The Impact of State Religious Freedom Restoration Acts

AN APPARENT FAILURE TO INCREASE JUDICIAL SUCCESS RATES

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Outraged claims of bigotry,[1] discrimination,[2] and anti-LGBT motives[3] were proclaimed from the uppermost echelons of the media when Indiana passed a Religious Freedom Restoration Act (RFRA) in 2015 under then-Governor—now Vice President—Mike Pence. An article headline by the *New York Times* Editorial Board on March 30, 2015, claimed in no uncertain terms that Indiana was "Using Religion as a Cover for Bigotry."[4] While Indiana's law was different in certain respects[5] from other related acts, this was merely the most recent in a string of controversial laws passed with the stated intention of protecting religious liberties.

Meanwhile, the issue of religious freedom is more relevant, and a greater topic of conversation, now in 2017 than it has been in perhaps decades. Less than a month into President Donald Trump's new administration, the so-called Muslim ban was signed via executive order, followed soon after by the president's claims that religious freedoms are "under threat."[6]

Much attention gets focused on federal protections of civil liberties, but state activity in this realm is important as well. Twenty states have RFRA statutes, and Alabama has a constitutional amendment to the same effect. An additional 17 states have heightened religious liberty protections through court order. A project examining these laws is timely because another 17 states introduced legislation relating to religious liberty in 2015 alone.[7] With contentious social issues continuing to conflict with the perceived infringement of religious liberties, religious issues will likely play a substantial role in state and federal jurisprudence in the coming years.

Despite heated media coverage, the scholarship remains unclear on what the actual effect of these state laws has been. Indeed, the vast majority of religious liberty scholarship has focused on the federal RFRA,[8] not its related state iterations. Thorough research has also tracked the trends of state RFRA jurisprudence through the mid-2000s.[9] In these studies, religious liberty protection was generally operationalized as any free exercise case in a state with RFRA protections. My project continues the discussion by providing an updated survey of state RFRA jurisprudence, focusing on the success of cases that explicitly rely on a state RFRA claim.

Contextualizing the Religious Freedom Restoration Act

Employment Division, Department of Human Resources of Oregon v. Smith was a landmark religious liberty decision in which a Native American claimed the need to use peyote, a prohibited drug, for religious purposes.[10] Writing for the majority, Justice Antonin Scalia ruled against Smith, declaring that a "neutral, generally applicable law" does not violate the free

exercise clause simply because it burdens a person's religious beliefs. A discussion on this decision and its effects on federal law and federal cases is outside the scope of this project.[11] However, the case's influence on the proliferation of state RFRAs is undisputed, and a brief conversation about its history will be helpful in contextualizing how these laws came to be.

As an indicator of its bipartisan nature, the federal RFRA was passed unanimously in the House and 97–0 in the Senate.

When the court made this ruling in 1990, it effectively dismantled the strict scrutiny test as applied to free exercise cases. "Strict scrutiny" in this context meant the government could only burden religious liberty if it could prove that doing so was a "compelling interest" for the state and was the "least restrictive means" of achieving the intended goal.[12] It is largely accepted that this strict model had been established by decisions in *Sherbert v. Verner*[13] and *Wisconsin v. Yoder*.[14] However, Justice Scalia disputed this, and certain scholars believe *Smith* was not in fact a landmark change from precedent.[15]

At any rate, *Smith* replaced the strict scrutiny framework, instead finding that governments need not meet the strict scrutiny threshold for their actions to survive religious freedom claims.[16] Laws apparently no longer needed any special justification for burdening religion, provided they served legitimate state interests and were merely "neutral and generally applicable."[17] This outcome was immediately decried as an attack on religious liberty by advocacy groups, leading public figures, bipartisan members of Congress, and news organizations.

The scholarly backlash was also immediate and fierce. Of the 16 law review articles and notes written in the two years directly following the decision, all but one denounced the result.[18] A leading editorial by the *Los Angeles Times* proclaimed the decision to be an "affront" and "pure legal adventurism."[19] Subsequently, advocacy groups and policymakers sprang into action. As Christopher Lund notes, the *Smith* decision "spawned a chain of events highly protective of religious liberty. It led to the passage of the Religious Freedom Restoration Act (RFRA), and the Religious Land Use and Institutionalized Persons Act (RLUIPA)."[20] As an indicator of its bipartisan nature, the federal RFRA was passed unanimously in the House and 97–0 in the Senate.

The original purpose of the federal RFRA was "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened."[21] The standard this incorporates is highly protective. *Yoder* found that religious liberty could be infringed only for "interests of the highest order," and in *Sherbert*, it was only in case of "the gravest abuses, endangering paramount interests."[22] Supreme Court cases since these two have found that a governmental interest is not compelling unless the government pursues it uniformly across the full range of similar conduct.[23]

The federal RFRA certainly seemed to be a boon for religious liberty. However, the Supreme Court decision in *City of Boerne v. Flores*,[24] handed down four years after the federal RFRA was passed, deemed the RFRA to be unconstitutional as applied to the states. This meant that states, where the "great majority" of case law is decided,[25] would once again use the lower standard of review. This in turn led to the passage of "state-law versions of the Religious Freedom Restoration Act (state RFRAs), as well as a reexamination of some state-level constitutional provisions relating to religious liberty."[26] Today, there are 20 legislated state RFRA provisions, which will be discussed in greater detail later.

Current Scholarship Literature Review

Most of the scholarship in this field has focused on the effects of the federal RFRA, and little research has been done on the effects of state RFRAs. As will be shown, this is largely due to a dearth of such cases. In the first several years, a significant amount of research was completed on the federal RFRA and its effects on religious liberty protections. While this project is focused on the state RFRAs and their effects, studying the effects of the federal version of the law is useful for understanding the state effects and comparing trends.

In 1997, Craig Anthony Arnold analyzed 174 cases pertaining to free exercise claims after the federal RFRA and the *Smith* decision. He found that under both the federal RFRA standard of strict scrutiny and *Smith*'s standard, courts upheld religious exercise in about one-third of cases.[27] His research distinguishes between several categories of religious freedom cases, but nowhere does he define how he operationalizes "religious exercise" for his measurements. It could be only those cases that cite the free exercise clause, any claim of burdened religion, or some other criteria. Further, he does not differentiate which federal courts he examines. For these reasons, it would be hard to accurately compare his numbers to other studies or to replicate his study, although his study does provide a helpful signpost for the limited success of cases under the federal RFRA at this time.

Ira C. Lupu wrote an article in 1998 examining citations of the RFRA in the Federal Register and found that the law did not cause federal agencies to be more protective of religious liberties.[28] In addition, he evaluated 168 federal RFRA decisions in both federal and state courts, finding 144 and 24 cases, respectively.[29] He found that 60 percent of the RFRA decisions occurred in prison cases, and perhaps more.[30] He also found an overall win percentage of 15 percent of cases decided on merits. Of the non-prison cases that reached merit decisions, more than 75 percent resulted in denial of relief.[31]

A 1999 study by James Brent on the jurisprudential effects of the federal RFRA found that "free exercise claimants prevailed in 31.8% of their cases" in the US Court of Appeals before the *Smith* decision.[32] The success rate dropped to 20 percent after *Smith* was decided, but it returned to its pre-*Smith* levels after the passage of RFRA with a protection rate of 32.4 percent.[33] Once he controlled for different variables, Brent found respondents were more likely to win cases than petitioners were in the US Appeals Court (43.6 percent versus 23.1 percent, respectively).[34] Given that free exercise claimants were the petitioners in 80 percent of appealed cases he studied, this correlates with the low overall success rate.

Brent uses several different measurements in his coding, including whether:

1. The religion is "mainstream" or "fringe,"
2. A court is controlled by Democrats or Republicans,
3. The plaintiff is a prisoner or non-prisoner, and
4. Multiple claims or a single claim is made.

He finds that mainstream Catholic and Protestant adherents were more likely than those of other religions to be granted religious protections, and Democrats were more likely to decide in favor of free exercise claimants than Republicans were.[35] Against his expectations, prisoners were not significantly less likely to win their cases than non-prisoners were, and claimants making multiple constitutional claims were not significantly more likely to win.[36]

Brent establishes good baseline free exercise data and highlights important trends. However, similar to Arnold's article, his research is difficult to replicate because he does not explain how he operationalizes a "free exercise" case for the purposes of his study. In his coding rules section he explains that his case selection includes "only those cases in which an individual or institution challenged the action of a government agent or institution."[37] He further clarifies that he analyzes only cases that make a "free exercise claim,"[38] but he does not say what he includes in this category. Finally, he analyzed 261 cases, which is helpful for establishing a baseline number of cases that scholars in this field use to assemble their data sets.

Amy Adamczyk, John Wybraniec, and Roger Finke conducted a more comprehensive study in 2004 on the effects of the federal RFRA.[39] They analyzed 2,109 cases that made a First Amendment claim between 1981 and 1997 at all levels of the judiciary. Their analysis shows that "the consequences of the *Smith* decision were swift and immediate. The percentage of favorable decisions for federal Free Exercise cases [at all levels of the judiciary] dropped from over 39% to less than 29% following *Smith* but then returned to over 45% after RFRA was passed."[40] This study shows similar trends to Brent's, as it shows there were reduced religious protections in different levels of the judiciary following *Smith* and a corresponding increase after the federal RFRA.

In 2008 David Claborn performed a monumental survey of state RFRA jurisprudence through the mid-2000s.[41] He attempted to determine how many free exercise cases are successful in states with legislated RFRAs or states with heightened judicial protections for religious liberty. He makes some key conclusions from his findings.

First, his study implies that state courts generally are a better venue for religious actors than federal courts, as religious actors won more cases there during the time frame he studied.[42] He also concludes that neither legislative nor judicial attempts are successful in increasing religious freedom protections, given the trends he evaluated.[43] Despite this, he claims that states appear to protect religious actors more than federal courts do with a 44 percent favorable vote-rate in the state courts.[44] However, if one looks only at the cases in which "the Free Exercise clause was mentioned as part of the reasoning, the success rate drops to 35% in 1,339 votes."[45]

With this free exercise specification, his project becomes more methodologically similar to the Brent and Adamczyk, Wybraniec, and Finke studies. In addition, the 35 percent success rate is close to the average of their two studies. Claborn also finds that "legislative states had a favorable vote-rate of 53% before [passing a RFRA], and 41% after passing a RFRA. This puts the overall favorable vote-rate for states prior to increasing scrutiny at 50%, and after increasing scrutiny at 42%."[46]

Claborn seeks to operationalize success in religious freedom cases as judicial votes. This type of project has significant sociological value in terms of understanding the extent to which a judge's bias may affect a case's outcome. However, this method may be misleading in terms of understanding actual trends of these cases.

After all, someone who loses a court decision with the judges split 4–5 did not win 44 percent of the case, but rather 0 percent of it. Someone who loses a court decision 1–2 did not win 33 percent of the case, and so on. To say that a person won 1,000 judge votes out of 3,000 would imply that that person has a 33 percent success rate. In reality, they could have potentially won none of those cases, resulting in an actual 0 percent success rate.

Furthermore, operationalizing success by judicial votes requires controlling for potential influences on a judge. This model's construction is shown in Table 1.[47]

Weighing each variable and its predicted direction equally is impossible, as Claborn himself acknowledges in certain areas of his dissertation, and it is not possible to know how each particular judge is influenced. I would rather not postulate on these matters, and it would be inappropriate to do so outside of a sociological study. To be sure, his project does track important aspects of the jurisprudence as it pertains to judicial bias. This is an important component of the conversation in state RFRA jurisprudence, although it is beyond the scope of my project.

It has been more than five years since the completion of his research, in which time seven additional states (about 50 percent of his original measurement) have passed new RFRA statutes. In addition, it appears he used only cases from 1992 to 2005, meaning the latest cases he evaluated were decided at least 12 years ago. By comparison, 161 of the 273 (59 percent) cases measured in my study were litigated after 2005.

In 2011, Claborn revisited this topic in a different article. Citing his previous project, he conclusively asserted that not only do state attempts to increase religious freedom fail to work, but they appear to decrease the rate by which religious protection is granted.[48] This finding appears to be confirmed by my own project, which finds lower rates of protection

Table 1. Claborn's Control Variables for Judge Biases

Dependent Variable: Judge Votes for Religious Actors	Predicted Direction of Relationship with Religious Freedom
Independent Variables	
1. State legislative attempts to better protect religious liberty	+
2. State judicial precedents to better protect religious liberty	+
Independent Control Variables	
3. County-level Republican presidential vote	–
4. State judge liberalness	+
5. Metro-area religious adherence rate	+
6. Metro-area religious homogeneity	–
7. Popularity of religion seeking protection	–
8. Deviant drug or sexual behavior seeking protection	–
9. Prisoner asking for protection	–
10. Economic impact cases	–
11. Free exercise of religion used in legal reasoning	+
12. Establishment clause used in legal reasoning	–
13. Free speech used in legal reasoning	+

Source: David Claborn, "Can the States Increase Religious Freedom If They Try? Judicial and Legislative Effects on Religious Actor Success in the State Courts," University of Massachusetts Amherst, 2008.

under state RFRA claims than under general free exercise claims. Claborn asserts that his findings show RFRA states are "clearly more hostile states for religious actors seeking judicial protection."[49] In addition, he finds religious plaintiffs are more likely to be successful if they seek protection in a state with judicially increased protections or that has not signaled one way or another, as opposed to in federal courts or states that have legislated a RFRA.[50]

In 2013, Robert Martin sought to find the "results of the judicial process Americans pursue when their religious and legal duties come into conflict, and does so in the context of the state appellate judicial system."[51] As one might expect from a dissertation in sociology, his project was more concerned with the factors that can help one predict the outcomes. As such, he developed sophisticated models for finding the likelihood of success with free exercise claims, using a thorough list of variables and factors.

In total, he identified 453 state appellate court cases that fit his criteria of being a free exercise case.[52] In the end, he analyzed only 225 cases, which were coded according to his specifications.[53] His final case set is closely in line with my project, which has 224 cases in its final case set. Martin found that religious plaintiffs were successful in 26 of 225 cases, or just under 12 percent of state appellate court cases.[54] These cases were coded to include only free exercise cases that were adjudicated using either a "balancing test" or a "rational-basis test."

He recognizes in his paper that his numbers are significantly lower than other authors' numbers. He believes previous authors used broader case selection, resulting in broader definitions of what constitutes a "free exercise case." He notes that it is impossible to confirm this due to the opacity of the tests previous scholars used. He believes he used an "appropriately narrow" focus on free exercise disputes, which did not include "specific and unique benefits" that were already given to religious groups. He also notes that his study's focus on claims heard in state courts might also be responsible for the lower success rates that he finds.[55]

Martin lays out a series of potential variables that may influence case outcomes, which I will briefly mention but will not attend to in depth. The first potential variable is the claimant's religion. He finds that religious minority groups are disproportionately more likely to allege violations of their free exercise rights in the time frame he studied.[56] Martin also conveyed throughout the paper that he does not believe there is enough case law to allow us to draw generalizable, empirical conclusions.

Four states with state RFRA legislation—Rhode Island, Missouri, Virginia, and Utah—had no cases with state RFRA claims.

Christopher Lund performed a short survey of this topic in 2010 for a symposium on religious liberty in the *South Dakota Law Review*.[57] His research showed that few cases were being brought and that even fewer resulted in religious liberty protections. He notes that there is "virtually no state RFRA litigation" in the states.[58] A full 10 years after passing RFRA legislation, five states have had minimal litigation with state RFRA claims: Idaho (four claims), Oklahoma (three claims), South Carolina (two claims), and Alabama and New Mexico (one claim each).[59] Additionally, four states with state RFRA legislation—Rhode Island, Missouri, Virginia, and Utah[60]—had no cases with state RFRA claims.[61] As of 2010, there were 16 state RFRA laws (see Table 3). According to my research, at this time 10 states had two or fewer reported cases citing a RFRA claim.

Of the cases that did exist, Lund points out that most cases end in defeat for the religious plaintiff. He acknowledges that there have been "important victories using state RFRAs" and that "tallying wins and losses may not be the best measure of the efficacy of a state RFRA anyway," given that many religious liberty claims are meritless and deserve to lose.[62] However, he maintains that it is indeed significant that "more than half of the jurisdictions have no litigated victories under their state RFRAs."[63] In his opinion, this can be at least partially attributed to state RFRA cases being litigated in the "wrong place"—that is, federal courts.[64] He believes state courts would naturally be the friendlier venue for these cases to be brought. Regardless, he concludes that the overall low success rates may make it less likely that attorneys bring claims under these RFRAs, less likely that courts take them seriously, and less likely that the state settle RFRA claims.

Lund's article reflects the length and rigor of a law review article as opposed to full dissertation studies such as those highlighted above. Still, he summarizes important findings: that there is a paucity of state RFRA cases, that they rarely result in religious protections, and that they are often brought in federal rather than state courts. My project makes similar findings, although I do not find that religious liberty claimants are significantly more likely to win in state rather than federal courts. (In fact, the opposite may be true.)

Clearly there are wide-ranging differences in the levels of protection that each scholar has found. For purposes of simple comparison, the rates of success from each study have been combined into Table 2. The case selection methodologies of the different researchers likely play a role in the variation of success rates seen. Different researchers also explain their selection methods with different levels of rigor and transparencies. Researchers define a "free exercise" case differently, operationalize "success" for a religious plaintiff differently, examine different judicial levels, include or exclude published opinions, include or exclude trial court data, seek to explore different aspects of free exercise, and so on.

Upon concluding the literature review, I find there is a gap in the scholarship. Throughout my research for this project, there has not surfaced a measurement of the actual impact of RFRA legislation as

Table 2. Success Rates of Free Exercise Cases by Scholar

Author(s)	Year	Success Rate for Free Exercise Claims, Post-*Smith*	Type of Cases Analyzed	Courts Measured
Adamczyk et al.	2004	45%	First Amendment claims	Federal and state
Arnold	1997	33%	"Religious exercise"	Federal
Brent	1999	32%	Free exercise	Federal appellate
Claborn	2008	35%	Free exercise	Federal and state
Lupu	1998	15%	Federal RFRA	Federal
Martin	2013	12%	Free exercise	State appellate

Source: Author.

demonstrated by the success of religious plaintiffs who specifically mention a state RFRA as one of their claims. Whereas all earlier projects focus on free exercise cases in the post-*Smith* religious protection regime, the later projects focus on states with heightened scrutiny for religious freedom.

My project focuses on cases that explicitly cite a specific state RFRA statute. I do this intentionally and with a specific purpose. Without specifically operationalizing and consistently tracking a plaintiff's success in using a state RFRA claim, it will be impossible to know the true effects of the state RFRAs. The results of my study reveal numbers lower than the average of free exercise claims as laid out above, although in line with the Martin and Lupu studies. Of course, this project carries with it significant limitations, which I discuss at length in the appendix.

There are multiple reasons why it may be useful to know the current status of RFRAs and how they have been interpreted by the courts. Some initial conclusions may be drawn to understand the actual effects of state RFRA laws, provide predictability for legislatures or states that are considering passing a RFRA, and understand what the successes and failures of RFRAs have been. It seems unlikely that state legislators would continue to enact these laws if they knew religious freedom claimants are unsuccessful in being granted protections, perhaps even more unsuccessful than without such laws.

Current Status of State RFRA Laws

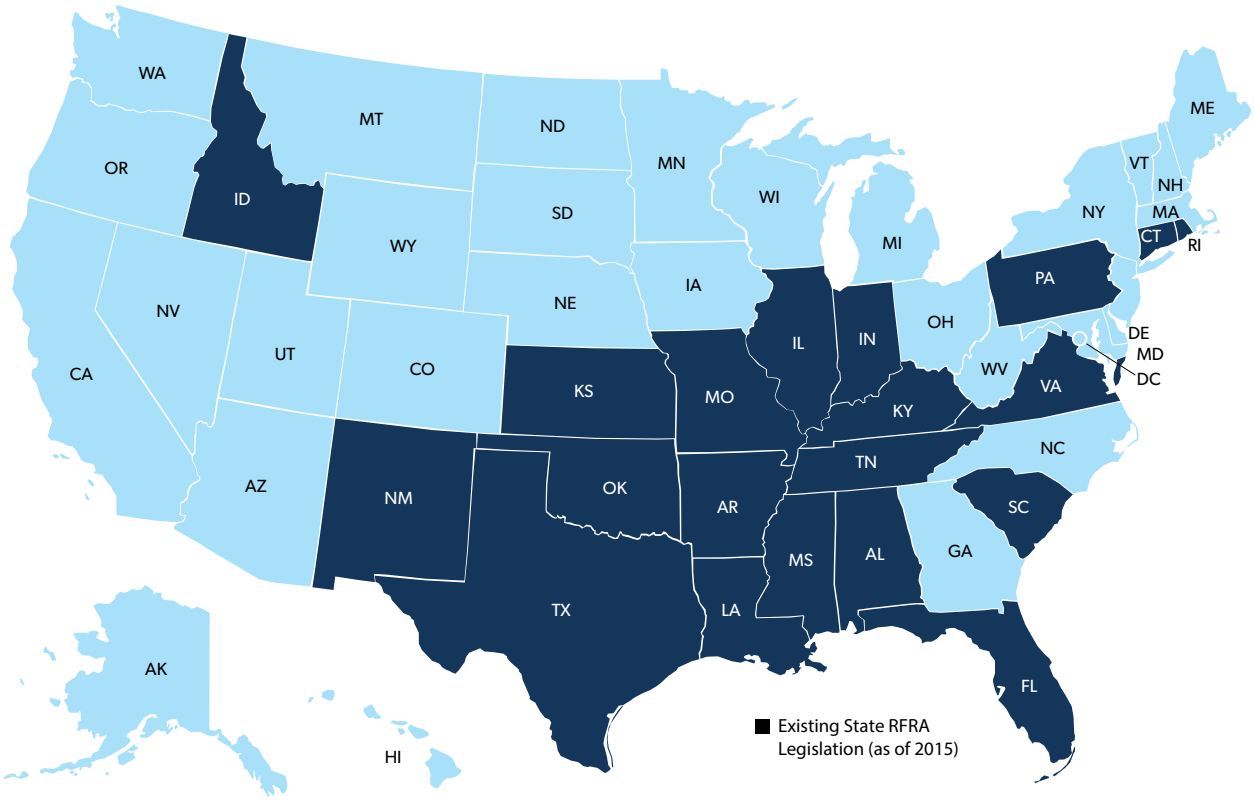
Currently, 19 states have constitutional provisions preventing governmental interference with religious free exercise, with certain exceptions, most commonly in the case of "acts of licentiousness, or practices inconsistent with the peace or safety of the state."[65] These constitutional provisions are not necessarily explicitly written into the constitution, and at least 12 states have this protection by court order. These states are Alaska, Hawaii, Indiana, Maine, Massachusetts, Michigan, Minnesota, Montana, North Carolina, Ohio, Washington, and Wisconsin. For the sake of this study, these states are not measured, nor does the scholarship reviewed above attempt to do so, except in Claborn's dissertation.

Certainly more research can be done to answer the question: What is the effect of jurisprudential attempts to increase religious protections? My project is in line with most of the scholarship in the field and attempts to find the effects of legislated RFRAs.

As of March 2017, 20 states have legislated some version of a state RFRA. Nineteen of these are statutes, and one of them—in Alabama—is a constitutional amendment.[66] Ten of these were passed between 1998 and 2000. The pace slowed thereafter, with the remaining 10 being passed since 2000. States with existing RFRA legislation are shown in Figure 1.[67]

Different state RFRAs offer different protections, as made evident by the different clauses included in

Figure 1. Existing State RFRA Legislation (2015)



Source: Author.

the statute. Some statutes are replicas of the original federal RFRA. Others include more specific protections such as heightened scrutiny thresholds and statutes of limitations. Three types of thresholds can trigger protection by a RFRA: substantial burden, burden, or restriction on religious liberty. A brief description of the type of protection listed by each state RFRA is listed in Table 3.

Certain states have a noticeable dearth of state RFRA cases, at least as can be measured by legal databases. The states with the lowest barrier for obtaining religious protection—Rhode Island, New Mexico, and Missouri—merely mention "restriction on religious liberty" as being the threshold for triggering strict scrutiny for government actions. One would expect that with these low thresholds, claimants would bring many claims under their state RFRA and would be largely successful in their claims. Remarkably, these three states are among the states with the fewest RFRA cases litigated (see Figure 2). As mentioned in my limitations section, it is entirely possible that a multitude of cases are being brought at the trial court, never to be made readily searchable and perhaps never to be compiled at all.

In some states, this certainly runs against the grain of what legal scholars thought might occur. For instance, in Missouri, one law review article claimed:

> Missouri, while the twelfth state to enact RFRA, is the first state to modify the means-to-ends standard imposed upon the government. Another difference between Missouri's RFRA and those of other states is the handful of exceptions provided within the statute. In addition to a decade of case law in

> other jurisdictions applying both federal and state RFRAs, Missouri also has state constitutional precedent which will aid the courts as they implement RFRAs general rule and its exceptions. The end result is increased protection for religious liberties with extra flexibility granted to the government in a few highly sensitive areas.[68]

This optimistic view of "increased protection for religious liberties" is not reflected in reality. In fact, I have found only three cases in which the Missouri RFRA was mentioned in a court's reasoning.[69]

What has caused this seemingly counterintuitive phenomenon? In a later section, I offer some preliminary opinions, including anti-plaintiff bias in appealed civil liberties cases and frequent judicial deference by both state and federal judges.

Table 3. Differing Levels of Religious Liberty Protection by State

State	Year	Required Threshold
Connecticut	1993	Burden
Florida	1998	Substantial Burden
Illinois	1998	Substantial Burden
Rhode Island	1998	Restriction on Religious Liberty
Alabama	1999	Burden
Arizona	1999	Substantial Burden
South Carolina	1999	Substantial Burden
Texas	1999	Substantial Burden
Idaho	2000	Substantial Burden
New Mexico	2000	Restriction on Religious Liberty
Oklahoma	2000	Substantial Burden
Pennsylvania	2002	Substantial Burden
Missouri	2004	Restriction on Religious Liberty
Virginia	2007	Substantial Burden
Tennessee	2009	Substantial Burden
Louisiana	2010	Substantial Burden
Kansas	2013	Substantial Burden
Kentucky	2013	Substantial Burden
Mississippi	2014	Substantial Burden
Arkansas	2015	Substantial Burden
Indiana	2015	Substantial Burden

Source: Author.

Results of Primary Source Research

My research identifies 224 total cases that have cited state RFRA claims according to my specifications outlined in the appendix. Eleven states (Arkansas, Idaho, Kansas, Kentucky, Mississippi, Missouri, New Mexico, Rhode Island, South Carolina, Tennessee, and Virginia) have legislated RFRA statutes, but only five or fewer litigated RFRA cases. A total of 323 decisions can be extracted from the cases, including district or trial court decisions inferred from the procedural histories and the dispositions of the appellate court cases.

As shown in Table 4, plaintiffs seeking religious protections with a RFRA claim were successful at a rate of 16.4 percent in both state and federal courts, excluding state trial court data.[70] The protection rate was 14.2 percent of all cases in both state and federal courts, including state trial court data. Plaintiffs seeking religious liberty protections were successful in 11 percent of all state court decisions. This 11 percent figure is, remarkably, precisely in line with Martin's finding in his 2013 study.

Broken down among state appellate and intermediary court versus trial court decisions, the success rate is 17.6 percent and 6 percent, respectively. Religious plaintiffs litigating a RFRA claim were successful in 17 percent of federal courts. Broken down to federal appeals courts and federal district courts, the rates of success were 21.2 percent and 14.5 percent, respectively.

The difference between cumulative state decisions and cumulative federal decisions (11 percent versus 17 percent) is not statistically significant. The largest statistically significant deviation from the set is the 6 percent success rate seen at state trial courts, which implies that (1) religious plaintiffs are not winning many cases at the trial level, which is why they appeal at higher rates, or (2) public actors are less likely to

Table 4. Success Rates of State RFRA Claims by Court

Court Type	Successful Cases	Total Cases	Percentage
Combined State/Federal:			
• Totals Including State Trial Court	46	323	14.2%
• Totals Excluding State Trial Court	27	165	16.4%
Combined Appellate Courts	24	126	14.5%
Combined Trial Courts	22	191	11.5%
State Decisions (Total)	17	152	11%
State Appellate/Intermediary	13	84	17.6%
State Trial Courts	4	67	6%
Federal Decisions (Total)	29	171	17%
Federal Appellate/Intermediary	11	52	21.2%
US District Courts	18	124	14.5%

Source: Author.

appeal a loss than a plaintiff is. However, as discussed in the next section, certain studies find that the favorable reversal rate for plaintiff appeals is lower than that for defendant appeals. This would imply that government actors (the defendants in RFRA cases) are more likely to appeal a case when they suffer a loss, assuming they understand their much higher chance for success on appeal.

The results for the state appellate, federal appellate, and US district courts are largely in line with one another, but the state trial courts skew the results. It should be noted that all state cases measured are a biased data set insofar as it contains only those cases that are eventually appealed to the higher levels. This is because state trial court data cannot be accessed in legal research databases. A fuller treatment of this limitation is discussed in the appendix.

This project also measured the rate at which a court grants a RFRA claimant religious protection because of a RFRA claim, as opposed to despite it. These rates are reported in Table 5. Courts can decide that a claimant's religious free exercise has been substantially burdened but not decide in favor of the plaintiff if the government has indeed done so in the least restrictive means possible and for a compelling government interest. This is rare, however. A more common scenario occurs when the court declines to review the RFRA claim but grants religious liberty protection to the plaintiff based on some other claim. It is important to differentiate this, as failing to do so could have covered up important trends, thus leading to skewed rates of success for state RFRA claims.

In US district courts and federal intermediary and appellate courts, the rate at which religious plaintiffs were granted religious protections based on their state RFRA claims was 17.2 percent and 12.5 percent, respectively. Weighted for number of cases, this results in a total federal court RFRA claim success rate of 16.4 percent. In state cases, due to limited access to trial court data, only intermediary and appellate courts could be measured for success of state RFRA claims. The rate at which religious plaintiffs were granted religious protections based on their state RFRA claim in these state courts was 13 percent.

Here, the rate of successful state RFRA claims is less disparate between state and federal courts than the overall rate of religious protections granted for burdens on free exercise. In addition, the numbers

Table 5. Successful State RFRA Claims

Court Type	Successful Cases	Total Cases	Percentage
Federal District	20	116	17.2%
Federal Appellate	6	48	12.5%
Federal (Total)	*26*	*165*	*16.4%*
State Intermediary/Appellate	10	78	13%
Combined State/Federal	*36*	*243*	*14.8%*

Source: Author.

Table 6. Categories of State RFRA Claims

Category	Federal Courts	State Courts	Combined Totals
Prisons	51/146 (35%)	20/78 (17.2%)	71/224 (31.7%)
Land Use/Zoning	30/146 (20.5%)	14/78 (17.9%)	44/224 (19.6%)
Education/School	17/146 (11.6%)	6/78 (7.7%)	23/224 (10.3%)

Source: Author.

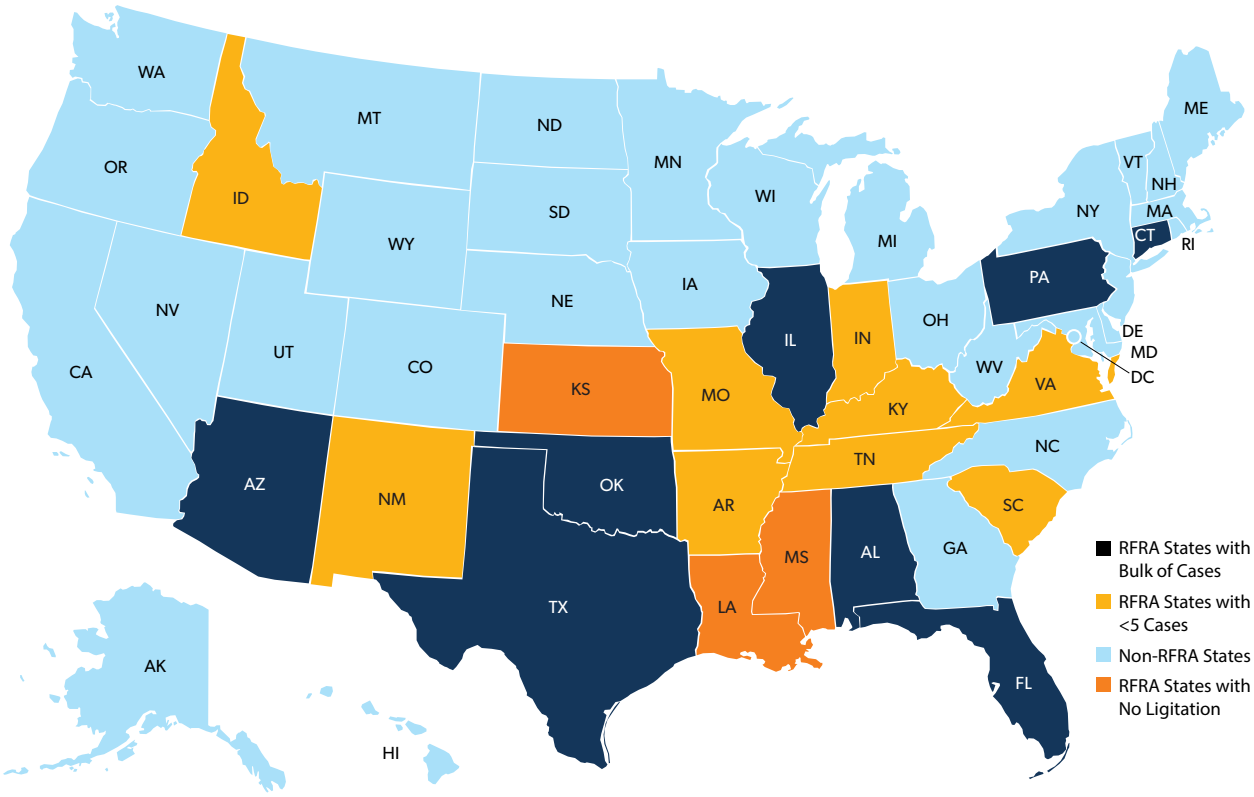
are largely in line with the average rate of religious protections. Only 18 cases in the entire data set (or 8 percent of all cases) involved a situation in which the court recognized a legitimate state RFRA claim but did not grant religious protection, or vice versa. In all other cases, the two factors did not differ from one another.[71] If a court granted a RFRA claim, it usually granted religious protections. If a court denied a RFRA claim, it usually denied religious protections. This shows a strong correlation between a person's success with their RFRA claim and their eventual success in court.

The largest categories of cases pertained to prisoners, land use or zoning, and education or schools. It appears state legislators have agreed with early scholarly opinions that prisoners ought to be "legitimate and important candidates for state RFRA protection."[72] As shown in Table 6, 31.7 percent of cases involved litigants who were prisoners, in both federal and state courts. Cases involving land use and zoning regulations made up 19.6 percent of the cases, and cases involving regulation of education and schools made up the third-largest category, with 10.3 percent of total cases.[73]

The vast majority of cases took place in a handful of jurisdictions. For instance, 190 cases occurred in just eight states: Alabama, Arizona, Connecticut, Florida, Illinois, Oklahoma, Pennsylvania, and Texas. This means 84.8 percent of cases occur in just 38 percent of states with legislated RFRAs. Importantly, three states—Mississippi, Louisiana,[74] and Kansas—do not have any cases decided under their state RFRAs that can be found in any online legal database. The remaining states each have five or fewer cases litigated under their respective RFRAs.[75] The frequency with which cases are brought in each state are illustrated in Figure 2.

While 11 states passed RFRAs between 1993 and 2000 (see Figure 2), only six of the cases measured took place during this time. Put another way, only six cases from a federal court or state appellate court made a RFRA claim in these eight years. The distribution of cases by year can be seen in Figure 3. This finding is also in line with Lund's research in 2010, which

Figure 2. Frequency of State RFRA Claims by State



Source: Author.

showed few cases in the early years after the proliferation of state RFRA legislation.[76]

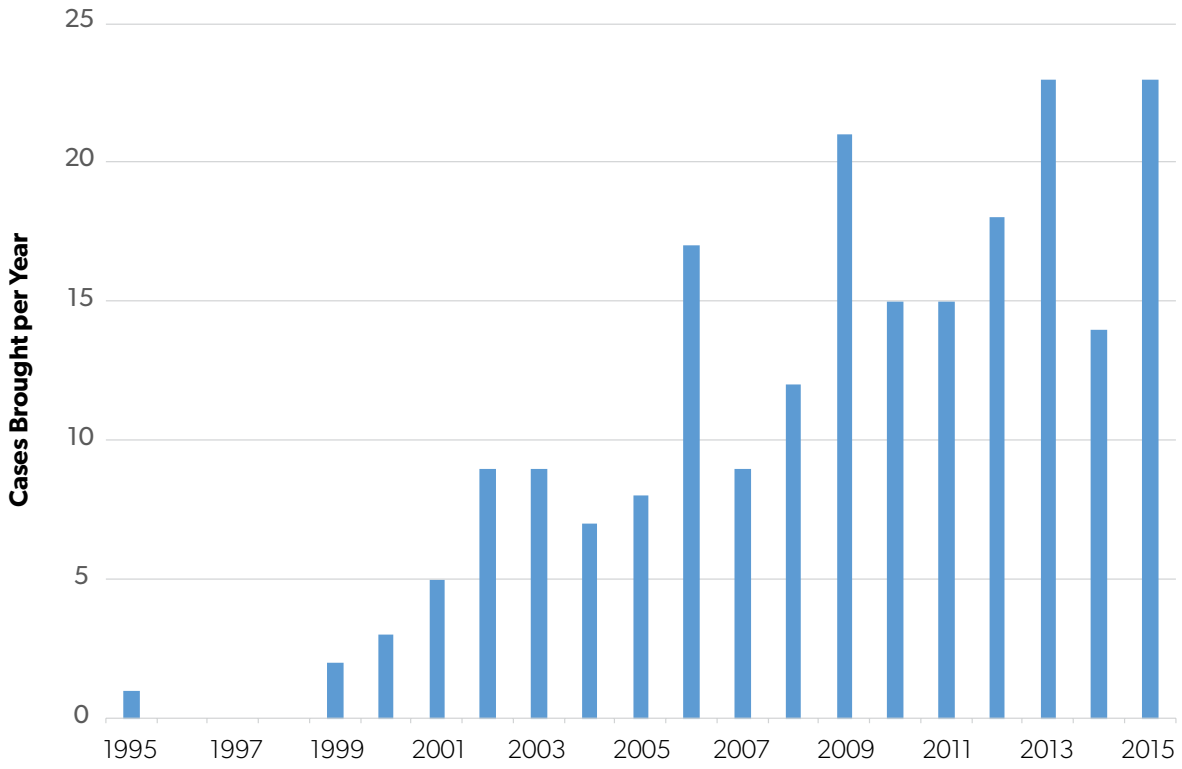
Before 2006, there was not a single year in which more than 12 state RFRA claims were made in any state appellate or federal court. After 2008, every single year met or exceeded 12 claims per year, and three of these years (2009, 2013, and 2015) exceeded 20 claims, representing a nearly 100 percent jump from the earlier years. Whereas 45 cases, representing 20 percent of the cases measured, took place in the first 11 years of state RFRA legislation (1995–2005), 179 cases, or the remaining 80 percent, took place in the latter 10 years of state RFRA legislation (2006–15). This shows a strong and clear positive correlation between increasing frequency of state RFRA claims and more recent years.

Analysis

The overall protection rates of plaintiffs who make a RFRA claim were lower than anticipated and lower than the findings of most studies that have measured the success rates of free exercise claims. Research has shown that certain religious liberty claims perform better than others. For instance, Claborn found in 2008 that 44 percent of general "religious free exercise claims" were successful in state courts, but when he separated cases to look at only those involving the free exercise clause, the success rate dropped to 35 percent.[77] It appears that, as discussed earlier, the rates of success largely vary based on the definition of "free exercise" that the author uses.

For instance, Martin used narrower criteria than previous studies to operationalize a "free exercise"

Figure 3. Frequency of State RFRA Claims by Year



Source: Author.

case. He found a religious protection rate of just under 12 percent in state appellate courts when he evaluated narrowly defined free exercise claims, as explained earlier. My project, by studying a specific type of religious liberty claim, is also narrowly defined. As laid out in the appendix, this project uses search terms that are by necessity much narrower than those in other studies. It is not entirely surprising then that the 11 percent rate of success I find in state courts is precisely in line with Martin's studies. An implication of this finding is that state RFRA claims might perform as well as a small subset of religious claims but not as well as most religious liberty claims in general.

However, one would expect that a law specifically intended to protect religious liberty—such as the RFRA—would result in higher rates of religious liberty protection than in the absence of such laws. The evidence produced by this and other studies, such as Claborn's, suggests the opposite may be true. This is significant and bears further discussion.

I will offer some initial opinions on this phenomenon, although they are indeed preliminary and necessitate greater discussion. I am of the mind that "any single work of empirical research . . . must be understood as providing only preliminary evidence to support or undermine any particular hypothesis," and my project is no different.[78]

The low success rate for state RFRA claimants is counterintuitive, and not only because of the legislators' intent passing these laws. It is also surprising because the laws are modeled after the federal RFRA, the passing of which was followed by increased success for free exercise claimants. As the Adamczyk, Wybraniec, and Finke study found, "The percentage of favorable decisions for free exercise cases dropped from over 39 percent to less than 29 percent following

Smith and returned to over 45 percent after RFRA was passed."[79] Other studies mentioned earlier corroborate the same. If the federal RFRA is correlated with or causes greater success rates for free exercise claimants, this would likely occur at the state level, as well.

The courts are far more likely to reverse decisions in favor of defendants than they are in favor of plaintiffs.

In his 1998 study, Lupu hypothesized several potential causes of low federal RFRA claim success.[80] He postulates that judges are uncomfortable with making claims of exemption from general law and especially with claims of religious exemptions for several reasons. First, he references potential judicial bias, as judges are "drawn from America's highly educated elite," who "may be skeptical about intensely held religious commitments."[81] Second, judges may be sensitive to the "possibility of religious fraud," which would require the government to use intrusive measures to seek the truth. Third, judges may feel that religious exemptions can produce violations of the establishment clause. Fourth, judges may be hyperaware of their own biases and choose to give no exemptions, rather than institute an inconsistent scheme.

This emphasis on judicial bias has featured prominently in the scholarship I examined in my literature review, such as Claborn's and Martin's dissertations. It is beyond the scope of this project to further examine the effects of judicial bias on the outcomes of cases, and excellent work has been done on this already. Instead, I choose to examine other possibilities, such as anti-plaintiff bias in appealed civil liberties cases and frequent judicial deference by both state and federal judges.

Anti-Plaintiff Bias in Appealed Civil Liberties Cases. A majority of state court decisions and a significant portion of the federal court decisions in my study take place in appellate courts. For this reason, it is important to understand trends in appellate courts so as to understand their impacts on this study's results.

The first possible reason for depressed success for RFRA plaintiffs could be so-called plaintiphobia, which has been observed in both the federal and state appellate court systems. Scholars such as Clermont and Eisenberg describe this phenomenon as the tendency of appellate courts to affirm cases significantly more often in favor of the defendants, especially in certain case categories such as those concerning civil liberties. In addition, the courts are far more likely to reverse decisions in favor of defendants than they are in favor of plaintiffs. And as I will show, studies found that these phenomena were more prominent in cases in which government officials are defendants, as in RFRA cases.

Clermont and Eisenberg's 2002 empirical study of federal appellate court trial data found that "defendants that appeal their losses after trial obtain reversals at a 33% rate, while losing plaintiffs succeed in only 12% of their appeals from trials."[82] This study divided these cases into six major groups: contracts, torts, civil rights, labor laws, miscellaneous statutory actions, and others. They found that in four of these groups (contracts, labor laws, miscellaneous statutory actions, and others), the defendant/plaintiff differential is relatively modest, ranging from about 5 percent in others to almost 12 percent in labor laws.[83] They conclude that "to put these differentials in perspective, they are not substantially different from the size of the reversal-rate differential between 'haves' and 'have nots' found in published state-court opinions."[84] However, in the torts and civil rights groups, they find that "the defendant/plaintiff differential swells to about 20% and 36%, respectively."[85] This shows that the defendant advantage in appeal reversals seems to be more significant in the civil rights categories than in other ones.

In what the authors call "The Especially Telling Case of Civil Rights," they found that plaintiffs in

the "other civil rights" category are "less successful in preserving their trial court victories, as they suffer a reversal rate of 48.04."[86] This "other civil rights" category includes topics such as discrimination and First Amendment cases. It appears that religious liberty cases would fit into this category as well. In the authors' view, these judicial categories are predicated on the "motives of official decision makers, and that may create similar anti-plaintiff bias."[87]

Importantly, in the "other civil rights" category, they also find that plaintiffs who are prisoners have less difficulty maintaining their trial victories than non-prisoner plaintiffs. Prisoner cases make up the largest category of cases in my study. So this finding by Clermont and Eisenberg seems to discourage the notion that prisoner cases may be the independent variable causing lower success rates in my study, given that they are not particularly disadvantaged in civil liberties appeal cases. In short, it seems at least plausible that many state RFRA claims are affected by anti-plaintiff bias in federal courts to a greater degree than other types of cases, and at least as much as in other civil rights cases.

However, plaintiphobia does not appear to be limited to only federal courts. A 2009 empirical study of appellate court trials, this time in state courts, found that "appellate reversal rates for jury trials and defendant appeals exceed reversal rates for bench trials and plaintiff appeals. The reversal rate for plaintiff appeals is 21.5 percent, compared with 41.5 percent for defendant appeals."[88]

Plaintiphobia could also affect RFRA claims because of the particular advantage government parties enjoy in appeals cases. RFRA statutes, as opposed to other civil laws, stipulate that actions can be brought against only government officials in their individual (as opposed to official) capacities. Research shows that the challenges religious plaintiffs encounter may be exacerbated by the fact that federal courts are also more likely to affirm a case when a government party is the respondent. In addition, government parties are more likely to win on appeal.

A 1992 study by Donald Songer and Reginald Sheehan conducted research on the US Court of Appeals to explore the success rates of different types of appellants. The study found that "in spite of the general propensity of the courts of appeals to affirm, the federal government was successful on 58.2% of its appeals. At the other end of the spectrum of assumed litigation resources, individuals won only 12.5% of their appeals."[89] In other words, they concluded that the federal government was 4.66 times as successful an appellant as individuals. In addition, they found that "the federal government, which won 58.2% of the cases they had appealed held their adversaries to only a 13.1% success rate in the cases they had appealed (i.e., the federal government won 86.9% of the cases in which they appeared as respondent), giving the United States a net advantage of 45.1%."[90]

The government's advantage in appeals cases is not limited to the federal government; it is also found in state and local governments, although to a lesser extent. Songer and Sheehan's study also found state and local governments had a net advantage of 29.9 percent over individuals, and individuals were least advantaged, with a net advantage of –18.2 percent.[91] In all these cases, the government, in general and at all levels, clearly enjoys advantages over individuals in appeals courts both as appellants and respondents.

This study also noted that cases with a civil liberties claim were associated with a decreased probability of appellant success.[92] They suggested that these results likely indicated that a large percentage of appeals in civil liberties cases are frivolous. It would be improper to compare Songer and Sheehan's study to my own, given that they measure all civil liberty cases but only in federal appeals courts, while I measure a specific subset of civil liberty claims in all courts. However, it is worth noting that frivolous claims could play a role in the low success rates observed in my study. Thus, while the presence of a civil liberty claim might be correlated with lower rates of success for a religious plaintiff, it is important to not mistake this for causality.

Regardless, a dismal rate of appellate success exists for civil rights plaintiffs. How might this disadvantage influence litigants' actions? First, attorneys are likely to be well aware of the difficulty of receiving a favorable decision when appealing their RFRA cases, given the disproportionate advantage that defendants

in this category seem to enjoy. Attorneys may choose to not pursue RFRA claims in the first place or not appeal them from the trial court level, which would depress the number of reported state RFRA claims registered in an online database such as LexisNexis or Westlaw. This could answer some of the questions in the literature on why there are so few state RFRA cases. An exploration of what causes anti-plaintiff bias in appellate courts can be seen in the cited studies and is beyond the scope of this study.

Many religious beliefs are a matter of life or death to the believer, whereas government may not feel as strongly about the implementation of a particular regulation.

Of course, as mentioned, the state decisions examined in my project are a biased sample and represent only those cases that have already been appealed. Nearly all these cases are of religious plaintiffs appealing losses. Given that the research shows that "appeals are comparatively rare events"[93] and that "trial court decisions effectively terminate the bulk of the legal disputes they address,"[94] plaintiffs may be finding significantly better success at the state court trial levels than what is found in state appellate courts in this study.

Perhaps the high percentage of religious plaintiffs in appeals cases is simply a reflection of a greater incentive to appeal, based on a perception that they have more at stake. After all, many religious beliefs are a matter of life or death to the believer, whereas government may not feel as strongly about the implementation of a particular regulation. However, if there were government losses at the trial court level, all available research and data would encourage them to appeal, given their disproportionately high rate of success. Thus, I must infer that government officials are not losing at significantly higher rates in state trial courts than what is reflected in the appeals court data.

It is possible that a large number of appellate court cases end in favorable settlements out of court, even though they do not reverse a decision in favor of religious claimants. This does not discount the low rate of success that religious claimants find in decided cases. In addition, no literature supports this view. In fact, it may be less likely that this occurs, given that RFRA plaintiffs have a low overall success rate and government actors have little or no incentive to reach a settlement out of court, if they can confidently expect to win in court. While my study finds slightly higher (although not statistically significant) rates of success in appellate courts than trial courts, this most likely is because only serious cases with higher likelihoods of success are being appealed. Most religious claimants are likely deterred from appealing, given their low likelihood of success.

In short, it seems there are strong arguments to be made that civil liberties plaintiffs are disadvantaged in the appeals process and that government parties enjoy an advantage. State RFRA cases are a special situation because they always require both that the plaintiff is making a claim regarding their civil liberties and that the defendant is a government actor. Given that individual religious claimants suing government actors make up nearly the entirety of the cases I analyzed, it seems as if anti-plaintiff bias in appealed civil liberties cases could certainly be a contributing factor to depressed RFRA success. Due to this, I cannot rule out that a state statute protecting religious liberties, but stipulating that only government officials can be sued, may be doomed from the start in achieving its goal of religious protection.

Deference Between Court Systems on State Matters. While plaintiphobia may exist in the appellate court systems and may even be strongly correlated

with civil rights (including free exercise) cases, there does not seem to be a good explanation for the mechanisms that cause it. Finding one is beyond the scope of this paper.

A potential contributing factor, and perhaps the most important reason for decreased state RFRA success in the federal and state appellate courts, is that courts prefer deference to groundbreaking legal decisions. This hesitance to be the first to rule, combined with few cases being brought in the first place, means few major decisions have been made. As a result, we see a dearth of precedent from which courts can base decisions. Several pieces of evidence indicate that courts wish to defer to precedent or other authority before turning to state constitutional law or state legislation as a basis for judgment.

Research has shown that state courts seem to be selective of the types of cases they will decide using state law or constitutions. In 2000, Staci Beavers and Craig Emmert found that, compared to all types of cases that state courts decide, "courts were especially reluctant to base civil liberties decisions on state constitutions."[95] Whereas contemporary state judicial policy research has focused on individual-rights law, their research showed that civil liberties cases were especially unlikely to result in state-law decisions.[96] This research finds state courts are more likely to defer to federal legislation and jurisprudence whenever possible on issues of civil liberties.

At the same time, federal courts also seem to prefer deference to state courts on issues of state legislation and state constitutions. Indeed, scholars agree that as a matter of general principle, "federal courts should not decide novel state law questions if they need not."[97] Indeed, as Ann Althouse puts it, "When the basis for suit is state law, . . . there is . . . an absence of . . . federal interest."[98] Through my research I found that state RFRA claims are no exception. State RFRA claims are often absorbed by or replaced with other relevant free exercise claims in the case, such as the federal RLUIPA.

If this is the case, then a state legislature's attempt to add an additional layer of religious protection is being ignored. The courts have largely acted as if these laws, rather than forcing a strict scrutiny standard in their own right, are in many cases simply restating and ensuring federal protections. In one state RFRA case, *Konikov v. Orange County*, the court stated:

> Konikov also appeals the district court's grant of summary judgment in favor of Defendants on his [claim] of . . . violation of the Florida Religious Freedom Restoration Act ("RFRA"), Fla. Stat. ch. 761.01. We sustain his RLUIPA and his due process challenges to the ordinance. . . . We do not reach Konikov's equal protection, free exercise, freedom of speech, and freedom of assembly claims to the extent that these constitutional claims rely on the same theories underlying the claims dismissed by the district court and reversed in this opinion, *because full relief is available under the statute*.[99] (Emphasis added.)

It is not only federal courts that decline to review RFRA claims. State courts also seem to have mastered the art of sidestepping state RFRA claims, and if trial courts refuse to recognize the claim, this could be a major reason for a lack of state RFRA claims reaching the appellate court level. In addition, when a court decides to grant religious liberty on a different free exercise claim, it will often dismiss or simply decline to review the rest of the claims. While this results in religious liberty protection in many cases, it does not create precedent by which state RFRAs can be litigated in the future.

As a further example of this phenomenon, a Florida judge found, "The plaintiffs also contend that the [ordinance] violates their rights . . . under the Florida Religious Freedom and Restoration Act. Because we sustain the congregations' RLUIPA challenge to the ordinance, we *need not* reach these additional claims" (emphasis added).[100] Still another case read, "the Pennsylvania Religious Freedom Protection Act of 2002 has not been judicially interpreted and this Court is hesitant to sail the uncharted waters within its reach."[101] Both of these examples, although taken from federal decisions, show a hesitance to rule on these state RFRA claims, especially when they feel it is unnecessary.

As can be seen, many courts shy away from being the first, or among the first, to rule on these cases.

Given that so few cases have been litigated, there appears to exist a vicious cycle of deference in which no court rules on state RFRA claims. If state courts are more likely to defer on civil liberties cases, and federal courts are more likely to defer on issues of state law, perhaps state laws touching civil liberties cases are a deadly combination, allowing few cases to be brought and few plaintiffs to win. However, I do not think it must be this way, and I offer a preliminary proposal on how this can be addressed.

If state courts wait for higher courts to set precedent, citizens may suffer in the meantime, and the legislatures' intent to increase civil liberty protections is thwarted.

Toward an Invigorated State Constitutionalism. Courts would do well to begin to rule boldly and more frequently on state RFRA claims. Of course, there is tension between state and federal courts on who should rule on state civil liberty cases. This tension must be resolved if attempts to increase religious liberty are to find greater success rates.

This can be achieved through recapturing federalism, which would restore state courts with the sovereignty to rule independently on issues falling in their jurisdiction. State courts ought to set precedent on issues of state civil liberties, solving the back-and-forth between the state and federal systems. If state courts wait for higher courts to set precedent, citizens may suffer in the meantime, and the legislatures' intent to increase civil liberty protections is thwarted. If higher courts do indeed set this precedent, then states are stripped of their ability to protect civil liberties independently of the federal government's actions.

Above all, state courts ought to recapture a robust protection of civil liberties, basing their decisions when possible on their own state constitutions. Many states have already done this through judicially heightened protections of religious liberties, as I explained earlier. The idea of an invigorated state constitutionalism is not at all new, and much legal and political ink has been spilled on this topic.[102] Nevertheless, a brief discussion may be helpful to frame my recommendations.

The "conscious construction of state constitutional policies" slowed dramatically during the Warren Court.[103] As the federal court released slews of federal constitutional rulings in state criminal cases, the state courts "fell silent on the subject of their own constitutions."[104] James Gardner and others attribute the subsequent rise of renewed interest in state constitutionalism to the Burger and Rehnquist Courts' scaling back of federal constitutional protections. These decisions encouraged "the development of independent and distinct state constitutional doctrines" and "re-established a context in which state courts have considerable policy latitude in a vast range of areas."[105] This gave rise to a field of state constitutionalism that sought to revamp state courts' abilities to interpret their own constitutions.

In a now-classic 1977 article titled "State Constitutions and the Protection of Individual Rights," US Supreme Court Justice William J. Brennan argued that without the protections in state constitutions that extend beyond "those required by the Supreme Court's interpretation of federal law," "the full realization of our liberties cannot be guaranteed."[106] While acknowledging increasing amounts of litigation, he declared:

> A solution that shuts the courthouse door in the face of a litigant with a legitimate claim for relief, particularly a claim of deprivation of a constitutional right, seems to be not only the wrong tool but also a dangerous tool for solving the problem. The victims of

> the use of that tool are most often the litigants most in need of judicial protections of their rights—the poor, the underprivileged, the deprived minorities.[107]

In his view, it was important that states do not deny rights to their citizens simply because of federal interpretations. In certain cases, this tension created situations in which state courts would assert the sovereign independence of their own constitutions, in direct contradiction to the US Supreme Court's rulings. Justice Brennan approved warmly of such contradictions.

He also believed state courts must serve as a "double source of protection for the rights of our citizens."[108] This happened, in his view, whenever a state court offered civil rights protections. He believed that this was happening with increased frequency and that it ought to.

More recent scholarship tends to show that states have not asserted their independent constitutions as often as Justice Brennan would have liked or as he predicted they would. Fifteen years after Justice Brennan wrote his piece, a frequently cited but controversial 1992 article by James Gardner titled "The Failed Discourse of State Constitutionalism" argued that "state courts by and large have little interest in creating the kind of state constitutional discourse necessary to build an independent body of state constitutional law."[109]

Gardner describes a "New Federalism" that has "the ultimate goal of creating in every state a vigorous, independent body of state constitution capable of standing by itself as a basis for constitutional rulings by state courts."[110] New Federalism disapproves of practices that include "avoiding reliance on state constitutions altogether; analyzing state constitutions in a perfunctory manner that provided little guidance to litigants and lower courts; and inappropriately relying on federal rulings and analyses as a guide to construction of state constitutions."[111]

He describes two types of New Federalism: a "primacy" method and an "interstitial" method. Proponents of the primacy approach believe "that state courts confronted with constitutional issues should look to the state constitution in the first instance and should interpret it in a principled way that takes account of the text, history, structure, and underlying values of the document."[112] In short, state courts should look to their own constitutions as the Supreme Court looks to the US Constitution.

Proponents of the interstitial approach disagree slightly, believing "state courts should look in the first instance to the federal Constitution where that document can provide a basis for decision" and should turn to the state constitution only when federal courts approve state action or when federal constitutional law is "ambiguous."[113] This interstitial approach is more closely aligned with what is proposed as a solution in this project.

However, Gardner finds that the New Federalists failed to see their ideas enacted in the jurisprudential setting. It was his view that "state courts often seem downright reluctant to construe their state constitutions at all, and when they do so their opinions are often vague, perfunctory, or almost entirely dependent on analytic strategies and terminology borrowed from federal constitutional discourse."[114] Other scholars tend to agree. A study by Beavers and Emmerts found that "state judges have, however, re-approached their separate constitutions with considerable trepidation; an examination of state courts' equal protection decisions from 1975 to 1984 indicated that a mere 6.7 percent such cases were rooted solely in state constitutional law."[115]

The ideas of Justice Brennan and the New Federalists seem not to have won the day. I do not propose that New Federalism ought to be the dominant ideology governing state constitutionalism. State courts should not avoid using federal precedent or do legal gymnastics to base their decisions entirely on state constitutions. However, state courts should be willing to rule boldly and preliminarily on state civil liberties cases. Their hesitance to do so creates a vacuum in which federal courts may rule instead. Worse, it leaves precedent for laws such as state RFRAs entirely undeveloped, which in turn leaves those in need of civil liberty protections vulnerable.

Supreme Court Justice Sandra Day O'Connor (then a state judge) agreed with the tenets of federalism and the importance of empowering state courts.

She felt that state courts ought to be strengthened and given independence to rule on federal constitutional issues, but especially on state constitutional issues. She wrote:

> It is a step in the right direction to defer to the state courts and give finality to their judgments on federal constitutional questions where a full and fair adjudication has been given in the state court. . . . If we are serious about strengthening our state courts and improving their capacity to deal with federal constitutional issues, then we will not allow a race to the courthouse to determine whether an action will be heard first in the federal or state court. We should allow the state courts to rule first on the constitutionality of state statutes.[116]

This final sentence has indeed been the prevailing method of the federal court system—and rightly so. Now state courts must take it upon themselves to rule on those cases that fall most properly in their jurisdiction.

No longer should state courts sit on their hands and wait for federal courts to give them guidance on how to rule on their state legislation. Justice Brennan may have been right all along, that state constitutional jurisprudence is the "Guardian of Individual Rights," but perhaps not for the reason he anticipated. For the state courts have not been stripped of their power, so much as they have ceded it; they have not been prohibited from ruling on their own state laws, so much as they have cautiously waited, preferring federal guidance to state sovereignty. State courts must recapture their independence not merely to preserve their sovereignty but to end a never-ending cycle of deference that can only be detrimental to the people.

Future Research and the Qualitative Angle. This study has been conducted quantitatively, intended to fill a hole in the current scholarship on the issue of state RFRA claims. As demonstrated, it has made significant findings. My study, however, certainly does not present the entire picture, and this research now sheds light on important qualitative work that still needs to be done.

I have measured that plaintiffs do not have high success rates when they make state RFRA claims. However, a quantitative analysis that measures only success rates may fail to capture the other ways in which state RFRAs may protect religious liberties. As Lund notes, "tallying wins and losses may not be the best measure of the efficacy of a state RFRA anyway."[117] Attempting to analyze these unfortunately falls outside the scope of this project, although I will highlight some important questions for future researchers to explore.

Organizations that favor the existence of state RFRAs may claim that state RFRAs prevent governmental violations of religious liberty. That is, the mere existence of a state RFRA may prompt state and local governments to be extraordinarily cautious so as not to infringe on religious liberties and incur a lawsuit. Governments potentially achieve this by pursuing methods to decrease the likelihood of infringements. They could take precautions to prevent religiously prejudicial rules, regulations, and laws from being created in the first place. They could solicit feedback, set up expedited channels to review complaints, and take other actions after apparently restrictive rules have been made but before they are put into effect. Finally, governments may simply be more likely to accede to a citizen's complaint if merely *threatened* by a RFRA lawsuit after an apparent violation has taken place.

This last possibility could be a key reason for the infrequency of state RFRA cases and the low success rate of cases that are eventually brought. In this situation, claimants who make the case for a strong RFRA claim would likely have their claims settled by the government out of court. In turn, this would leave primarily weak or meritless RFRA claims to be brought to the court's attention, leading to the low success rate that I measured.

No studies or research point to any evidence of this phenomenon taking place in RFRA states. In fact, earlier in this paper I reviewed the literature concerning the high judicial success rate of government actors when issues of civil rights were being litigated by private citizens. The literature shows that even if governments are preempted from violating religious liberties or more likely to settle them out of court due

to the existence of a state RFRA, this simply results from a lack of knowledge about their likely success rate if they litigated the case. Perhaps they would be more willing to litigate if they simply knew how frequently government actors are typically successful for this type of claim.

States typically regarded as more conservative and Republican are more likely to have a state RFRA.

Finally, future researchers will need to grapple with the fact that state RFRAs have been legislated in states that are already heavily religious. As noted earlier and shown in Figure 1, states typically regarded as more conservative and Republican are more likely to have a state RFRA. In fact, 70 percent of the state RFRAs exist in states that, as of 2016, have total Republican control of their state government (meaning control of both houses of the state legislature and the state governorship).[118] Furthermore, of the 25 states that have total Republican control as of 2016, 14 of them (or 56 percent) have a state RFRA, a higher rate than the overall 40 percent rate across all states.

This trend also aligns squarely with the most religious states in the country. As of 2016, all six of the most religious states (measured by Pew as the percentage of adult citizens who are "highly religious") have legislated RFRAs.[119] In the same report, 12 of the 21 most religious states (or 57 percent) have legislated RFRAs.

A state's political and religious characteristics are important to take into account when exploring qualitative effects of the state RFRA. It is not entirely surprising that Republican legislatures or legislatures in deeply religious states, which largely overlap, would pass religious liberty laws. But what effect would a state RFRA have in a deeply religious state? Are state and local governments in deeply religious states more or less likely to infringe on religious liberties and require additional religious liberty protections? These are not questions my research can answer. My hypothesis is that the answer will lie in the rate at which the heavily religious majority infringes on the rights of religious minorities.

There are other angles and important questions to be answered in the pursuit of understanding the real impact of state RFRA laws. Simply measuring success rates may not be the best way to measure the laws' success. For this reason, more work on the topic ought to be done.

Conclusion

This study is significant as the first to have measured the success rates of state RFRA claims in state and federal courts. I have examined the literature surrounding the federal and state RFRAs, as well as numerous studies measuring the success rates for free exercise claims in state and federal courts. The different measurements and conclusions of these numerous studies are summarized and distinguished from one another. Importantly, this project is the first to have successfully assembled a data set that is large enough to measure protection rates and from which can be drawn some tentative conclusions.

My research shows that free exercise claimants are successful in 17 percent of federal court decisions and 11 percent of state court decisions. When weighted for the distribution of cases, this results in a combined protection rate of 14.2 percent.[120] This rate is significantly lower than nearly all other measurements of free exercise cases in previous studies. However, the 11 percent success rate observed in state courts is in line with the 12 percent figure reported by the Martin study of free exercise claims in state appellate courts.

My project employed a multilevel system of search methods to compile a data set. Previous studies attempted and failed to measure the success rate of state RFRAs, frustrated by an apparent paucity of

claims under the state RFRA statutes. They could only conclude that claims under these statutes were "exceedingly rare."[121] Part of this may be attributed to a failure to use appropriately broad search terms such as those my project identified.

Their inability to compile a data set may also be attributed to my project's finding that 80 percent of state RFRA cases have taken place since 2006. This shows a significant increase in frequency when compared to the 1996–2006 period. Claims remain exceedingly rare in certain states, as this project also reveals that about 85 percent of state RFRA claims occur in just eight of the 21 states. However, the increasing frequency of state RFRA claims may point to a trend of increased litigation under these statutes.

While I believe that not "enough case law exists to allow us to draw generalizable, empirical conclusions,"[122] my project is significant as the first study to have successfully established a baseline measure of the success of state RFRA claims in both federal and state courts. While state RFRA statutes are no doubt legislated with the intent of increasing religious freedom protection, the opposite may in fact be occurring. It is a significant finding that relatively few cases are litigated in the first place, but it is perhaps even more significant that state RFRA cases appear to be granted even lower levels of protection than other religious liberty claims litigated in the same jurisdictions.

This project proposes several tentative causes for these phenomena and a preliminary solution. Anti-plaintiff bias and advantages enjoyed by government actors in the appellate court system may be contributing factors. These appear to be exacerbated when combined with a civil liberties claim, as state RFRA cases are. In addition, it appears there is a cycle of circular deference in which neither state nor federal courts wish to set precedent on state RFRA claims.

I propose that state courts ought to boldly set precedent with increasing frequency on matters of state civil liberties. When possible, rather than postponing their decisions so they may defer to federal precedent, state courts ought to embrace an invigorated state constitutionalism and base their decisions on their state constitutions.

I also note that important research needs to be done, especially on the potential qualitative effects of legislating state RFRAs. Simply measuring the quantitative success rate of cases may fail to capture certain ways in which these laws may still increase religious liberty protections.

Looking ahead, this project has made significant and innovative findings that ought to be of value to multiple stakeholders in the judicial process. Plaintiffs and their attorneys would benefit from understanding a plaintiff's likelihood of failure when making a state RFRA claim. Legislatures that are considering instituting a state RFRA to increase religious protections should consider that any case that cites a state RFRA as a claim appears to have, at least from a quantitative perspective, a lower chance of success than other religious liberty claims. Finally, judges and juries ought to rule boldly and more frequently on this important issue, so "the full realization of our liberties" might be guaranteed.[123]

Appendix: Methodology and Coding Rules

I researched cases using LexisNexis, cross-checked with Google Scholar. I searched for every case that cited each specific RFRA statute. Previous projects used broad search phrases.[124] Given the more limited scope of my project in examining cases that cite one individual statute per state, I used narrower search phrases.

The judicial levels that I analyzed include state trial, intermediate, and appellate courts, as well as federal US district and appellate courts. I tracked each case through each judicial level to gain the maximum amount of data. State trial court decisions are inferred from the appellate decisions I analyzed in Lexis, given that in every appellate case, the lower court decision can be inferred from procedural history and, if included, descriptions by the higher court of lower court proceedings. The vast majority of trial court cases are never published in online legal databases or in any easily accessible format, as discussed further in the limitations section, so without using this method, this entire set of data would be unknown.

There are obvious benefits and potentially dubious effects from measuring only state cases that are eventually appealed. The obvious benefits include being able to add a significant number of cases to my data set and explore an additional category of courts that are otherwise unavailable. The potential downside is the perception that appealed cases vary from the general body of cases. Some potential ways they might vary include:

1. **Type of Cases.** Perhaps certain categories of cases are more likely to be appealed.

2. **Differences in Litigants Themselves.** Perhaps religious liberty cases are more likely to be appealed by wealthy individuals, by people of certain religions, in certain geographic regions, and so forth.

3. **Politically Appealing Cases.** Certain cases are funded by advocacy groups or pursued by prosecutors when they are seen as being valuable for furthering personal agendas.

While certain categories of litigation might be appealed more than others, this is not a reason to avoid measuring the state appellate cases. At best, it is irrelevant and does not skew the results. At worst, it skews the results but gives the field a sense of what types of RFRA cases are indeed appealed, as this is not something that the literature currently provides.

As Claborn notes when he made a similar methodological decision, "it is hard to imagine any substantive bent this bias would cause regarding the goals of the study,"[125] and I concur. He further says, "The benefits of 1) increased data, and 2) greater representation of courts of general jurisdiction appear to outweigh the negative aspects of 3) possible demographic bias, or 4) bias toward the more-appealable cases."[126] Given that this is the only way to evaluate state appellate and trial-level decisions in this field of research, I deemed it worth pursuing. However, the percentage breakdowns for trial courts and other courts have been separated out so as to have a data set that is not affected by the trial court decisions.

Search Criteria: Assembling the Data Set

I developed a multilevel search system to select the cases for my data set. All cases are drawn from states that have a legislated RFRA statute.

The first level of search was for the statute's actual citation. However, it is well-known and widely discussed in the literature that there is a lack of standardization for citations in constitutional law and state statutory cases.[127] This renders it impossible to foresee how different courts might cite the same statute. Thus, it was necessary to use a second level of coding that was more generalizable and would capture all cases, regardless of the variation in citation. In fact, through my research I ascertained that a significant number, if not the majority, of cases available on LexisNexis pertaining to state RFRA claims do not use a formal statutory citation at all, opting to call the statute by its long-form name instead. This may have been one reason for Lund's inability to find cases in his article, as I reference earlier.

It may be that trial courts cite the RFRA in its formal statutory citation, and intermediary and courts of last resort simply reference back to the counts explained at length by trial courts. The relevant legal parties in the appeals court would of course have access to these documents anyway. However, the causes are unknown, and accessing these unpublished trial court cases is impossible. Judges may also just be content to state a statute's title without citing it formally, whether out of a desire for simplicity or simply out of ease. At any rate, using broader search terms in a second level of search was necessary to be collectively exhaustive.

The second, broader level of search involved a standardized system of searching for RFRA cases using a series of Boolean operators. Although the search was overbroad, it is better to cast a wide net so no state RFRA cases escape the reach of this project. This overbroad search returned thousands of cases, the vast majority of which—all but the 224 in my eventual data set—referenced the federal RFRA (citation) and not the state RFRA.[128] However, through this second level of coding I found many more cases, cited irregularly and without standardization, than when I searched for the formal statutory citation alone.

The third level of search was the LexisNexis Shepardize tool. With this, I attempted to find every case that cites a case controlled by a state RFRA claim to find cases that implicitly cite a RFRA statute. This third level of coding was unhelpful, given that it was impossible in most cases to ascertain whether the RFRA component was the meaningful controlling precedent of the citing case. This was especially true when a court references a trial court decision that cannot be accessed.

Case Selection and Exclusion Criteria

Two simple rules governed case selection. A case was included in my research if the following conditions were met:

1. The plaintiff stated a claim under a state RFRA statute, or a state RFRA was mentioned by the court's reasoning.

2. One of the legal parties claimed a burden on its free exercise of religion.

I excluded certain types of cases and certain decisions from my data set. The following are examples of cases that failed to meet both of these criteria and were thus excluded:

1. Cases that cited a claim using the RFRA statute but in which no burden of free exercise was claimed. An example of this is when a person cited land use precedent that had been previously brought by a religious claimant.

2. Cases in which no decision regarding the relevant religious claims was reached. An example of this is when an intermediary court vacated or remanded a decision without rendering judgment on a plaintiff's religious claims.

3. Cases in which both sides asserted a RFRA or religious liberty as a claim, making it impossible to code because either side winning would result in a "1" for coding purposes. An example of this would be members of a church suing other members of a church.

Coding

I used two coding levels to determine (1) a claimant's overall success in obtaining religious protection when they make a state RFRA claim and (2) the success of the claimant's specific state RFRA claim.

The first level of coding I employed determines if the court ruled in favor of the religious claimant. Success for a religious claimant is operationalized by a majority of the court deciding in favor of the religious liberty claimant, with a "0" for ruling against the claimant and a "1" for ruling for the claimant. In rare cases, if someone made an affirmative or defensive religious liberty claim and was granted it by the court, I included it in my research.

For this first level of coding, I did not measure whether the religious liberty claimant was successful based on the specific state RFRA claim. This is what the second level measures. By simply measuring a claimant's overall success or failure in obtaining religious liberty (even when the court made its decision based on other claims), I intend to measure the impact that the mere decision to bring a state RFRA had, if any, on a claimant's ability to win religious liberty protections.

Sometimes it is difficult to confidently say whether religious liberty has been granted in a case. Courts will sometimes vacate, remand, or otherwise punt a case without rendering final judgment specifically on a plaintiff's religious claims. In many of these cases, a decision was vacated or remanded, but no subsequent litigation can be found, so it is unclear if a settlement was reached or if litigation simply stopped. In addition, in some cases, claims or motions were granted in part and dismissed in part, and the final court never explicitly ruled on the religious liberty claims. When a final judgment had not been rendered on a religious liberty claim, I coded the last available decision from a previous court, if applicable.[129]

In some instances, whether religious claimants eventually won their cases on their religious liberty claims appears to be an inevitable uncertainty. However, it is often still possible to understand how the trial and intermediary courts ruled and thus to glean an understanding of the protection rates provided by different judicial levels.

Whereas the first level of coding did not factor in whether claimants actually had success because of their state RFRA claim, the second level of coding is specifically meant to determine if a court granted religious liberty protection with a state RFRA as a meaningful factor in its decision.

In many cases, a plaintiff will make a claim under a state's RFRA but will be granted religious liberty protection by the court for a different claim. Common examples of this include success on First Amendment claims, federal RFRA or RLUIPA claims, and discrete state laws protecting the rights of inmates or Native Americans. As long as the claimant brought a state RFRA case to begin with, if they were granted religious liberty protections, they would be considered to have satisfied the requirements for a "1" in the first level of coding. In the second level of coding, the court's decision to keep or dismiss a RFRA claim is significant.

Courts can dismiss a RFRA claim for several reasons, including lack of subject-matter jurisdiction or lack of precedent. As discussed, courts seem to be quite hesitant to touch the RFRA issue at all. For this reason, it is important to distinguish between cases that grant religious liberty protections due to a RFRA claim and those that do so *despite* it.

The second level of coding was operationalized by a court finding that a religious plaintiff has a cognizable RFRA claim. A "0" was assigned for courts that explicitly throw out the RFRA claim, and a "1" assigned for courts that do not explicitly throw out the claim and thus allow the claim to continue. My research considers a case to have a "successful RFRA claim" if the following requirements are met:

1. The religious plaintiff was granted religious liberty protections in the first level of coding.

2. The court did not at any point in the case decline to review the RFRA claim for any reason, including for lack of subject-matter jurisdiction, deference to other courts, lack of litigation or court decisions on the statute, or success of the case on other claims.

3. The RFRA claim was not struck or dismissed from a plaintiff's claims as a result of defendant motions.

Limitations

Researching state jurisprudence faces many obstacles and limitations. The first and most significant limitation in this type of study is that state trial court cases are virtually never published in online legal databases or in any easily accessible format. Short of visiting each and every courthouse in the nation, these cases are impossible to access (and perhaps not even then would one be successful in accessing them). Effectively, this results in an unavoidable lack of knowledge as to the status of RFRA jurisprudence that never reaches the state appellate or federal court systems.

However, given that these cases do not set precedent, reading state appellate and federal court cases is sufficient to understand the precedents that are set and how lower court decisions are being controlled. It is unlikely that a large number of religious claimants are successful at the trial level and escaping detection, given that government defendants would likely appeal due to advantages they enjoy in the appellate court system. In addition, if religious plaintiffs are unsuccessful at the appellate level, this likely causes similar decisions at the lower court levels.

Finally, while certainly imprecise, it is possible to use data on the rate of appeals, affirmances, and reversals to generally infer trends at the state trial court levels. Unfortunately, as Eisenberg and Heise found, comprehensive and "detailed time series on state court appeals from trials data are not available."[130] They did, however, find a 12 percent appeal rate and a 6.8 percent appeal-to-completion rate in a study of state appellate court cases.[131] This and similar studies could be used to infer the number of state cases being litigated at the state trial court level.

Limitations ought not to be considered a barrier to research; rather, they simply frame the way findings are understood. The preliminary opinions and judgments I offer are limited for the reasons set out above, but they serve only as a reminder of our incomplete knowledge. However, if only those works were written that had full certainty of their relevance and validity, not a single word would ever be published. Limitations simply drive the desire to continue excellent research so as to lower the hurdles future authors face.

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Notes

1. The Editorial Board, "Indiana's Law Invites State-Sanctioned Bigotry: Our View," *USA Today*, March 31, 2015, https://www.usatoday.com/story/opinion/2015/03/30/indiana-religious-freedom-law-editorials-debates/70697556/.

2. Michael Barbaro and Erik Eckholm, "Indiana Law Denounced as Invitation to Discriminate Against Gays," *New York Times*, March 27, 2015, https://www.nytimes.com/2015/03/28/us/politics/indiana-law-denounced-as-invitation-to-discriminate-against-gays.html.

3. Scott Neuman, "Indiana Governor: Lawmakers to 'Clarify' Anti-Gay Law," NPR, March 29, 2015, http://www.npr.org/sections/thetwo-way/2015/03/29/396131254/indiana-governor-lawmakers-to-clarify-anti-gay-law.

4. The Editorial Board, "In Indiana, Using Religion as a Cover for Bigotry," *New York Times*, March 31, 2015, https://www.nytimes.com/2015/03/31/opinion/in-indiana-using-religion-as-a-cover-for-bigotry.html.

5. Among other things, the Indiana Religious Freedom Restoration Act (SB101 Indiana 2015) appeared to allow private suits under the act. Under the federal RFRA (and state RFRAs), the lawsuit may be brought against the government only for an RFRA claim. In addition, the act granted status to corporations and businesses, which no court has interpreted to be allowed in any other type of RFRA.

6. Ryan Teague Beckwith, "Read President Trump's Remarks at the National Prayer Breakfast," *Time*, February 2, 2017, http://time.com/4658012/donald-trump-national-prayer-breakfast-transcript/.

7. National Conference of State Legislatures, "2015 State Religious Freedom Restoration Legislation," September 3, 2015, http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx.

8. 42 USC § 2000(bb) (1993).

9. For the sake of clarity, all references to the federal RFRA will be so denoted, whereas other references to an RFRA should refer to the state version. Of course, attention to surrounding context should guide interpretation.

10. Employment Division, *Department of Human Resources of Oregon v. Smith*, 494 US 872 (1990).

11. For continued discussions, see Christopher C. Lund, "A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence," *Harvard Journal of Law and Public Policy* 26, no. 2 (Spring 2003): 627; and Thomas C. Berg, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States," *Emory International Law Review* 19 (2005): 1277, 1320.

12. See Berg, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States," 1277, 1296; Ariana S. Cooper, "Free Exercise Claims in Custody Battles: Is Heightened Scrutiny Required Post-Smith?," *Columbia Law Review* 108 (2008): 719; and *Thomas v. Review Board of the Indiana Employment Security Division*, 450 US 718 (1981).

13. *Sherbert v. Verner*, 374 US 398 (1963).

14. *Wisconsin v. Yoder*, 406 US 205 (1972).

15. See Lund, "A Matter of Constitutional Luck"; and Berg, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States."

16. *Smith*, 494 US at 884–85.

17. *Smith*, 494 US at 879.

18. James E. Ryan, "Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment," *Virginia Law Review* 78, no. 6 (1992): 1407. See also Lund, "A Matter of Constitutional Luck"; and Berg, "The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States."

19. *Los Angeles Times*, "The Necessity of Religion: High Court Says Religious Freedom Is a Luxury—Wrong," April 19, 1990, http://articles.latimes.com/1990-04-19/local/me-1719_1_religious-freedom.

20. Christopher C. Lund, "Religious Liberty After Gonzales: A Look at State RFRAs," *South Dakota Law Review* 55 (2010): 466.

21. Douglas Laycock, "Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing

the Liberty," *Harvard Law Review* 118, no. 1 (November 2004): 217.

22. Ibid., 224.

23. Ibid.

24. *City of Boerne v. Flores*, 521 US 507 (1997).

25. Sandra D. O'Connor, "Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge," *William & Mary Law Review* 22 (1980): 801.

26. Lund, "Religious Liberty After Gonzales," 466.

27. Craig Anthony Arnold, "Religious Freedom as a Civil Rights Struggle," Nexus 2 (1997): 152.

28. Ira C. Lupu, "The Failure of RFRA," *University of Arkansas, Little Rock Law Journal* 20 (1998): 589.

29. Ibid., 590–91.

30. Ibid., 591.

31. Ibid.

32. James C. Brent, "An Agent and Two Principals: US Court of Appeals Responses to Employment Division, Department of Human Resources v. Smith and the Religious Freedom Restoration Act," *American Politics Quarterly* 27, no. 2 (1999): 250.

33. Ibid.

34. Ibid.

35. Ibid., 250–51.

36. Ibid., 250.

37. Ibid., 258.

38. Ibid., 259.

39. Amy Adamczyk, John Wybraniec, and Roger Finke, "Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA," *Journal of Church and State* 46, no. 2 (2004): 248.

40. Ibid.

41. David Claborn, "Can the States Increase Religious Freedom If They Try? Judicial and Legislative Effects on Religious Actor Success in the State Courts," University of Massachusetts Amherst, 2008.

42. Ibid., 6.

43. Ibid.

44. Ibid.

45. Ibid., 49.

46. Ibid., 74.

47. Ibid., 9.

48. David Claborn, "Effects of Judicial and Legislative Attempts to Increase Religious Freedom in U.S. State Courts," *Journal of Church and State* 53, no. 4 (2011): 631.

49. Ibid.

50. Ibid., 634.

51. Robert R. Martin, "Faith in the Balance? An Evaluation of the Outcomes of Religious Free Exercise Claims in the State Appellate Courts, 1997-2011," Pennsylvania State University, 2013, 3.

52. Ibid., 52.

53. Ibid., 53.

54. Ibid., 77.

55. Ibid., 78.

56. Ibid., 144.

57. Lund, "Religious Liberty After Gonzales."

58. Ibid.

59. Ibid., 479–80.

60. Lund considers the Utah statute to be a RFRA for the purposes of his study, although it is more accurately described as a state version of an RLUIPA law, as it can only be applied to land-use disputes.

61. Lund, "Religious Liberty After Gonzales," 480.

62. Ibid., 482.

63. Ibid.

64. Ibid., 482.

65. N.Y. Const. art. I, § 3; Ariz. Const. art. II, § 12; Cal. Const. art. I, § 4; Colo. Const. art. II, § 4; Conn. Const. art. I, § 3; Fla. Const. art. I, § 3; Ga. Const. art. I, § 1, para. IV; Idaho Const. art. I, § 4; Ill. Const. art. I, § 3; Md. Const., Declaration of Rights, art. 36; Minn. Const. art. I, § 16; Miss. Const. art. III, § 18; Mo. Const. art. I, § 5; Nev. Const. art. I, § 4; N.D. Const. art. I, § 3; S.D. Const. art. VI, § 3; Wash. Const. art. I, § 11; and Wyo. Const. art. I. § 18.

66. Arkansas, 2015 SB 975 (as enacted Apr. 2, 2015); Ariz. Rev. Stat. § 41-1493 (2015); Conn. Gen. Stat. Ann. § 52-571b (West 2015); Fla. Stat. Ann. §§ 761.01-761.05 (2014); Idaho Code Ann. §§ 73-401 to 73-404 (West 2014); 775 Ill. Comp. Stat. Ann. 35 (West 2014); Indiana, 2015 SB 101 (as enacted Mar. 26, 2015); Kan. Stat. Ann. §§ 60-5301 to 60-5305 (West 2014); Ky. Rev. Stat. Ann. § 446.350 (West 2014); La. Rev. Stat. Ann. §§ 5231-5242 (2014); Miss. Code Ann. § 1-3-39 (West 2014); Mo. Rev. Stat. § 1.302 (2014); N.M. Stat. Ann. §§ 28-22-1 to 28-22-5 (2014); Okla. Stat. tit. 51, §§ 251-258 (2014); 71 Pa. Stat. § 2403 (2014); R.I. Gen. Laws Ann. §§ 42-80.1-1 to 42-80.1-4 (2014); S.C. Code Ann. §§ 1-32-10 to 1-32-60 (2014); Tenn. Code Ann. § 4-1-407 (2014); Tex. Civ. Prac. & Remedies Code §§ 110.001-110.012 (2014); and Va. Code Ann. §§ 57-1 to 57-2.1 (2014). In addition, Utah has a state version of an RLUIPA (Utah Code Ann. §§ 63L-5-101 to -403 (2008), as it applies only to issues of land use.

67. National Conference of State Legislatures, "State RFRA Statutes," October 15, 2015, http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

68. James A. Hanson, "Missouri's Religious Freedom Restoration Act: A New Approach to the Cause of Conscience," *Missouri Law Review* 69, no. 3 (Summer 2004): 896, http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=3592&context=mlr.

69. *Combs v. Homer-Center School District*, 2008 US App. Lexis 17835 (2008); *Phelps-Roper v. City of St. Charles*, 2011 US Dist. Lexis 18159 (2011); and *New Life Evangelistic Center Inc. v. City of St. Louis*, 2015 US Dist. Lexis 145342 (2015).

70. The state trial courts screen out malicious and frivolous cases; only those cases that are likely to not be frivolous are accepted and ruled on by federal courts.

71. There are several cases in which the ultimate disposition or final ruling is unclear. For these cases, it is not yet possible to see the correlation between the state RFRA claim and the final decision.

72. Lee Boothby and Nicholas P. Miller, "Prisoner Claims for Religious Freedom and State RFRAs," *University of California, Davis Law Review* 32, no. 3 (1999): 573–74, 604.

73. An insignificant number of cases could have been coded as either land use/zoning or school/education, and I deemed these cases to be more relevant to the first category than the latter.

74. Louisiana has one case that references its RFRA in passing, but the RFRA does not seem to be particularly controlling in that case's reasoning. See *Mayeux v. Charlet*, 2016 La. Lexis 2144 (La. 2016).

75. Idaho is the exception to this, with six findable cases litigated under its RFRA.

76. Lund, "Religious Liberty After Gonzales."

77. Claborn, "Can the States Increase Religious Freedom?," 49.

78. Gregory C. Sisk, "How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases," *University of Colorado Law Review* 76 (2005): 1050.

79. Adamczyk, Wybraniec, and Finke, "Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA," 248.

80. Lupu, "The Failure of RFRA," 592–94.

81. Ibid., 593.

82. Kevin M. Clermont and Theodore Eisenberg, "Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments," *University of Illinois Law Review* (2002): 947.

83. Ibid., 953.

84. Ibid., 951.

85. Ibid.

86. Ibid., 958.

87. Ibid.

88. Theodore Eisenberg and Michael Heise, "Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal," *Journal of Legal Studies* 38, no. 1 (2009): 121.

89. Donald R. Songer and Reginald S. Sheehan, "Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals," *American Journal of Political Science* 36, no. 1 (1992): 241.

90. Ibid., 242.

91. Ibid.

92. Ibid., 251.

93. Eisenberg and Heise, "Plaintiphobia in State Courts?," 123.

94. Ibid.

95. Staci L. Beavers and Craig F. Emmert, "Explaining State High-Courts' Selective Use of State Constitutions," *Publius* 30, no. 3 (2000): 1.

96. Ibid., 15.

97. Barry Friedman, "Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts," *Columbia Law Review* 104, no. 5 (2004): 1237.

98. Ann Althouse, "How to Build a Separate Sphere: Federal Courts and State Power," *Harvard Law Review* 100, no. 7 (1987): 1522.

99. *Konikov v. Orange County*, Fla, 410 F.3d 1317 (11th Circuit). See the Editorial Board, "Indiana's Law Invites State-Sanctioned Bigotry."

100. *Midrash Sephardi Inc. v. Town of Surfside*, 2004 US App. Lexis 7706 (2004). See the Editorial Board, "Indiana's Law Invites State-Sanctioned Bigotry."

101. *Nichol v. Arin Intermediate Unit*, 2003 US Dist. Lexis 10810 (2003). See the Editorial Board, "Indiana's Law Invites State-Sanctioned Bigotry."

102. For a thorough discussion of the literature of this topic, see Robert F. Williams, "State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping," *William & Mary Law Review* 46, no. 4 (2005): 1500, at endnote 2.

103. Beavers and Emmert, "Explaining State High-Courts' Selective Use of State Constitutions," 2.

104. Ibid.

105. Ibid., 3.

106. William J. Brennan Jr., "State Constitutions and the Protection of Individual Rights," *Harvard Law Review* (1977): 491.

107. Ibid., 498.

108. Ibid., 503.

109. James A. Gardner, "The Failed Discourse of State Constitutionalism," *Michigan Law Review* 90, no. 4 (1992): 804.

110. Ibid., 771–72.

111. Ibid., 772. For a fuller discussion on New Federalism and the ways in which they criticized state constitutional decision-making practices, see ibid., 772 at endnotes 29–31.

112. Ibid., 774.

113. Ibid.

114. Gardner, "The Failed Discourse of State Constitutionalism," 805.

115. Beavers and Emmert, "Explaining State High-Courts," 3.

116. O'Connor, "Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge," 814–15.

117. Lund, "Religious Liberty After Gonzales," 482.

118. Amber Phillips, "These 3 Maps Show Just How Dominant Republicans Are in America After Tuesday," *Washington Post*,

November 12, 2016, https://www.washingtonpost.com/news/the-fix/wp/2016/11/12/these-3-maps-show-just-how-dominant-republicans-are-in-america-after-tuesday/.

119. Michael Lipka and Benjamin Wormald, "How Religious Is Your State?," Pew Research Center, February 29, 2016.

120. This number is excluding state trial court data.

121. Lund, "Religious Liberty After Gonzales," 467.

122. Martin, "Faith in the Balance?," 146.

123. Brennan, "State Constitutions and the Protection of Individual Rights," 491.

124. For example: "'Free exercise,' 'religious exercise,' 'exercise of religion,' 'religious freedom,' 'rluipa,' 'religious land use,' 'rfra,' 'freedom restoration,' 'religious right,' 'freedom of religion,' 'religion clause,' 'ministerial exemption,' 'ministerial exception,' 'ecclesiastical rule,' '(exempt* & religio*),' '(privilege* & clergy*),' '(exercis* near5 religion).'" See Martin, "Faith in the Balance?," 52.

125. Claborn, "Can the States Increase Religious Freedom?," 29.

126. Ibid.

127. Ibid., 23.

128. The secondary level of coding used Boolean operators (a series of "and/or" phrases) connecting the name of the state with the name of the specific statute in that state, along with the desired keywords. In Arkansas, for example, the search was: ("Arkansas" and "Religious Freedom Restoration Act"), ("Arkansas Religious Freedom Restoration Act"), ("Arkansas" and "RFRA"), or ("Arkansas" and "ARFRA").

129. As discussed earlier, few trial court decisions are ever overturned at the appellate court level. This gives credence to the idea that many cases in which the ultimate disposition is unclear are likely to simply affirm the lower court level. Thus, not including unclear decisions probably does not leave out a large number of cases that were likely to be overturned.

130. Eisenberg and Heise, "Plaintiphobia in State Courts?," 131.

131. Ibid.