, and therefore, are often viewed as minorities and less likely to be involved in establishment issues.<sup>244</sup> Yet, as the graph above shows, Catholicism fairs only slightly better than Christianity, and “Other Christian” religions are viewed even less positively than Christianity generally.<sup>245</sup> The graph below explores whether some religions are more likely to trigger establishment issues in legal scholarship than others:<sup>246</sup>

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241. One prominent legal scholar, Eugene Volokh, has opined that perhaps those on the political left view Islam differently than other faiths, but he relies only on anecdotal evidence. See Eugene Volokh, *Left-Wing Radio Station KPFA Cancels Event with Noted Atheist Richard Dawkins Because of His Harsh Criticism of Islam*, WASH. POST (July 27, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/07/24/left-wing-radio-station-kpfa-cancels-event-with-noted-atheist-richard-dawkins-because-of-his-harsh-criticism-of-islam/?noredirect=on&utm\\_term=.13ab9b1eb8c3](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/07/24/left-wing-radio-station-kpfa-cancels-event-with-noted-atheist-richard-dawkins-because-of-his-harsh-criticism-of-islam/?noredirect=on&utm_term=.13ab9b1eb8c3) (showing an example of how left-wing organizations taken steps to protest critical views of Islam).

242. See *supra* Table 6 (showing a majority of Americans identify as Christians).

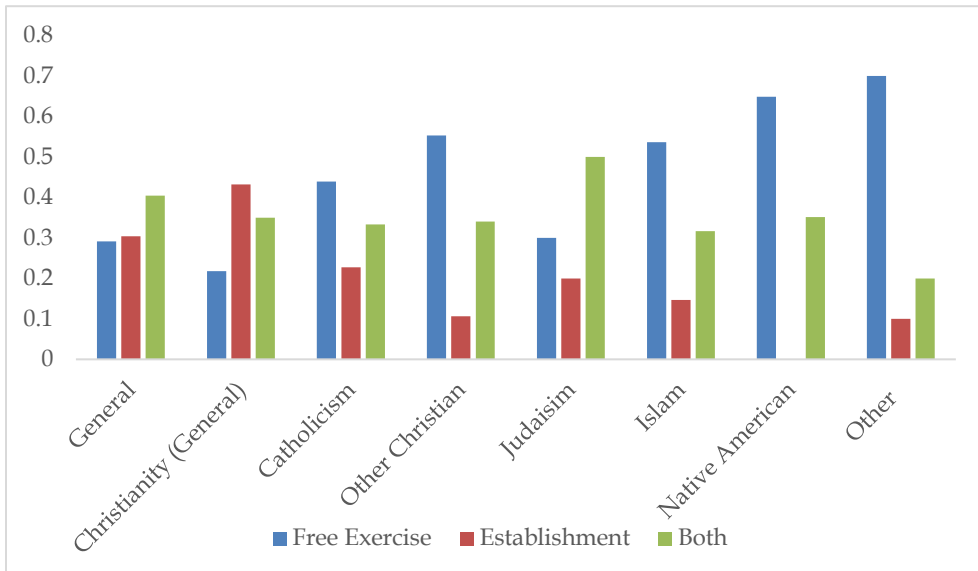
243. See *supra* Graph 5; see also Phillips, *supra* note 114 (indicating establishment articles receive less favorable treatment).

244. See Davis, *supra* note 206 and accompanying text.

245. See *supra* Graph 11; see also Phillips, *supra* note 114.

246. See *infra* Graph 12; see also Phillips, *supra* note 114.

Graph 12. Religion Type and Area of Law and Religion



The General Christianity category is more likely to be discussed in the context of establishment issues than other religious categories, with Catholicism second.<sup>247</sup> However, the “Other Christian” category has the lowest average treatment value (i.e., least positive), but is also the second lowest for having pure establishment issues and looks nearly identical to Islam on Graph 12, despite Islam’s much higher average treatment value.<sup>248</sup>

Table 8 below explores the regression analysis of whether some religions are more likely to be found when establishment issues are discussed in articles compared to the baseline of general religion.<sup>249</sup>

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247. See *supra* Graph 12.

248. See *supra* Graph 12.

249. See *infra* Table 8; see also Phillips, *supra* note 114.

Table 8. Regression Analysis of Average Treatment Value for Religion Type  
in Establishment Issues

<b>Variable</b>	<b>Coefficient (Robust Standard Error)</b>
<b>Christianity (General)</b>	.073* (.031)
<b>Catholicism</b>	-.148* (.063)
<b>Other Christian</b>	-.262*** (.074)
<b>Judaism</b>	-.009 (.104)
<b>Islam</b>	-.246** (.080)
<b>Native American</b>	-.358*** (.080)
<b>Other Religions</b>	-.409** (.146)
<b>Constant</b>	.709*** (.016)
<b>Observations</b>	1292
<b>F-value</b>	9.02***
<b>Adjusted R-square</b>	0.05
<b>S.E.R.</b>	.454

\* (p ≤ .05); \*\* (p ≤ .01); \*\*\* (p ≤ .001)

Not surprisingly, when compared to religion generally, Christianity, in a general sense, is more likely to be discussed with establishment issues.<sup>250</sup> After all, a majority of Americans identify as Christian.<sup>251</sup> Also as expected, Islam, Native American religions, and other minority non-Christian religions (except Judaism) are much less likely to be discussed with establishment issues.<sup>252</sup> Interestingly, other Christian faiths are also about as unlikely to be

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250. See *supra* Table 8; see also Phillips, *supra* note 114.

251. See *supra* Table 6 (depicting that polls indicate a Christian majority).

252. See *supra* Table 8 (showing that non-Christian religions have high negative coefficients); see also Phillips, *supra* note 114.

discussed with establishment issues as Islam.<sup>253</sup> And Catholicism is also less likely to be invoked in establishment discussions than religion generally.<sup>254</sup> This seems to indicate that specific Christian faiths are usually not seen as a threat to the separation of church and state, but that Christianity generally is.<sup>255</sup>

### *E. Accommodation and Separation*

Arguably more important than whether religion is treated more positively or not is whether the actual legal issue is resolved in that religion's favor, which implicates the fifth research question: what is associated with arguments for greater (or less) accommodation of religious beliefs and separation of religion and government.<sup>256</sup> This can be complicated by whether accommodation and separation are both invoked in an issue (such as the historical example of Virginia Baptists not wanting to pay a tax to support the Virginia State Episcopalian Church),<sup>257</sup> or when only one of the two is focused on in an article. As can be seen in Graph 12 below, it may actually only make a slight difference.<sup>258</sup>

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253. See *supra* Table 8.

254. See *supra* Table 8.

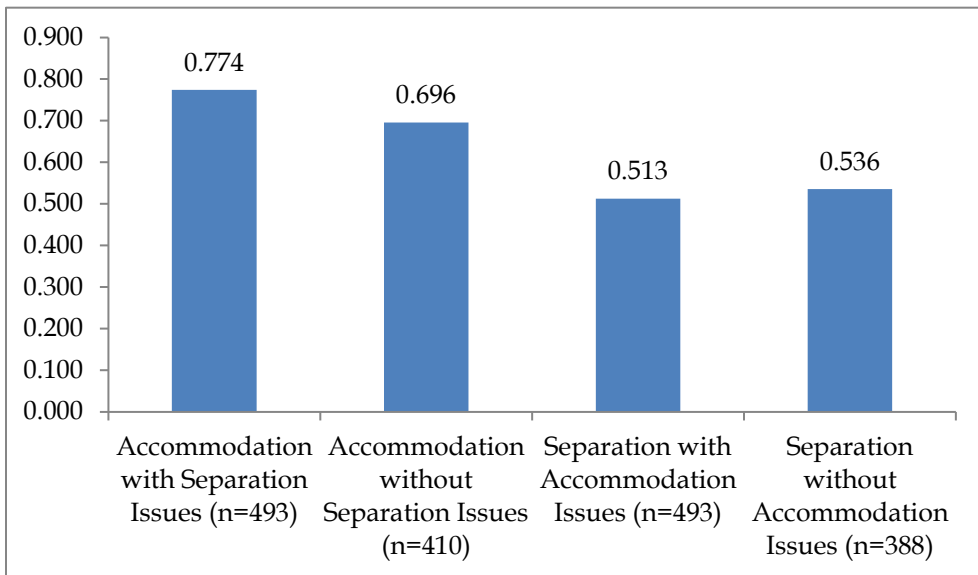
255. See *supra* Table 8; *infra* Section III.E (analyzing treatment of accommodation of religion compared to separation of religion and government).

256. See generally Mark Tushnet, *Accommodation of Religion Thirty Years On*, 38 HARV. WOMEN'S L.J. 1 (2015) (articulating differences between accommodation and strict separation of religion and government).

257. Bill Federer, *First Things First – Religious Freedom & How Baptists Influenced Jefferson*, American Minute With Bill Federer (Feb. 6, 2019), <https://newsmaven.io/americanminute/church-state/first-things-first-religious-freedom-how-baptists-influenced-jefferson-WLR3noXWw0KGdyVcHtr7Q/>.

258. See *infra* Graph 12; see also Phillips, *supra* note 114.

Graph 12. Percentage of Articles Addressing  
Accommodation and/or Separation<sup>259</sup>



As expected, legal scholars are more likely to call for accommodating religious practices when in the context of establishment issues,<sup>260</sup> probably because the establishment of one religion can infringe on the practices of another.<sup>261</sup> However, presumably legal scholars would be more likely to argue for separation of church and state in the context of accommodation versus when accommodation is not implicated because accommodation can trigger Establishment Clause concerns. But instead, scholars argue for separation

259. As noted previously, whether an article was advocating the accommodation of religious practices, or for further separation of the government and religion, was coded a 1 for accommodation or separation, and 0 if not. If coders disagreed, their values were averaged to 0.5.

260. See *supra* Graph 12; see also Phillips, *supra* note 114.

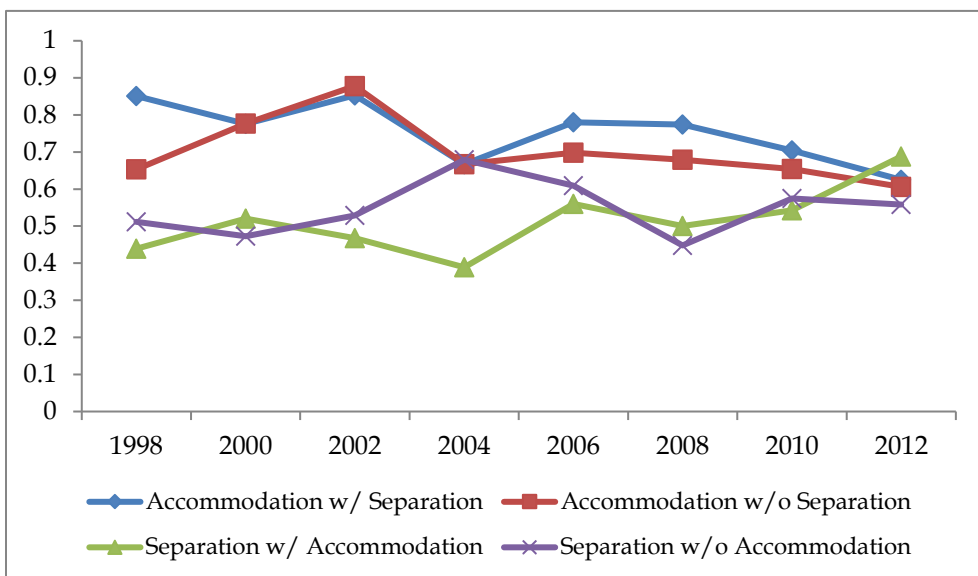
261. See, e.g., *Religion in Colonial America: Trends, Regulations, and Beliefs*, FACING HISTORY AND OURSELVES, <https://www.facinghistory.org/nobigotry/religion-colonial-america-trends-regulations-and-beliefs> (last visited May 27, 2019) (“Eight of the thirteen British colonies had official, or ‘established,’ churches, and in those colonies dissenters who sought to practice or proselytize a different version of Christianity or a non-Christian faith were sometimes persecuted.”); Federer, *supra* note 257 (noting that Baptists were imprisoned in Virginia for preaching a faith different than the established Anglican Church religion).



less of the time (though the differences are rather minimal).<sup>262</sup> Interestingly, but not surprisingly, while legal scholars argue for accommodating religion two-thirds to three-quarters of the time, they advocate for the separation of government and religion only about half of the time.<sup>263</sup>

This raises another question: whether legal scholarship’s focus on accommodation and separation arguments changes over time similar to the way treatment of religion appears to be changing?<sup>264</sup>

Graph 13. Accommodation and Separation Over Time



While not without some noise, modest trends emerge.<sup>265</sup> Both accommodation with separation issues and accommodation without separation issues decrease over time, indicating scholars are generally less likely to argue for accommodation in the latter part of this time period than its beginning.<sup>266</sup>

262. See *supra* Graph 12; see also Phillips, *supra* note 114.

263. See *supra* Graph 12; see also Phillips.

264. See *infra* Graph 13; see also Phillips, *supra* note 114.

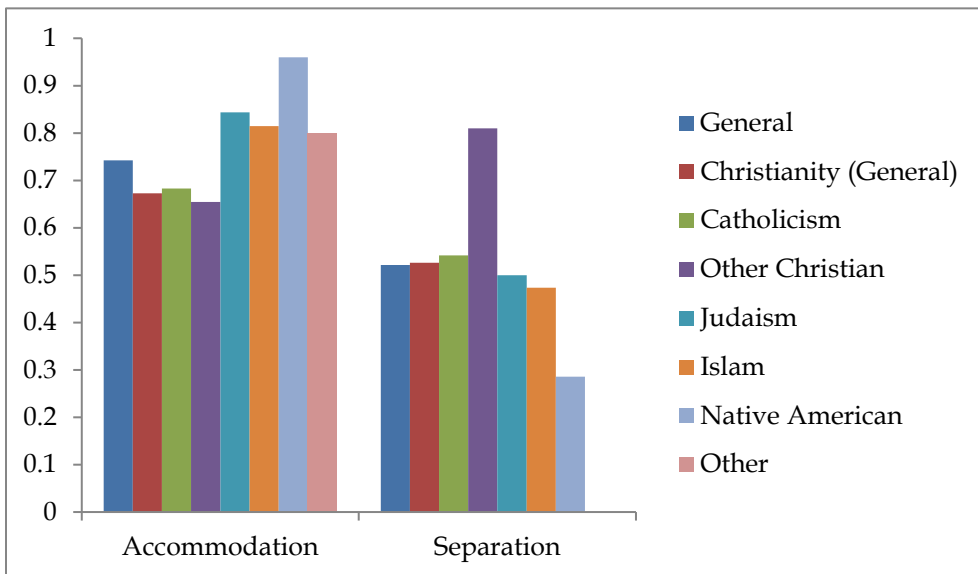
265. See *supra* Graph 13; see also Phillips, *supra* note 114.

266. See *supra* Graph 13.

Likewise, separation with accommodation issues and separation without accommodation issues slightly increase over time, meaning scholars are more likely to call for the separation of church and state as time has gone on during this particular time period.<sup>267</sup> Notably, only the accommodation trend is statistically significant when one runs a regression model where accommodation is the outcome variable and separation and year are predictors.<sup>268</sup>

Another area of inquiry is whether some religions are more likely to invoke accommodation or separation arguments. Graph 14 below looks at the accommodation and separation values for each religion type where there is sufficient data.<sup>269</sup>

Graph 14. Accommodation and Separation by Religion Type



267. See *supra* Graph 13.

268. See Phillips, *supra* note 114 (Year coefficient = -.009 (robust standard error = .004), p = .016. Separation coefficient = -.341 (robust s.e. = .035), p < .0001. Constant = 18.55 (robust s.e. = 7.30), p = .011. n = 493; F-value = 52.59, p < .0001; Adjusted R-squared = .177; S.E.R. = .351).

269. See *infra* Graph 14; see also Phillips, *supra* note 114.

The patterns in accommodation and separation appear to be highly correlated with those of treatment.<sup>270</sup> First, legal scholars tend to argue for accommodation less for Christianity in general, Catholicism, and specific Christian sects (other than Catholicism) than religion generally, and particularly less than other specific religions.<sup>271</sup> Approximately four-fifths of the time, scholars advocate accommodating Judaism, Islam, and other non-Christian religions.<sup>272</sup> And 95% of the time, authors advocate for the accommodation of Native American religions.<sup>273</sup> Whereas authors argue for accommodation about three-quarters of the time when dealing with religion generally, they only advocate for accommodation about two-thirds of the time when dealing with Christianity generally or specific Christian faiths.<sup>274</sup>

Why this is the case is unclear. It could be that Christian accommodation presents more of a threat to other values.<sup>275</sup> For instance, Native Americans are generally not seeking accommodations of their religious practices in the context of LGBT rights or abortion—two very hot button issues.<sup>276</sup> Additionally, while orthodox Jews and many Muslims may have views similar to many Christians on controversial issues,<sup>277</sup> as religious minorities they may be less

270. Compare *supra* Graph 14 (Accommodation and Separation by Religion Type) with Graph 11 (Average Treatment Value by Religion).

271. See *supra* Graph 14; see also Phillips, *supra* note 114 (accommodation by religion).

272. See *supra* Graph 14.

273. See *supra* Graph 14.

274. See *supra* Graph 14.

275. See, e.g., Jeremy J. Zacharias, *Religious Accommodations in the Workplace: An Analysis of Atheistic Accommodations in the Workplace Pertaining to Title VII of the Civil Rights Act of 1964*, 15 RUTGERS J. L. & RELIGION 135, 148 (2013) (“When an employee sincerely holds such religious belief, such as preaching the Good News of the Catholic or Christian Bible, the employer may be required to accommodate, even in the face of opposition from other employees. This is of particular concern to Atheistic employees, since members of other faiths, Christianity being the most predominant, have the right to ‘preach the Good News,’ while an Atheistic observer must sit and listen to something he does not believe in.”).

276. See generally *Religious Freedom for Native Americans*, THE PLURALISM PROJECT, <http://pluralism.org/religions/native-american-traditions/issues-for-native-peoples/religious-freedom-for-native-americans/> (last visited May 27, 2019) (outlining accommodation concerns of many Native Americans with regard to free exercise and claims to sacred land but not including LGBT rights or abortion rights).

277. Compare *Religious Landscape Study: Views About Abortion*, PEW RESEARCH CTR., <https://www.pewforum.org/religious-landscape-study/views-about-abortion/> (last visited May 27, 2019) (comparing views on abortion by religion and showing the percentage of Muslims (37%), Orthodox Christians (45%), mainline Protestants (35%), Jews (15%); Evangelical Protestants (63%); and Catholics (47%) that think abortion should be illegal in all or most cases); with *Religious Landscape Study: Views About Homosexuality*, PEW RESEARCH CTR., <https://www.pewforum.org/religious->

likely to argue for religious accommodation in such contested areas, content to focus on issues more pressing to their beliefs.<sup>278</sup> Alternatively, it could be even if a religious majority and a religious minority advocate for accommodation of the same religious practice, scholars are more open to accommodating a minority than a majority because it is less disruptive or less likely to undermine the law or public policy requiring accommodation.<sup>279</sup> However, it is a bit troubling if accommodation were to hinge only on such practical concerns rather than principle.<sup>280</sup>

As to separation, most faiths are treated about the same with three exceptions.<sup>281</sup> The category Other Christians, which includes mainstream sects like Lutherans and minority sects like Jehovah Witnesses and Christian Scientists, is the type of religion legal scholars are most likely to advocate for the separation doctrine (four-fifths of the time).<sup>282</sup> On the other extreme, legal scholars argue for separation less than a third of the time when dealing with Native American religions, and never when the topic was non-Christian religions (other than Judaism, Islam, and Native American).<sup>283</sup> Why other Christian faiths would be so singled out, especially compared to Catholicism or Christianity generally, is unclear. Also, why some non-Christian faiths would be

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landscape-study/views-about-homosexuality/ (last visited May 27, 2019) (comparing views on homosexuality by religion and showing the percentage of Muslims (57%), Orthodox Christians (31%), Mainline Protestants (26%), Jews (16%), Evangelical Protestants (55%), and Catholics (23%) that think homosexuality should be discouraged).

278. See, e.g., *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015) (addressing free exercise issue where Abercrombie refused to hire a practicing Muslim woman because she wore a hijab in accordance with her religious beliefs); *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (holding that state prison policy that prohibited Muslim inmates from growing short beards in accordance with their beliefs violated the Religious Land Use and Institutionalized Persons Act).

279. See *Defending the Rights of Religious Minorities*, ACLU, <https://www.aclu.org/issues/religious-liberty/free-exercise-religion/defending-rights-religious-minorities> (last visited May 27, 2019) (“Even as the ACLU vigorously defends the rights of Christians, we are mindful of the often severely disproportionate threat to the rights and well-being of religious minorities.”); Zacharias, *supra* note 275, at 164–66 (advocating for equal accommodations for atheists in the workplace).

280. Zacharias, *supra* note 275, at 165 (“However, as our country becomes more accepting of alternate forms of thinking and of equal rights more generally, many cannot refute that change is on the horizon for workplace accommodations as we know them. Religious accommodations in the workplace are leaning towards a future that requires equality for all people, no matter which religion one belongs to.”).

281. See *supra* Graph 14; see also Phillips, *supra* note 114.

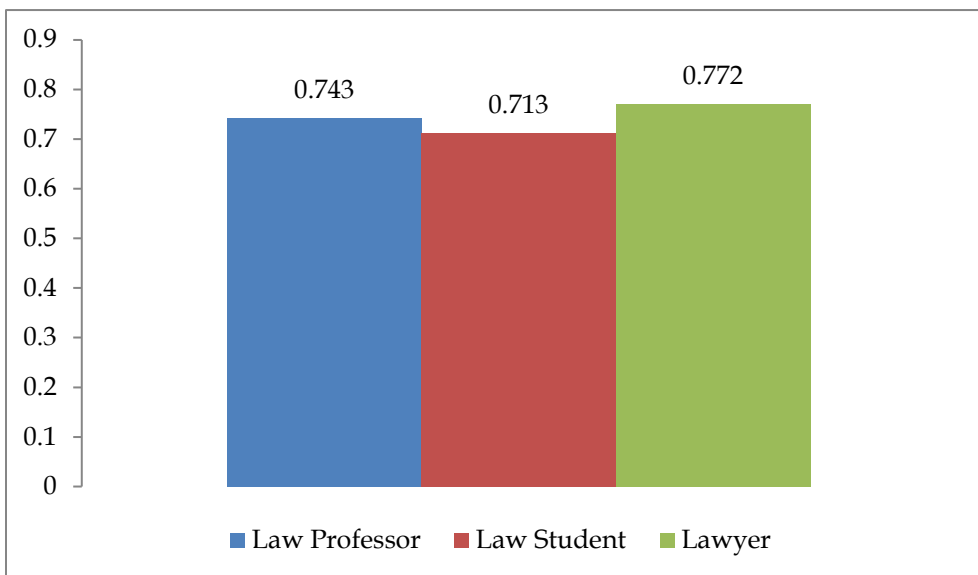
282. See *supra* Graph 14; *supra* note 210 (noting the sects included within the Other Christian category).

283. See *supra* Graph 14.

treated differently in the separation context as compared to others is also unclear since all non-Christian faiths are a minority in this country.<sup>284</sup>

Turning to a different question, are different types of legal scholars—law professors, law students, or lawyers—more or less likely to argue for accommodation or separation generally?<sup>285</sup> Graph 15 below analyzes accommodation by author type.<sup>286</sup>

*Graph 15. Accommodation by Author Type*



There is little difference overall, certainly no statistically significant one, between the type of legal scholar and whether they advocate for accommodation.<sup>287</sup> That said, does that lack of a real difference hold across time?<sup>288</sup>

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284. See *Religious Landscape Study: Religions*, *supra* 202 (finding that non-Christian faiths accounts for 5.9% of Americans).

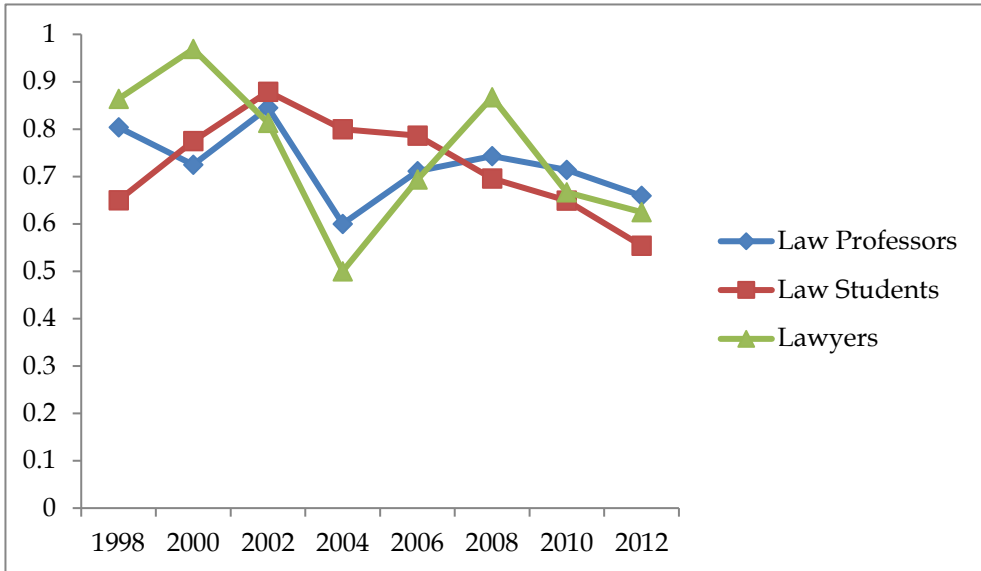
285. See *infra* Graphs 15–17 (showing accommodation and separation by author type); see also Phillips, *supra* note 114.

286. See *infra* Graph 15; see also Phillips, *supra* note 114.

287. See *supra* Graph 15; see also Phillips, *supra* note 114.

288. See *infra* Graph 16 (data by each author type over time); see also Phillips, *supra* note 114.

Graph 16. Accommodation by Author Type Over Time



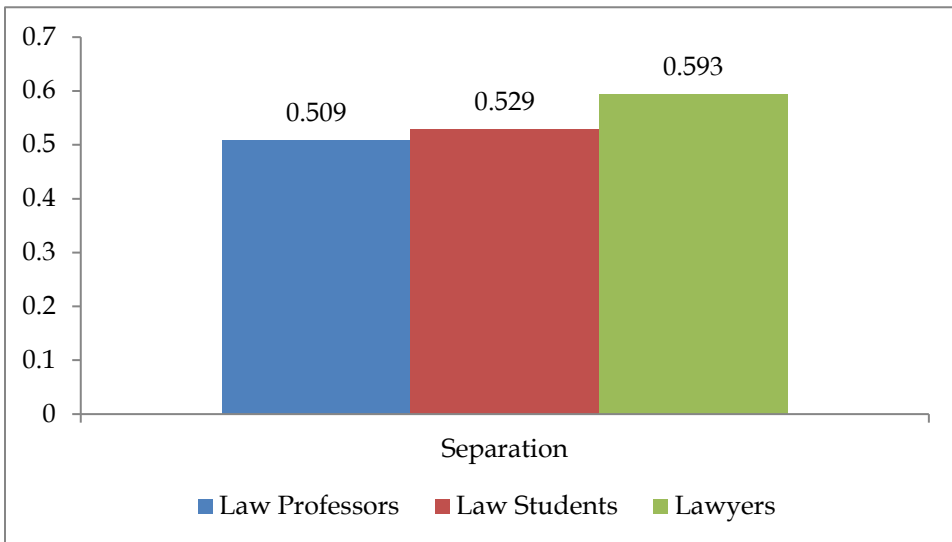
While there is some movement in the data, there is again little difference based on author type and whether they advocate for accommodation of religion.<sup>289</sup> As for separation, Graph 17 below explores that perspective.<sup>290</sup>

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289. See *supra* Graph 16.

290. See *infra* Graph 17 (treatment of separation by each author type); see also Phillips, *supra* note 114.

Graph 17. Separation by Author Type



Here, there is also little difference (at least no statistically significant one) between the type of author and the propensity to argue for separation.<sup>291</sup>

#### F. Journal Rankings

Finally, how do all of the various questions examined above relate to the ranking of the journal that publishes an article (the seventh research question)?<sup>292</sup> Unlike in other academic disciplines, authors submitting an article for publication in a law journal are generally free to submit to as many journals as they would like.<sup>293</sup> Hence dozens, even hundreds, of journals could

291. See *supra* Graph 16; see also Phillips, *supra* note 114.

292. See *supra* pp. 152 (presenting research question).

293. See Brian Galle, *The Law Review Submission Process: A Guide for (and by) the Perplexed*, MEDIUM (Aug. 12, 2016), <https://medium.com/whatever-source-derived/the-law-review-submission-process-a-guide-for-and-by-the-perplexed-9970a54f89aa> (“Most law journals permit simultaneous submissions.”); *Can Authors Submit to More Than One Law Journal at a Time?*, SCHOLASTICA (Feb. 19, 2019, 1:40 PM CST), <http://help.scholasticahq.com/customer/portal/articles/1008635-can-authors-submit-to-more-than-one-law-journal-at-a-time-> (explaining how to submit an article to multiple

assess the same article and decide whether or not to extend a publication offer, with an author potentially having more than one publication offer to choose from.<sup>294</sup> While there are undoubtedly numerous factors that go into an author choosing which publication offer he or she will accept, the predominant consideration is the prestige of the journal.<sup>295</sup> Thus, most of the time, an author chooses the most prestigious journal (measured by its ranking) from among the competing offers to publish her article.<sup>296</sup> Additionally, most law journals are not peer-reviewed, meaning that fellow law professors are not making decisions about extending publication offers (though sometimes they are consulted).<sup>297</sup> Instead, law students predominantly run law journals, and they make publication decisions.<sup>298</sup> Thus, what a twenty-four-year-old second or

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law reviews).

294. See Galle, *supra* note 293 (discussing the process of receiving offers and using standing offers to requisite expedited decisions by higher ranked law reviews for additional offers).

295. See Brain Galle, *Law Review Rankings*, PRAWFSBLAWG (July 21, 2011), <http://prawfsblawg.blogs.com/prawfsblawg/2011/07/law-review-rankings.html> (discussing how greater attention is given to author’s who publish in higher ranked journals, the importance of law review rankings, and how they are calculated).

296. See Galle, *supra* note 295 (discussing generally the incentive for authors to select more prestigious law reviews). It is true that the Washington and Lee law journal rankings may not perfectly operationalize the prestige of a journal, but no attempts to measure an abstract construct are perfect, and the only other alternative ranking system would be to impute the prestige of the law school to a journal via the law school’s *U.S. News & World Report* annual ranking. *Id.* (suggesting that authors choose an offer from a journal from a law school ranked higher on U.S. News than a journal ranked higher on the Washington and Lee law journal rankings with a lower U.S. News ranking). That is problematic, though, because the flagship journal at each law school is more prestigious than secondary journals, and even all secondary journals at a school are not necessarily viewed the same. Jordan H. Leibman & James P. White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 J. LEGAL EDUC. 387, 387–88 (1989) (“At most law schools, it is fair to characterize the generalist journal as the ‘principal’ or ‘main’ journal. Because they are generally older than the school’s specialty reviews, they have had more time to accumulate the patina of prestige. Their very titles—which bear no subject matter qualifiers . . . suggest positions of preeminence. Also, because the law reviews permit multiple submissions, the generalist journals receive far more manuscripts for their available publication slots than do the specialty reviews. Consequently, they can be more selective in what and whom they publish, and with selectivity usually come prestige and reputation.”); Jacqueline Lipton, *General vs Specialty Journals*, THE FACULTY LOUNGE (Sept. 2, 2009, 9:23 PM), <https://www.thefacultylounge.org/2009/09/general-vs-specialty-journals.html>. The Washington and Lee rankings, despite their flaws, better capture this than any other existing measure. Jason P. Nance & Dylan J. Steinberg, *The Law Review Article Selection Process: Results From a National Study*, 71 ALB. L. REV. 565, 603 (2008) (using Washington & Lee rankings as the best available proxy for journal prestige).

297. Steven Lubet, *Law Review vs. Peer Review: A Qualified Defense of Student Editors*, 2017 U. ILL. L. REV. ONLINE 1, 2 (2017) (explaining that law review journals are not peer-reviewed).

298. *Id.*



third-year law student might find of interest may differ from what the public or legal profession at large focuses on.<sup>299</sup> And of course, their views on religion, particularly when it intersects with controversial legal issues, may also diverge from others.<sup>300</sup>

There are several factors that might influence whether more prestigious journals are interested in an article.<sup>301</sup> First, the prestige of the author’s current affiliated law school<sup>302</sup>—a variable that can only be examined when a law professor is the author since prestige of non-law professors is more difficult to measure (and for law student editors to gauge); lawyers and other professionals do not have a current institutional affiliation; and law students are almost always publishing in journals at their own school,<sup>303</sup> so the prestige of their own school is irrelevant. Second, the treatment of religion may be relevant.<sup>304</sup> For example, articles that treat religion in a more neutral or mixed manner may be perceived as more scholarly than articles that portray it as more positive or problematic.<sup>305</sup> Third, the type of religion an article focuses on may be related to the prestige of a journal if law student editors making publication decisions are more interested in certain religions.<sup>306</sup> Finally, the year an article was published could also matter if there is a trend generally in legal scholarship towards viewing religion less positively.<sup>307</sup>

The regression models in Table 9 below explore the relationship between

299. Leibman & White, *supra* 296, at 389 (“If professionals, preferably academic lawyers, controlled the journals, they argue, different kinds of pieces would be selected for publication, and as a consequence, different kinds of pieces would be written for the new market.”); Lubet, *supra* note 298, at 6–9 (describing an ERISA claim that may have been treated differently by a law student than a legal professional).

300. See David Masci, *Q&A: Why Millennials Are Less Religious Than Older Americans*, PEW RESEARCH CTR. (Jan 8, 2016), <http://www.pewresearch.org/fact-tank/2016/01/08/qa-why-millennials-are-less-religious-than-older-americans/> (highlighting religious different among Millennials).

301. See *infra* notes 304–09.

302. See LawProfBlawg, *Are Law Review Articles A Waste of Time*, ABOVE THE LAW (April 17, 2018), <https://abovethelaw.com/2018/04/are-law-review-articles-a-waste-of-time/?rf=1> (“If you look at all the articles published in the top 10 law reviews, it is very difficult to find someone who didn’t graduate, or who doesn’t work in, a top 10 law school.”).

303. See Lubet, *supra* note 297 (noting that students editors combine their own written works with the lead articles).

304. See *infra* note 308.

305. Cf. Michael Patrick King, *How to Write an Appellate Brief*, 1984 N.J. LAW 16, 16 (1984) (noting that the objectivity leads to credibility, while the opposite erodes credibility in legal writing).

306. See *supra* p. 152 (presenting research questions).

307. See *supra* notes 131 and accompanying text; *supra* Graph 4.

these factors and the rankings of the journals that published the articles.<sup>308</sup> The first model includes the author’s school rank, and the second omits it to include articles written by non-law school professors.<sup>309</sup> The third and fourth models are identical to the first and second, respectively, except a different treatment variable is used.<sup>310</sup> Instead of the -2 to 2 scale, the absolute value of this scale is used to see if it does not matter which direction the valence is, only that treatment of religion is further from the neutral/mixed ideal of academic writing.<sup>311</sup> Finally, a higher value on a coefficient means that a variable is associated with a less prestigious journal since the most prestigious journal is ranked one, the next most prestigious is ranked two, etc.<sup>312</sup>

Table 9: Regression Analysis of Journal Ranking

Variable	Model 1	Model 2	Model 3	Model 4
<b>Author School Rank</b>	.98*** (.18)	--	.98*** (.18)	--
<b>Year</b>	2.35 (2.28)	7.65*** (1.74)	2.55 (2.26)	7.82*** (1.73)
<b>Treatment</b>	-12.02 (8.61)	-8.33 (6.45)	--	--
<b>Treatment (Absolute Value)</b>	--	--	-4.88 (12.02)	5.88 (8.95)
<b>Christianity (General)</b>	54.13+ (29.54)	20.72 (20.88)	56.68+ (29.70)	23.99 (20.76)
<b>Catholicism</b>	47.82 (49.38)	22.10 (30.20)	52.88 (49.12)	23.28 (30.34)
<b>Other Christian</b>	27.48 (58.52)	-6.39 (41.35)	32.06 (60.51)	-3.45 (42.43)
<b>Judaism</b>	-54.03 (56.83)	56.31 (58.00)	-50.41 (58.13)	52.93 (58.11)
<b>Islam</b>	87.04 (71.39)	86.38 (54.11)	84.87 (71.56)	82.23 (54.09)

308. See *infra* Table 9; see also Phillips, *supra* note 114.309. See *infra* Table 9.310. See *infra* Table 9; see also Phillips, *supra* note 114.311. See *infra* Table 9; see also Phillips, *supra* note 114.312. See *infra* Table 9; see also Phillips, *supra* note 114.

<b>Native American</b>	-18.94 (35.61)	76.00 <sup>+</sup> (45.57)	-29.22 (35.30)	64.17 (45.56)
<b>Other Religion</b>	-27.45 (58.52)	86.88 (65.72)	-26.06 (55.85)	80.63 (64.75)
<b>Constant</b>	-4547 (4572)	-15048*** (3488)	-4953 (4530)	-15419*** (3467)
<b>Observations</b>	587	1292	587	1292
<b>F-value</b>	5.55***	3.76***	5.57***	3.52***
<b>Adjusted R-squared</b>	.083	.027	.080	.026
<b>S.E.R.</b>	244.55	274.86	244.98	275.01

<sup>+</sup> (p < .10); \* (p < .05); \*\* (p < .01); \*\*\* (p < .001)

In the model that included an author’s law school ranking, that variable was the only statistically significant predictor of the ranking of the journal that published the article.<sup>313</sup> Therefore, the author’s law school ranking could be viewed as a proxy for the article’s quality.<sup>314</sup> In an environment where it may be difficult to parse quality, the author’s law school ranking provides an independent and external signal for editors making publication decisions since submissions to law journals do not generally exclude author information from those making these decisions.<sup>315</sup> However, the coefficient is modest—for

313. See *supra* Table 9.

314. Albert H. Yoon, *Editorial Bias in Legal Academia*, 5 J. LEGAL ANALYSIS, 309, 309 (2013) (“In academia, the journal in which authors publish their articles serve as a proxy for their quality. An article placed in a highly ranked or prestigious journal is presumed to be of higher quality than one placed in those of lesser rank or prestige.”).

315. This is sometimes referred to as the Letterhead Effect. See Kevin M. Yamamoto, *What’s in a Name? The Letterhead Impact Project*, 22 J. LEGAL STUD. EDUC. 65, 65 (2004) (“A widespread deeply held belief by law professors is that law reviews are unfairly prejudiced and biased in favor of papers from authors at higher ranked, or more prestigious, institutions.”); *A Look Inside the Law Review Sausage Factory—and Possible Evidence of Bias Against Conservatives*, Above the Law (Sept. 13, 2012, 12:20 PM), <https://abovethelaw.com/2012/09/a-look-inside-the-law-review-sausage-factory-and-possible-evidence-of-bias-against-conservatives/> (“Law professors often complain about the so-called ‘letterhead effect.’ As professor Paul Caron explains the theory, ‘student law review editors faced with a deluge of submissions inevitably use an author’s school as a screening tool in selecting which articles to take a serious look at.’ They use pedigree as a proxy for quality, instead of undertaking an independent assessment of the article’s merits.” (quoting Paul Caron, *A High Tech “Letterhead Effect”*, TAXPROFBLOG (Mar. 18, 2016), [https://taxprof.typepad.com/tax-prof\\_blog/2006/03/a\\_high\\_tech\\_let.html](https://taxprof.typepad.com/tax-prof_blog/2006/03/a_high_tech_let.html))).

every increase of one in the school’s rank, the journal rank increases (or becomes less prestigious) by about one rank.<sup>316</sup> And while no other variable reached statistical significance ( $p \leq .05$ ), the dummy variable for “Christianity (General)” approached statistical significance ( $p = .067$ ).<sup>317</sup> Notably, Christianity (General) was associated with a less prestigious journal ranking of fifty-four positions when compared to an article that had the same treatment, published in the same year, and from an author from the same law school, but that dealt with religion generally.<sup>318</sup>

Looking at the model that drops the author’s school rank variable (i.e. looking at all of the articles in the dataset), the only variable that achieves statistical significance is the year variable.<sup>319</sup> Unfortunately, that variable does not clearly explain anything; it was placed in the model in part to control for the fact that each year there are more publishing journals, meaning more journals to rank, potentially resulting in a decrease in the average journal ranking (i.e. becoming less prestigious).<sup>320</sup> While it is possible that more prestigious law journals are less interested in the overall topic of law and religion, it is also possible the regression results merely reflect the increase in journals and are not related to the nature of the article itself.<sup>321</sup> As for models three and four, where the treatment variable has been converted to its absolute value in order to see whether only extreme values matter regardless of their direction, there was no substantive difference for both the coefficients and statistical significance.<sup>322</sup> In sum, the type of religion an article is discussing usually is not correlated with the ranking of the law journal the article ends up in, except perhaps with General Christianity and maybe Native American religions.

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316. *See supra* Table 9.

317. *See supra* Table 9. Part of what’s driving this lack of statistical significance is the low number of observations for most of the religion types. Also, the religion dummy variables were compared to General Religion as the baseline. *See supra* Table 9; Phillips, *supra* note 114.

318. *See supra* Table 9; *see also* Phillips, *supra* note 114.

319. *See supra* Table 9.

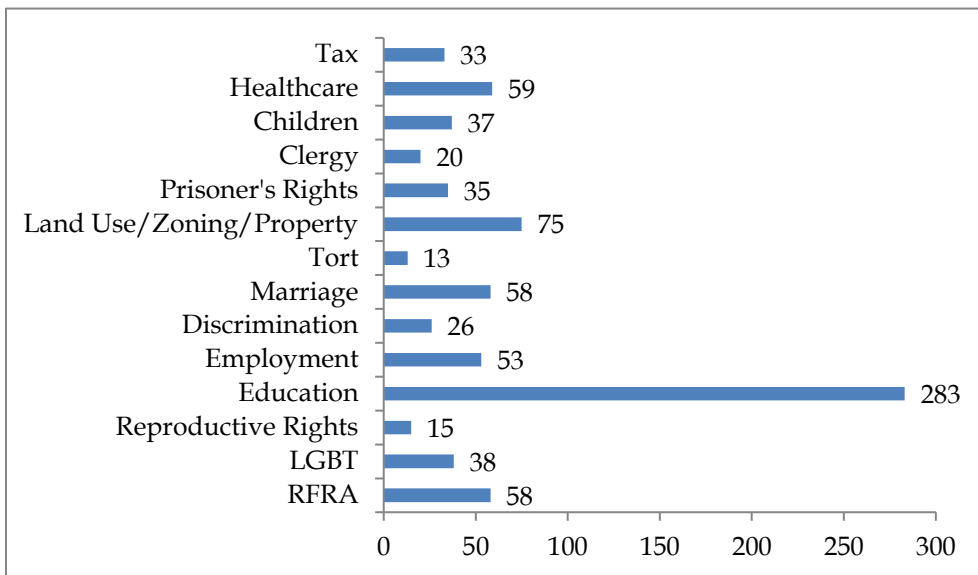
320. *See* Katharine T. Schaffzin, *The Future of Law Reviews: Online-Only Journals*, 32 *TOURO L. REV.* 243, 246 (2016) (discussing how law journals are creating online companion journals); Max Stier et al., *Law Review Usage and Suggestions for Improvements*, *STAN. L. REV.* 1467, 1470 (1992) (highlighting how the number of legal periodicals has increased five-fold).

321. *See supra* Table 9.

322. *See supra* Table 9.

*G. Area of the Law*

The final question this Article addresses is whether legal scholars treat religion differently based on the non-religious legal issue addressed.<sup>323</sup> In other words, are legal scholars more likely to advocate for accommodation or separation depending on the legal area being addressed. For example, maybe legal scholars are more likely to argue for accommodation in the area of prisoner rights than LGBT rights, or argue for separation in education than in land use/zoning issues. Graph 20 below shows the most common sub-areas of the law addressed by articles in this study, which include 803 of the 1,292 articles coded—approximately 62%.<sup>324</sup>

*Graph 20. Sub-areas of the Law*

Education is clearly the area of the civil law that legal scholars are most

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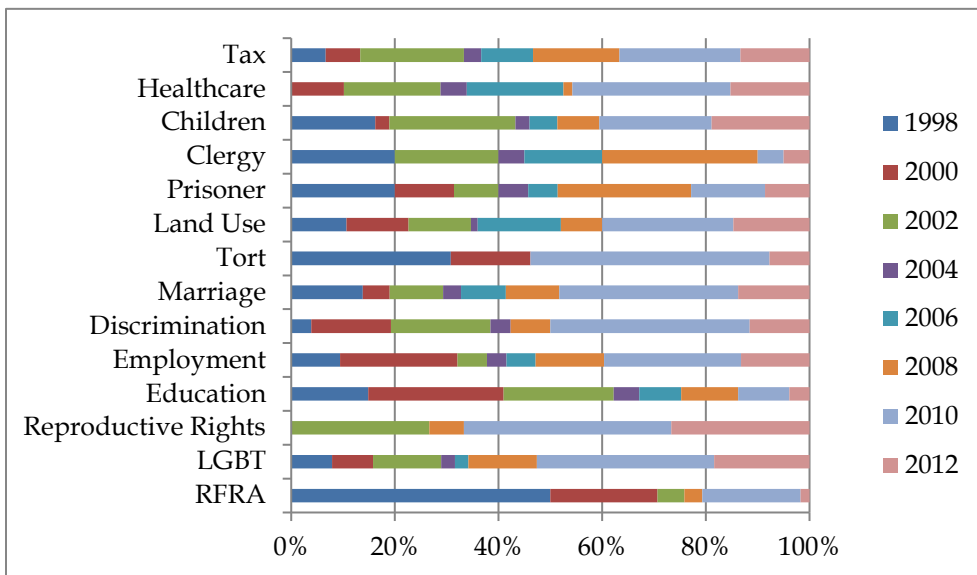
323. See *supra* p. 152 (presenting research questions).

324. See *infra* Table 20; see also Phillips, *supra* note 114.

interested in discussing religion.<sup>325</sup> Somewhat surprisingly, religion and the intersection of land use/zoning/property is second.<sup>326</sup> Second to last, just barely more than tort law, is the area of reproductive rights.<sup>327</sup> While reproductive rights may be a perennial hot topic in the law, it was not an area of focus for law and religion during this time period.<sup>328</sup> Also, women’s rights were only the subject of four articles in this study’s dataset and so it was not included on the chart above.<sup>329</sup>

But, there is more to be explored here. Are some topics becoming “hot-ter” with time, and others waning in interest for legal scholars writing on law and religion? Graph 21 below shows each of these fourteen subcategories and the percentage of articles within each subcategory per year.<sup>330</sup>

*Graph 21. Sub-areas of Law Over Time*



325. See *supra* Table 20.

326. See *supra* Table 20.

327. See *supra* Table 20.

328. See *supra* Table 20.

329. See Phillips, *supra* note 114.

330. See *infra* Table 21 (Sub-areas of Law Over Time).

Some interesting patterns emerge. For instance, about 70% of all the articles dealing with RFRA were written between 1998–2000.<sup>331</sup> This pattern is not surprising because the Supreme Court held RFRA was unconstitutional as applied to the States in 1997.<sup>332</sup> Similarly, approximately half of the law and religion articles dealing with marriage, discrimination,<sup>333</sup> and LGBT issues (there is some overlap) were not published until the 2010–2012 period.<sup>334</sup> This also isn’t surprising given the increasing prominence of the same-sex marriage debate during that period of time.<sup>335</sup> Other areas of the law where a large bulk of the articles were written at the end of the time period studied include tax, healthcare, children, torts, clergy and reproductive rights.<sup>336</sup>

Another way to look at this phenomenon is to graph the percentage of all articles that a particular sub-area covers across time. Two of most popular areas initially in the dataset were RFRA and education.<sup>337</sup> Graph 22 below tracks changes in those areas.<sup>338</sup>

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331. See *supra* Graph 21; see also Phillips, *supra* note 114.

332. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (“RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.”).

333. The category of discrimination includes discrimination against religion and discrimination for religious reasons.

334. See *supra* Graph 21; see also Phillips, *supra* note 114.

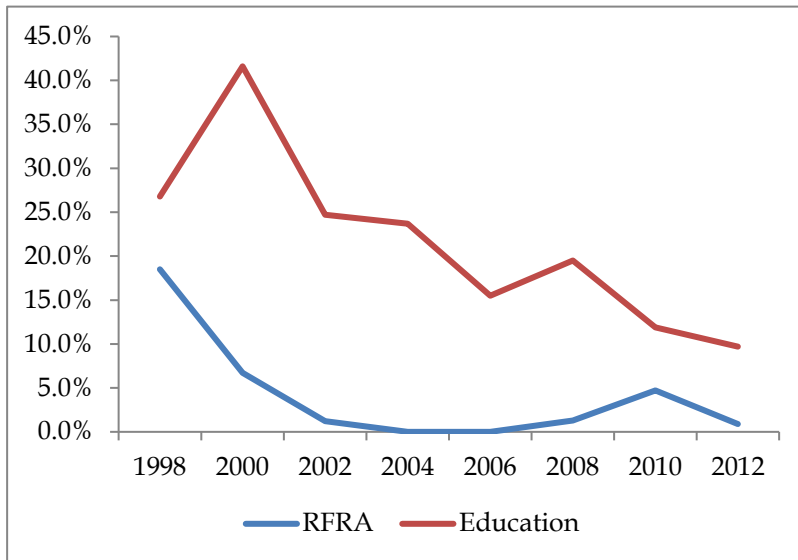
335. See, e.g., Thomas Messner, *Religion and Morality in the Same-Sex Marriage Debate*, THE HERITAGE FOUND. (July 20, 2010), <https://www.heritage.org/marriage-and-family/report/religion-and-morality-the-same-sex-marriage-debate> (noting in 2010 that “developments in the same-sex marriage debate have focused new attention on the place of religion and morality in shaping the legal definition of marriage”).

336. See *supra* Graph 21.

337. See Phillips, *supra* note 114.

338. See *infra* Graph 22; see also Phillips, *supra* note 114.

*Graph 22. RFRA and Education Over Time*



The interest of legal scholars to write about law and religion as it relates to education is still strong compared to other areas, but has dropped dramatically over this fifteen-year period.<sup>339</sup> Likewise, RFRA completely fell off the map for a few years, but has had a small resurgence between 2008 and 2012.<sup>340</sup> In contrast, Graph 23 looks at what many would consider some of the hottest issues today in law and politics.<sup>341</sup>

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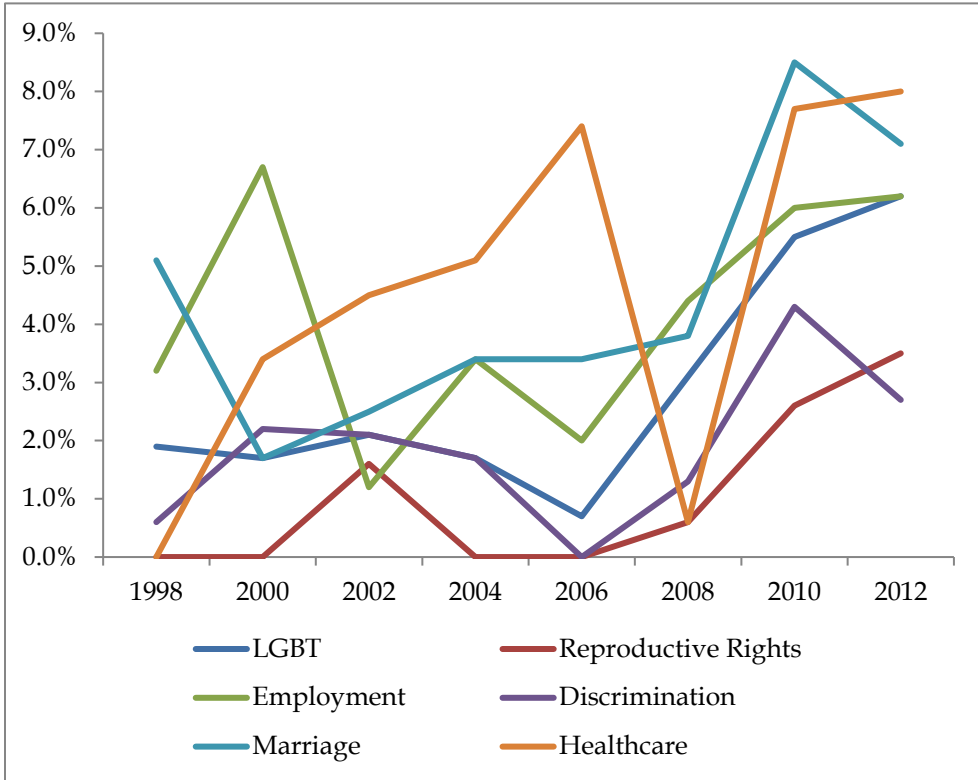
339. *See supra* Graph 22.

340. *See supra* Graph 22.

341. *See infra* Graph 23; *see also* Phillips, *supra* note 114.



Graph 23. “Hot-button” Sub-areas Over Time



LGBT issues in relation to religion more than tripled from 1.9% in 1998 to a high of 6.2% in 2012.<sup>342</sup> Notably, this time period pre-dates some of the most recent debates of the law in this area.<sup>343</sup> For example, discussions on reproductive rights and religion were non-existent in 1998, but jumped to 3.5% in 2012, which does not cover the recent discussions relating to *Burwell v. Hobby Lobby Stores, Inc.*<sup>344</sup> Health care and religion also began at 0.0% in

342. See *supra* Graph 23; see also Phillips, *supra* note 114.

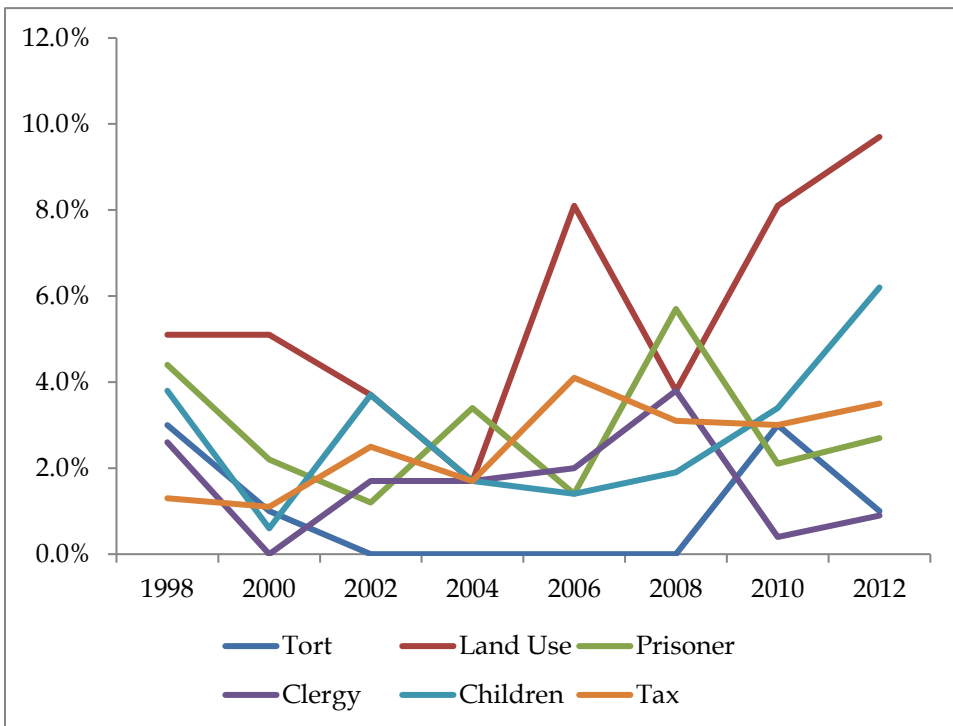
343. See *infra* note 344 and accompanying text.

344. See *supra* Graph 23; see, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785

1998, but has generally increased since then, topping out at 8.0% in 2012.<sup>345</sup> Marriage, employment, and discrimination increased too, though not quite as dramatically.<sup>346</sup>

Other less controversial areas in the law increased less over time than the hot-button issues, or even decreased.<sup>347</sup> Graph 24 below illustrates this point.<sup>348</sup>

*Graph 24. Other Sub-areas Over Time*



(2014) (holding that the Affordable Care Act’s contraceptive mandate violates RFRA, “as applied to closely held corporations”).

345. *See supra* Graph 23.

346. *See supra* Graph 23.

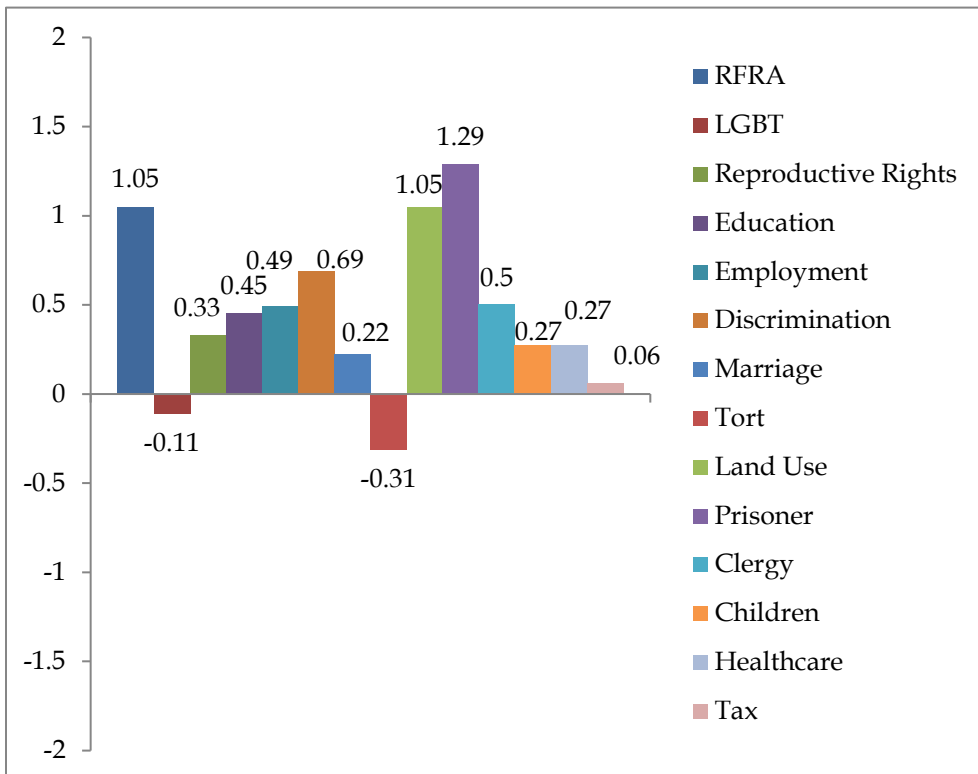
347. *See infra* Graph 24.

348. *See infra* Graph 24.

The sub-areas of land use, children, and tax all increased across the fifteen-year period, with some variation.<sup>349</sup> And the sub-areas of clergy, torts, and prisoners all slightly decreased.<sup>350</sup>

Another way to investigate law and religion as it relates to these sub-areas of the law is to see if the average treatment value differs by sub-area.<sup>351</sup> The graph below provides the average for each sub-area for the time period studied.<sup>352</sup>

*Graph 25. Average Treatment Value for Sub-area*



349. See *supra* Graph 24.

350. See *supra* Graph 24.

351. See *infra* Graph 25.

352. See *infra* Graph 25; see also Phillips, *supra* note 114.

The differences here can be quite stark. Religion is actually portrayed on the problematic side of the scale when LGBT rights or torts are involved, and barely above zero (neutral/mixed) when taxes are implicated.<sup>353</sup> This is not surprising. In the context of LGBT issues, religious liberty is usually framed as clashing with LGBT rights.<sup>354</sup> As for torts and religion, such issues are usually characterized as a party claiming religious liberty or arguing for separation of church and state as a defense to being sued; for example, when someone is injured during an exorcism.<sup>355</sup> In contrast, religion is portrayed most positively in the context of RFRA<sup>356</sup> (a law designed to protect religious freedom), and land use/zoning/property issues and prisoner’s rights (which are covered by the Religious Land Use and Institutionalized Persons Act (RLUIPA)<sup>357</sup>—a statute also designed to protect religious freedom).<sup>358</sup>

Besides portrayal of religion, does legal research in these sub-areas advocate accommodating religion or call for separation? Graph 26 below explores this question.<sup>359</sup>

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353. *See supra* Graph 25.

354. Laura K. Klein, *Rights Clash: How Conflicts Between Gay Rights and Religious Freedoms Challenge the Legal System*, 98 *Geo. L.J.* 505, 505 (2010) (“That some religious beliefs clash with the gay rights movement is undeniable. . . . [T]he clash between religion and the advancement of the gay rights movement . . . has taken the form of litigation.”); *see e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723 (2018) (holding that the Colorado Civil Rights Commission violated the Free Exercise Clause when the Commission determined that a baker, a devout Christian, violated the Colorado Anti-Discrimination Act when he refused to make a wedding cake for a gay couple).

355. *See, e.g.*, *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 11, 12 (Tex. 2008) (holding that a church was not liable for a tortious injury suffered during an attempted exorcism).

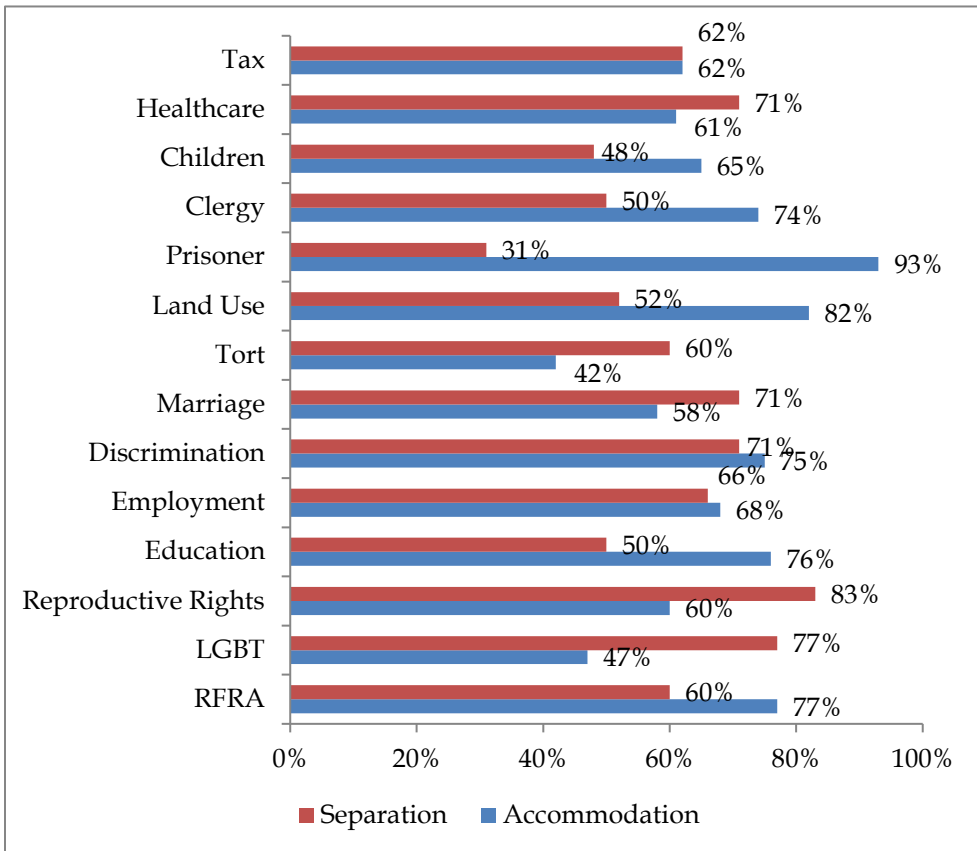
356. Religious Freedom Restoration Act (RFRA) of 1993 42 U.S.C. §§ 2000bb to 2000bb-4 (2012), *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

357. Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000 42 U.S.C. §§ 2000cc to 2000cc-5 (2012).

358. *See supra* Graph 25.

359. *See infra* Graph 26; *see also* Phillip, *supra* note 114.

*Graph 26. Separation & Accommodation by Sub-area*



Both LGBT issues (47%) and tort issues (42%) are below 50% accommodation rates, meaning, on average, less than half the time scholars call for accommodating religious exercise in these legal areas.<sup>360</sup> Marriage is only slightly better at 58%.<sup>361</sup> On the high end of accommodation are prisoner’s rights (93%) and land use (82%).<sup>362</sup> Interestingly, legal scholarship advocates

360. *See supra* Graph 26.

361. *See supra* Graph 26.

362. *See supra* Graph 26.

for accommodation only 77% of the time when discussing RFRA,<sup>363</sup> which ironically was passed to facilitate the accommodation of religious beliefs.<sup>364</sup> While 77% is still a high number, it is lower than one would expect.<sup>365</sup>

As for separation, the areas of children (48%), prisoners (31%), and education (50%) were all below or right at 50%, meaning that scholars advocate for greater separation of government and religion roughly half or less than half of the time.<sup>366</sup> On the high end are reproductive rights (83%), LGBT rights (77%), healthcare (71%), and marriage (71%).<sup>367</sup> In sum, the way scholars portray religion, as something positive or problematic, depends largely on what area of law religion is intersecting. What is more, there is great fluidity over time regarding the topics legal scholars explore in the area of law and religion.

#### IV. CAVEATS, CONSEQUENCES, AND EXPLANATIONS

##### A. Caveats

The trends unearthed in this study of law and religion in American legal scholarship are cabined to the period covered by the dataset: 1998–2012.<sup>368</sup> While this period of fifteen years in the recent past provides a good window into where we are today, the study cannot speak to developments in the last few years; nor can this study extrapolate a broader picture from this fifteen-year period. Consequently, these caveats raise additional questions: Are these trends part of a longer trend or are these trends an abrupt break from the past?

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363. See *supra* Graph 26.

364. See Daniel J. Solove, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459, 459 (1996) (stating that RFRA was aimed to dramatically increase protection for religious liberties).

365. See *supra* Graph 26.

366. See *supra* Graph 26.

367. See *supra* Graph 26.

368. See Phillips, *supra* note 114; *supra* Part II.

B. *Consequences*

Nevertheless, the trends here have possible implications. The data appear to be consistent with secularization theory in several regards.<sup>369</sup> First, the positive treatment of religion is decreasing over this time period.<sup>370</sup> Admittedly, the treatment of religion is still on the positive side of the value scale, and the downward trajectory, while statistically significant, is not necessarily that large.<sup>371</sup> Second, legal scholarship is less likely to argue for the accommodation of religious practices when they conflict with secular laws, a trend that is also statistically significant.<sup>372</sup>

While not necessarily fitting into the secularization thesis, it appears that not all religions are “created equal” in the eyes of legal scholars (this does fit the religion economies model).<sup>373</sup> At first glance, adherents in the United States of Native American religions, Judaism, Islam and other non-Christian religions may take heart; legal scholars appear to characterize these faiths more positively than those related to Christianity, or religion generally.<sup>374</sup> Furthermore, scholars are more likely to argue for accommodation for these non-Christian faiths than those that belong to Christianity (or just religion in general).<sup>375</sup> Importantly, while a trend away from accommodation and the positive treatment of religion may affect Christian-related faiths first, it is not clear that it will not also impact non-Christian faiths eventually as well. Being later in line to a firing squad is not much reason to rejoice. And while one scholar viewed Jews as the “canaries in the coal mine” for human rights in European history, he now argues that Christians have taken over the canary

369. See *infra* notes 370–71 and accompanying text. “The principal thrust in secularization theory . . . has been a claim that, in the face of scientific rationality, religion’s influence on all aspects of life—from personal habits to social institutions—is in dramatic decline.” William H. Swatos, Jr. & Kevin J. Christiano, *Secularization Theory: The Course of a Concept*, 60 SOC. OF RELIGION 209, 214 (1999).

370. See *supra* Graph 4; *supra* notes 131–33 and accompanying text.

371. See *supra* Graph 4; *supra* notes 131–33 and accompanying text.

372. See *supra* Graph 26. For evidence that secularization is not occurring in the United States because, while moderate religions are declining, more intense religions are persisting (unlike in other countries), see Landon Schnabel & Sean Bock, *The Persistent and Exceptional Intensity of American Religion: A Response to Recent Research*, 4 SOC. SCI 686, 686 (2017).

373. See *supra* Graph 11. See Rex Ahdar, *The Idea of Religious Markets*, 2 INT’L J. L. CONTEXT 49, 51 (2006) (discussing the religious economy model which argues that the fluctuation of religions can be understood in the supply and demand principles of economics—greater supply leads to greater participation).

374. See *supra* Graph 11; *supra* Table 7; *supra* notes 224–46.

375. See *supra* Graph 14; *supra* notes 270–74.

role, becoming a “litmus indicator of whether freedom exists not only for them—but for all others in their societies.”<sup>376</sup>

So, what if legal scholarship is moving in a direction that is less amenable to religious practice and religion in general?<sup>377</sup> What impact might that have? The impact could be significant. Courts often turn to legal scholarship on complex issues.<sup>378</sup> Thus, arguments in legal scholarship could influence judges, and ultimately, have the force of law.<sup>379</sup> Similarly, legal scholarship could also persuade policymakers in the legislature or executive branches of state and the federal governments to enact statutes or regulations that treat religion less favorably.<sup>380</sup> Therefore, if legal scholarship is less amenable to religion, religion could become less protected under American law than it has been in the past.

This result would be unfortunate given the correlation between religious freedom and societal benefits, and religious individuals and individual successes.<sup>381</sup> For example, religious individuals tend to have stronger marriages and families, are less involved in substance abuse and crime, obtain higher levels of education, are more likely to volunteer and donate to charities, exhibit better work habits, live longer, enjoy better health, earn more money, and experience higher levels of well-being and happiness.<sup>382</sup> These characteristics have effects on the economy, police forces, schools, the poor, and a host of other aspects of society.<sup>383</sup> Thus, it is not surprising that religious freedom strongly correlates with various positive economic, civic, and public

376. ALLEN D. HERTZKE, *FREEING GOD’S CHILDREN: THE UNLIKELY ALLIANCE FOR GLOBAL HUMAN RIGHTS* 163–64 (2004) (quoting Michael Horowitz).

377. Cf. Christopher Shea, *Beyond Belief: The Debate Over Religious Tolerance*, *THE CHRONICLE OF HIGHER EDUC.* (June 9, 2014), <https://www.chronicle.com/article/The-Limits-of-Religious/146971> (discussing arguments by scholars that treat religion negatively and that religious rights should take second seat to secular rights).

378. See Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 *MICH. L. REV.* 1483, 1514 (2012) (“The impact of scholars’ works on government or policy is also reflected through the citation of scholars’ works in government documents and, more often, by the direct and active participation of individual scholars in the legislative process, as through the giving of congressional testimony, the authoring of amicus briefs, and service in government-appointed committees and other governmental activities.”).

379. *Id.*

380. *Id.*

381. See Patrick F. Fagan, *Why Religion Matters Even More: The Impact of Religious Practice on Social Stability*, *THE HERITAGE FOUND.* (Dec. 18, 2006), <https://www.heritage.org/civil-society/report/why-religion-matters-even-more-the-impact-religious-practice-social-stability>.

382. See *id.*; see also PUTNAM & CAMPBELL, *supra* note 11 at 443–92.

383. See Fagan, *supra* note 381; see also PUTNAM & CAMPBELL, *supra* note 11 at 443–92.



health benefits.<sup>384</sup>

For instance, Rabbi Jonathan Sacks, the former chief rabbi of the United Hebrew Congregations of the British Commonwealth, has argued that “[religion] remains the most powerful community builder the world has known. . . . Religion is the best antidote to the individualism of the consumer age. The idea that society can do without it flies in the face of history.”<sup>385</sup> A Harvard Business School professor, who has been named the world’s top “thought leader” two years in a row by Thinkers50 at the “Oscars of the ‘management guru’ world,”<sup>386</sup> wrote an article entitled *Religion is the Foundation of Democracy and Prosperity*.<sup>387</sup> A New York Times columnist noted that “The social goods associated with faith flow almost exclusively from religious participation, not from affiliation or nominal belief.”<sup>388</sup>

Consequently, to experience a weakening of these social goods because religion is less valued and less protected could have widespread and harmful effects in our society.<sup>389</sup> Of course, this is as much a cultural and societal issue as a legal one, but that is beyond this Article’s scope. And certainly, the community of legal scholars could outpace or re-direct society’s mores and priorities, and help codify their views in a way that few other communities of scholars can.<sup>390</sup>

### C. Explanations

Why might legal scholarship be moving in this direction? There are numerous potential explanations, two of which are related: the growth of the

384. See Brian J. Grim, Greg Clark, & Robert Edward Snyder, *Is Religious Freedom Good for Business? A Conceptual and Empirical Analysis*, 10 INTERDISC. J. OF RES. ON RELIGION 1, 4–6 (2014); see also GRIM & FINKE, *supra* note 43 at 205–09; Paul A. Marshall, *The Range of Religious Freedom*, in RELIGIOUS FREEDOM IN THE WORLD 1, 1–11 (Paul A. Marshall ed., 2008).

385. Jonathan Sacks, *The Moral Animal*, N.Y. TIMES (Dec. 23, 2012), <https://www.ny-times.com/2012/12/24/opinion/the-moral-animal.html>.

386. Jena McGregor, *The World’s Most Influential Management Thinker?*, WASH. POST (Nov. 12, 2013), <https://www.washingtonpost.com/news/on-leadership/wp/2013/11/12/the-worlds-most-influential-management-thinker/>.

387. Clayton Christensen, *Religion is the Foundation of Democracy and Prosperity*, MORMON PERSPECTIVES (Feb. 8, 2011), <http://www.mormonperspectives.com/?p=115>.

388. Ross Douthat, *The Christian Penumbra*, N.Y. TIMES (Mar. 29, 2014), <https://www.ny-times.com/2014/03/30/opinion/sunday/douthat-the-christian-penumbra.html>.

389. See Marshall, *supra* note 384 (describing the problems that societies experience with less religious liberty).

390. See Shapiro & Pearse, *supra* note 378.

administrative state<sup>391</sup> and an increased legal orientation of anti-discrimination.<sup>392</sup> George Washington described the nation’s historical roots as an “enlarged and liberal policy,” wherein “a very limited national government . . . allowed a large sphere of civil society to flourish outside of government regulation.”<sup>393</sup> And as philosopher Leo Strauss would later argue, this relationship between government and civil society “stands or falls . . . by the distinction between the public and the private. In the liberal society there is necessarily a private sphere with which the states legislation must not interfere.”<sup>394</sup>

This paradigm ran into serious headwinds with a recalcitrant South (and to a degree the North as well) that sought to keep African-Americans as second-class citizens through segregation.<sup>395</sup> Thus, in order to kill segregation, “America’s robust civil society has become increasingly subject to government regulation.”<sup>396</sup> While the expansion of government has been an effective treatment for the cancer of segregation, like many such invasive treatments, the effects have spilled over and impacted that which is nearby but distinct.<sup>397</sup> As one commentator observed:

[T]he new civil-rights mentality has changed the American understanding of the job of government vis-à-vis the liberty of citizens. . . .

A large body of American opinion holds that it is the government’s job to prevent any and all discrimination. That belief is

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391. Ronald Pestritto, *The Birth of the Administrative State: Where it Came From and What it Means for Limited Government*, THE HERITAGE FOUND. (Nov. 20, 2007), <https://www.heritage.org/political-process/report/the-birth-the-administrative-state-where-it-came-and-what-it-means-limited> (discussing the administrative state).

392. See Bernstein, *supra* note 9 (noting the attachment to anti-discrimination law).

393. Richard Samuelson, *Who’s Afraid of Religious Liberty?*, MOSAIC, (Aug. 1, 2016), <https://mosaicmagazine.com/essay/2016/08/whos-afraid-of-religious-liberty/>.

394. *Id.*

395. *Brown v. Board of Fifty: “With an Even Hand”: A Century of Racial Segregation, 1849–1950*, LIBRARY OF CONGRESS, <https://www.loc.gov/exhibits/brown/brown-segregation.html> (last visited May 31, 2019) (“Regarded by many as second-class citizens, blacks were separated from whites by law and by private action in transportation, public accommodations, recreational facilities, prisons, armed forces, and schools in both Northern and Southern states.”).

396. See Samuelson, *supra* note 393.

397. *Id.* (“Nowadays, the Justice Department has been creating new ‘protected classes’ on its own recognizance, without even a pretense of seeking congressional approval for so radical a change from the originating statute.”).

pushing government more and more deeply into our daily affairs.<sup>398</sup>

Of course, there are likely other reasons for why the administrative state has grown in this country,<sup>399</sup> but the result is a society that increasingly wants government to eradicate discrimination coupled with a bureaucracy that has increasingly invaded the private sphere to do so.<sup>400</sup> This creates conflicts between religious liberty on the one hand, and rights based in anti-discrimination law on the other—often with religion being viewed as the vehicle of discrimination.<sup>401</sup>

For example, one law professor has noted that in the “conflict between the demands of religion and the demands of society,” sometimes, especially in recent history, “religious doctrines changed . . . partly because the larger society insisted that discriminatory behavior change.”<sup>402</sup> Moreover, he characterized the protests in Indiana and Arkansas against state-level Religious Freedom Restoration Acts by pro-LGBT groups as “the birth pangs of a new wave of equality” in “one of those moments in history when pressure from the larger society pushes against religious belief and insists that believers, at least when doing business with the public, not act even on sincere objections.”<sup>403</sup> A former law professor and state supreme court justice observed that “[a]s the powerful principle of nondiscrimination has been accommodated in the law, many rank it above the constitutional guarantee of free exercise of religion, contending that religious freedom must be curtailed whenever it conflicts with nondiscrimination.”<sup>404</sup> The irony is that this has caused some to believe that

398. *Id.*

399. See Pestrutto, *supra* note 391 (tracing the creation of the administrative state to the New Deal); Jon Ward, *Big Government Gets Bigger*, WASH. TIMES (Oct. 19, 2008), <https://www.washington-times.com/news/2008/oct/19/big-government-gets-bigger/> (stating that United States’ greatest rapid growth in government since the Great Depression was primarily a result of the fight against Islamist terrorism).

400. David A. Strauss, *What the ‘Religious Freedom’ Controversy is Really About*, WASH. POST (Apr. 10, 2015), [https://www.washingtonpost.com/opinions/a-new-wave-of-equality/2015/04/10/87e1a378-dc80-11e4-a500-1c5bb1d8ff6a\\_story.html?utm\\_term=.a604ab3dd1af](https://www.washingtonpost.com/opinions/a-new-wave-of-equality/2015/04/10/87e1a378-dc80-11e4-a500-1c5bb1d8ff6a_story.html?utm_term=.a604ab3dd1af).

401. See, e.g., *Using Religion to Discriminate*, ACLU, <https://www.aclu.org/issues/religious-liberty/using-religion-discriminate> (“With increasing frequency, we are seeing individuals and institutions claiming a right to discriminate—by refusing to provide services to women and LGBT people—based on religious objections.”).

402. Strauss, *supra* note 400.

403. *Id.*

404. Dallin H. Oaks, *Transcript: Elder Oaks Remarks at Claremont Graduate University Religious*

“religious liberty is going to be the civil rights issue of the next decade.”<sup>405</sup>

Furthermore, this conflict has led some to recharacterize religious liberty or the right to free exercise as a “right to worship.”<sup>406</sup> This new, narrower conception of religious freedom seeks to limit free exercise to the private sphere: the home, the church, the synagogue, and the mosque.<sup>407</sup> Such a move is not new—this reconceptualization of religious liberty was first flagged in the mid-1980s—but it may be growing more common.<sup>408</sup> Thus, while free speech rights may be expanding,<sup>409</sup> religious liberty rights may be contracting both in the physical and societal spaces where they may be exercised.<sup>410</sup> This has caused some to warn about circling the wagons too broadly at the periphery of religious liberty—such as in commercial settings—so as to suffer defeats at the core: in the home and in places of worship.<sup>411</sup> Such “practical

*Freedom Conference*, CHURCH OF JESUS CHRIST NEWSROOM (Mar. 25, 2016), <https://newsroom.churchofjesuschrist.org/article/transcript-elder-oaks-claremont-graduate-university-religious-freedom-conference>.

405. David Ward, *Rick Warren: Religious Liberty the Civil Rights Issue of the Next Decade*, DESERET NEWS (Dec. 4, 2012, 12:40 PM), <https://www.deseretnews.com/article/765616925/Rick-Warren-Religious-liberty-the-civil-rights-issue-of-the-next-decade.html> (quoting Pastor Rick Warren, founder and senior pastor of Saddleback Church).

406. *See, e.g.*, Hillary Clinton, *Exclusive: Hillary Clinton: What I have in Common with Utah Leaders*, DESERET NEWS (Aug. 10, 2016, 9:40 AM) <https://www.deseretnews.com/article/865659843/Exclusive-Hillary-Clinton-What-I-have-in-common-with-Utah-leaders-2-religious-freedom-and-the.html?pg=all>.

407. *See* RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* 20 (1984) (“Religion is the business of church and home and has no place in public space.”).

408. *Id.*; *see* Samuelson, *supra* note 393 (“The Obama White House has taken to quietly replacing the phrase ‘freedom of religion’ with ‘freedom of worship,’ a purely private affair with no permissible impact on either speech or conduct.”); Peggy Fletcher Stack, *‘Freedom of Religion’ Isn’t Same as ‘Freedom to Worship’—Just Ask Catholic Priests or Mormon Apostles*, SALT LAKE TRIBUNE (Aug. 3, 2017), <https://www.sltrib.com/religion/2016/09/18/freedom-of-religion-isnt-same-as-freedom-to-worship-just-ask-catholic-priests-or-mormon-apostles/> (discussing response to the Democratic Party’s proposal to use “freedom of worship” instead of “freedom of religion” because the latter is more expansive).

409. David L. Hudson, Jr., *In the Age of Social Media, Expand the Reach of the First Amendment*, AMERICAN BAR ASS’N, [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-ongoing-challenge-to-define-free-speech/in-the-age-of-social-media-first-amendment/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/in-the-age-of-social-media-first-amendment/) (arguing for that that free speech rights found in the First Amendment should apply to powerful private entities and corporations like Facebook and Twitter).

410. *See* NEUHAUS, *supra* note 407; Samuelson, *supra* note 393; Strauss, *supra* note 400.

411. *See* Elder Lance B. Wickman, *Promoting Religious Freedom in a Secular Age: Fundamental Principles, Practical Priorities, and Fairness for All*, CHURCH OF JESUS CHRIST NEWSROOM (July 7–8, 2016), <https://newsroom.churchofjesuschrist.org/article/promoting-religious-freedom-secular-age-fundamental-principles-practical-priorities-fairness-for-all> (characterizing the “innermost core” of re-

priorities” may always be at play in the consideration of constitutional rights, but they still show a right that is less than robust.<sup>412</sup>

As an example of this growing conflict between religious freedom and anti-discrimination, the U.S. Commission on Civil Rights’ recently released report—*Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties*<sup>413</sup>—was met with concern by a diverse coalition of seventeen religious faith leaders.<sup>414</sup> This coalition subsequently sent a letter to President Barack Obama; President Pro Tempore of the Senate, Senator Orrin Hatch; and the Speaker of the House, Congressman Paul Ryan—who are the “authorities responsible for appointing members of the U.S. Commission on Civil Rights.”<sup>415</sup>

The report found that “[r]eligious exemptions to the protections of civil rights based on classifications such as race, color, national origin, [etc.] . . . significantly infringe upon these civil rights.”<sup>416</sup> It also found that when the First Amendment’s Free Exercise Clause or RFRA require religious exemptions, such “exemptions from non-discrimination laws and policies must be weighed carefully and defined narrowly on a fact-specific basis.”<sup>417</sup> The report noted that “[o]verly-broad religious exemptions unduly burden nondiscrimination laws and policies,” and so, the report determined that “courts, lawmakers, and policy-makers at every level must tailor religious exceptions to civil liberties and civil rights protections as narrowly as applicable law requires.”<sup>418</sup> Additionally, the report stated that “[f]ederal legislation

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ligious freedoms as those “more closely [] relate[d] to purely private, family, and ecclesiastical matters”; characterizing the “near the core” as “freedoms that pertain to “religiously important nonprofit functions carried on by religious organizations;” and characterizing “beyond the core” as those in commercial settings). Lance Wickman is the general counsel for The Church of Jesus Christ of Latter-day Saints. *Id.*

412. *Id.*

413. U.S. COMMISSION ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES (2016), <https://www.usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.PDF>.

414. *See Interfaith Group Asks US Government to Reject Report that Stigmatizes Religious Americans*, CHURCH OF JESUS CHRIST NEWSROOM (Oct. 12, 2016), [https://newsroom.churchofjesuschrist.org/article/interfaith-coalition-president-congress-biased-religious-liberty-report\[hereinafter Interfaith Group\]](https://newsroom.churchofjesuschrist.org/article/interfaith-coalition-president-congress-biased-religious-liberty-report[hereinafter Interfaith Group]).

415. *Id.* (providing copy of letter).

416. *See* U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 413, at Letter of Transmittal.

417. *Id.* at 25.

418. *Id.* at 26.

should be considered to clarify that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions and only to the extent that they do not unduly burden civil liberties and civil rights protections against status-based discrimination.<sup>419</sup>

Consequently, the religious leaders expressed “deep concern” that the report “stigmatizes tens of millions of religious Americans, their communities, and their faith-based institutions, and threatens the religious freedom of all our citizens.”<sup>420</sup> The report also found that “without exemptions, [religious organizations] would not use the pretext of religious doctrine to discriminate.”<sup>421</sup> In effect, the letter concluded that the Commission had found that if exemptions are allowed, religious organizations would use religious doctrine to discriminate.<sup>422</sup> Thus, the leaders felt that the report essentially labeled some religious individuals and institutions as bigoted, pointing to the statement by the Commission’s Chairman: “The phrases ‘religious liberty’ and ‘religious freedom’ will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance.”<sup>423</sup>

As the report and reaction to it make clear, this clash between anti-discrimination principles and religious liberty is likely to grow in scope and pitch in the coming years.<sup>424</sup> To the extent it is seen as a zero-sum game (i.e., winner take all), the current trajectories in legal scholarship do not favor religious freedom in this fight.<sup>425</sup>

## V. CONCLUSION

Over the fifteen-year period studied here, a few trends regarding religion in legal scholarship emerge. First, while still on the positive side of the scale,

419. *Id.* at 27.

420. *Interfaith Group*, *supra* note 414.

421. U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 413, at 26.

422. *Interfaith Group*, *supra* note 414.

423. *Id.* (quoting U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 413, at 29).

424. See Emma Margolin, *Backlash Grows Over ‘Religious Freedom’ and ‘Anti-Discrimination’ Push*, NBC NEWS (Apr. 11, 2016, 7:22 AM), <https://www.nbcnews.com/news/us-news/backlash-grows-over-religious-freedom-anti-discrimination-push-n554016> (stating that religious freedom bills in Mississippi and North Carolina are causing controversy and likely to pass elsewhere).

425. See *supra* Graph 10.

the average treatment of religion was less positive and statistically significant.<sup>426</sup> Second, lawyers tended to portray religion less positively than law students and law professors, and law students portrayed religion less positively than law professors.<sup>427</sup> Third, legal scholars did not view all religions equally—non-Christian religions were portrayed more positively than religion generally, which was portrayed more positively than either Christianity generally or specific Christian denominations.<sup>428</sup> The clearest winner (the religion portrayed most positively) were Native American religions, while the clearest loser (the religion portrayed least positively) were specific Christian faiths other than Catholicism.<sup>429</sup> Fourth, writing about Christianity generally (as opposed to specific Christian denominations or other faiths) was associated with placement in less prestigious journals, a finding that approaches statistical significance.<sup>430</sup> Finally, when law and religion intersected with another legal area, religion was portrayed differently and scholars advocated for separation and accommodation at different rates.<sup>431</sup> For example, religion was portrayed problematically in the LGBT context, meaning scholars were less likely to advocate for accommodating religious practice, but religion was portrayed quite positively in the prisoner’s rights context with a high percentage of scholars advocating for religious accommodations.<sup>432</sup> Given that legal scholars often impact future laws, these trends may portend court decisions, statutes, and regulations in the next few decades.<sup>433</sup> Time will tell.

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426. *See supra* Graph 4; *supra* notes 131–33 and accompanying text; *see also* Phillips, *supra* note 114.

427. *See supra* Graphs 8–10; *supra* notes 183–99 and accompanying text.

428. *See supra* Graph 11; *supra* Table 7; *supra* notes 223–46 and accompanying text.

429. *See supra* Graph 11; *supra* notes 223–46 and accompanying text.

430. *See supra* Table 9; *supra* notes 313–22.

431. *See supra* Section III.G.

432. *See supra* Graphs 25–26.

433. *See supra* notes 378–80 and accompanying text.

APPENDIX

*Coding Guide*

First you have to determine whether to code the article. If it only in passing deals with religion and American civil law, if it a foreign law journal, or if it is dealing with religion but not the civil law (such as religious law), then we don't code it.

Spreadsheet Categories:

A. Citation: give the citation of the article (no author or title info); e.g., 123 Yale L. J. 456 (2010)

B. Year: year article was published

C. Article Type: list whether it was an article, comment, note, essay, book review, case note, lecture, etc.

D. Publishing School: which school published the journal the article was published in

E. Author Title: professor (of law), visiting (assistant/associate) professor (of law), student, lawyer, judge, law clerk, adjunct faculty, clinical faculty, a professor of some other field (other professor), or some other type of professional or non-academic author

F. Author School: the school the author is affiliated with (if there is one)

G. Journal Ranking: go to <http://lawlib.wlu.edu/LJ/>

Find the appropriate year, click on “Combined Score” and then “Submit”

Record ranking of the journal

H. Subject: the area of the civil law that the article implicates (e.g., tax, bankruptcy, voting rights, reproductive rights, etc.)

I. Religion: list the particular faith(s) the article focuses on, if it does (e.g., Christianity, Islam, Native American, etc.), including specific denominations (LDS, Jehovah Witnesses, etc.)



J. Free Exercise: put a “yes” if the article deals with the free exercise of religion/religious liberty/religious freedom

K. Establishment: put a “yes” if the article deals with the establishment of religion/separation of church and state

L. Treatment

Positive: put “positive” if the article is primarily portraying or treating religion as something positive, something that brings benefits, something that should be protected or strengthened

Mixed: put “mixed” if the article roughly equally portrays religion as something positive and something problematic, or seems to portray it neutrally

Neutral: put “neutral” if the article doesn’t really portray religion in any way at all

Problematic: put “problematic” if the article is primarily portraying or treating religion as problematic in some way, because it can cause harm, or impedes other rights or values

M. Accommodation/Strengthen/Protect: if the article deals with the free exercise of religion/religious liberty, put a “yes” in this column if the article calls for the accommodation of religious beliefs/the strengthening or protection of religious liberty or not, and a “no” if it does not

N. Separation: if the article deals with establishment/the separation of church and state, put a “yes” in this column depending if the article calls for a stricter separation, or not moving towards a looser separation of church and state, and a “no” if the article calls for a looser separation (or what is sometimes call more accommodation of religion by government—this is different than accommodating free exercise claims) or not moving to a stricter separation

O. Notes: mostly recording why you chose not to code an article (entirely foreign focus, not intersecting with the civil law, or not stating an opinion—just summarizing something else)