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# The Jewish Factor: A Study of Jewish Judicial Behavior in Religious Freedom Cases

by Alan Hickey

## Introduction

On 3 August 1993, Ruth Bader Ginsburg was confirmed as an associate justice to the Supreme Court. Being the first Jewish woman ever appointed to the court, her confirmation marked a great milestone for both women and the Jewish community as a whole. Following her appointment, Ginsburg said

I am a judge born, raised, and proud of being a Jew. The demand for justice runs through the entirety of the Jewish tradition. I hope, in my years on the bench of the Supreme Court of the United States, I will have the strength and the courage to remain constant in the service of that demand. (Ginsburg 1995)

Ginsburg's tie to her Jewish heritage is evident in this quote, even though she is not an actively practicing Jew. And although she is not overly religious, Ginsburg's deep ethno-religious ties to the Jewish community have strongly influenced many aspects of her life as an attorney and her subsequent career as a Supreme Court justice.

Ginsburg's statement raises a broader question concerning how Jewish affiliation, whether ethnic or religious, might influence a Jewish justice on the Supreme Court and how he or she decides certain legal issues. Because Jews are a minority religious group that has faced the brunt of prejudice and discrimination for generations, being Jewish acts as a potential catalyst for political socialization and behavior. This catalyst affects Jewish appointees to the Supreme Court to some degree because of their self-identification with the Jewish ethno-religious identity. This study, therefore, seeks to analyze the effects of the Jewish ethno-religious identity on judicial behavior. To examine issues that might appeal differently to Jews as opposed to justices

affiliated with other religious traditions, the scope of this study is limited to religious freedom cases involving the “Establishment” and “Free Exercise” Clauses of the First Amendment.

As the prevalence of judicial activism affecting salient political issues (i.e., *Roe v. Wade*, the “Prop8” case, etc.) has increased over the twentieth century, legal studies scholars have made great inroads in analyzing judicial behavior at the Supreme Court level. They have created models that examine judicial outcomes, such as the Attitudinal Model, which focuses on how a judge’s political ideology affects decisions; the Strategic Model, which focuses on measuring how judges calculate their decision-making for the best policy outcome down the road matching their ideological beliefs; and the Audience Model, which examines how judicial behavior is affected by the audiences judges are trying to appease. Of all of these models, the Attitudinal Model championed by Segal and Spaeth (1993) is the most vibrant and empirically sound.

Although these models, especially the Attitudinal Model, examine factors that bias judicial decisions, scholars neglect the demographic of religion as a significant predictor of Supreme Court judicial behavior. One reason that religion is overlooked as a viable contributing factor in predicting judicial behavior is because political ideology can overpower religion in empirical analysis. This may be a result of religious traditions’ and denominations’ increased involvement in political action causing an amalgamation of religious and political ideologies. Therefore, drawing exact conclusions about the relationship between religion and politics is difficult because of such multicollinearity issues (Arceneaux and Huber 2007). Jews on the Supreme Court provide an interesting case study to examine how religion might play a measurable role in judicial behavior.

As a minority ethno-religious group, Jews are roughly 2 percent of the U.S. population (Putnam and Campbell 2010) and are overly represented at the Supreme Court (three current justices—33 percent of the court—are Jewish: Ginsburg, Breyer, and Kagan). Because of this high representation, a Jewish bloc vote would play a determining factor on certain cases heard before the court if their Jewish ethno-religious identity played a significant role in how they decided cases. In particular, religious freedom cases may provide special insight into whether Jewish Supreme Court justices’ voting behavior is affected by their ties to a beleaguered ethno-religious minority—their Jewish affiliation may make them prone to sympathy concerning individuals’ religious freedom rights enumerated in the “Establishment” and “Free Exercise” clauses of the First Amendment. Specifically, Jewish justices would have particular feelings regarding citizens’ rights protecting them from government infringement or support of specific religious traditions and allowing them to freely exercise their religious beliefs and practices.

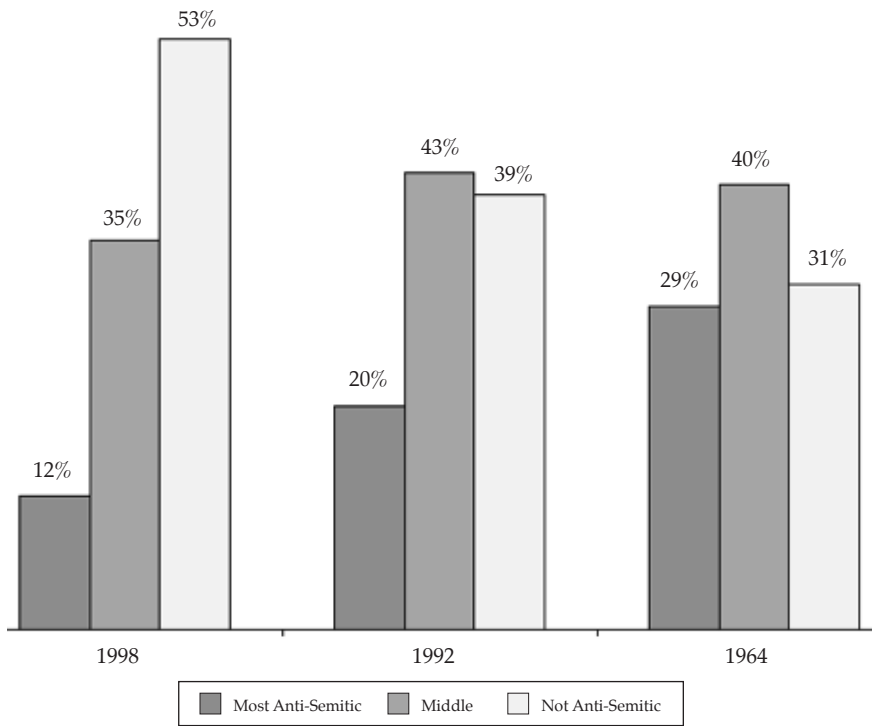
This study's findings reveal that religion plays a minimal factor in determining and predicting Jewish justices' judicial decisions. The regression analysis results reveal a minor, statistically significant relationship between Jewish affiliation and Siske, Heise, and Morriss' Anti-Political Model of judicial voting behavior in religious freedom cases. The empirical analysis also suggests a relationship between a justice's religious affiliation and his or her party affiliation; this finding implies the effect of religion on judicial behavior is partially absorbed into justices' political affiliation, making party identification a potential mediating variable in the analysis that masks the effects of religion. Though the results of this study are not very robust, because of the limitations of a small sample size, they still lean in a positive direction, suggesting there is potentially a correlation between Jewish Supreme Court justices' ethno-religious identity and their voting behavior according to the Anti-Political Model.

### **Jews as a Beleaguered Religious Minority**

Jewish Supreme Court justices' voting behavior relates to Jewish perceptions of their identity as a beleaguered minority in the American setting. This perception stems from a history of abuse and prejudice directed at Jewish immigrants starting their lives in America. Anti-Semitism has affected the Jewish population as a whole, both as a religious group and an ethnic group, because it caused prejudice to arise en masse against Jews in the U.S., barring them from employment, recognition, and equal treatment before the law (Karfunkel and Ryley 1978; Liebman and Cohen 1990, 42-50).

Following WWII and the establishment of the state of Israel, anti-Semitism began to dissipate among U.S. citizens as the atrocities of the Holocaust became common knowledge. This dissipation has occurred gradually as religions have had to come to terms with their anti-Semitic teachings and beliefs (Glock and Stark 1966), but the candidacy of Joe Lieberman and the significant participation of Jews in American politics stand as an evidence that Jews are being accepted into American society (Shribman 2004). Further, the upward mobility of Jewish citizens from low-paid urban jobs to levels of higher education and better employment became a contributing factor in the dissipation of anti-Semitism, and the stigma of the low-class Jewry began to be erased (Tress 1998).

Multiple surveys funded by the Anti-Defamation League of B'nai B'rith (ADL) add empirical evidence supporting the dissipation of anti-Semitism after WWII. The survey results revealed that in 1964 "approximately three-in-ten (29 percent) of Americans held a significant number of anti-Semitic beliefs" ("Anti-Semitism and Prejudice in America"). This number reduced to 20 percent in a 1992 survey and fell again to 12 percent in a 1998 survey (Ibid.). These results confirm a changing attitude toward American Jews, which relates to their assimilation into American culture.

**FIGURE 1: Decline in Level of Anti-Semitism Since 1964**

Source: Anti-Semitism and prejudice in America: Highlights from an ADL Survey - November 1998. Anti-Defamation League. [http://archive.adl.org/antisemitism\\_survey/survey\\_i.html#UqArCmRDshX](http://archive.adl.org/antisemitism_survey/survey_i.html#UqArCmRDshX) [accessed 5 December 2013].

As prejudice and discrimination began to dissipate following the war, the effects of Hitler's systematic extermination of Jews led to a common ethno-religious, Jewish identity that bonded Jews across the world to the grief and pain associated with the loss of so many friends and loved ones. This common burden borne by the Jewish community inspired pride, a nationalistic spirit regarding the newly formed Jewish state of Israel, and a new Jewish identity—an identity founded more upon the Jewish history and culture rather than its religious doctrine and practices (Jewish Identity). This Jewish identity has given rise to generations of American Jews who are invested in their Jewish heritage and feel more connected with the American experience as they have assimilated into American culture. This assimilation has caused a divide between orthodox and ethnic Jews concerning their acceptance into American society, but overall, increasing tolerance has limited the marginalization of the Jewish tradition (Rebhun and Levy 2006; Alper and Olson 2011).

Even though Jews have greatly assimilated into American culture and become less religious over time, justices on the Supreme Court have shown their support for women and minority groups through their professional roles as attorneys and judges. Two examples of Jewish justices on the Supreme Court who have participated in the support of Jews and other minority groups are Justice Brandeis and Justice Ginsburg. Justice Louis Brandeis, a son of Jewish immigrants from Kentucky, spent much of his legal career in New York championing the cause of Zionism as a way to save “oppressed Jews abroad” (Feldberg 2013). Justice Ginsburg spent part of her career as an attorney working in conjunction with the ACLU for the advancement of women’s rights (Halberstam 1998). Ginsburg placed her passion against discrimination in the context of her Jewish experience when, during her nomination hearing she stated

Senator Kennedy, I am alert to discrimination. I grew up during World War II in a Jewish family. I have memories as a child, even before the war, of being in a car with my parents and passing a place in [Pennsylvania], a resort with a sign out in front that read: “No dogs or Jews allowed.” Signs of that kind existed in this country during my childhood. One couldn’t help but be sensitive to discrimination, living as a Jew in America at the time of World War II. (Justice Ginsburg, quoted in Halberstam 1998)

These examples illustrate that Jewish justices’ ethno-religious identity is tied to their support of women and minorities. This support may translate over to their views regarding the advancement of religious freedom for religious minority groups and religious traditions in general.

### **Judicial Behavior and Religion Theory**

This study is grounded in multiple theories of religion, politics, and judicial behavior. Currently, the focus of empirical analysis of judicial behavior has been primarily limited to the study of political ideology, strategic decision-making, and audience influence (Segal and Spaeth 1993; Epstein and Knight 1998; Baum 2006). Although these theories aid in predicting judicial decisions, they are limited in scope. The demographic factor of religion is used as a control in empirical analysis, but it is largely neglected as a possible salient influence of judicial behavior. Because of religion’s power to socialize individuals and even mobilize them to political action, its role in affecting political behavior should be examined in the context of the judiciary (Wald, Silverman, and Friday 2005).

Many studies have shown strong correlations between religiosity and political behavior in the electorate, noting that an individual’s level of religiosity is a strong predictor of party affiliation (although Black Protestants do not fit this exact mold) (Putnam and Campbell 2010; McDaniel and Ellison 2008). Beyond the ideology of the electorate, studies show religion has a salient effect on voter mobilization and the outcomes of presidential and congressional elections (Converse 1966; Wilson 2007;

Wilcox and Robinson 2011). Important steps have been made in the analysis of religion's effect on judicial behavior at the state and lower federal court levels, but the academy is largely silent on the relationship between religious tradition and the judicial decision-making of Supreme Court justices (Songer and Tabrizi 1999; Sisk, Heise, and Morriss 2004).

Arguably, the lack of empirical data on Supreme Court justices' religiosity and the efforts made to detach the court from the influence of public opinion limit the avenues available to study religion's influence on Supreme Court decisions. This does not mean all roads for research are blocked. The study of judicial behavior through the Attitudinal Model provides a framework for analyzing the attitudes of justices on specific issue areas relying mostly on the situation of individual cases rather than the objects, or individuals, involved (Segal and Spaeth 1993). These situations, or facts, of individual cases are an objective means for delineation of the differences between justices' attitudes on certain legal subjects. Examining whether religion or political ideology significantly influences Jewish behavior on the Supreme Court is possible because of this general model.

Overall, the Attitudinal Model is focused on examining and predicting judicial behavior through the lens of political ideology, treating Supreme Court justices as quasi-politicians. Segal and Spaeth submit that justices will "vote" in cases according to their political ideology rather than relying on historical interpretivism, precedent, or the intent of the founding fathers. The Attitudinal Model sprung from the legal realist movement of the 1920s, which focused on how justices have the power to create law through their office in highest court and will make decisions in cases to further their policy goals (Segal and Spaeth 1993, 66–69). Although the attitudinal model does an adequate job examining the potential effects of political ideology on judicial behavior, a different model is needed to examine the relationship between Jewish ethno-religious identity and judicial behavior on the Supreme Court.

The Anti-Political Model used to analyze judicial behavior in lower federal courts for cases involving the Free Exercise and Establishment clauses has the capacity to measure more exactly the influences of Jewish judicial behavior at the Supreme Court level (Siske, Heise, and Morriss 2004). This model, created by Siske, Heise, and Morriss in their study of federal religious freedom cases, explained how judges "split their vote" and decide differently when hearing Free Exercise cases rather than Establishment cases; judges following this model tend to be supportive of government protections of citizens' rights to practice their religion but have a strict view of the separation of church and state and desire for the court to remain neutral in such cases and not promote government support of religious organizations. The judges "advocate a vigorous judicial protection of the free exercise of religious practice, while simultaneously seeking to erect a high wall of separation of religion from political

action, based upon a consistent theory of religious freedom” (511). Siske, et al. called this model anti-political because

it is an approach that views the judiciary as the better-suited institution to protect fundamental religious freedoms (through judicial enforcement of religious exemptions under the Free Exercise Clause) and also opposes entanglement of the political branches with religion and religious institutions through enactment of legislatively-enacted favors or administrative accommodations (thus envisioning a stronger limitation on such political action through application of the Establishment Clause). (Ibid., 511)

This model has a positively high association with Jewish and other Christian affiliated judges, making it the best model to use in conjunction with the Attitudinal Model to measure Jewish judicial behavior in Supreme Court decisions on religious freedom cases (514).

In relation to the Anti-Political Model, defining how someone’s religious affiliation is measured is important. To examine religion’s role in affecting judicial behavior for this study, religion was examined through the lens of how different, self-identified religious traditions represented on the Supreme Court view religious freedom (Kellstedt, et al. 1996). By measuring religion this way, the ethnic and religious elements of the Jewish ethno-religious identity are combined.

Not only may religion be measured by a person’s belonging to a religious sect, but also it can be measured by his or her “religiosity.” Scholars can measure religiosity in a number of ways—church attendance and daily prayer are two large indicators of religiosity (Putnam and Campbell 2004; Finke and Starke 2005). For the purposes of this study, religiosity is not used as a measure of religious affiliation because of the lack of religiosity data for Supreme Court justices. Due to the propensity of religious traditions to lean toward opposite ends of the ideological spectrum, examining empirical significance of differing religious groups’ views on religious freedom provides enough contrast to show if being Jewish affects a justice’s voting behavior in religious freedom cases.

## **Hypotheses**

The nature of this study contrasts the viability of the Attitudinal and Anti-Political Models in predicting the judicial behavior of Supreme Court justices. These contrasting models provide different theories for judicial behavior and competing hypotheses for this study.

Because Jews have a history as a beleaguered religious minority their sympathies lie in protecting the rights of other beleaguered religious minorities. This characteristic of the Jewish community should be found in the judicial voting behavior of the Jewish Supreme Court justices. Therefore, for this study, I make the following hypothesis:



H<sub>AP</sub>: The effects of Jewish affiliation on judicial decision-making in religious freedom cases will be statistically significant and positively correlated to the Anti-Political Model.

In contrast, because Supreme Court justices have agendas and individual policy goals concerning legal issues, they will behave in accordance with their political ideology rather than their religious or ethno-religious. This view would presuppose the following hypothesis:

H<sub>AT</sub>: The effects of political ideology on judicial voting behavior in religious freedom cases will be statistically significant and support the Attitudinal Model as the strongest measure for predicting how justices decide cases.

### **Data and Methodology**

For this study, I used the U.S. Supreme Court Justices Database compiled by Lee Epstein and her colleagues (Epstein, et al. 2013). This database includes information on all official nominees to the Supreme Court who went before a Senatorial confirmation hearing. The information that will be used from this database will include measures of religious tradition, prior judicial experience, gender, and race.

Both of the contrasting independent variables in my study, Jewish religious affiliation and political ideology, are quantified through the U.S. Supreme Court database. For my purposes the religiosity of Supreme Court justices is negligible. The self-identification of justices to a specific religious tradition was the important factor. Jews, whether practicing or not, have deep ties to the ethno-religious heritage of the Jewish minority; therefore, self-identification is sufficient to quantify this independent variable.

As for political ideology, it is quantified through the party identification of each justice as defined in Epstein, et al. This may seem to be a crude means of measuring the political ideology of members of the Supreme Court due to the wide spectrum that political ideology is measured, but for the purposes of this study, the high correlation between political ideology and party identification support the use of a justice's party affiliation as a measure of their ideology.

Further data was used from the Chicago-Kent College of Law, which lists cases by issue. These "issues" are first divided into main categories such as "First Amendment" or "Due Process" and then further differentiated into sub-categories like "Freedom of Speech," "Free Exercise Clause," "Establishment Clause," and "Prisoners' Rights." From these issue lists, I selected twenty cases involving the Establishment and Free Exercise Clauses when a Jewish justice was part of the court's decision. Cases "involving" the Establishment and Free Exercise Clauses were those that had majority and minority opinions based in the legal analysis and interpretation of these constitutional clauses: "1) Congress shall make no law respecting an establishment of religion, or 2) prohibiting the free exercise thereof" [numbering added]. For purposes of this study, being "part of the court's decision" did not include justices who

abstained from voting by recusing themselves. The time period of these cases spans from 1961 to 2006 and involved six of the eight Jewish justices who have served on the court: Justices Frankfurter, Cardozo, Goldberg, Fortas, Ginsburg, and Breyer (Oyez).

The dependent variable in my study is the justices' voting behavior in religious freedom cases. In this study, religious freedom cases referred to cases involving the Free Exercise and Establishment Clauses in the First Amendment. Cases involving the Free Exercise Clause are those involving challenges to state and federal laws restricting religious practices. Cases involving the Establishment Clause are those involving challenges to state or federal laws that directly support, or appear to support, religion by closing the gap between church and state. The twenty cases chosen for this study rely strictly upon these two clauses and were thus coded as cases involving these two clauses by the Chicago–Kent Law School.

The information for coding variables used in this study's regression analyses was lifted from U.S. Supreme Court Justices Database (Epstein, et al. 2013). The first variable of "religious group" includes measures of justices' religious affiliation—the justices involved in the twenty cases used in this study represent the following religious groups and denominations: "Baptist," "Episcopalian," "Jewish," "Lutheran," "Methodist," "Presbyterian," Protestant," and "Roman Catholic." For the purposes of regression analysis, these religious traditions were grouped together: "Mainline Protestants," which included the "Episcopalian," "Lutheran," "Methodist," "Presbyterian," and "Protestant" (this religious tradition stands as a place holder for justices who were not evangelical but affiliated with a kind of Mainline Protestantism) was left out of the regression and served as the baseline for comparison; "1" represented "Baptists," the sole category of Evangelical Protestants in the study; "2" represented "Roman Catholics," and "3" represented "Jewish." In determining the "Mainline Protestant" category for this study, I assumed that these individuals are predominantly white and follow a Mainline Protestant tradition regardless of the denominations they belong to (because of the overrepresentation of Mainline Protestants on the Court, this assumption seems reasonable).

The variable of "party" includes each justice's supposed party affiliation prior to his or her nomination to the court. For this variable, I assumed that political ideology and party affiliation are highly coded in order to test the Attitudinal Model. "Party" was coded as follows: "-1" represented the republican justices, "0" represented the Independent justice, and "1" represented the democratic justices.

The control variables of gender and race were both coded as dummy variables. Gender was coded so that "male" equals "0" while "female" equals "1." For race, "white" equals "0" and "black" equals "1." Whether a justice served as a federal court judge or not is the last control variable that was coded to represent which Federal Court Circuit the justice served in.

Some may ask why political affiliation was not used as a control variable for the first probit regression of the study. After running multiple statistical tests, the

inclusion of the justices' political affiliation showed multicollinearity issues when tested with religious tradition. The political affiliation variable strongly overpowered religious tradition variables and skewed other control variables. To get the most accurate results concerning the relationship between affiliating with the Jewish religious tradition and judicial voting behavior, I dropped the political affiliation variable from the first regression and included it in the second regression to contrast the predictive power of the Anti-Political and Attitudinal Models.

The crux of this study relies on the proper coding of these twenty cases. The purpose of this study is to expound upon the previous work of Sisk, Heise, and Morriss' examining religious freedom cases at the federal court level. To simulate a test of their Anti-Political Model, I used their coding of free exercise and establishment clause cases. Their coding is as follows:

For purposes of the [Anti-Political] model, a decision upholding a free exercise-related claim is coded as "1"; a decision rejecting such a claim would be coded as "0." Likewise, a decision upholding an establishment of religion challenge to government action is coded as "1," while a decision rejecting the Establishment Clause claim and upholding governmental action related to religion is coded as "0." (514)

First, I performed a cross-tabulation to measure whether Jewish voting behavior in these twenty cases is similar to Sisk, Heise, and Morriss's findings that 99 percent of federal Jewish judges follow the Anti-Political Model (514). This simple cross-tabulation compares justices' voting behavior to their religious affiliation. I then performed another cross-tabulation to examine the substantive strength the Attitudinal Model might have in predicting the same kind of voting phenomena examined by the Anti-Political Model. Following the cross-tabulations, I performed two probit regressions using the twenty cases to test the relationship between the Jewish ethno-religious identity and judicial voting behavior and the relationship between party affiliation and voting behavior, controlling for gender, race, and a justice's previous federal court experience.

Further, I used clustered standard errors to indicate that the voting behavior of justices may be correlated within cases but independent between different cases. The first of these regressions identifies the statistical significance of being Jewish as a factor in predicting outcomes for religious freedom cases. This regression excludes the "party" variable to examine what effects religion might have on judicial voting behavior without the influence of political ideology. The second probit regression includes "party" and the same control variables as the first regression.

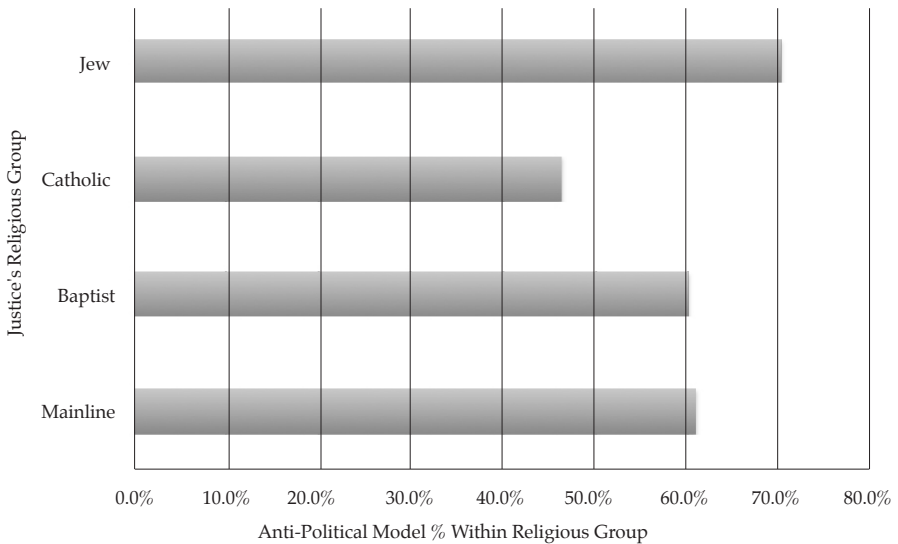
Following the probit regression analyses, I used a simple OLS regression to test the relationship between the "party" variable and the different religion dummy variables. I used both clustered and robust standard errors and included the same control variables in this regression that were used in the probit regressions. This is not a true form

of mediation model but is suggestive of the reason for the multicollinearity issues that occur when including both the party ID variable and the religion dummy variables.

**Results**

The first cross-tabulation examining the relationship between Jewish ethno-religious affiliation and judicial voting behavior returned positive results supporting Sisk Heise, and Morriss’s Anti-Political Model at the Supreme Court level. When comparing the different justices and their voting behavior by religious tradition, I found that 70 percent of the Jewish vote followed the Anti-Political Model, meaning that a justice supports claims under the Free Exercise Clause and upholds Establishment Clause challenges against the government. Sisk, Heise and Morriss’s study also found that “Other Christians,” a group consisting of non-Catholics with a general Protestant affiliation, significantly supported the Anti-Political Model. The “Protestant” group of justices, a similar group, was the only group that had a higher percentage supporting the Anti-Political Model than the Jewish justices (See Appendix). To simplify the model, these general “Protestants” were categorized as “Mainline Protestants.” These substantive findings show that Jews and “Protestants” are prone to vote a certain way in religious freedom cases and reveal a high propensity for Jews to vote following the Anti-Political Model.

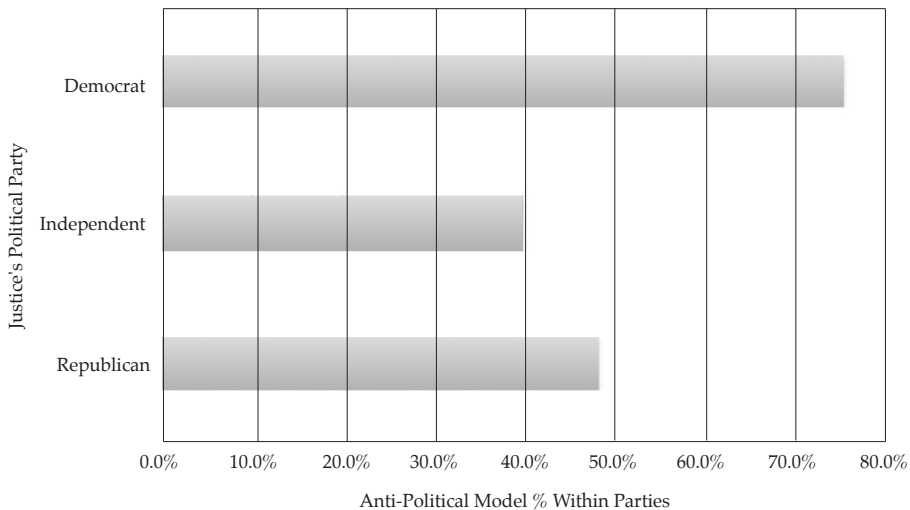
**FIGURE 2: Percentage of Justices' Votes that Follow the Anti-Political Model by Religious Group**



*Note:* This figure is compiled using the data from the “Percentage of Judicial ‘Anti-Political’ Voting Behavior by Religious Affiliation” table in the Appendix.

The second cross-tabulation examining the substantive relationship between a justice’s party affiliation and voting behavior provides a different explanation for a justice following the Anti-Political Model’s pattern of voting. According to the cross-tabulation, over 75 percent of the Democratic justices followed the Anti-Political Model’s voting behavior, supporting free exercise claims while also supporting challenges to government support of religion. Both independents and republicans on the court followed the voting pattern less than 50 percent. This substantive finding brings into question whether political ideology or party ID can explain judicial voting behavior as well or better than religion.

**FIGURE 3: Percentage of Justices' Voters that Follow the Anti-Political Model by Party**

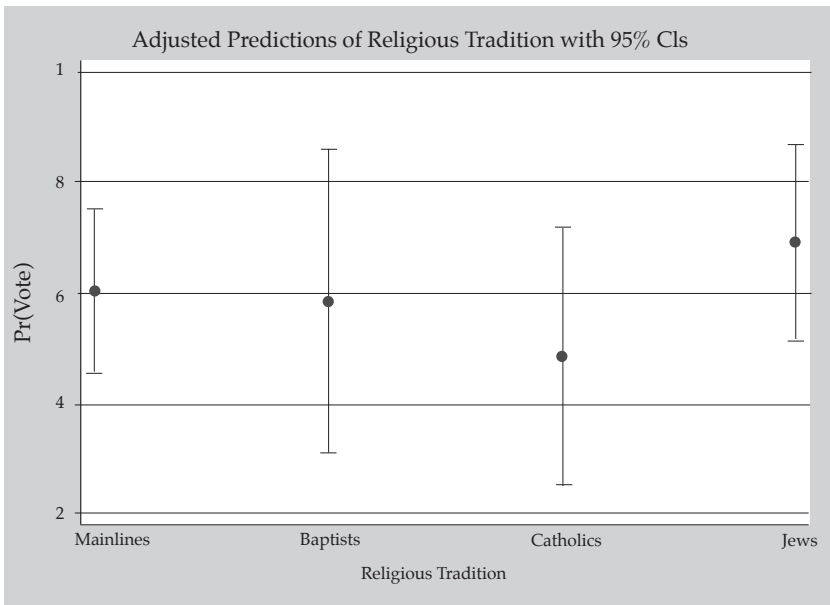


*Note:* This figure is compiled using the data from the “Percentage of Judicial ‘Anti-Political’ Voting Behavior by Party” table in the Appendix.

This study’s more rigorous probit analyses revealed 1) a slim margin of significance that being Jewish has a positive effect on judicial voting behavior and 2) the overpowering nature of the political ideology variable. The first probit analysis showed that being Jewish had a statistically significant effect on voting behavior when compared to a baseline of “Mainline Protestant” justices using a one-tailed test and also controlling for gender, race, and previous federal court service. The coefficient for Jewish justices is 0.239, which means that being Jewish (an increase from 0 to 1) increases the predicted probability of a justice following the Anti-Political Model of voting behavior. The predicted probability of a justice following the Anti-Political

Model of voting behavior is 0.69 for Jewish justices, while the predictive probability is only 0.60, 0.58, and 0.49 respectively for Mainlines, Baptists, and Roman Catholics. Being Jewish, therefore, has a higher predictive probability of following the Anti-Political Model than the other religious traditions. The marginal differences between the predicted probabilities may seem small, but there are differences.

**FIGURE 4: Predicted Probabilities of Supreme Court Voting Behavior by Religious Group**



*Note:* This graph was created using the marginsplot command in Stata 13. The predicted probabilities were found by holding gender, race, and federal court experience constant at their respective means. Confidence intervals are large because of a small sample size.

According to this finding, Jewish Supreme Court Justices are influenced by their ethno-religious affiliation like their Jewish counterparts on federal courts. These results were found to be statistically significant between the 90 percent and 95 percent confidence levels using a one-tailed test.

The second probit regression revealed the power of political ideology and the Attitudinal Model as a predictor of judicial behavior. When the “party” variable was included into the regression, every coefficient of the control variables were skewed, even causing the Jewish coefficient to change from positive to negative reversing the positive correlation that existed in the first probit regression. Another change from the first probit regression was the change in the Baptist and Jewish variables

**TABLE 1: Probit Regressions of Religion's Effects on Voting Behavior in Religious Freedom Cases**Dependent variable: *Judicial Voting Behavior in Religious Freedom Cases*

Variables	Effects on Judicial Voting Behavior	
Baptist	-0.048	-0.703**
	(-0.220)	(-0.205)
Catholic	-0.295	-0.411
	(-0.288)	(-0.311)
Jewish	0.239 <sup>x</sup>	-0.657**
	(-0.167)	(-0.313)
Served on Federal Court	0.000	0.000
	(0.000)	(0.000)
Race	-0.202	-0.219
	(-0.223)	(-0.183)
Party		0.580***
		(-0.106)
Constant	0.234	0.774***
	(-0.211)	(-0.264)
Observations	178	178
Robust standard errors in parentheses		
*** p<0.01, ** p<0.05, * p<0.1 <sup>x</sup> p<0.1 for a One-Tailed Test		

*Note:* Heteroskedasticity-robust standard errors are given in parentheses under estimated coefficients. The *F*-statistics are heteroskedasticity-robust. Coefficients and *F*-statistics are individually statistically significant at the \*10% \*\*5%, \*\*\*1% significance.

from having little to no statistical significance to being statistically significant at the 99 percent and 95 percent levels respectively. These results suggest that there is some form of relationship between the religion and party affiliation variables.

Without running a complete mediation model to test the exact relationship between the religion and party affiliation variables, I conducted a simple regression with clustered and robust standard errors. This regression revealed that both the

Baptist and Jewish dummy variables were statistically significant at the 95 percent level, meaning that with 95 percent certainty these religious groups have an effect on a justice's party affiliation. Both religious coefficients are positive, showing that being a Baptist or a Jewish justice increases the likelihood that a justice is also a democrat.

**TABLE 2: Regression of Religion's Effects on Party Identification**

Dependent variable: *Party ID of Supreme Court Justices*

Variables	Effects on Party
Baptist	1.066**
	(-8.44)
Catholic	0.157
	(-1.79)
Jewish	1.541**
	(-6.68)
Served on Federal Court	0.001**
	(-8.15)
Gender	-0.256**
	(-3.2)
Race	0.099
	(-0.38)
Constant	-0.906**
	(-28.84)
R <sup>2</sup>	0.51
N	178
* p<0.05; ** p<0.01	

*Note:* Dependent variable is the party affiliation of each justice. Religion variables are measured compared to the baseline of Mainline-Protestant justice's voting behavior. Clustered and heteroskedasticity-robust standard errors are in parentheses beneath the coefficients.

## Conclusion

The seemingly contradictory results of this study shed a little light on the complicated relationship between the Anti-Political and the Attitudinal Models that seek to explain judicial voting behavior. One of the difficulties of this study is the



high level of multicollinearity between the religion and political affiliation variables. Trying to separate and determine the overlap between the exact effects of religion on judicial decision-making or of religion through the intermediary of political ideology on justices' voting behavior is difficult. This makes it difficult for regression analysis to clearly define the power that religion has in either model.

Although Jewish ethno-religious affiliation does not have a very robust effect on how a justice votes when tested without the party affiliation variable, these results add weight to the argument that religion has a measurable effect on judicial behavior. It is important to see that a 0.2 difference between the predicted probabilities of Jewish and Roman Catholic justices is sizable on a 0 to 1 scale. This difference proves intriguing when comparing Catholics, a widely persecuted, Christian sect in America that remained on the outside of politics until the early to mid-twentieth century, to Jews, who are rising from the ashes of previous discrimination and entering more fully into the political jungle. One would think that the Catholics and the Jews would be more similar in their voting behavior because of similar struggles related to discrimination as religious groups, but that is not the case. With three Jewish justices currently on the court, the higher probability of following the Anti-Political Model could result in a higher proportion of cases decided in favor of free exercise issue and against government involvement with religion.

Even with minimal significance supporting the hypothesis that Jewish ethno-religious identity has an effect on judicial voting behavior, one must realize that by including the party affiliation variable the regression became skewed in many directions with the "party" variable being highly statistically significant. These results, with the statistically significant relationship shown in the simple regression, suggest the Attitudinal Model is a strong predictor of judicial voting according to the anti-political voting pattern with the effect of Jewish ethno-religious identity playing a subordinate role, possibly having some of its effects mediated through the "party" variable.

However, it is important to note the limitations of a small sample size for this study (twenty cases, 178 votes) did not completely eliminate the statistical significance of the relationship between Jewish judicial affiliation and justice voting behavior. Therefore, it may be assumed that as more religious freedom cases come before Jewish justices, the theory behind this study could be proved more extensively. A further limitation being that only eight Jewish Supreme Court justices have served in the twentieth and twenty-first centuries, the strength of the Anti-Political Model should increase as the number of Jewish Supreme Court justices increases as well.

The general finding of this study reveals there are influences other than political ideology that may affect the voting behavior of Supreme Court justices, even though the Attitudinal Model remains a strong predictor of judicial voting behavior. Although there has been a limited number of Jews on the Supreme Court, they

are over-represented in the judiciary. By understanding how their religion may influence their voting behavior, academics may more easily predict the kinds of decisions that the Jewish justices will make. Future research should expand the kinds of cases that are examined in relation to the religious beliefs of Supreme Court justices and their voting behavior. Also, because of the small sample size of the different types of cases, establishment and free exercise, I chose not to test them independent of each other. Future research should examine each type of case and see if the Anti-Political Model holds in both camps at the Supreme Court level.

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## APPENDIX

### Percentage of Judicial “Anti-Political” Voting Behavior by Religious Group

Notes: “Frequency of Vote” means the number of judges who voted either following the Anti-Political Model (Vote=1) or not (Vote=0).

### Simplified Percentage of Judicial “Anti-Political” Voting Behavior by Religious Group

Notes: “Frequency of Vote” means the number of judges who voted either following the Anti-Political Model (Vote=1) or not (Vote=0).

### Percentage of Judicial “Anti-Political” Voting Behavior by Party

Notes: “Frequency of Vote” means the number of judges who voted either following the Anti-Political Model (Vote=1) or not (Vote=0).

## List of Cases Used in Study

### *Establishment Clause Cases*

1. *Abington School District v. Schempp*, 374 U.S. 203 (1963)
2. *Capitol Square Review Board v. Pinette*, 515 U.S. 753 (1995)
3. *Chamberlin v. Dade County Board of Public Instruction*, 374 U.S. 487 (1963)
4. *Cutler v. Wilkinson*, 544 U.S. 709 (2005)
5. *Epperson v. Arkansas*, 393 U.S. 97 (1968)
6. *Good News School v. Milford Central School*, 533 U.S. 98 (2001)
7. *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005)
8. *McGowan v. Maryland*, 366 U.S. 420 (1961)

9. *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995)
10. *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000)
11. *Two Guys v. McGinley*, 366 U.S. 582 (1961)
12. *Van Orden v. Perry*, 545 U.S. 677 (2005)

*Free Exercise Cases*

1. *Braunfeld v. Brown*, 366 U.S. 599 (1961)
2. *City of Boerne v. Flores*, 521 U.S. 507 (1997)
3. *Gallagher v. Crown Kasher Super Market*, 366 U.S. 617 (1961)
4. *Gonzales v. O Centro Espirita Beneficenteuniao do Unaio Vegetal*, 546 U.S. 418 (2006)
5. *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969)
6. *Sherbert v. Verner*, 374 U.S. 398 (1963)
7. *Torcaso v. Watkins*, 367 U.S. 488 (1961)
8. *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150 (2002)