

ARTICLE

THE POLITICS OF APPOINTING CATHOLICS TO THE FEDERAL COURTS

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With the January 31, 2006 confirmation of Samuel Alito as associate justice of the United States Supreme Court, the Court has a majority consisting of Roman Catholic justices for the first time in American history. When adding the five Catholic and two Jewish justices, one could argue that the religion of the majority of the nation has been marginalized, in terms of representation on the nation's highest court, as never before. Does this have significance other than sectarian pride? Does this provide proof that religion has become irrelevant in the selection of Supreme Court justices? Indeed, we can ask to what extent religion played a part in the calculus of presidents and their administrations in the selection of Supreme Court justices as well as lower federal court judges throughout the course of the history of the federal judiciary. And, if it has been part of the calculus, why?

The objective of this article is to examine the appointment of Catholics to the Supreme Court and to the lower federal courts. I marshal evidence suggesting that presidents who appointed the first two Catholics to the Supreme Court were not motivated by religion, but that subsequently through the presidency of Lyndon Johnson, religion was very much a concern of presidential administrations. Since the presidency of Richard Nixon, however, religion has returned to a largely irrelevant status. The emergence of a Catholic majority on the Supreme Court, I argue, is a result of a unique configuration of circumstances. As for the lower federal courts, although evidence for the earlier years of the United States is spotty, there is nevertheless the hint of somewhat of a parallel to Supreme Court appointments in the nineteenth century, with even a closer parallel in the twentieth and twenty-first centuries.

Part I of this Article, on presidential agendas and judicial selection, offers a theoretical framework to explain the selection of judges. Part II focuses on the Supreme Court and the appointment of Catholics from 1836 to 1932; from 1933 to 1980; and from 1981 to 2006. Part III then focuses on lower-federal-court appointments during approximately the same time

periods. Part IV presents an argument explaining why policy agenda appointments have come to predominate judicial selection. Finally, Part V concludes that policy agenda considerations for Republicans, and partisan agenda considerations for Democrats, have resulted in the relatively large numbers of Catholics appointed to the lower federal courts.

I. PRESIDENTIAL AGENDAS AND JUDICIAL SELECTION

The concepts of a president's policy agenda, his partisan agenda, and his personal agenda can be useful in understanding the politics of federal judicial selection.¹ "Policy agenda" means the substantive policy goals of an administration, including what it hopes to accomplish both legislatively and administratively. By "partisan agenda," I mean the use of presidential power to achieve political results for the president or for the party by rewarding either individual supporters or key elements of the president's or party's political base. And "personal agenda" here means the use of the president's appointment power to favor a personal friend or close associate.

Although the policy agenda, the partisan agenda, and even the personal agenda may all be furthered at one and the same time in the person of a specific nominee, what distinguishes one type of agenda from another is presidential motivation. If the principal concern, for example, is to help party leaders, to maintain a good relationship with a senator, to resolve a party rift, to reward individual party supporters, to cater to a particular constituency group within the party's base, or to enhance the president's reputation and appeal, then presidential action can be seen as promoting a partisan agenda, even if there are also policy consequences. If the president is primarily concerned with the policy consequences of his appointments, then particular appointments may be considered part of the policy agenda. And if the president seeks to exercise personal patronage, those appointments may be considered part of a personal agenda.

Of course, this conceptual scheme presents some difficulties. Motivation can be elusive to discover, as the motivations of administration officials and members of Congress in making recommendations may be different from those of the president. Moreover, presidential motives for particular appointments may be mixed, and it may be difficult to document which motive was responsible for a specific presidential appointment. Thus, these determinations must be based on reasonable inferences from the available evidence.

When an administration's judicial appointments are primarily partisan-agenda or personal-agenda actions, the policymaking activity of the courts

1. The concept of "agenda" was developed in PAUL CHARLES LIGHT, *THE PRESIDENT'S AGENDA: DOMESTIC POLICY CHOICE FROM KENNEDY TO REAGAN* (rev. ed. 1991), and in JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (2d ed. 1995). Agenda as applied to judicial selection is discussed in SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 3-4* (1997), from which this section draws.

will not be seen as crucial to administration goals. In such cases, judicial appointments are a species of political patronage, dependent more on partisan or personal political reasons than the appointees' ideology or judicial philosophy. In contrast, an administration whose judicial appointments are driven by its policy agenda will view the courts as likely to affect the success or failure of its policy goals. Hence, changes in court policy may be necessary, and an administration can be expected to use the selection process to appoint those who share its ideology, given a threshold level of professional ability and accomplishment of prospective appointees.

Under this conceptual scheme, the logical place for religious considerations in judicial appointments would be under the partisan agenda of an administration. In such cases, appointments could reward part of the core constituency or attempt to attract a religious group to join the party. Such use of religious considerations in the judicial selection process, however, would be inconsistent with the prohibition of religious tests for public office in the United States Constitution.² This, of course, means that evidence of religious considerations would likely not appear in the public record. It would have been unthinkable, for example, for President Dwight D. Eisenhower to announce at a news conference that he had directed his Attorney General to find "some fine, prominent Catholic to nominate" to the Supreme Court, something that Eisenhower did, in fact, privately write his Attorney General in a letter in anticipation of an opening on the Court.³ Instead, the role of religious considerations in judicial appointments must be found in materials containing behind-the-scenes revelations.

II. THE SUPREME COURT AND THE APPOINTMENT OF CATHOLICS

A. *Appointments of Catholics to the Supreme Court, 1836–1932*

The first appointment of a Catholic to the Supreme Court was that made by President Andrew Jackson, a Democrat, to his close political associate and cabinet member, Roger B. Taney. Taney came from a well-to-do Maryland political family. He joined Jackson's cabinet as Attorney General in 1831. A vigorous supporter of the President's campaign against the Second Bank of the United States, Taney was nominated to be Secretary of the Treasury in 1834; the Senate, however, voted not to confirm him. The next year, Jackson nominated Taney to be an associate justice on the Supreme Court, but the Senate postponed consideration of the nomination. When Chief Justice John Marshall died in 1835, Jackson nominated Taney to that post. Taney was confirmed on March 16, 1836.

2. U.S. CONST. art. VI, cl. 3 ("no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

3. Letter from Dwight D. Eisenhower to Herbert Brownell, Att'y Gen. (Mar. 8, 1955), in Ann Whitman Administration Papers, Brownell, Herbert, 1955–56 (3), Dwight D. Eisenhower Presidential Library, Abilene, Kan. [this collection hereinafter "Whitman Files"].

Despite the historic nature of Taney's appointment, there is nothing in the historical record to suggest that religion was a consideration in his appointment.⁴ Rather, this appointment seems to have been a policy-agenda appointment—Jackson could be confident that Taney shared his policy views. Yet, there was widespread anti-Catholic hostility during this period, and some of that spilled over into criticism of Taney's appointment.⁵ When Taney died in 1864, he was not replaced by a Catholic, and no Catholic served on the Court for another three decades.

President Grover Cleveland, another Democrat, placed the second Catholic on the Supreme Court with his 1894 appointment of Edward D. White. White was named after Cleveland's first two nominees were defeated in the Senate. White was a southerner from Louisiana and a former Confederate soldier; he was also a Democratic senator, and he was promptly confirmed by a unanimous Senate.⁶ In 1910 White was elevated to chief justice by President William H. Taft, and presided over the Court until 1921.

There is no hard evidence that White's religion was a consideration in either his initial nomination or his appointment as chief justice, although there is some suggestion that Taft sought to attract the Catholic vote.⁷ Cleveland's initial appointment of White can be considered a partisan-agenda appointment, as he reached into the Senate for a confirmable Democratic appointee.⁸ Taft's elevation of White, on the other hand, was perhaps policy agenda colored also by partisan- and personal-agenda motives.⁹

Religion appears to have played a role, however, in the selection of the third Roman Catholic appointed to the Court—the 1898 nomination of Joseph McKenna by Republican President William McKinley. By the end of the nineteenth century, the ongoing immigration of Catholics from Europe to the big cities in the East and Midwest made the Catholic vote increasingly important. By 1900, the number of Catholics was almost twice what it

4. BARBARA A. PERRY, A "REPRESENTATIVE" SUPREME COURT? 22 (1991).

5. CARL B. SWISHER, ROGER B. TANEY 317 (1935), as cited in PERRY, *supra* note 4, at 22; see generally PATRICK W. CAREY, CATHOLICS IN AMERICA (2004).

6. James F. Watts, *Edward Douglas White*, in THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789–1969, at 1640 (Leon Friedman & Fred L. Israel eds., 1980).

7. PERRY, *supra* note 4, at 30 (The naval aide to President Taft observed in a private letter written in 1911, the year before Taft would be running for reelection, that the President went out of his way to court Catholics and that "in nearly every city we visit he manages to show some special mark of respect for them and to have a few minutes conference with some of their leaders. . . . He [President Taft] says the Catholics elected him last time, and he thinks they can do it again.").

8. *Id.* at 25 ("White's appointment resembles Taney's in that political factors other than religion or its electoral ramifications determined each man's selection.").

9. *Id.* at 30. Taft's greatest ambition was to become chief justice of the United States Supreme Court, and that ambition could potentially be realized by promoting the relatively elderly Associate Justice White, assuming that the chief justiceship would become vacant at a time that Taft would be able to assume it. This, of course, is in fact what happened.

had been just twenty years earlier.¹⁰ This challenged a Republican Party that did not want to concede the Catholic vote to the Democrats, but that was strongly supported by the anti-Catholic and nativist American Protective Association.¹¹

McKenna had served in Congress with McKinley and subsequently served as his Attorney General. McKenna was also a religious Catholic.¹² McKinley had quietly accepted the support of the American Protective Association, but countered any impression that he was bigoted and signaled that the Republican Party welcomed Catholics to its ranks by naming a Catholic to the Court.¹³ Anti-Catholicism, however, came to the surface during the confirmation period.¹⁴ In general, McKenna's appointment can be seen as aiding both the partisan and personal agendas of President McKinley. With the confirmation of McKenna, the Court for the first time had two Roman Catholic justices. When Jewish Louis D. Brandeis, was confirmed in 1916, this meant that the Supreme Court had the smallest proportion of Protestants in the history of the Court to that point in time.¹⁵

Edward D. White's elevation to Chief Justice in 1910 was the fourth appointment of a Roman Catholic. The fifth Roman Catholic appointment, and the fourth individual Catholic appointed, was Republican President Warren Harding's 1922 nomination of Pierce Butler. Butler was a very conservative Democrat who rose from poverty to become a wealthy lawyer. There is evidence that Chief Justice Taft had great influence with President Harding, and had recommended Butler to the President. For President Harding, it was politically appealing to appoint a Democrat and a Catholic.¹⁶ Catholic lay and religious leaders actively promoted Butler's nomination.¹⁷ The nomination was controversial but his politics, and not his religion, was the principal basis of opposition although opposition from the Ku Klux Klan to the appointment of a Catholic may have influenced the few southern senators who voted against confirmation.¹⁸

10. *Id.* at 26.

11. *Id.* at 26-29.

12. HENRY J. ABRAHAM, *JUSTICES & PRESIDENTS* 153 (2d ed. 1985); James O'Hara, *Joseph McKenna*, in *THE SUPREME COURT JUSTICES* 285 (Clare Cushman ed., 1993); see generally James F. Watts, Jr., *Joseph McKenna*, in *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969*, *supra* note 6, at 1719-36.

13. ABRAHAM, *supra* note 12, at 153; but see PERRY, *supra* note 4, at 28.

14. PERRY, *supra* note 4, at 28-29.

15. See generally A. L. TODD, *JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS* (1964) (Brandeis's appointment also aroused some opposition rooted in bigotry, but Brandeis's appointment by Democratic President Woodrow Wilson in 1916 was made despite a realization that anti-Semitism might make the nomination controversial).

16. PERRY, *supra* note 4, at 32-33; see also DAVID J. DANIELSKI, *A SUPREME COURT JUSTICE IS APPOINTED* 87 (1964).

17. PERRY, *supra* note 4, at 32; DANIELSKI, *supra* note 16, at 61-63.

18. ABRAHAM, *supra* note 12, at 188-89; DANIELSKI, *supra* note 16, at 165-66.

B. *Catholic Supreme Court Appointees from 1933–1980*

The appointment of Catholic as well as Jewish appointees by President Franklin D. Roosevelt gave rise to the notion of Catholic and Jewish seats on the Supreme Court. Roosevelt had intended to appoint Felix Frankfurter, a Harvard Law School professor and Roosevelt's close advisor, to the Court to replace Justice Louis Brandeis upon Brandeis's retirement.¹⁹ But when Justice Benjamin Cardozo died unexpectedly at the end of 1938, Roosevelt named Frankfurter to fill his seat. When Pierce Butler died in November, 1939, the President nominated Frank Murphy, his Attorney General and close political associate; Murphy became the fifth Catholic to sit on the Court.

Roosevelt, by replacing one Jewish justice with another (Frankfurter replacing Cardozo) and one Catholic justice with another (Murphy replacing Butler), gave currency to the idea that Catholics and Jews—two groups that were particularly important to the Roosevelt Democratic Party coalition—were entitled to “representation” on the Supreme Court²⁰ and therefore promoted his partisan agenda. These appointments also went to prominent New Dealers, which furthered the President's policy agenda, and, given the circumstances, promoted the partisan agenda by rewarding representatives of the party's base.

When Justice Frank Murphy died prematurely in 1949, President Harry S. Truman replaced the one Catholic on the Supreme Court with a Protestant: his Attorney General, Tom Clark. This did not go unnoticed, and Truman defended his abandoning the “Catholic seat” by stating: “I do not believe religions have anything to do with the Supreme Bench. If an individual has the qualifications, I do not care if he is a Protestant, Catholic or Jew.”²¹ Interestingly, President Truman appointed Sherman Minton—a Protestant whose wife and children were practicing Catholics—to fill the next vacancy on the Court. But the religion of Minton's family did not get Truman or the Democratic Party off the hook politically, something that Republican President Eisenhower picked up on and acted on during his presidency.

Although Truman did not nominate any Catholics to the Supreme Court, he named a record proportion of Catholics to the lower federal courts.²² All four of Truman's Supreme Court appointments can be consid-

19. ABRAHAM, *supra* note 12, at 218–19; *see also* PERRY, *supra* note 4, at 70–73.

20. Roosevelt also appointed a former Catholic, James F. Byrnes who was born into the Catholic faith and grew up attending Catholic schools. But Byrnes became an Episcopalian in his early adulthood and his Catholic roots did not figure into Roosevelt's appointment of Byrnes; thus he is not counted among the Catholic justices. PERRY, *supra* note 4, at 47, n. 1.

21. N.Y. TIMES, June 29, 1949, at 1, *quoted in* ABRAHAM, *supra* note 12, at 64.

22. *See infra* p. 208 and tbls. 1 and 2.

ered personal-agenda appointments, as each nominee was personally and politically close to the President.²³

Republican President Dwight D. Eisenhower, aware of the strong feeling among Roman Catholics that a Catholic should be sitting on the Supreme Court, deliberately restored the “Catholic seat” on the Court. When Justice Robert Jackson died in 1954, Cardinal Joseph Francis Spellman personally presented the President with a resolution signed by 150 Catholic bishops asking that a Catholic be named to fill the new vacancy.²⁴ Although Jackson’s replacement was John Marshall Harlan, a Protestant, the President was clearly aware that traditionally Democratic Roman Catholics were ripe for the wooing to the GOP after many Catholics had supported Eisenhower’s successful presidential bid in 1952. Eisenhower indicated this awareness, for example, in a letter to Attorney General Herbert Brownell discussing the membership of the United States Commission for the Celebration of the Two Hundredth Anniversary of the Birth of John Marshall:

I find there is not a single Catholic in the group. In view of all the efforts we have made to appoint a few Catholics to the bench, I think we have really overlooked a chance to make a bow in their direction.

I understand that at the moment the luncheon we discussed is somewhat up in the air. If we do have it, I think I shall ask the Dean of the Law School at Georgetown University and the Dean of the Law School at Catholic University to be guests. In addition, I shall probably ask Judge Danaher or Bernard Shanley—or if you think desirable some prominent Federal judge or lawyer here in the District who is of the Catholic faith.

In addition, I still want the name of some fine, prominent Catholic to nominate to the bench [a reference to filling a future vacancy on the Supreme Court].²⁵

In 1956, when Eisenhower learned of Justice Sherman Minton’s intention to retire, he telephoned Attorney General Brownell and reminded him to “start thinking again about [naming] a very good Catholic.”²⁶ One might think that the reference to “a very good Catholic” was to professional qualifications rather than to devoutness, but years later, Justice Brennan (the Roman Catholic who Eisenhower nominated to fill this vacancy) revealed that Monsignor Shanley, the brother of Eisenhower’s appointments secre-

23. ABRAHAM, *supra* note 12, at 238–47 (discussing Truman’s Supreme Court appointments).

24. Dwight D. Eisenhower, diary entry (1954), in Whitman Files, *supra* note 3, cited in CHRISTINE L. NEMACHECK, STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH 49 (2007).

25. Letter from Dwight D. Eisenhower to Herbert Brownell, Att’y Gen., *supra* note 3.

26. Dwight D. Eisenhower, phone calls and diary entries (1956), in Whitman Files, *supra* note 3, quoted in NEMACHECK, *supra* note 24, at 49.

tary Bernard Shanley, had made inquiries of Brennan's parish priest as to whether Brennan indeed "was a good Catholic."²⁷

This was clearly the opportunity to restore the "Catholic seat" on the Supreme Court, and it occurred at a politically opportune time—right before the 1956 presidential election. The Eisenhower Administration moved quickly and named Roman Catholic William Brennan (who had been highly touted to the Administration by the chief justice of the New Jersey Supreme Court, Republican Arthur Vanderbilt) to the Supreme Court as a recess appointment. As then Deputy Attorney General William Rogers dryly noted, "We were glad that he [Brennan] was both a Democrat and a Catholic."²⁸ Because it was politically significant that a Republican President restored "the Catholic seat," to the Court, the Brennan appointment appears to be a quintessential partisan-agenda appointment.

The Kennedy presidency also provides evidence of the use of religious considerations to further the partisan agenda. When Justice Frankfurter, a Jew, retired from the Court in 1962, President Kennedy nominated his Secretary of Labor, Arthur Goldberg (who was also Jewish), to the Supreme Court. Attorney General Robert Kennedy, in an oral history interview in 1964, acknowledged that Frankfurter's replacement:

[B]asically was going to come to a Jew. . . . If you were going to appoint a Jewish lawyer, certainly Arthur Goldberg is awful smart, and there wasn't any reason to go outside and try to find someone else that you didn't know. . . . I think even if the Jewish aspect of it hadn't been involved, Arthur Goldberg would have been high on the list of lawyers . . . considered.²⁹

Given the Kennedy brothers' evident desire to maintain the "Jewish seat," it is inconceivable that they would not have maintained the "Catholic seat" had Justice Brennan left the Court during the Kennedy years.³⁰

C. Catholic Supreme Court Appointees from 1981–2006

When Chief Justice Warren Burger resigned in June of 1986, President Ronald Reagan nominated Associate Justice William Rehnquist to succeed Chief Justice Burger, and District of Columbia Circuit Court of Appeals Judge Antonin Scalia to the Rehnquist vacancy. The administration considered Scalia's Italian ancestry to be a plus—Scalia would be the first Italian American to serve on the Court—but his Roman Catholicism itself evi-

27. PERRY, *supra* note 4, at 40.

28. JOHN P. FRANK, *THE WARREN COURT* 121 (1964).

29. Interview by John Barlow Martin with Robert Kennedy, U.S. Att'y Gen., at 214–15 (Apr. 30, 1964) (on file with John F. Kennedy Presidential Library).

30. President Lyndon Johnson placed his close advisor Abe Fortas on the Court succeeding Arthur Goldberg who resigned to become Ambassador to the United Nations. Johnson, by replacing one Jew with another, thus maintained "the Jewish seat." As with Kennedy, it is inconceivable that Johnson would have allowed the "Catholic seat" to lapse had Justice Brennan left the Court.

dently did not come into play.³¹ The Reagan administration placed the policy agenda on its front burner for judicial selection,³² and Scalia more than filled the bill.

The following year, Justice Lewis Powell retired from the bench, and President Reagan sought to place D.C. Circuit Judge Robert Bork on the Court. When Bork's confirmation battle was lost,³³ President Reagan announced his intention to nominate another D.C. Circuit Court judge, Douglas H. Ginsburg, to fill the vacancy. Had the nomination been made and Ginsburg confirmed, Reagan would have "restored" the Jewish representation that had ended when Justice Abe Fortas resigned in 1969 and was not replaced by a Jew.³⁴ There is no evidence in the Reagan presidential papers that Ginsburg's religion was considered, or that anything other than the policy agenda mattered.

After the failed prospective Ginsburg nomination, Ninth Circuit Judge Anthony Kennedy was nominated and ultimately confirmed, thus becoming the third Roman Catholic on the Rehnquist Court. Again, there is no evidence that Kennedy's Catholicism played a role in his selection or confirmation. By this point in time, it would appear that the religious affiliation of potential Supreme Court nominees was simply irrelevant as long as their real politics was in line with the President's.³⁵

When Justice William Brennan retired in 1990, religion was not considered by the administration of President George H. W. Bush in the nomination of Brennan's successor—David Souter, a Protestant. Policy-agenda considerations were of great importance to the first Bush administration.³⁶ The following year, when the Court's first and only African American Justice retired, Thurgood Marshall was replaced by another African American, Clarence Thomas. Thomas was raised as a Roman Catholic, but left the Church for a time before eventually returning.³⁷ The Thomas appointment was both a policy-agenda and partisan-agenda appointment that seemed to suggest that there is an African American seat on the Court.

31. PERRY, *supra* note 4, at 42.

32. GOLDMAN, *supra* note 1, at 296–307.

33. See, e.g., ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989); MARK GITENSTEIN, *MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT* (1992); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

34. The Douglas Ginsburg prospective nomination was abandoned and not sent to the Senate after it was revealed that he smoked marijuana when he was a Professor of Law at the Harvard Law School.

35. At least this appeared to be true for Protestant denominations, Roman Catholics, and Jews. It is an interesting question whether a professionally qualified Muslim in tune with the president's political and judicial philosophy would have been, or even today would be, a viable judicial candidate for the Supreme Court.

36. Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 *JUDICATURE* 282, 286 (1993).

37. MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 101 (2005).

President Bill Clinton named two justices to the Supreme Court: Ruth Bader Ginsburg in 1993, and Stephen Breyer in 1994. Both are Jewish, but there is no evidence that their religion was a consideration in the selection process.³⁸ The appointments are probably best seen as policy agenda appointments.

Likewise, President George W. Bush has filled two vacancies on the Supreme Court: John Roberts as chief justice, and Samuel Alito, Jr., as an associate justice. Although both Roberts and Alito are Roman Catholics, there is no indication in the public record that their Catholicism played a role in their selection. Their judicial philosophy and ideological predispositions along with their blue chip professional credentials were widely seen as propelling their selection. Again, the policy agenda seems to have dominated.³⁹

D. Conclusion

It appears that the selection of Catholics to the Supreme Court historically has come full circle—from policy agenda appointments to primarily partisan- and/or personal-agenda appointments back to policy-agenda appointments. Initially, as with the first two appointments of Roman Catholics, religion was essentially not a consideration in their selection. Then through the presidency of Lyndon Johnson, religion was very much a part of the process giving way to the notion of a Catholic seat as well as a Jewish seat on the Court. But for almost the past four decades, the notion of religious-based seats and the consideration of religion in the calculus of selection seems to have returned to the same irrelevant status it appears to have had when Andrew Jackson named Roger B. Taney. The only difference is that today five of the justices are Roman Catholic, two are Jewish, and only two are Protestants.

III. RELIGION AND THE SELECTION OF LOWER FEDERAL COURT JUDGES

The selection of lower federal court judges has been steeped, historically, in the politics of political patronage—presidential patronage, senatorial patronage, and local party leader patronage.⁴⁰ Thus, judgeships have gone to those backed by senators and other major politicians of the president's party as well as those favored by the President himself. This has also meant that lower federal court judgeships have historically tended to be motivated by partisan agendas.

38. DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES 198–205* (1999).

39. See, e.g., Todd S. Purdum, *Court in Transition: The Overview; Bush Picks Nominee for Court; Cites His 'Fairness and Civility'*, N.Y. TIMES, July 20, 2005, at A1; Elisabeth Bumiller & Carl Hulse, *Court in Transition: The Overview; Bush Picks U.S. Appeals Judge to Take O'Connor's Court Seat*, N.Y. TIMES, Nov. 1, 2005, at A1; and David D. Kirkpatrick, *In Alito, G.O.P. Reaps Harvest Planted in '82*, N.Y. TIMES, Jan. 30, 2006, at A1.

40. See generally GOLDMAN, *supra* note 1.

A. *Appointment of Catholics to the Lower Courts from 1801–1932*

George Washington and John Adams appointed fellow Federalists to the federal courts. With one exception, the religious affiliations of the appointees were of Protestant denominations. When Adams was defeated for reelection in 1800 by the Democratic-Republican Thomas Jefferson, the lame duck Federalist Congress enacted the Judiciary Act of 1801, which created new federal court positions including separate circuit court judgeships. President Adams appointed the first Roman Catholic to the federal judiciary, Philip Barton Key from Maryland, to a Fourth Circuit judgeship created by the 1801 Act. Thomas Jefferson recognized what the Federalists were up to, and noted in a letter to James Madison, “The Federalists . . . have retired into the judiciary as a stronghold . . . and from that battery all the works of republicanism are to be beaten down and erased.”⁴¹ The Jeffersonians repealed the 1801 Act with the Judiciary Act of 1802, and Judge Key left the bench.

A major historian of the nineteenth century federal judiciary, Kermit Hall, found that kinship ties (either by blood or by marriage) to leading Jeffersonian Republican members of Congress played a major role in the selection of the several dozen lower-court judges during the presidencies of Jefferson, Madison, Monroe, and John Quincy Adams.⁴² None of those selected were Roman Catholic.

Beginning with Andrew Jackson’s presidency, a reconstituted Democratic Party championed democracy for the lower classes and declared its enmity of privilege and wealth. Jackson’s administration was states-rights oriented and was out of sync with the property-oriented and federal-supremacy-minded Supreme Court of Chief Justice John Marshall. As a result, Jackson used his power of appointment to name judges whose policy views were in accord with those of the administration. As Hall observed, Jackson “appreciated that judicial decision making often reflected a judge’s values,” and consequently was determined to name as judges only those, as Jackson phrased it, whose “principles of the Constitution are sound, and well fixed.”⁴³ Not only did Jackson name Roman Catholic Roger B. Taney, but he also named a Roman Catholic, Samuel Hadden Harper, to the district court bench in Louisiana.

Judicial appointments by Jackson’s successor, Martin Van Buren, were “more party directed than it had been during Jackson’s administration.”⁴⁴ Van Buren, like Jackson, named one Roman Catholic, Philip Kissick Lawrence, to the district court in Louisiana. Indeed, Lawrence succeeded Samuel Hadden Harper, although there is no evidence that there was a

41. BENJAMIN F. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 31 (1967).

42. KERMIT L. HALL, *THE POLITICS OF JUSTICE* 1–26 (1979).

43. *Id.* at 5.

44. *Id.* at 29.

conscious effort to replace one Catholic with another. Rather, there was a heavy Catholic presence in Louisiana, and therefore the pool of likely judicial candidates naturally included many Catholics.

Van Buren lost his bid for reelection to the Whig Party ticket of William Henry Harrison and John Tyler. After only one month in office, Harrison died and Tyler became president. Hall found that Tyler's lower-court nominations were calculated to provide support for his reelection as a third-party candidate, suggesting they were partisan-agenda appointments. Two of only six appointed to the district courts were Catholics—Elisha Mills Huntington to the federal bench in Indiana and Archibald Randall to the eastern district of Pennsylvania. Randall's appointment, in particular, appeared to be good politics. As Kermit Hall noted: "Randall's Catholicism and his good relations with the Irish community promised to broaden Whig support."⁴⁵ Democrat James Polk succeeded Tyler in 1845, and his eight district court nominations were influenced by congressional Democrats.⁴⁶ None of Polk's nominees, however, were Catholic.

In 1848, Whig Party candidate Zachary Taylor and his running mate Millard Fillmore were elected to the nation's highest offices. Taylor "wielded . . . judicial patronage in an outwardly party-directed fashion."⁴⁷ Fillmore, who assumed the presidency after Taylor's death in office, also used judicial appointments for partisan-agenda purposes.⁴⁸ Of these nominations, one Catholic, James McHall Jones, was appointed to the bench in California. It would be twenty-five years from the Jones appointment before another Roman Catholic made it to the federal district court bench.

After the Civil War, the Republican Party dominated American politics.⁴⁹ War hero General Ulysses S. Grant, a Republican, was elected President in 1868 and again in 1872. In 1875, Grant named Roman Catholic and Missouri congressman Isaac Charles Parker to the federal district bench in Arkansas. Grant's successor, Rutherford B. Hayes, did not appoint any Catholics to the federal bench. Hayes's successor James Garfield was elected in 1880, but his presidency was cut short by an assassin's bullet. Vice President Chester Arthur assumed the presidency, and in 1884 named a Catholic, Chauncey Brewer Sabin, to the district bench in Texas.

Democrat Grover Cleveland broke the Republican winning streak in 1884. In his first reelection bid in 1888, Cleveland won the popular vote but lost the electoral college; Benjamin Harrison was thus elected President. Cleveland, however, returned and was reelected to the presidency in 1892. During his four years as President, Benjamin Harrison appointed one Roman Catholic—Joseph McKenna, a Republican member of Congress—to

45. *Id.* at 51.

46. *Id.* at 62.

47. *Id.* at 90.

48. *Id.* at 93–100.

49. FRANK J. SORAUF, PARTY POLITICS IN AMERICA 134–36 (1968).

the Ninth Circuit. President Cleveland, during his two terms in office, did not view the federal courts as being in conflict with his policy agenda. Indeed, Cleveland's four appointments to the Supreme Court were Democrats. There is no evidence that they and Cleveland's thirty district court appointments (all Democrats) were policy-agenda appointments. Traditional partisan-agenda considerations appear to have characterized Cleveland's selection of judges. As a result, Roman Catholics aligned with the Democratic Party were "represented" by three appointments of Roman Catholics to the district courts and one to an appeals court.⁵⁰

In 1896, the forces of Populism had a transformative effect on American politics. Although the Democrats, joined by the Populists, lost the 1896 presidential election, the Republican Party was also deeply affected by the spirit of reform.⁵¹ The progressive wing of the Republican Party viewed the courts as enemies of the government efforts to mitigate the excesses of capitalism. After Theodore Roosevelt assumed the presidency in September 1901, following the assassination of President William McKinley, the Progressive movement became more fully integrated within the Republican Party. But partisan considerations were also at play, and Theodore Roosevelt appointed two Catholics to the district courts.⁵²

William Howard Taft, elected president in 1908, took an interest in judicial selection that was unique in the history of the American presidency. Taft was the first (and the only) former federal judge to assume the presidency (he had been appointed to the Sixth Circuit Court of Appeals by Benjamin Harrison in 1892 and served on the bench for eight years). Three of Taft's appointees to the Supreme Court were Democrats, as were five of his thirty-six district court appointments. Three district court appointees and one appeals court appointee were Roman Catholic.⁵³ Taft was less concerned with party affiliation and more concerned that his appointees shared his "real politics."⁵⁴

Judicial selection during the two terms of Democrat Woodrow Wilson, appears to have been primarily of the partisan agenda kind. Four to the federal district bench were Roman Catholic as were three to the circuit

50. Those named to the district courts were William Matthew Merrick to the federal bench in the District of Columbia; Charles Parlange to the bench in Louisiana; and John Augustine Marshall to the bench in Utah. Cleveland named one Catholic to an appeals court, Martin F. Morris, to the newly established Court of Appeals for the District of Columbia.

51. SORAUF, *supra* note 49, at 141-42.

52. Named were Wendell Phillips Stafford to the bench in the District of Columbia and Oscar Richard Hundley to the court in Alabama.

53. Named to the federal district bench were: George Donworth to the court in the state of Washington (the western district); Frank H. Rudkin also to the court in the state of Washington (the eastern district); and George M. Bourquin to the court in Montana. Named to an appeals court was William Schofield, to the First Circuit.

54. Daniel S. McHargue, *President Taft's Appointments to the Supreme Court*, 12 J. POL. 478, 509 (1950).

courts.⁵⁵ Republicans regained control of the federal government with the election of 1920, and retained this control through the subsequent two elections. Presidents Harding, Coolidge, and Hoover did not seek to change court policy, and the appointments can be seen as furthering their partisan agendas. But Herbert Hoover, with his attorney general, William Mitchell, sought to improve the quality of the appointees by attempting to break the grip that Republican senators had on district court appointments. There was much contention with Republican senators that ultimately ended with the administration, in effect, conceding defeat.⁵⁶ Harding and Coolidge each named two Catholics to the district courts, and Harding named one Catholic, Frank Rudkin, who was elevated to the Ninth Circuit. Hoover named four Catholics to the district courts but none to the appeals courts. The geographic spread of the district court appointees included two to the bench in Minnesota, two to the southern district of New York, and one each to the bench in Illinois, Michigan, California, and the District of Columbia.⁵⁷

B. Catholic Lower Court Appointments from 1933–1980

Franklin D. Roosevelt appointed a record number of Roman Catholics to the federal district and appeals courts. As seen in Table 1, 40 of his district court appointees were Catholics. As seen in Table 2, the number (6) and proportion (12.0%) of Catholics appointed to the appeals court was considerably less—but in absolute numbers a record nonetheless. Clearly, at the district court level Catholics were generously recognized, no doubt a reflection of Catholic participation in the ranks of the Democratic party and the prominence of Catholics at the head of local party organizations in major metropolitan areas of the Northeast and Midwest.⁵⁸

During his second term, Roosevelt was aware of the religion of his judicial nominees, and was somewhat concerned with the unprecedented number of Catholics appointed. For example, on August 1, 1939, Roosevelt wrote a memo to New York Senator Robert Wagner which was attached to a letter the president had received from a friend asking to be considered for a judgeship in the Southern District of New York. In his memo, Roosevelt wrote:

What do you think? Doubtless you have known him, as I have, for many years and he is a fine citizen. It is perfectly true

55. Named to the district courts were: Maurice Timothy Dooling to the bench in California; Martin Joseph Wade to the district court in Iowa; Martin Thomas Manton to the southern district of New York; and Charles Francis Lynch to the federal bench in New Jersey. To the appeals courts Wilson elevated Manton to the Second Circuit, and named two other Catholics—Constantine Smyth to the District of Columbia Circuit and Maurice Donahue to the Sixth Circuit.

56. JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* 317–20 (1953).

57. Because there are many names to mention, the reader is referred to the Gryski-Zuk-Goldman database for the names of these appointees. See *infra* note 105.

58. SORAUF, *supra* note 49, at 153.

that I am distinctly embarrassed by the fact that I have appointed to the District Court for the Southern District one Jew and four Catholics, and to the Brooklyn Court, first one Catholic and a week ago another.⁵⁹

Another example is when Attorney General Biddle wrote a memo to Roosevelt concerning a vacancy in the district court for Nebraska:

You asked me to see [Nebraska] Senator Norris . . . to suggest to him the advisability of appointing [John W.] Delehant, a Catholic, to the Court in accordance with the recommendations of Jim Lawrence, Quigley and Ed Flynn. He had previously expressed his belief that a Protestant should be appointed.

. . . .

[Senator Norris] will not oppose anybody you appoint on the District Court in Nebraska, but is still definitely of the opinion that it would be a mistake to appoint a Catholic. . . .

You will remember that the choice boiled down to Delehant and Paul F. Good (Protestant), both are excellent lawyers.⁶⁰

A mistake to appoint a Catholic? Were there sectarian tensions or jealousies in Nebraska that had to be addressed? Roosevelt had filled the previous vacancy in Nebraska with a Catholic. Despite the concerns expressed in this memo, Roosevelt appointed Delehant.

Interestingly, about midway through Roosevelt's third term, a special assistant to the attorney general undertook research to determine the religion of federal judges appointed by the Roosevelt administration from 1933 through much of 1942 compared to those appointed by Republican administrations from 1922 through 1932. Each judge and the judge's religion were listed and tables highlighted the percentage of Catholics in the population of each state and the percentage of Catholic Roosevelt appointees from each state. For the entire country, the statistics showed that "the percentage of Catholic appointments to federal judgeships . . . is 23.8 as against a Catholic population percentage of 16.9."⁶¹ The figures also showed that Roosevelt had appointed more than four times the proportion of Catholics as had his Republican predecessors. Nowhere in the report was there a suggestion that fewer Catholics should be appointed, and, for the balance of the Roosevelt administration, Catholics continued to receive unprecedented numbers of

59. Memorandum from Franklin D. Roosevelt to Robert Wagner, U.S. Senator, N. Y., (Aug. 1, 1939), [Re: Possible Appointment of Adolphus Ragan to the federal bench] Franklin D. Roosevelt Presidential Papers, OF 208c New York 1937-1939 (Roosevelt Presidential Library). The applicant, Adolphus Ragan, was not appointed to the federal bench.

60. Memorandum from Francis Biddle, Att'y Gen., to Franklin D. Roosevelt, (Dec. 29, 1941) [Re: Vacancy in the District Court for Nebraska], Franklin D. Roosevelt Presidential Papers OF 208b Nebraska 1933-1945 (Roosevelt Presidential Library).

61. Memorandum to Francis Biddle, Att'y Gen. (Nov. 27, 1942), Franklin D. Roosevelt Presidential Papers, at Francis Biddle Papers, Box 2, Judicial Appointments (Roosevelt Presidential Library).

judicial appointments.⁶² Roosevelt's judges were drawn from among the Democratic Party elite, but in religion, they appeared to represent the party's rank and file.⁶³

Harry Truman's presidential papers suggest his administration was very attuned to ethnic politics, including the appointment of Catholics, to reward members of the party's core constituency. There is ample evidence of this in Truman's presidential papers. An illuminating example that was prominent at the time concerned the administration's efforts to fill three vacancies on the federal district bench in Chicago. The President submitted nominees for all three vacancies at the same time—a "balanced" slate consisting of one Catholic, one Protestant, and one Jew. At the time, Truman was at odds with Illinois Democratic Senator Paul Douglas who had his own slate of candidates for the posts whose religions happened to be—one Catholic, one Protestant, and one Jew.⁶⁴

As seen in Tables 1 and 2, Truman appointed an even higher proportion of Catholic judges than Roosevelt. Like Roosevelt, Truman appointed a larger proportion of Catholics to the district courts (33%) than the appeals bench (23%), but even the proportion of Catholic appellate appointees was unprecedented and was almost double that of Roosevelt. It would seem that religious barriers to advancement in the judiciary were lowered even further for Catholics during the Truman administration. Given the importance of Catholics for the Democratic Party coalition, this was a logical development. Truman's appointees were thus in many respects representative of the Democratic Party coalition.

Eisenhower, as discussed earlier, wanted to name Catholics to the courts as a way of demonstrating that Catholics were welcomed by the Republican Party. Catholics constituted under one in five appointees but that was less than the proportion of Catholics named by Truman. Nevertheless, Eisenhower "restored" the Catholic seat on the Supreme Court with the naming of Justice William Brennan before the presidential election in 1956. The trend since the Roosevelt administration seemed to be for the appointment of Catholics to become more routine. In absolute numbers, as seen in Table 1, Eisenhower named twenty-four Catholics to the district courts, an unprecedented number for a Republican president. In absolute numbers, as seen in Table 2, Eisenhower named six Catholics to the appeals courts—the same number of Catholics appointed first by Roosevelt and then by Truman.

How would the nation's first Roman Catholic president handle religion when selecting judges? Assistant Deputy Attorney General Joe Dolan, who handled judicial selection in the Kennedy administration, gave some insight

62. GOLDMAN, *supra* note 1, at 59.

63. See SORAUF, *supra* note 49, at 153.

64. The details are recounted in GOLDMAN, *supra* note 1, at 73–74.

into this in an oral history interview: “We never considered religion. Perhaps we were somewhat sensitive about it due to the fact that this was the Administration of the first Catholic president.” But Dolan also conceded:

Ethnic composition is a consideration in gross. If you’re doing an adequate job in my opinion for a President, and you’re making appointments over a four year period, it would not be well at the end of four years if someone got up and said in the course of an election campaign—he didn’t appoint a single Jew to the bench, does that mean there is no Jewish lawyer qualified? Or he didn’t appoint a single Italo-American. . . . Well, you just say well, no one was suggested who seemed suitable, but it does seem unbelievable that you could have four years without appointing any Irish-American to the judiciary, or any Italian name, or Jewish, or if you didn’t appoint a single Negro, I think it would be regarded as somewhat remarkable. People wouldn’t believe you if you said it was just a coincidence, if you said it just happened that way. So in my opinion you can’t let it happen. You have to look and you have to be alert to the possibilities. Let’s say Polish-Americans—there aren’t too many Polish lawyers in the United States. And of the Polish lawyers in the United States, there aren’t too many who are in what you would call in New York the Wall Street law firms, in Denver, a 17th St. law firm. . . . As economic opportunities have expanded to the ethnic groups, so have the kind and character of the practice of the lawyers who identify with it. So you bet we look for a Pole. At the same time you maintain your standards. . . .⁶⁵

When Dolan was asked whether representatives of ethnic groups, religious groups, civil rights groups and other groups expressed an interest in judicial appointments, Dolan responded: “Ethnic groups, yes; religious groups, I don’t recall any. Civil rights groups—definitely.”⁶⁶

Because almost all Irish Americans, Polish Americans, Italian Americans, and Mexican Americans and other Latinos are Catholic, ethnicity and religion are inextricably intertwined.

The Johnson administration also understood the political necessity of recognizing ethnic groups. With Italian Americans, for example, Nicholas Katzenbach, who served as Deputy Attorney General under Kennedy and as Attorney General under Johnson, sought someone of Italian heritage for a district court vacancy in Connecticut.⁶⁷ On another occasion, White House assistant Jack Valenti advised Johnson to appoint those of Italian and Polish

65. Interview by Charles T. Morrissey with Joe Dolan, Assistant Deputy Att’y Gen. (Dec. 4, 1964), The Papers of John F. Kennedy 84–86 (Kennedy Presidential Library).

66. *Id.* at 87.

67. Memorandum from Nicholas Katzenbach, Deputy Att’y Gen., to P. Kenneth O’Donnell, Special Assistant to the President (Jan. 23, 1964), The Papers of Lyndon B. Johnson FG 505/FG 216, WHCF (Johnson Presidential Library).

ancestry.⁶⁸ In yet another instance, when Robert Belloni was appointed to the federal bench in Oregon, White House assistant Joseph Califano stressed to Johnson that Belloni was not an Italian American and should not be cited by Johnson as an Italian American appointment.⁶⁹ Johnson's personnel director John Macy recounted in an oral history interview that he had lists of "women and Negroes and Mexican-Americans" and that "it was a matter each time of seeing if we couldn't find somebody from the list."⁷⁰

Greater than one in four Kennedy and Johnson appointees to the district courts were Catholic—this proportion was higher than Eisenhower's proportion (19.0%), but lower than both Roosevelt's (30.1%) and Truman's (33.0%). About one in four Kennedy and Johnson appeals court appointees were also Catholics—this was substantially higher than the 12% appointed by Roosevelt and the 13.3% appointed by Eisenhower. Although these figures do not definitively prove the presence or absence of subtle religious biases within the judicial selection process, it is a reasonable inference that whatever biases had existed in the past were no longer at work in most parts of the country by the late 1960s.

Kennedy named the first publicly acknowledged Hispanic to a lifetime federal judgeship—Reynaldo B. Garza, a Mexican American Catholic from Texas.⁷¹ Johnson appointed Manuel L. Real, also a Mexican American Catholic, to a judgeship in California, and two Puerto Ricans (one of whom, Hiram R. Cancio, was Catholic) to the first two lifetime judgeships in Puerto Rico. For Kennedy and Johnson, the considerations of religion and ethnicity reflected the partisan agenda.

Richard Nixon, before Watergate unraveled his presidency, and in contrast to his recent predecessors in office, believed judicial selection should be undertaken with the policy-agenda in mind.⁷² However, not until the Reagan administration were policy agenda concerns institutionalized in the selection process.⁷³ In practice, the appointment of Catholics by Nixon, and then Ford, reflected the partisan agenda more than the policy agenda.

68. Memorandum from Jack Valenti, White House Assistant, to Lyndon B. Johnson (Aug. 30, 1965), The Papers of Lyndon B. Johnson, EX PE 2 7/27/65–8/31/65, WHCF (Johnson Presidential Library).

69. Memorandum from Joseph Califano, White House Assistant, to Lyndon B. Johnson (Mar. 12, 1967), The Papers of Lyndon B. Johnson, Ex FG 530/ST 33–ST 39, WHCF (Johnson Presidential Library).

70. Interview by David McComb with John Macy, Personnel Director to Lyndon B. Johnson (Apr. 26, 1969), The Papers of Lyndon B. Johnson 15–16 (Johnson Presidential Library).

71. Note that Truman appointee Judge Harold Medina's father was Mexican American. Medina was first on the federal district court bench and later promoted to the U.S. Court of Appeals for the Second Circuit (both appointments made by Truman). But Medina did not present himself as an Hispanic American and was not known or considered by the Truman administration as someone of Latino descent. Interestingly, when Medina died his obituary in the New York Times did not mention his Hispanic origins. Obituary, *Harold Medina, U.S. Judge, Dies at 102*, N.Y. TIMES, Mar. 16, 1990, at B7.

72. GOLDMAN, *supra* note 1, at 205–06.

73. *Id.* at 291–94.

As Tables 1 and 2 suggest, slightly more than one-in-six Nixon and Ford appointees to the lower federal courts were Catholic approximating the Eisenhower proportion but less than the one-in-four rate for Kennedy and Johnson. The gap in the appointment of Catholics between Democrats and Republicans would remain until the Reagan years, and likely reflected differences in the religious composition of the population of Republicans and Democrats likely to be considered for the bench.

President Jimmy Carter named Catholics to more than twenty-five percent of the judgeships he filled—a proportion akin to that of the Kennedy and Johnson administrations, and higher than that of previous Republican presidents. In absolute numbers, Carter appointed, up to that point in time, a record number of Catholics to the district courts, fifty-six, and tied with Kennedy-Johnson for the record of Catholics to the appeals courts—fifteen.

Carter's administration made the most deliberate effort in the history of federal judicial selection to place women, African Americans, and Hispanic Americans (which in practice meant Catholics) on the federal bench.⁷⁴ Carter named fourteen Hispanic Americans to the federal district bench in six states and Puerto Rico, and two to appeals courts. Fifteen of these sixteen breakthrough appointments were Catholics. These appointments, along with the appointment of non-Hispanic Catholics can be considered partisan-agenda appointments.

C. Catholic Lower Court Appointments from 1981–2007

The administration of Ronald Reagan was clearly concerned with its policy agenda and promoting that agenda with its appointments to the federal courts.⁷⁵ What did this mean in terms of appointments of Catholics to the lower federal courts? Certainly professionally qualified Catholics who shared the administration's conservative views on abortion, pornography, and other social issues would be in the pool of potential appointees. There is no evidence, however, that religion itself played a role in selection. President Reagan, in a 1983 speech to the American Bar Association, addressed this very issue: “[W]e do not and will never select individuals just because they are men or women, whites or blacks, Jews, Catholics or whatever. I don't look at people as members of groups; I look at them as individuals and as Americans.”⁷⁶ Yet in that same address he emphasized: “We're committed to appointing outstanding blacks, Hispanics, and women to judicial and top-level policymaking positions in our administration.”

There is, indeed, some evidence that certain ethnic backgrounds, which happened to coincide with a preponderance of Catholic adherents,

74. See generally *id.* at 238–84.

75. *Id.* at 296–307.

76. Ronald Reagan, Speech to the American Bar Ass'n (1983), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN 1983, at 1110, 1112 (1985).

did play some part in judicial selection. For example, Italian Americans often lobbied for the appointment of Italian Americans to the federal bench. Antonin Scalia, for example, was touted for a circuit court position on the District of Columbia Circuit by the president of the National Italian American Foundation.⁷⁷ New Mexico Republican Senator Pete V. Domenici also wrote to Reagan and argued that “the selection of Mr. Scalia, an Italian American, would result in significant approval by the Italian-American community of this Nation.”⁷⁸ Scalia’s ethnic background was no doubt a positive, although not determinative, factor in his appointment. It likely played a similar role in his appointment to the Supreme Court four years later—Reagan boasted that he was responsible for “the first Italian-American to be nominated to the Supreme Court in history.”⁷⁹

President Reagan typically telephoned those he was about to nominate to the federal bench. Prior to placing each call, the President received a memorandum briefing him about the nominee and suggesting what he might say.⁸⁰ When Italian Americans were named to the lower courts, it was not unusual for the telephone memorandum to mention this. For example, the telephone memo concerning Judge Leroy J. Contie, Jr., noted: “Judge Contie was enthusiastically endorsed by many Italian organizations and is a member of the Sons of Italy.”⁸¹ The nominees themselves also occasionally revealed an ethnic consciousness. For example, when Richard I. Cardamone was appointed to the Second Circuit, he wrote to the president: “I . . . happen to be the first person of Italian ancestry to serve as a member of the 180-year-old Second Circuit.”⁸²

Interestingly, during the Carter years, the Justice Department prepared resumes that accompanied the nomination documents sent by the attorney general to the president and each contained the category “Ethnic Group” (the Carter administration included such designations as “hispanic,” “black,” “Asian,” and “white”). The Reagan administration continued this practice. For example, the resume for Juan R. Torruella, a Catholic named

77. Letter from Frank D. Stella, President of the Nat’l Italian Amer. Found., to Ronald Reagan (July 21, 1981), The Ronald Reagan Presidential Papers, WHORM, FG 52 (0316000-032999), #032838 (Reagan Presidential Library).

78. Letter from Pete V. Domenici, U.S. Senator, N.M., to Ronald Reagan (Aug. 3, 1981), The Ronald Reagan Presidential Papers, WHORM, FG 52 (035000-036999), #035957 (Reagan Presidential Library).

79. Ronald Reagan, Remarks by Telephone to the Annual Convention of the Knights of Columbus in Chi., Ill. (Aug. 5, 1986), PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN 1986, at 1053, 1055 (1989).

80. GOLDMAN, *supra* note 1, at 294.

81. Memorandum for the President, Re: Recommended Telephone Call to Leroy J. Contie, Jr. (Jan. 11, 1982), The Ronald Reagan Presidential Papers, WHORM, FG 52 (058000-063299), #063109 (Reagan Presidential Library).

82. Letter from Richard Cardamone to Ronald Reagan (Nov. 9, 1981), The Ronald Reagan Presidential Papers, WHORM, FG 52 (037000-048499), #047790 (Reagan Presidential Library).

to the First Circuit, listed his ethnic group as “Hispanic.”⁸³ One of those who recommended him was Luis A. Ferré, the Republican state chairman and National Committee representative for Puerto Rico. In his letter to Reagan, Ferré emphasized that the appointment of Torruella would provide the “unique opportunity” to name someone “intellectually supportive of the Administration and at the same time would allow you to appoint the first Hispanic to the [First Circuit] bench.”⁸⁴

The administration was particularly interested in appointing Hispanic Americans. For example, when Attorney General Edwin Meese received a letter from a friend recommending a state judge of Hispanic ethnicity for a federal district court position in California, Meese forwarded the letter to John Herrington, the assistant to the president for personnel, and handwrote on the copy of the reply to which he attached the original letter: “Hispanic—What do you know/think?”⁸⁵ The individual who had been recommended to Meese, Edward Garcia, was in fact subsequently appointed to the California federal bench. In total, fifteen Hispanic Americans, fourteen of whom were Catholic, were named to the bench (fourteen to the district courts and one to the appeals bench) during the two terms of Reagan’s presidency—one less than the Carter record of sixteen Hispanics appointed to the lower federal courts. The Republican Party sought to woo Hispanic voters in the 1984 election. Thus, the Reagan administration focus on appointing Hispanic judicial candidates clearly served the partisan agenda.

In terms of religion, Reagan appointed more Catholics and fewer Protestants than any other Republican president—proportions similar to those of Democratic administrations. In the past, the religious composition or mix of each party’s base, and therefore the pool of potential judicial candidates from each party, was different. The findings reported in Tables 1 and 2 for the Reagan administration should not be read as suggesting that the administration gave preference to Catholics *because* of their religion but rather that more Catholics had entered the potential pool from which Republican judicial nominees were drawn, thus increasing the proportion of Catholics chosen. This makes sense in terms of the relatively heavy Catholic vote for Reagan in 1980 and especially 1984.⁸⁶ The proportion (4.8%) and number (14) of Hispanic Americans appointed to the district courts was considera-

83. Resume Sheet for Juan R. Torruella, Candidate for the 1st Cir., The Ronald Reagan Presidential Papers, WHORM, FG52 (216000-216999), #216690 (Reagan Presidential Library).

84. Letter from Luis A. Ferré, State Chairman and Republican Nat’l Comm. Member from P.R., to Ronald Reagan (July 10, 1984), The Ronald Reagan Presidential Papers, WHORM, FG 52 (232000-233799), #232801 (Reagan Presidential Library).

85. Memorandum from Edwin Meese III, Counsel to the President, to Robert K. Puglia, Presiding Justice, 3d App. Dist., Ct. Ap. For Cal. (July 5, 1983), The Ronald Reagan Presidential Papers, WHORM, FG 52 (149267-158899), #151210 (Reagan Presidential Library).

86. See, e.g., Maurice Timothy Reidy, *Who Owns the ‘Catholic’ Vote?*, SOJOURNERS MAG, 12 (June 2006), at 12, available at <http://www.sojo.net/index.cfm?action=magazine.article&issue=Soj0606&article=060610>.

bly higher than that of African Americans (2.6% and six people). It was widely understood that the Republican Party sought to woo Hispanic voters in the 1984 election, and it clearly better served the partisan agenda to focus on appointing Hispanic Americans than African Americans.

The Reagan Administration also saw conservative Catholic institutions as natural allies. In an address to the Knights of Columbus on August 5, 1986, President Reagan asserted:

In many areas—abortion, crime, pornography, and others—progress will take place when the Federal judiciary is made up of judges who believe in law and order and a strict interpretation of the Constitution. I'm pleased to be able to tell you that I've already appointed 284 Federal judges, men and women who share the fundamental values that you and I so cherish. . . .⁸⁷

The ideological agreement of conservative Catholics with the president's policy agenda also likely contributed to the significant number of Catholic appointments by the Reagan administration, particularly to the appeals courts.

The first Bush (hereinafter Bush I) presidency was responsible for naming to the federal district courts a proportion of Catholics that was slightly higher than that of the Reagan and Carter administrations.⁸⁸ With appointments to the appeals courts, the Bush I proportion was only slightly below that for the Carter administration but lower than that for the Reagan administration.⁸⁹ In making judicial appointments to the district and appeals courts, the Bush I administration was primarily motivated by its policy agenda, and there is no indication that a potential nominee's Catholicism played an overt role in the judicial selection process.⁹⁰

President Bill Clinton's proportions of Catholic appointees to the district courts, as seen in Table 1, was about the same as that of Bush I and slightly higher than that for Reagan, Carter, Kennedy, and Johnson. The proportion of Catholics to the appeals courts, as indicated in Table 2, however, tied Reagan's record and was the highest for any Democratic administration. There did not seem to be any conscious effort to recruit Catholics, and those appointed appeared to reflect the pool of candidates from which a Democratic president committed to affirmative action would draw.⁹¹

George W. Bush's administration, in addition to naming two Catholics to the Supreme Court, also named an unprecedented proportion of Catholics

87. Ronald Reagan, Remarks by Telephone to the Annual Convention of the Knights of Columbus in Chi., Ill., *supra* note 79, at 1055.

88. See Goldman, *supra* note 36, at 287.

89. *Id.* at 293.

90. *Id.* at 285–86. I reviewed the presidential papers of George H.W. Bush and found no evidence of religion playing a part in judicial selection.

91. Of the eighty-seven Catholics appointed by Clinton to the federal district bench, forty-one (47.1%) were women and minorities. Of the eighteen Catholics appointed to the appeals courts, nine (50.0%) were women and minorities.

during his first six years to both the district and appeals courts (Catholics constituted over one-third of his appointees to those courts). There is no indication that a nominee's religion was directly considered in the selection process; rather, the administration was focused on making policy-agenda appointments to the federal courts consistent with energizing the party base.⁹²

IV. WHY POLICY AGENDA APPOINTMENTS?

How the policy agenda came to have such prominence in judicial selection is an important story to tell and to understand, and can help explain why devout Catholics may have had—and still have—an edge in the appointments of recent Republican administrations.⁹³ Over the past fifty years, the old patronage-based political party machines have atrophied and have been replaced by issue-oriented party organizations that have been captured and guided by policy-oriented activists. The issues of the 1960s and 1970s—civil rights for African Americans and other ethnic minorities, equality for women, the Vietnam War, and then the Watergate scandals and the abuse of governmental power—all accelerated the move toward left-wing, issue-oriented Democratic party organizations. Abortion, affirmative action, crime, the heavy hand of government, and similar issues accelerated the move towards right-wing, issue-oriented Republican party organizations.

In the past, patronage jobs provided the incentives for people to work for the party organizations and their candidates; today, however, policy positions form the basis for a new incentive system. Adding to this new emphasis on policy positions, various nonprofit advocacy groups formed to further their individual agendas—that included placing sympathetic judges on the federal bench.⁹⁴ These advocacy groups give or withhold their political support to senators, and can mobilize their membership with a well-conceived mailing, telephone, or get-out-the-vote campaign. To accomplish all of this, these groups developed their own paid bureaucracy that requires a constantly-growing base of paid memberships in the organization and ongoing fundraising. Promoting the organization's issues and highlighting conflicts with opposing groups not only helps the groups maintain the allegiance of their core supporters, but also expands their membership. The

92. See generally Sheldon Goldman, Elliot Slotnick, Gerard Gryski, Gary Zuk & Sara Schiavoni, *W. Bush Remaking the Judiciary: Like Father Like Son?* 86 JUDICATURE 282 (2003); Sheldon Goldman, Elliot Slotnick, Gerard Gryski & Sara Schiavoni, *W. Bush's Judiciary: The First Term Record*, 88 JUDICATURE 244 (2005) [hereinafter Sheldon Goldman et al., *The First Term Record*].

93. This section draws on my article, Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 874–78 (2005).

94. See LAURA COHEN BELL, *WARRING FACTIONS: INTEREST GROUPS, MONEY, AND THE NEW POLITICS OF SENATE CONFIRMATION* (2002); NANCY SCHERER, *SCORING POINTS: POLITICIANS, ACTIVISTS AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS* 108–32 (2005).

divide between the opposing policy activists is not necessarily mirrored by the general public.⁹⁵

Advocacy or interest groups have assumed a prominent place in judicial selection and confirmation. Before the 1980s, there were times when groups were involved in a judicial nomination, but nothing matched the fight over President Reagan's nomination of Robert Bork to the Supreme Court in 1987.⁹⁶ Bork's nomination was a call to action for the advocacy groups opposed to the nomination, and they invested an unprecedented amount of resources into anti-Bork media advertising and lobbying senators. Robert Bork, who was a distinguished conservative legal scholar, had an impressive resume—Yale Law School professor, Solicitor General of the United States, a partner in a major District of Columbia law firm—and for several years before his Supreme Court nomination, a U.S. Court of Appeals judge for the District of Columbia circuit. But when Bork was nominated to the Supreme Court, his previously-expressed views contesting the constitutional foundation of the right to sexual and reproductive privacy became a prime factor for those opposed to his nomination. At his confirmation hearing, Bork promised to keep an open mind on the issue of abortion and the right to privacy. However, liberal and moderate senators did not believe him, and they appeared to be vindicated when, years after he resigned from the federal bench, Robert Bork admitted that he believed *Roe v. Wade* was wrongly decided and suggested that, had he been on the Supreme Court, he would have provided the fifth vote to overturn it.⁹⁷ After the Bork debacle, conservative activist groups, just as their liberal counterparts, closely scrutinized judicial nominees and mounted pressure at the executive branch and senatorial levels pushing the candidacies of ideologically acceptable individuals and opposing nominees or potential nominees they found unacceptable.

The trend in judicial selection, thus, has been to move away from primarily patronage concerns to concerns about furthering the president's policy agenda through judicial appointments. This trend has been reinforced by policy-oriented party activists. Since the early 1990s, senators have increasingly openly opposed judicial nominees on policy and judicial philosophical grounds. Most of that opposition, aside from Supreme Court nominations, has centered on nominees to the courts of appeals. This was true during the last six years of the Clinton presidency, when some Republican senators delayed or killed some nominations, and it has continued with Democratic opposition to the nominations of George W. Bush.⁹⁸

95. See MORRIS P. FIORINA ET AL., *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (2005).

96. See BRONNER, *supra* note 33; GITENSTEIN, *supra* note 33; BORK, *supra* note 33.

97. ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 71 (2003).

98. See Sheldon Goldman et al., *The First Term Record*, *supra* note 92, at 244.

A defining policy agenda issue for recent Republican administrations, including that of George W. Bush, has been opposition to *Roe v. Wade*, which created a constitutional right for a woman to abort a non-viable fetus. The Catholic Church has been at the forefront of opposition to abortion, and many conservative Catholic lawyers and jurists have consequently been drawn to the Republican Party and placed in the pool of potential judicial appointees. Recent Democratic administrations have drawn from pools of potential judicial candidates that represent their party's base, which still includes substantial numbers of Catholics.

V. CONCLUSION

Religion has played a varying role in the selection of judges throughout American history. At the Supreme Court level, there is little evidence that in the nineteenth century a potential nominee's affiliation with the Roman Catholic church was a de facto disqualifier for active consideration for an appointment, although given wide-spread anti-Catholicism in large parts of the country it is possible that potential candidacies were thus nipped in the bud. We do see, however, that the partisan agenda of presidential administrations resulted in the appointments of Catholics to the Supreme Court for the first fifty-six years of the twentieth century.

The patronage base of American political parties, whereby jobs were the glue that held political party organizations together, became less important as civil service reforms were consolidated and as the number of persons needed to mount nationwide, and even major statewide campaigns, far exceeded the number of patronage jobs available. The old fashioned political party machines also decayed in the face of political reformers who rebelled against corrupt machine politics.⁹⁹ At the national level, candidates for president found it more effective to establish their own organizations that operated outside the national party structure. Interestingly, Roman Catholic President John F. Kennedy accelerated this trend in his race for the White House.¹⁰⁰

Furthermore, the politics of the 1960s and early 1970s—with increased emphasis on issues such as the unpopular Vietnam War, rising crime rates, the Watergate scandal, and environmental concerns—and the formation of policy-oriented interest groups fueled the linkage of policy as incentives for political activism.¹⁰¹ The Supreme Court's abortion rights decisions energized conservatives, and the issue became a rallying cry for Ronald Reagan and helped propel him to the presidency in 1980.¹⁰² Given the judiciary's

99. See JAMES Q. WILSON, *THE AMATEUR DEMOCRAT: CLUB POLITICS IN THREE CITIES* (1962) (the first book-length study of this emerging phenomenon).

100. See THEODORE H. WHITE, *THE MAKING OF THE PRESIDENT, 1960* (1961) (the classic study of the 1960 presidential election campaign).

101. See BELL, *supra* note 94; SCHERER, *supra* note 94.

102. GOLDMAN, *supra* note 1, at 296–97.

involvement with many contentious issues—including the rights of criminal defendants; the rights of women and minorities, and eventually gays; environmental protection; and, of course, abortion rights—the policy orientation of candidates for federal judgeships became increasingly salient for interest groups, politicians, and presidential administrations. The abortion issue, as well as homosexuality, has been of great concern to the Catholic Church and has drawn some Catholics to the Republican Party, as reconstituted by Ronald Reagan and his supporters. The Republican Party rode the so-called social issues (crime, abortion, affirmative action, family values/anti-homosexuality) to victory in 1988, and then again in 2000 and 2004.

As the policy agenda has come to predominate judicial selection, the appointment of Catholics has been more policy-driven, and in the most recent cases of the appointments of John Roberts and Samuel Alito, a result of a unique configuration of circumstances.¹⁰³ The making of a Catholic majority on the Supreme Court was not a deliberate attempt to stack the Court with Catholics, but a byproduct of policy-agenda judicial selection.¹⁰⁴

Likewise, a review of the politics of appointing Catholics to the lower federal courts suggests that, until recently, the partisan agenda was primarily responsible for the appointment of Catholics. With the emergence of the policy agenda domination of the selection process, the presence of well qualified, conservative Republican Catholics in the pool of potential judicial nominees has resulted in more Catholics being named by Republican administrations than in earlier eras. To the extent that Catholicism is identified with a key facet of the Republican policy agenda, Catholicism has played an indirect role in these selections. To the extent that Roman Catholics constitute a key segment of the Democratic Party's base, it can likewise be said that Catholicism has an indirect effect on selection.

103. The unique circumstances include the timing of Chief Justice Rehnquist's death, the failure of the Harriet Miers nomination, and the fact that Republicans controlled the Senate.

104. Anthony Kennedy was President Reagan's third choice to fill the vacancy left by the retirement of Justice Lewis Powell. Research reveals that non-Catholics were considered for the positions filled by Antonin Scalia and Clarence Thomas. See NEMACHECK, *supra* note 24, at 153–54.

TABLE 1: ¹⁰⁵ CATHOLIC APPOINTEES TO THE DISTRICT COURTS 1829–2007			
President	No. of Catholics	Total No. of Appointments	Percent Catholic
Jackson (D)	1	18	5.6
Van Buren (D)	1	8	12.5
Tyler (W)	2	6	33.3
Fillmore (W)	1	4	25.0
Grant (R)	1	32	3.1
Arthur (R)	1	13	7.7
Cleveland (D) (2 terms)	3	30	10.0
T. Roosevelt (R)	2	57	2.5
Taft (R)	3	36	8.3
Wilson (D)	4	53	7.5
Harding (R)	2	42	4.8
Coolidge (R)	2	61	3.3
Hoover (R)	4	44	9.1
FDR (D)	40	133	30.1
Truman (D)	32	97	33.0
Eisenhower (R)	24	126	19.0
Kennedy (D)	28	103	27.2
Johnson (D)	34	126	27.0
Nixon (R)	31	179	17.3
Ford (R)	7	52	13.5
Carter (D)	56	202	27.7
Reagan (R)	80	290	27.6
Bush 1 (R)	42	148	28.4
Clinton (D)	87	305	28.5
Bush 2 (R) (six years)	73	203	36.0

105. Sources: From Jackson through Hoover presidencies, data from the database assembled by Gerard Gryski and the late Gary Zuk, Auburn University. From FDR through Bush 2, first six years, data from the database assembled by Sheldon Goldman, University of Massachusetts. Note that both databases through Bush's first term have been combined and recently have been deposited at the Inter-University Consortium for Political and Social Research at the University of Michigan and at the University of Kentucky S. Sidney Ulmer Project for Research in Law and Judicial Politics. The S. Sidney Ulmer Project for Research in Law and Judicial Politics, <http://www.as.uky.edu/polisci/ulmerproject> (last updated Mar. 2, 2007). The Law and Social Science Program of the National Science Foundation (NSF grants SBR-9810838 and SBR-9800000) helped support the gathering of the data reported in this table.

TABLE 2: ¹⁰⁶ CATHOLIC APPOINTEES TO THE APPEALS COURTS 1891–2007			
President	No. of Catholics	Total No. of Appointments	Percent Catholic
B. Harrison (R)	1	12	8.3
Cleveland (D)	1	9	11.1
Taft (R)	1	13	7.7
Wilson (D)	3	20	15.0
Harding (R)	1	6	16.7
FDR (D)	6	50	12.0
Truman (D)	6	26	23.1
Eisenhower (R)	6	45	13.3
Kennedy (D)	5	20	25.0
Johnson (D)	10	41	24.4
Nixon (R)	7	45	15.6
Ford (R)	4	12	33.3
Carter (D)	15	56	26.8
Reagan (R)	23	78	29.5
Bush 1 (R)	9	37	24.3
Clinton (D)	18	61	29.5
Bush 2 (R) (six years)	17	49	34.7

106. Sources: From Jackson through Hoover presidencies, data from the database assembled by Gerard Gryski, Deborah Barrow, and the late Gary Zuk, Auburn University. From FDR through Bush 2, first six years, data from the database assembled by Sheldon Goldman, University of Massachusetts. Note that the Gryski/Barrow/Zuk database is on file with the Inter-University Consortium for Political and Social Research at the University of Michigan and the University of Kentucky S. Sidney Ulmer Project for Research in Law and Judicial Politics. *See supra* note 105.