<AT>Methodological Appendix. Responsible Religious Freedom: Factual Scrutiny in Free Exercise Doctrine</AT>

<AU>Brady Earley</AU>

<AF>Empirical Research Fellow, Brigham Young University, USA</AF>

<AU EMAIL>bearley@uchicago.edu/AU EMAIL>

This appendix provides a detailed summary of case selection, coding, and analysis for the empirical results in “Responsible Religious Freedom: Factual Scrutiny in Free Exercise Doctrine,” published in volume 39, issue 3 (2024) of the *Journal of Law and Religion*. Any questions about the method for compiling and analyzing the database can be emailed to [bearley@uchicago.edu](mailto:bearley@uchicago.edu).

<H1>Case Selection</H1>

Cases were selected using various searches in Westlaw Precision. First, the following filters were applied to all searches conducted: (1) jurisdiction was limited to state court cases; (2) time period was limited to all cases between May 15, 1972, and December 31, 2022; and (3) type of opinion was limited to reported opinions. For additional justifications for each of these filters, please refer to the section of the article headed “Quantitative Evidence for Factual Scrutiny.”

After limiting searches to the above parameters, the following search query was used: (*religious freedom*, *free exercise*) *% establishment clause*. After running this query, other iterations included the following alternate phrasings: *freedom of religion*, *religious exercise*, and *religious liberty*. After running these alternative queries, each list of cases was downloaded and exported as a CSV. Using the case name, court, citation, and date, duplicates were then eliminated. This brought the list of cases to be coded to 3,311.

As an additional check, I also reviewed cases that included the Establishment Clause to ensure cases that may have raised an establishment and free exercise issue were not excluded. This included an additional 914 cases. Of these, thirty-five also dealt with a free exercise issue on the merits and were thus added to the final total of cases.

<H1>Case Coding</H1>

<H2>Research Assistant Training </H2>

After compiling the universe of cases, the next step was to identify which cases decided a free exercise issue on the merits. To do this, three law students were sent a spreadsheet of federal cases using the same search parameters described above. They were asked to do five hundred federal cases that could operate as a training set before coding the state cases and allow them to ask questions and get familiar with the research task. This list was randomized to ensure students were exposed to a variety of case types across time and place. The instructional video included the following four steps to coding:

1. Open Westlaw and ensure you are looking at the appropriate type of cases in the search filter (that is, federal or state).
2. Using the case name, court name, date, and citation, search for the case in Westlaw. If you cannot identify the case, flag it for the author.
3. After verifying they had found the correct case, identify whether the case involved a free exercise issue decided on the merits. For example, if a case discussed free exercise of religion and free speech claims, but the court resolved the case on the issue of free speech, code it as “No free exercise issue” and move to the next case.
4. If you identify a case where a free exercise issue was decided, then code it the case on four different variables:
   1. Religion of claimant. Name the religion based on a broad categorization or as stated in the text. For example, Protestant, Catholic, Muslim, Hindu, Buddhist, agnostic/atheist, Jewish, Christian (general), or unspecified.[[1]](#footnote-1)
   2. Religious belief. Use this category if no religious affiliation was specified in the case, but a particular religious belief was.
   3. Test used. Mark 1 when the test used scrutinized the government justification for an action that burdened religious exercise. Use the following list of potential key words that would suggest this type of test was used: *balancing*, *strict scrutiny*, *least restrictive means*, *compelling state interest*, *heightened scrutiny*, *substantial burden*, *targeting*, Yoder, Sherbert. If the test used gave deference to the governmental interest and asserted justification for burdening religious exercise, assigned a 0. Some key words for this category include *neutral* and *generally applicable law*, *Employment Division v. Smith*, *deference to government*, and *incidental burden*. If the opinion focused on why the religious belief was insincere, mark this variable as NA.
   4. Outcome. Mark 1, denoting the outcome as success, if any part of the religious claimant’s claim in the case succeeded. For example, if the government had two compelling interests found to be narrowly tailored, but the court found that a final interest was not narrowly tailored and therefore unconstitutionally burdened claimant’s religious exercise, this would be marked as a 1 on the outcome. Assign a 0 to cases where all of the religious claimant’s claims were unsuccessful.
   5. Notes. In this final column, flag any borderline or otherwise irregular cases that the author could assist in coding.

As they coded through each case, coders were encouraged to ask questions on the federal sample of five hundred cases.

<H2>Validation Checks</H2>

I independently coded all 3,311 state cases and then sent a randomized sample of 499 cases to the law student coders from the state case law dataset. After completing the random sample of five hundred federal cases, the three law student coders were then asked to complete the state sample of 499 cases that could be used to compare with my coding. Because students had already worked through the federal dataset, they were told not to ask me any additional questions on the state dataset so coding could be done independently by the student coders and the author.

Once student coders completed the state sample, their categories were compared to my coding. Across the 499 cases, there was agreement in 397 between author and law student coding. This is just under 80 percent agreement. When disagreements did arise, I checked my coding against that of the students and discussed the case with the student as needed. Generally, disagreements arose over what test was applied. For example, some cases applied both deference and scrutiny in different parts of the case. In these instances, the case was marked as scrutiny of government even though deference may have also been present.

1. Because some coders were unfamiliar with several Protestant denominations, I also provided a link to resource within a Pew Research Center report that classifies sub-traditions within Protestantism. *Appendix B: Classification of Protestant Denominations*, *in* America’s Changing Religious Landscape, Pew Research Center (May 12, 2015), https://www.pewresearch.org/religion/2015/05/12/appendix-b-classification-of-protestant-denominations/. [↑](#footnote-ref-1)