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Religious Liberty in Prisons under the Religious Land Use and Institutionalized Persons Act following *Holt v Hobbs*: An Empirical Analysis

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Abstract: Religion in the United States remains a consistent source of conflict not only because of the breadth and depth of personal religious commitment, but also because of guarantees from the United States Constitution. The First Amendment protects religious Free Exercise but also constrains federal, state, and local governments from establishing official government religions, endorsing religions or religion itself. Despite the risk of potential conflicts with the constitution's text, Congress has supported laws that expand religious liberty. One such example is the Religious Land Use and Institutionalized Persons Act (2000), which significantly enhanced prisoners' right to religious exercise above the minimum provided by the First Amendment. In the 2015 case of *Holt v. Hobbs*, the Supreme Court ruled in favor of a Muslim prisoner who had been denied his request for religious accommodations under RLUIPA because the prison failed to satisfy the act's strict scrutiny standard before it denied accommodations to a prisoner to practice his faith. Via an analysis of case law since *Holt v. Hobbs* was decided in January 2015 until March 2018, we investigate the extent to which *Holt* has affected judicial voting in RLUIPA cases and how such voting may have been influenced by judges' ideological dispositions.

Keywords: religious rights; prisoners; prisoner accommodations; religious land use and institutionalized persons act; United States supreme court

1. Introduction

It is no secret that the exercise of religious liberty can be divisive.[1] Religion remains a perpetual source of conflict not only because of the breadth and depth of people's religious commitments, but also because of the text of the United States Constitution. The First Amendment protects religious Free Exercise[2] but also constrains federal, state and local governments from establishing official government

[1] (Goodrich and Busick 2018, n. 3) (Collecting articles concerned with the threat caused by federal statutory enactments expanding protection for religious adherents).

[2] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (city's ordinance, prohibiting ritual animal sacrifices, violated the First Amendment's Free Exercise Clause failed to survive the rigors of strict scrutiny; it singled out activities of Santeria faith and suppressed more religious conduct than was necessary to achieve their stated ends); *but see*, O' Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (so long as the policy is reasonably related to legitimate penological objectives, the Free Exercise Clause does not require prisons to show there are no reasonable alternatives that would accomplish its security needs before it infringes on an inmate's free exercise of religion).

religions, endorsing religions or indeed religion itself.[3] Despite the risk of potential conflicts with the constitution's text, Congress has supported laws that expand religious liberty.[4]

The Religious Land Use and Institutionalized Persons Act ("RLUIPA" or the "Act"), passed by Congress in 2000,[5] is a paradigmatic example of such legislative activity. The law significantly enhanced prisoners' right to religious exercise above the minimum provided by the First Amendment.[6] Despite a growing body of case law interpreting the Act and commentary on its meaning,[7] empirical research into judicial decision making and RLUIPA have been sparse and rudimentary.[8]

In 2015 in *Holt v. Hobbs*[9] the Supreme Court ruled in favor of a Muslim prisoner who had been denied his request for religious accommodations under RLUIPA. This was because the prison failed to satisfy RLUIPA's strict scrutiny standard before it denied accommodations to a prisoner to practice his faith.[10] *Holt's* support for the prisoner's RLUIPA claim was striking, especially when *Holt* is compared to the only other Supreme Court case interpreting RLUIPA in prison settings, *Cutter v. Wilkinson*.[11] There, the *Cutter* Court spoke equivocally about RLUIPA rights. On the one hand *Cutter* reiterated RLUIPA's strict scrutiny standards but on the other hand simultaneously suggested that a substantial degree of deference is owed to prison officials in applying the strict scrutiny standard to justify burdens on religious exercise.

Oddly, the *Holt* decision does not even mention *Cutter*. This might suggest the *Holt* Court recognized the effect its deference language in *Cutter* might have in defeating RLUIPA's strict scrutiny standard. Could it be that *Holt* sent a message of retreat on the deference front? If so, have lower courts received the message and acted upon it as they are obligated to do? We raise this question because sometimes federal judges deviate from what precedent seems to dictate. Indeed, judges frequently vote ideologically when afforded the opportunity to do so.[12]

These considerations raise questions about *Holt* in the context of judges' tendency to vote ideologically.[13] Accordingly, in this study we investigate whether *Holt* has affected judicial voting in RLUIPA cases involving prisoners' requests for religious accommodations and how such voting may have been influenced by judges' ideological dispositions. We deploy a nonparametric matching technique using a dichotomous dependent measure, pro-prisoner plaintiff or pro-defendant, as our dependent measure to assist us in answering these and related questions. Finally, we attempt to draw

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3 *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962) (holding that a state statute authorizing a short voluntary prayer for recitation at the start of the school day violates the establishment of religious clause of the First Amendment); Lee v. Weisman, 505 U.S. 577 (1992) (including clergy who offer prayers as part of an official public-school graduation ceremony is forbidden by the Establishment Clause); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (vesting in the governing bodies of churches and schools the power to prevent issuance of liquor licenses for premises located near the church or school violates the Establishment Clause of the First Amendment); *but see*, Cutter v. Wilkinson, 544 U.S. 709 (2005) (Section 3 of RLUIPA, on its face, qualifies as a permissible accommodation to religious exercise that is not barred by the Establishment Clause); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints* v. *Amos*, 483 U. S. 327 (1987) (upholding against an Establishment Clause challenge a provision exempting religious organizations from the prohibition against religion-based employment discrimination in Title VII of the Civil Rights Act of 1964).

4 *See*, e.g., The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (16 November 1993), codified at 42 U.S.C. § 2000bb through 2000bb 4. This was introduced by Congressman Chuck Schumer (D-NY) on 11 March 1993. A unanimous U.S. House and a nearly unanimous—three senators voted against passage—passed the bill, and President signed it into law.

5 42 U.S.C. §§ 2000cc to cc-5 (2012).

6 *See*, e.g., Smith v. Perlman, 658 Fed Appx 606 (2nd Cir. 2016); Holland v. Goord, 758 F.3d 215, 224 (2nd Cir. 2014) (observing that RLUIPA stands in contrast to the Free Exercise Clause's less demanding rational basis test); Madison v. Ritter, 411 F.Supp.2d 645, aff'd in part, and reversed in part, 474 F.3d 118 (4th Cir. Year) (observing that RLUIPA provides more protection than the First Amendment) and O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (quoting Turner v. Safley, 482 U.S. 78, 79 (1987)).

7 *See*, e.g., Case Comment, (Goce Beneficente 2015; Shapiro 2016a, 2016b).

8 *See, e.g.*, (Bollman 2018) (applying descriptive statistics to study among other things the effects of *Holt v. Hobbs*, U.S., 135 S.Ct. 853 (2015) on case outcomes at the U.S. District Courts and U.S. Courts of Appeals).

9 135 S.Ct. 853 (2015).

10 *Id.*

11 544 U.S. 709, 712–13 (2005).

12 (Sisk and Heise 2012) (observing strong ideological voting in Establishment Clause cases).

13 *Id.*

conclusions from the results to learn whether Congress has achieved its goal in enacting RLUIPA of affording institutionalized persons' broad protection for their genuinely felt religious commitments.

2. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)

Section 3 of RLUIPA states:

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, ... even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[14]

RLUIPA's protections are enforceable against states and their subdivisions and persons acting under color of state law.[15] RLUIPA does not protect the interests of federal prisoners.[16] RLUIPA provides for a private cause of action for violations of its provisions.[17] However, RLUIPA does not create a cause of action for monetary damages against state entities,[18] and states have not consented to waive their sovereign immunity with respect to official capacity monetary damage claims under RLUIPA.[19] Moreover, RLUIPA does not impose on state employees individual liability for violations of the Act.[20] This is because RLUIPA was adopted pursuant to Congress's Spending Clause powers. As such personal liability may only be imposed on those parties receiving the funds.[21] RLUIPA provides an alternative ground for invoking judicial intervention through the Commerce Clause. That provision kicks in where the Act's substantial burden requirement affects "commerce with foreign nations, among the several states, or with Indian tribes."[22]

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[14] 42 U.S.C. § 2000cc–1(a). *See*, Cutter v. Wilkinson, 544 U.S. 709 (2005) (describing test). "[A] prison cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." Shakur v. Schriro, 514 F.3d 878, 890 (9th Cir. 2008) (quoting Warsoldier v. Woodford, 418 F.3d 989, 999 (9th Cir. 2005).

[15] 42 U.S.C. § 2000cc–5(4). It states government under the Act "(A) means (i) a State, county, municipality, or other governmental entity created under the authority of a State; (ii) any branch, department, agency, instrumentality, or official of any entity listed in clause (i); and any other person acting under color of State law . . . " *See, e.g.*, Wood v. Yordy, 753 F.3d 899, 902 (9th Cir. 2014) (dismissing action against officials in their individual capacities, since RLUIPA does not authorize suits against persons other than in an official capacity).

[16] 42 U.S.C. § 2000cc–5(4) (limiting reach of statute to state entities); Daley v. Lappin, 2011 U.S. Dist. LEXIS 100624 (M.D. Pa 7 September 2011) (holding that a federal prisoner is ineligible for relief under RLUIPA), *vacated and remanded on other grounds*, 555 Fed. Appx. 161 (2014).

[17] 42 U.S.C. § 2000cc–2(a) ("A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government").

[18] *See, e.g.*, Sossamon v. Texas, 131 S.Ct. 1651 (2011); Sharp v. Johnson, 669 F.3d 144, 155 (3d Cir. 2012); Rendelman v. Rouse, 569 F.3d 182, 189 n. 2 (4th Cir. 2009); Wright v. Lassiter, 633 Fed Appx 150 (4th Cir. 2016) (*per curium*) (unpublished disposition).

[19] Begnoche v. DeRose, 2017 U.S. App. LEXIS 1386*7, note 6 (3d Cir. 2017) citing Sharp v. Johnson, 669 F.3d 144, 155 (3d Cir. 2012) (citing Sossamon v. Texas, 563 U.S. 277, 131 S.Ct. 1651, 1655, 1660 (2011).

[20] Davilia v. Marshall, 2016 WL 2941929*2 (11th Cir. 2016); Begnoche v. DeRose, 2017 U.S. App. LEXIS 1386*7, note 6 (3d Cir. 2017); Holland v. Goord, 758 F.3d 215, 224 (2nd Cir. 2014) (RLUIPA does not authorize claims for monetary damages against state officers in either their individual or official capacities) (citing Washington v. Gonyea, 731 F.3d 143, 145-46 (2nd Cir. 2013); Stewart v. Beach, 701 F.3d 1322, page (10th Cir. 2012); Nelson v. Miller, 570 F.3d 868, 886–89 (7th Cir.2009); Rendelman v. Rouse, 569 F.3d 182, 188–89 (4th Cir.2009); Sossamon v. Lone Star State of Tex., 560 F.3d 316, 328–29 (5th Cir.2009), aff'd on other grounds by 131 S.Ct. 1651 (2011) Smith v. Allen, 502 F.3d 1255, 1271–75 (11th Cir.2007), abrogated on other grounds by Sossamon, 131 S.Ct. 1651.

[21] See, e.g., *Smith*, 502 F.3d at 1272–75 ("[I]t is clear that the 'contracting party' in the RLUIPA context is the state prison institution that receives federal funds; put another way, these institutions are the 'grant recipients' that agree to be amenable to suit as a condition to receiving funds—but their individual employees are not 'recipients' of federal funding."). Although the Spending Clause basis for suits under RLUIPA is clear, whether there is as well a Commence Clause basis for such claims is unclear. See, Haight v. Thompson, 763 F.3d 554 (6th Cir. 2014) (Cole, concurring).

[22] 42 U.S.C. §§ 2000cc–1(b), 2000cc–2(a). See, e.g., Nelson v. Miller, 570 F.3d 868, 886 (7th Cir. 2009); Rendelman v. Rouse, 569 F.3d 182, 189 (4th Cir. 2009); Washington v. Gonyea, 731 F.3d 143, 146 (2nd Cir. 2013) (commenting without deciding that an adequate pleading under RLUIPA commence clause provision requires stating fact showing how the restriction on religious rights had an effect on interstate or foreign commerce).

Plaintiffs may not obtain declaratory or injunctive relief under RLUIPA where an order can have no effect on the defendant's behavior toward him.[23] Would-be plaintiffs must exhaust available administrative remedies before seeking relief under RLUIPA.[24] Since failure to exhaust is an affirmative defense that must be pleaded, it can be waived.[25]

With RLUIPA came a burden-shifting framework for claim resolution.[26] The RLUIPA plaintiff's initial burden is two-fold: he or she must show that (1) the relevant religious exercise is "grounded in a sincerely held religious belief" and (2) the government's action or policy "substantially burden[s] that exercise" by, for example, forcing the plaintiff "to 'engage in conduct that seriously violates [his or her] religious beliefs.'"[27] Under RLUIPA there is no requirement that plaintiffs' sincerely held religious belief be fundamental to, or a central tenet of, their religion.[28] However, an adherent's mere preference for a practice does not establish a substantial burden for the religious exercise.[29] Moreover, challenges to the sincerity of religious convictions by motions to dismiss the complaint may not be made until later phases of the litigation;[30] this is because plaintiff's beliefs are largely a credibility determination and sincerity can rarely be determined, even on a motion for summary judgement.[31] Finally, RLUIPA establishes a subjective test of whether religious beliefs are sincerely felt; thus, they need not be consistent with majority views of the tenets of a particular faith or even if some may find the beliefs illogical.[32] If the plaintiff carries this burden, the government bears the burden of proof to

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[23] See, Banks v. Secretary, Pennsylvania Dep't of Corrections, 601 Fed Appx. 101, **5) (3d Cir. 2015) (denying prison-specific injunctive and declaratory relief, holding that claims were moot on transfer because injunctive and declaratory relief for injury at institution where he no longer resided could have no effect on defendant's behavior toward him).

[24] The Prison Litigation Reform Act (PLRA) provides that "[n]o action shall be brought with respect to prison conditions . . . by a prisoner confined in any . . . prison . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The purpose of the exhaustion requirement is twofold. See, *Woodford v Ngo*, 548 U.S. 81, 89 (2006). First, it "protects administrative agency authority" by allowing the agency to "correct its own mistakes" rather than being immediately "haled into federal court." *Id.* (internal citations omitted). Second, it promotes efficiency insofar as administrative review processes are generally faster and more economical than is litigation. *Id.* Even where the parties subsequently seek judicial remedies, the administrative-review process often produces a useful record to ease and expedite further proceedings. *Id.* See also, *McCarthy v. Madigan*, 503 U.S. 140, 150 (1992).

[25] See, Daley v. Lappin, 555 Fed Appx 161, 167 (3 d Cir. 2014) (defendant's failure to assert exhaustion defense in district court cannot be raised for the first time on appeal).

[26] 42 U.S.C. § 2000cc–2(b); *Chance v. Tex. Dep't of Criminal Justice*, 730 F.3d 404, 410 (5th Cir.2013).

[27] *Holt v. Hobbs*, 135 S. Ct. 853, 862 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, U.S., 134 S.Ct. 2751, 2775, 189 L.Ed.2d 675 (2014)). See, e.g., Washington v. Klemm, 497 F.3d 272, 28 (3d Cir. 2007) (for purposes of RLUIPA, substantial burden exists where: a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; or , the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs); Smith v. Governor for the State of Alabama, 562 Fed. Appx. 806 (11th Cir. 2014) (granting summary judgment to defendant on ground that plaintiff failed RLUIPA's substantial burden test which "requires at a minimum that a RLUIPA plaintiff demonstrate that government's denial of a particular religious item or observance was more than an inconvenience to one's religious practice.").

[28] See, e.g., Holt v. Hobbs, 135 S.Ct. 853, 860 (2015); Williams v. Wilkinson, 645 Fed. Appx. 692, 216 U.S. App. LEXIS 6877 (10th Cir. 2016) (applying standard to prisoner's request to attend communal services and be provided kosher food despite his Muslim affiliation).

[29] *See*, e.g., United States v. Quaintance, 608 F.3d 717, 720–23 (10th Cir. 2010) (RLUIPA requires courts to protect against only burdens on sincere religious exercises, not personal offenses); Mutawakkil v. Huibregtse, 735 F.3d 524, 527 (7th Cir. 2013) ("[Plaintiff] says that it would be preferable (from his perspective) if he were allowed to use just his spiritual name . . . but preference or convenience is not the standard."); Jahad Ali v. Wingert, 569 Fed. Appx 562 (10th Cir. 2014) (no burden where prison officials used both committed and adopted religious name).

[30] *See*, e.g., Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 ("[a]lthough RLUIPA bars inquiry into whether a particular belief or practice is central to a prisoner's religion, the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity."); Abdulhaseeb v. Calbone, 600 F.3d 1301, 1318 (10th Cir. 2010) (it is not until the summary-judgment phase that "the burden shifts to the defendants to show the substantial burden results from a compelling governmental interest and that the government has employed the least restrictive means of accomplishing its interest."); Spratt v. R.I. Dep't of Corrections, 482 F.3d 33, 38 (1st Cir. 2007) (citing 42 U.S.C. § 2000cc-2(b)).

[31] *See*, e.g., Kay v. Bemis, 500 F.3d 1214, 1219 (10th Cir. 2007).

[32] *See*, Yellowbear v. Lampert, 741 F.3d 48, 55 (10th Cir. 2014) (citing Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981).

show that its action or policy (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that interest.[33]

The Supreme Court has emphasized that "[s]everal provisions of RLUIPA underscore its expansive protection for religious liberty."[34] Courts must construe RLUIPA "in favor of a broad protection of religious exercise, to the maximum extent permitted by . . . [RLUIPA's] . . . terms and the Constitution."[35] In addition, RLUIPA "may in some circumstances require [a][g] overnment to expend additional funds to accommodate [inmates'] religious beliefs."[36]

RLUIPA defines "'religious exercise' capaciously to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'"[37] Although RLUIPA subjects governmental action to exacting scrutiny, "it also affords prison officials ample ability to maintain security."[38] When applying RLUIPA, "courts should not blind themselves to the fact that the analysis is conducted in the prison setting."[39] In particular, they must recognize that "[p]rison officials are experts in running prisons and evaluating the likely effects of altering prison rules."[40] However, judicial deference is not unyielding; courts are not "bound to defer" to a prison system's assertions.[41] "[I]t is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress."[42] Thus, while courts "should respect" the prison officials' expertise, they cannot abandon "the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard."[43]

RLUIPA creates certain procedural obstacles to which prisoners must adhere. As mentioned above the Act imposes on prisoners an administrative exhaustion requirement: "No action shall be brought with respect to prison conditions under section 1983 of this title, *or any other Federal Law*, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."[44] RLUIPA sets out a four-year statute of limitations for bringing judicial actions for violations under the Act.[45]

RLUIPA and its predecessor statute, the Religious Freedom Restoration Act of 1993 (RFRA),[46] were Congressional reactions to the Supreme Court's decision in Employment Division., Department. of Human Resources of Oregon. v. Smith. [47] In this case the Court held that neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment.[48] *Smith* largely overruled the method of analysis used in prior free exercise cases that used a balancing test that considered whether a challenged government action that substantially burdened the exercise of religion was necessary to further a compelling state interest.[49] In its place *Smith* abandoned the strict scrutiny standard and substituted a rational basis test for asserting a Free Exercise claims against the government, thereby narrowing the constitutional ground

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33 42 U.S.C. § 2000cc–1(a); *Holt,* 135 S.Ct. at 863; Ali v. Williams, 822 F.3d 776, 786 (5th Cir. 2016)(describing the least restrictive means test as "exceptionally demanding") (citing Hobby Lobby, 134 S.Ct. at 2780).

34 *Holt*, 135 S.Ct. at 860.

35 *Id.* (quoting 42 U.S.C. § 2000cc–3(g)).

36 *Hobby Lobby,* 134 S.Ct. at 2781 (citing 42 U.S.C. § 2000cc–3(c)); *see also Holt,* 135 S.Ct. at 860.e

37 *Holt,* 135 S.Ct. at 860 (quoting 42 U.S.C. § 2000cc–5(7) (A)). Indeed, atheism may fall within RLUIPA's protective ambit. *See*, e.g., Kaufman v. McCaughtry, 419 F.3d 678, 683–84 (7th Cir. 2005) (recognizing atheists as a religious group but denying an accommodation since it would be impracticable to spend limited resources on only two prisoners).

38 Holt, 135 S.Ct. at 866.

39 *Id.*

40 *Id.* at 864.

41 *Id.*

42 *Id.* (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 434, (2006)).

43 *Id.*

44 42 U.S.C. § 1997e(a). *See*, Cutter v. Wilkinson, 544 U.S. 709, 723 n. 12 (2005) ("[A] prisoner may not sue under RLUIPA without first exhausting all available administrative remedies.").

45 28 U.S.C. § 1658(a). See, e.g., Al-Amin v. Shear, 325 Fed. Appx 190, 193 (4th Cir. 2009) [add citations].

46 42 U.S.C. § 2000bb *et seq*.

47 494 U.S. 872 (1990).

48 *Id.* at 878–82.

49 *See*, *Wisconsin v. Yoder*, 406 U.S. 205, 214, 219 (1972) and *Sherbert v. Verner*, 374 U.S. 398, 403, 406 (1963).

upon which to assert free exercise infringements against the government.[50] Thus, when inmates claim that prison policy substantially burdens their Free Exercise rights the state may defeat the claim by showing that its rules are "reasonably related to legitimate penological interests."[51]

Congress enacted RFRA to overcome the effects of *Smith* by returning protection for religious exercise to pre-*Smith* standards.[52] In the prison context Congress was concerned that government officials retained too much power in denying capriciously one more liberty to prisoners where they had already been stripped bare.[53] In making RFRA applicable to the States and their subdivisions, Congress relied on Section 5 of the Fourteenth Amendment.[54] In *City of Boerne v. Flores*[55] the Supreme Court held that RFRA exceeded Congress' powers under that provision.[56] *City of Boerne* did not, however, address enforcement of RFRA-created rights against the federal government.

In 2006, in *Gonzales v. O Centro Esperita Beneficente Uniao do Vegetal*, the Supreme Court held unanimously that members of a Christian spiritualist sect could enforce RFRA-based rights against the federal government.[57] Since the question of whether RFRA exceeds Establishment Clause limits was not decided in *O'Centro* or in subsequent cases decided by the Supreme Court, it remains an open question whether RFRA oversteps constitutional limits. Those circuits that have addressed this issue have rejected claims that RFRA violates the Establishment Clause,[58] and considering the Court's unanimous ruling it seems likely that it would not find that RLUIPA exceeded Establishment Clause limits. The importance of RFRA in the present context is that its provisions, not those of RLUIPA apply to prisoners' right to religious accommodations in federal prisons.

In the next section we next discuss our research methodology. This includes an explanation of how we selected cases for our data base, the classification of judicial decisions, coding protocols, and statistical tools applied to answer our research questions.

3. Methodology

3.1. Case Selection

To isolate effects attributable to *Holt v. Hobbs*, we employed a nonparametric matching technique to estimate if there was a change in judicial voting after *Holt.* We selected cases decided at the U.S. Courts of Appeals before and after the Supreme Court's ruling in *Holt* on 20 January 2015.

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50 The Court held that religiously motivated persons enjoy no special right to violate otherwise valid laws, provided the laws are of general application and do not single out religiously motivated conduct for adverse treatment. *Smith* at 878. Smith, who was employment by the Oregon government had participated in a Native American Church ritual that involved ingestion of Peyote, a banned substance in Oregon. Smith's boss found out about the ceremony and fired him. Smith sought but was denied unemployment benefits by the state on the ground that he lost his job through criminal misconduct. *Id.* 882–85. However, under rationale basis scrutiny, the Oregon law withstood the challenge since it was neutral and was not designed to target any religious group.

51 O'Lone v. Shabazz, 482 U.S. 342, 349 (1987) (quoting Turner v. Safley, 482 U.S. 78, 79 (1987)). That said, there is tension between O'Lone v. Shabazz and Turner v. Safley, "which create a First Amendment duty of religious accommodations in prisons, and ... *Employment Division v. Smith*, 494 U.S. 872 (1990), which *denies* a constitutional duty of religious accommodations in broad terms yet without overruling O'Lone or Turner." Lewis v. Sternes, 712 F.3d 1083, 1085 (7th Cir. 2013) (Posner, J.) (discussing issue).

52 See, 42 U.S.C. § 2000bb(b)(I)(2004); Burwell v. Hobby Lobby Stores, Inc., 573 U.S.,134 S.Ct. 2751, 2760–61 (2014).

53 *See* (Laycock and Goodrich 2012; Gaubatz 2005).

54 Section 5 states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Constitution, amend 15, sect. 5. In commenting on *City of Boerne* then Judge Gorsuch wrote: " ... the Court held that RFRA stretched the federal hand too far into places reserved for the states and exceeded Congress's Section 5 enforcement authority under the Fourteenth Amendment. As a result, the Court held RFRA unconstitutional as applied to the states, though still fully operational as applied to the federal government." Yellowbear v. Lampert, 741 F.3d 48, 52 (10th Cir. 2014) (citing City of Boerne v. Flores, 521 U.S. 507, 529–36).

55 521 U.S. 507 (1997)

56 *Id.* at 532–33.

57 *See*, Gonzales v. O Centro Esperita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (member of sect have RFRA right to sacramental use of hoasca, a hallucinogenic tea despite being banned by the Controlled substance Act, since the government could not demonstrate it had a compelling interest in barring the sacramental use of this drug); See, Burwell v. Hobby Lobby Stores, Inc., 573 U.S.,134 S.Ct. 2751, 2760–61 (2014).

58 *See*, e.g., Kikumura v. Gallegos, 242 F.3d 950 (10th Cir. 2001); In re: Bruce Young, 141 F.3d 854 (8th Cir. 1998). [find citations].

This approach enabled us to more plausibly attribute effects to the *Holt* decision in the specific legal environment surrounding the timing of *Holt.* We included decisions in the data base that met the following criteria:

1. The prisoner's claim was brought and *decided* under RLUIPA. Prisoners often brought claims under the First Amendment's Free Exercise Clause or the Fourteenth Amendment's Due Process Clause. A decision was included only if the text of the decision revealed the case was disposed of under the Act rather than an alternative legal ground.
2. The data was derived from published and indexed/" "unpublished" courts of appeals decisions. Most of Courts of Appeals decisions are decided as "unpublished." This does not mean they are unavailable on various data bases but only that the circuit judges deciding the case concluded the holding will not be considered to have formal precedential value. However, in every other respect these decisions purport to following legal precedent applicable to the case before the court.
3. The decision was rendered by one of the United States Circuit Courts of Appeals. Thus, United States District Court and U.S. Supreme Court decisions were not included in the data base.
4. Prisoners bringing claims are or were incarcerated in state facilities. This is because RLUIPA only provides for religious accommodations to prisoners housed in state facilities.
5. The cases were decided during the period following the *Holt* decision in January 2015. Those cases ranged from June 2012 to March 2018.

Applying these criteria our dataset was constructed from 135 decisions at the Courts of Appeals before and after *Holt*, for a total of 405 votes.[9] Because courts analyze RLUIPA cases under a variety of procedural and substantive lenses we coded the decisions in a way that tracked the process courts followed in deciding them.

3.2. Decisional Categories

3.2.1. Procedural Dismissals

With some frequency RLUIPA claims are dismissed on procedural grounds for such reasons as the statute of limitations having expired or the prisoners' failure to exhaust administrative remedies prior to suing. Other non-merits grounds for dismissal include mootness and lack of standing. We categorized these decisions as non-merits dismissals ("NMD"). The idea here was to separate those cases from the ones which ruled on the merits of the RLUIPA claims and addressed core purposes of the Act. Of the 135 decisions 33 were categorized as NMD cases; these comprised 99 of the 405 votes.

3.2.2. Merits Decisions

On the merits side, RLUIPA plaintiffs must initially show that they hold a sincere religious belief and that the government substantially burdened its exercise. Here we distinguished those decisions that held the prisoner's claim failed to allege a substantial burden on religious exercise from those in which the courts found the prisoner did so. Among the 102 decisions that remained after the NMDs were subtracted from 135 decisions . . . 47 decisions (comprised of 141 votes) were dismissed for failure to allege or prove adequately a substantial religious burden. This left 55 decisions comprised of 165 votes to apply RLUIPA's compelling interest-least restrictive means test.

This approach tracked the Act's analytic framework since under RLUIPA analysis stops when no burden is found. In other words, there is no reason for the courts to continue with the compelling interest and least restrictive means tests when the prisoner fails to show the government imposed a substantial religious burden on the prisoner. On the other hand, where the court found the plaintiff alleged a substantial burden the court would have to decide whether the state showed it had a

compelling interest justifying its actions and had applied the least restrict means in doing so.[59] Among the cases where the prisoner made an adequate showing on the religious burden prong 40 decisions went in favor of the prisoner and 15 for the prison.

These numbers reveal that 24.4% of the RLUIPA claims were never reviewed on the merits because of NMDs. Most of these decisions were mootness-dismissals based on the prisoner's transfer to another facility, an outright release, or the provision of an adequate accommodation to the prisoner since the claim was filed. Far fewer of these dismissals were based on failure to exhaust administrative remedies or limitations failures.

About 34.8% of *all* 135 claims filed were dismissed because the prisoner failed to make a prima-facie case showing that exercise of sincerely held religious beliefs was substantially burdened. Of the 102 claims that survived NMD 47 of these, or about 46.1%, were dismissed on "no substantial burden" ground. Thus, out of the original 135 claims filed only 55 (165 votes) proceeded to a compelling interest-least restrictive means analysis. This represents only 41% of the initial 135. Of this group 40 plaintiff prisoners obtained relief from the courts in [state] cases.

3.2.3. Courts of Appeals Voting Patterns

A potential issue in our data analysis was the fact that prior to *Holt v. Hobbs* Courts of Appeals applied different degrees of deference to prison-defendants' claims that religious accommodations under RLUIPA should not be granted because they would compromise the states' interest in safety or the orderly administration of their oversight function, for example. Some circuits exercised substantial deference to such government claims while others applied the strict scrutiny required by RLUIPA in a more demanding fashion. The latter group took a "hard look" at compelling interest and least restrictive means claims made by prison officials; they examined much more closely the factual assertions made by the government to justify their refusal to accommodate the prisoners' requests for accommodations. Such circuits may be labeled "hard look" jurisdictions.[60]

In this regard Bollman concluded that the Fifth, Sixth, Eighth, Tenth and Eleventh Circuits were "deferential" circuits and the First, Third, Fourth, Seventh, and Ninth Circuits were hard look circuits.[61] We concur with Bollman's contention but conclude the Second Circuit was a hard look jurisdiction pre-*Holt* and have adjusted our data analysis accordingly.

The voting dispositions and circuit court legal standards, deferential or hard look, applied pre-*Holt* had the potential to affect our ability to determine whether *Holt* affected judges' voting. Since *Holt* was definitive in its insistence that courts take a "hard look" at the reasons given and the availability of less restrictive means to accomplish prisons' policy objectives, *Holt* should result in less substantial movement in voting between the pre-*Holt* period and the post-*Holt* one since those circuits were already voting in a manner seemingly more consistent with what *Holt* required. On the other-hand the deferential circuits it would seem might move more substantially in a pro-prisoner direction since they had, so to speak, a greater distance to travel to meet the *Holt* standard. We accounted for the circuit effects in this regard in our statistical analysis as explained more fully below.

3.2.4. Case Locating and Coding

The data are drawn from all cases obtained from a search of the Westlaw and LexisNexis databases for all U.S. Court of Appeals cases meeting the criteria set forth above. We assigned a value of "1" to

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[59] We recognize that some judges might dispose of cases they were inclined to dismiss anyway by simply finding no substantial burden and thereby avoid the demanding work of analyzing the governmental interest asserted by prison officials and whether they applied the least restrictive means to achieve their policy objectives. Although the high proportion of cases dismissed on no substantial burden ground suggests this could be the case this is far from certain.

[60] (Bollman 2018) (Applying descriptive statistics to study among other things the effects of *Holt v. Hobbs*, 135 S.Ct. 853 (2015) on case outcomes at the U.S. District Courts and U.S. Courts of Appeals).

[61] Holt v. Hobbs, 135 S.Ct. at 841–42 notes 11 & 12; 851–57, notes 76–138 (citing cases).

votes that were in favor of the plaintiff-prisoner and "0" in favor of the prison-defendant. Votes for cases to be remanded for further proceedings were also coded as "1" since in such instances the prisoner achieved substantial success: the court of appeals required the lower court to apply RLUIPA in a way more favorable to the prisoner than it had when it first confronted the case. As such, of all the votes in our dataset, 137 (33.8%) were classified as pro-prisoner-plaintiff while 268 (66.2%) were classified as pro-prison defendant.

4. Results

Our main interest is in assessing whether the *Holt v. Hobbs* case decided at the US Supreme Court at the end of 2015 had any impact on judicial behavior. Of all votes cast, 192 (47%) were cast before *Holt* and 213 (52.6%) were cast after *Holt*. Figure 1 shows the distribution of pro-prisoner-plaintiff and pro-prison-defendant votes before and after *Holt*. As shown, the descriptive statistics show an increase in the percentage of votes in favor of the plaintiff-prisoners, going from around 29% of votes before *Holt* to 38% of votes after *Holt*.

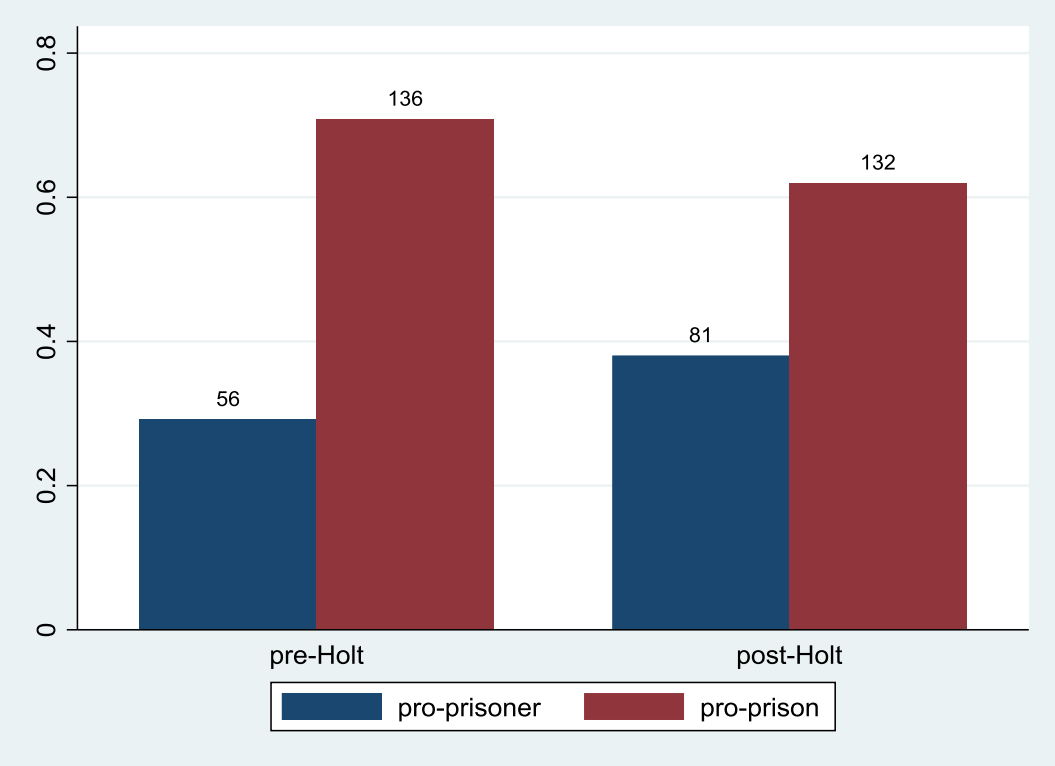

Figure 1. Distribution of Votes Before and After *Holt v. Hobbs* (June 2012 to February 2018).

To isolate the part of these outcomes that can be attributed to changes in judicial behavior, we consider the potential confounding impact of both party affiliation and political ideology. In our dataset, 197 (48.6%) of votes were cast by Democratic Party appointees, while 208 (51.4%) were cast by Republican Party appointees.

In all a higher percentage of Republican votes (36%) were cast in favor of the plaintiff-prisoners compared with Democrats (31%). As shown in Figure 2, this party difference is almost entirely attributable to the post-*Holt* era. Before *Holt*, just over 70% of both Republican and Democratic affiliated votes (77 and 59 votes respectively) were in favor of the prison-defendant. After *Holt*, the percentage of votes in favor of the prison-defendant decreased to 56% of Republican affiliated votes (56 votes) while the Democratic affiliated proportion of votes in favor of the prison only dropped to 67% (76 votes).

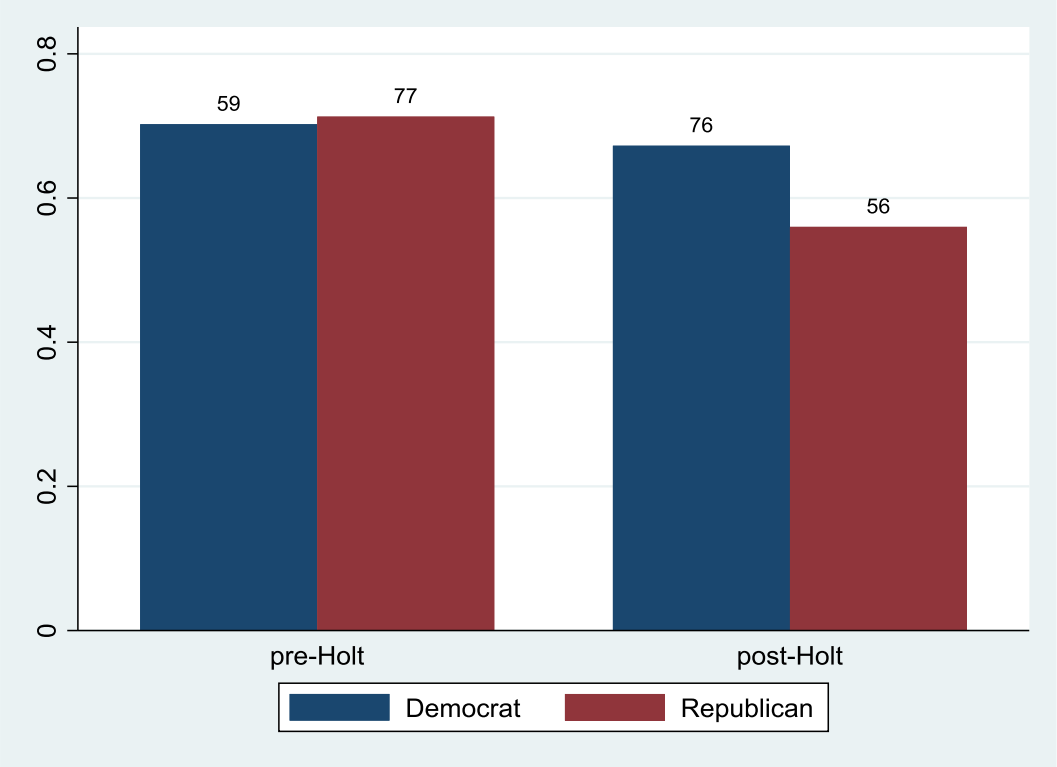

Figure 2. Distribution of pro-prison votes before and after *Holt* by party affiliation.

Party affiliation, while often used as a proxy for political ideology, may be an inadequate device by which to match judges, since it potentially masks significant ideological differences among those of the same party affiliation. This notion is captured by common phrases such as "blue dog" Democrat or "moderate" Republican which denote party members who are respectively somewhat to the right or left of members of their party in their voting records. As such, we also consider a more finely grained measure of ideology based on DW-NOMINATE continuous scores.

In total, there were 196 judges in our dataset, 90 (46%) of whom were appointed by a Democratic Party president, and 106 of whom were appointed by a Republican counterpart. The DW-NOMINATE score ranges from −1 (most liberal) to +1 (most conservative). The average score of Democratic Party appointees was −0.32 and that of Republicans +0.44. The distribution of these scores is shown in Figure 3.[62]

[62] Here, we use the same formula employed in (Sisk and Heise 2012), where judges are assigned the DW-NOMINATE score of the appointing President if there is no Senator of the same party in the judge's state, the score of the Senator if there is one of the same party as the appointing President for the judge's state, or the mean of the scores of both Senators if there are two Senators of the same party as the appointing President for the judge's state. However, whereas Sisk and Heise use "common-space" DW-NOMINATE scores, we use the specific scaling for the Senate, since only Senators are involved in the judicial appointment process.

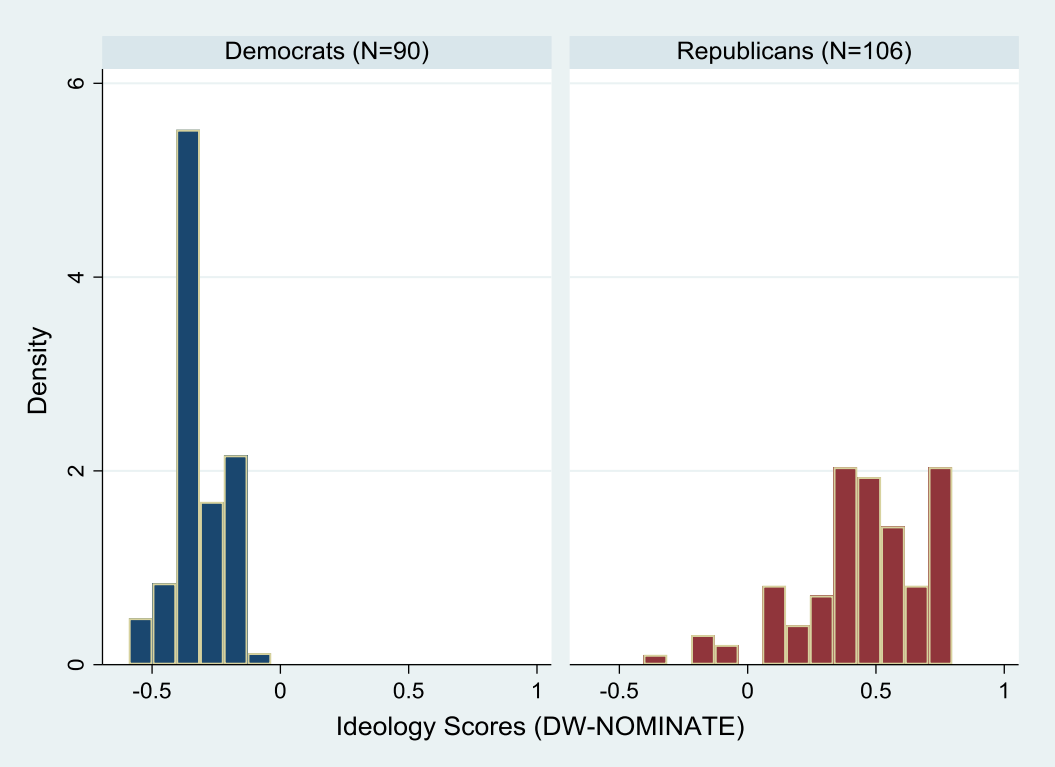

Figure 3. Distribution of ideology (DW-NOMINATE) scores by party affiliation.

Beyond judicial ideology, we also consider the nature of the jurisdiction in which a case was heard. As described earlier, there are strong theoretical grounds to distinguish between "deference" circuits and "hard look" circuits. Consequently, in assessing whether judges changed their voting behavior following the *Holt* decision, we would ideally want to compare the record of judges from a similar jurisdiction. We coded the Fifth, Sixth, Eighth, Tenth and Eleventh circuits as "deference circuits" and the First, Second, Third, Fourth, Seventh and Ninth circuits as "hard look" circuits. In all, 189 (47%) votes were cast in "deference" circuits, and 216 (53%) were cast in "hard look" circuits. As discussed, there are reasons to expect that judges in deference circuits would be more likely to change their voting propensities following *Holt*, since the U.S. Supreme Court decision could be interpreted as sending a signal to the lower courts to accord more weight to the religious needs of prisoners.

Finally, we also consider the type of case. Our cases involved the following classifications: whether a non-merits dismissal(NMD)occurred on procedural ground such as statute of limitations or mootness, whether there was a determination of "no substantial burden" that would lead to an automatic victory for the defendant/prison, whether the court found the plaintiff-prisoner stated an adequate claim for a burden on religious exercise that would have proceeded to further analysis, and whether the circuit from which the decision was taken was a deferential or hard look circuit.

Matching Analysis

As explained above, our main purpose in accounting for whether the court found a substantial burden (or in which no such determination was made at all) require more analysis and therefore are more likely to invite differences of opinion. It would not necessarily be meaningful to compare the behavior of two judges, one considering a "slam dunk" case of NMD and the other considering a case that was considerably more complicated.

Our analysis to follow uses a nonparametric matching technique to ascertain if there was a change in judicial behavior pre- and post-*Holt*. This approach uses the "potential outcome framework" to estimate an Average Treatment Effect (ATE). This approach is perhaps best explained by an illustration.

Take, for example, the case of a judge considering an RLUIPA claim. Of interest is whether the same judge would vote differently on a similar case following the Supreme Court's *Holt* decision. As such the *Holt* decision is here a kind of "treatment effect." In this framework there are two "outcomes," one observed and one notional based on how the judge "would have" voted if the case had been decided in a different era. The average treatment effect is then the average of the differences between each observed and corresponding notional outcome.

Proceeding to our matching analysis, we were able to specify perfect matching on all the categorical covariates: party affiliation (Democratic or Republican), circuit type ("hard look" or "deference"), and case type (no substantial burden, substantial burden, or non-merits dismissal). This means the votes being compared—aside from occurring before or after the *Holt* case—are those in which we can assume that the judges involved were both of the same party affiliation, both from either a "hard look" or "deference" circuit, and both considering a case of the same type. For the continuous ideology score, we were also able to obtain near perfect matching. The success in matching judges according to ideology scores is also depicted in the balance plot of Figure 4, which contrasts the closeness of ideology scores for the matched data versus those of the original raw data. These statistics imply that in assessing whether *Holt* had an impact on individual judges we are essentially comparing judges of the same party affiliation and political ideology on cases of the same type and being decided in similar circuit types.

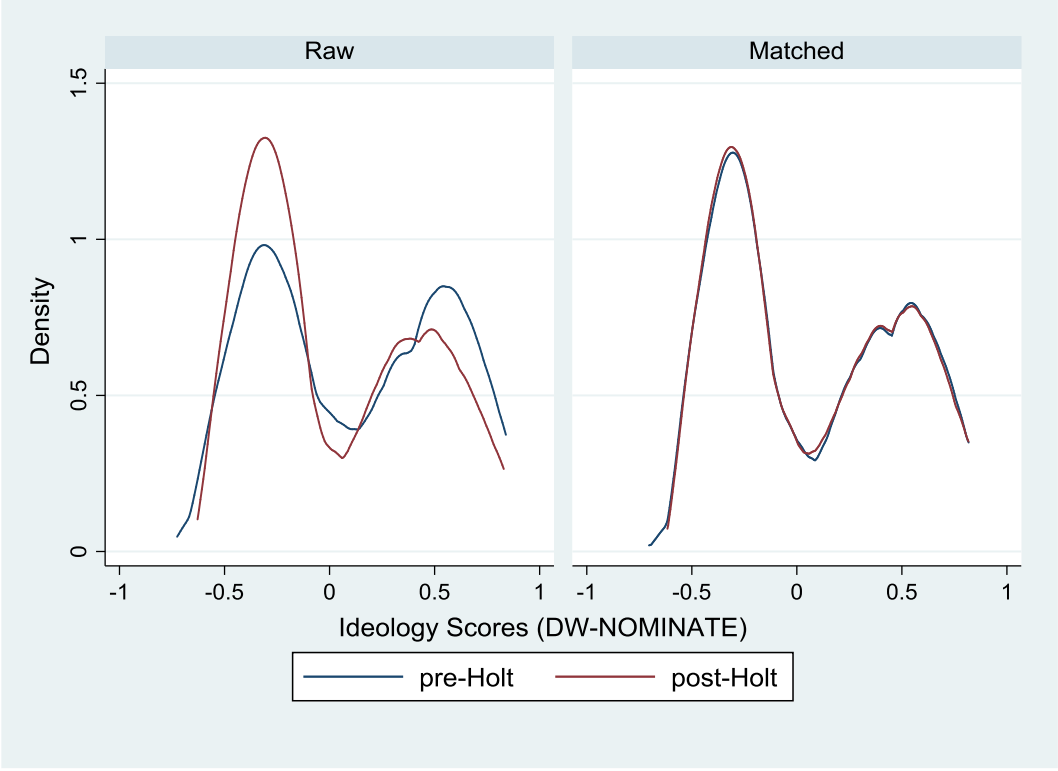

Figure 4. Balance Plot of ideology (DW-NOMINATE) scores for raw and matched data.

Based on this matching our results provide evidence that judicial voting propensities did indeed change following the *Holt* decision. The result is statistically significant although the effect size is quite modest. Specifically, we find that the marginal probability, here the average treatment effect or ATE, of a judge voting in favor of the defendant-prison dropped by 13% following *Holt* (Table 1) We should note here that this result is not evident from the descriptive statistics but is only obtained after close matching of judicial and case attributes when comparing cases before and after *Holt*.

Table 1. Estimated change in voting propensities following *Holt* matching by ideology, party affiliation, circuit type, and case type.

	ATE
Average probability change post-*Holt*	−0.13 ***
	(0.04)
N	*405*

Note: Nearest-neighbor matching estimates using Mahalanobis distance metric. *** $p < 0.01$.

5. Discussion

Using a non-parametric matching design and aligning judges with applicable case level [circuit-type (deferential or hard look)], judge-level [judges' ideology (party affiliation, DW-nominate scores)] and plaintiffs' religious affiliation into our model, we found a significant difference in voting outcomes before and after *Holt v. Hobbs*, which was decided on 20 January 2015. Judges' pro-prison voting decreased after *Holt*. We observe however the effect size was a modest one. Specifically, we find that the marginal probability, here the average treatment effect or ATE, of a judge voting in favor of the defendant-prison dropped by 13% following *Holt*. This result was not evident from the descriptive statistics; we ascertained this change only after close matching of judicial and case attributes when comparing cases before and after *Holt*. It seems then the *Holt* precedent matters and to some degree made the rights protected under RLUIPA a bit more secure.

In hindsight prisoners' claims tended to fall into three main types: grooming, ceremonies, or services, and requests for religious materials.[63] Among these categories, ceremonial or group services for prisoners would seem to pose (from a prison official's perspective) the most threat to good order; judges might take this same view. Since we did not account for accommodation- type in our study it is potentially a confounding factor that contributed to variance in judges' voting behavior. Future researchers may wish to include this as a variable in modeling judicial voting on RLUIPA claims.

Methodologically, the use of non-parametric matching for our subject [judges] served this study well and may be an improvement on traditional logistic regression modeling for dependent measures which are dichotomous Our matching approach enabled us to more accurately compare how judges voted before and after *Holt*; it enabled us to make more cogent comparisons between these precedential eras by accurately isolating *Holt*'s effects. Use of this approach may make more accurate the conclusions we draw about why judges behave as they do and should perhaps be employed more often in studying judicial behavior.

We now consider relevant issues as to why we obtained only a modest effect when it might have been reasonable to expect a greater impact of the *Holt* precedent. The 135 RLUIPA decisions we analyzed produced 408 judicial votes. At first blush it is striking that nearly 24.4% (33) of these claims were dismissed on non-merits ground, for example, filing the claim after the statute of limitations had run, mootness, based on prisoner transfer or release, and other reasons not related to RLUIPA's core purpose of protecting prisoners' sincerely felt religious commitments. The most likely reason for this result is that a substantial majority of these claims were initiated by *pro se* prisoners who are unschooled in the arcane world of civil procedure. It is hard to attribute these outcomes to anything but poor "lawyering."

Why 47 of the remaining 102 claims were dismissed for failure to allege or establish a substantial burden on religious exercise is less clear. The results are perhaps a bit surprising since RLUIPA defines religious exercise broadly as "any exercise of religion, whether or not compelled by, or central to,

[63] *Id.* at 848.

a system of religious belief."[64] Certainly *Holt* reinforced this Congressional directive by requiring an individualized assessment of the prisoner's subjective sincerity and a determination of whether the prisoner must actually choose between following religious belief or following prison policy.[65] While some portion of these claim failures may be attributable to pro se prisoners' poor drafting skills, this seems an incomplete explanation since trial courts are forgiving in processing pro se complaints which dominate the landscape in RLUIPA proceedings.

It is possible that claims dismissed for lack of substantial burden were simply weak ones where the prisoners assumed that rights created by RLUIPA covered mere religious preferences rather than the substantial burden RLUIPA requires. For example, prisoners would with some frequency admit in the papers they submitted that they could practice their faith without the prison accommodating those preferences. In other words, their requests for accommodations appeared to be only a gloss on their subjective beliefs about what their faith required. In the same vein, prisoners' assertions of what their beliefs required and what prison mandates were unconnected logically. Such claims were virtually guaranteed a dismissal on RLUIPA's substantial burden prong.

We can only speculate on the reasons for the high proportion of NSB dismissals since there could be ideological or other factors at play in explaining why 46% of the surviving claims were defeated on RLUIPA's first prong.[66] Our data, however, did not reveal substantial differences in voting patterns between Democratic and Republican appointees or conservative and liberal voters when judges' DW-nominate scores were considered. In any case, even if there had been such differences, our methodology that matches vote comparisons according to both judicial and case attributes gives us a strong basis for asserting that we have successfully isolated the impact of the *Holt* case alone, without other confounding factors.

Although it is possible that the substantial burden dismissals might be a mere cover for deference to prison officials' claims of security needs or orderly administration of prisoner concerns, our data gives us no reason to suspect this is true. Indeed, the limited research in this area suggests this theory may not be a viable one.[67]

Notably, of the 55 claims which proceeded to a compelling interest-least restrictive means analysis 40 plaintiff-prisoners obtained relief in the Courts of Appeals. This represents about 73% of these cases. Given RLUIPA's burden shifting approach, the direction of the results is not surprising. Recall that RLUIPA requires a compelling governmental justification to say "no" to the prisoners' request for an accommodation and proof that the denial is the least restrictive means of accomplishing that purpose. The legal challenge for the prison-defendants may be daunting once the plaintiff establishes that a substantial burden on his or her religious exercise has occurred, especially in the wake of *Holt*.

It seems then, on a practical level, prisoners and their advocates would be well advised to devote as much time and effort as may be feasible in drafting complaints which: link their religious beliefs and their implementation, clearly and precisely while being sensitive to the safety, budgetary and staffing issues prison officials typically confront. As to the latter point selecting locations and times where security will be adequate may be helpful in obtaining the requested accommodation. So too, selection of objects for use in religious activities which pose a diminished potential for use as weapons may help advance the strength of the RLUIPA claim. Perhaps those advocates, even those working in a ministerial capacity, could serve as advisors in connection with prisoners' requests for religious

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64 42 U.S.C. 2000cc-5(7)(A). The Supreme Court has held however, that this belief must be "sincer[e]." Cuttter v. Wilkinson, 544 U.S. 709, 725 n. 13 (2005). This standard broadened the definition of substantial burden compared to the one contained in RFRA. *See, e.g.*, Hunter v. Baldwin, No. 95-35330, 1996 WL 95046 (9th Cir. Mar. 5, 1996).

65 Holt v. Hobbs, 135 S.Ct. 853, 862 (2015).

66 Our findings tract those of Bollman who observed that nearly 47% of the post-Holt cases he studied were dismissed on no substantial burden ground. See, e.g., (Bollman 2018). Since his data base was comprised of both U.S. District Court and Court of Appeals decisions those results are not directly comparable to ours.

67 *See, e.g.*, (Bollman 2018) (speculating about such a possibility but generally finding little empirical support for this proposition).

accommodations, especially in assisting *pro se* petitioners with basic writing assistance, especially in organizing their submissions to the court, for example with such things as word usage and sequencing of the complaint.

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References

Bollman, Barrick. 2018. Deference and Prisoner Accommodations Post-Holt: Moving RLUIPA toward 'Strict in Theory, Strict in Fact'. *Northwestern University Law Review* 112: 839–78.

Gaubatz, Derek L. 2005. RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions. *Harvard Journal of Law & Public Policy* 28: 501–10.

Goce Beneficente. 2015. Religious Land Use and Institutionalized Persons Act—Religious Liberty Holt v. Hobbs. *Harvard Law Review* 129: 351–57.

Goodrich, Luke W., and Rachel N. Busick. 2018. Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases. *Seton Hall Law Review* 48: 353–401.

Laycock, Douglas, and Luke W. Goodrich. 2012. RLUIPA: Necessary, Modest, and Under-Enforced. *Fordham Urban* Law Journal 39: 1021–41.

Shapiro, David M. 2016a. To Seek a Newer World: Prisoner's Rights at the Frontier. *Michigan Law Review First Impressions* 114: 124–33. [CrossRef]

Shapiro, David M. 2016b. Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny. *The George Washington Law Review* 84: 972–1028. [CrossRef]

Sisk, Gregory C., and Michael Heise. 2012. Ideology 'All the Way Down'? An Empirical Study of Establishment Clause Decisions in Federal Courts. *Michigan Law Review* 110: 1201–64.