

ADDRESS

CATHOLICISM AND THE COURT: THE RELEVANCE OF FAITH TRADITIONS IN JURISPRUDENCE

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The mandate of this panel, "How We Got Here," is to examine the dynamics of religion, culture, politics, and judicial nominations. Those dynamics, which the organizers of this conference at least hypothesize, have helped produce a Catholic majority on the Supreme Court—a first. As an editor and journalist, I am able to say something about the first three elements in that dynamic: religion, culture, politics . . . But judicial nominations? I only know what I read in the *New York Times*. Post facto, it is easy enough to identify the qualities that invited the attention of a particular president to a particular candidate. Before the fact, however, the choice is not obvious nor is it easy to see why other candidates, apparently indistinguishable from the nominee and equally qualified, could not have been chosen. (For example, in the last round of nominees, Michael McConnell of the Tenth Circuit comes to mind.)

Human nature and human dealings being what they are, I doubt that any one element in this dynamic (like religion) can explain the presence of the five justices who make up a Catholic majority today. Of course, it remains to be seen what kind of majority the five turn out to be, or whether they become a majority in anyway way other than sharing a Catholic faith. In other words, there may be less than the whiff of incense that some seem to smell here.

And speaking of the *New York Times* (not a Catholic publication), let me cite a recent story as one way into the dynamics of Catholicism, culture, and politics today.¹ Archbishop Donald Wuerl, presiding at the annual Red

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1. Neela Banerjee, *Archbishop's Call for Court Blessing Steers Clear of Issues*, N.Y. TIMES, Oct. 2, 2006, at A12; see also Paul Schwartzman, *Archbishop Stresses Ties Between Morality, Faith at Mass with Justices*, WASH. POST, Oct. 2, 2006, at B02.

Mass in Washington, D.C. on Sunday, October 1, said in his sermon, “[t]he two spheres, church and state, while distinct, are always interrelated.” And he continued, describing how this worked, “[p]olitics, law, faith are mingled because believers are also citizens. Church and state are home for the same people.”² The *Times* story went on to report that after Mass, on the steps of the cathedral,

two young men approached [the archbishop] to have him bless their rosaries and to take pictures with him.

As the archbishop stood with one man, the other, holding the camera, said happily, “Here’s to the union of church and state!”

The archbishop laughed, but gently corrected him. “No,” he replied, “remember, I said they were distinct spheres.”³

That Archbishop Wuerl—a moderate or centrist conservative—had to defend the idea of two distinct spheres against the notion advanced by the young man that there should be no separation between church and state tells us a little something about the Catholic population in the United States today. Namely, not just liberals but conservatives too are arguing with the hierarchy.

Following the Second Vatican Council, which closed in December 1965, a period of reform and renewal took place in the Catholic Church in the United States. As a result, there developed over the years the complaint that the council had been hijacked by liberals (including bishops, clergy, and laypeople). Sometimes these have been described more darkly as “liberal forces.” Yet, in recent years, the pendulum has swung back (as it usually does in the Catholic Church), most markedly in the character of the Catholic episcopacy and clergy, which is now more conservative than at any time in recent memory. Some will speak darkly of “conservative forces”; but in fact, the liberal/conservative divide within the Catholic Church is complex, and in many respects not parallel to the liberal/conservative divide in United States politics.

Catholic laity, if we are to take its measure by opinion polls, tend to be in some matters more liberal (on abortion, stem cell research, and same-sex unions) than their bishops, and in other matters more conservative—on allowing torture, restricting immigration, and welcoming tax cuts⁴—than their bishops. There are, as those young men on the cathedral steps demonstrated, serious and earnest individuals, movements, and groups of conservative Catholics, some of whom hearken back to pre-Vatican days (and

2. Banjeree, *supra* note 1, at A12.

3. *Id.*

4. William V. D’Antonio, *American Catholics and Party Politics: Demography, Commitment and Social Teachings*, NAT’L CATH. REP., Sept. 30, 2005, available at http://natcath.org/NCR_Online/archives2/2005c/093005/093005n.htm; see also Tom Carney, *Americans, Especially Catholics, Approve of Torture*, NAT’L CATH. REP., Mar. 24, 2006, available at http://natcath.org/NCR_Online/archives2/2006a/032406/032406.htm.

even to pre-Vatican II formulations, for example, on church and state), but most of whom follow John Paul II in the view that Vatican II was meant to be an *aggiornamento* (an updating), not a revolution. These conservative laypeople are a minority in the U.S. Catholic Church. And then, there are liberal Catholics, most of whom certainly accept Vatican II, and some of whom think it did not sufficiently update the church. At the moment, they appear to be a dwindling majority, in part because younger Catholics are not joining in the battles of their elders, whether liberal or conservative. In fact, in many cases, not joining in anything Catholic at all.

Nonetheless, like the young men in the *Times* story, Catholic laypeople, whatever their tendency—conservative or liberal, reactionary or progressive, bomb thrower or pacifist—now think jousting with the hierarchy and clergy is one of their baptismal rights. In other words, automatic deference to the preachments of bishops and priests can no longer be counted upon.

For one thing, Catholics—or old-immigration Catholics and some new immigrants too (Cubans and Vietnamese, for example)—are well educated; they can think for themselves when they want to. They are deeply assimilated into mainstream American society. They grow up in suburbs. Their parents and even grandparents have been professionals and white-collar workers. Many do not pay their fair share of taxes in higher-income brackets—just like their counterparts in other faith traditions and no faith traditions at all. They and their children attend elite colleges and universities. Their first jobs put them on the fast-track of promotions in the business or professional worlds. Old-immigrant Catholics pepper the higher levels of banks, businesses, universities, corporations, and government, now including the Supreme Court. All five Catholic justices show elements of this pattern, even Justice Thomas who grew up in more modest circumstances than the others. Most important, they are all graduates of either Harvard or Yale law schools and by appointments to circuit courts they joined the pool of potential Supreme Court nominees. They are members of an important American elite.⁵

Could we agree that the level of Catholic assimilation, education, and socio-economic status goes some way—indeed, in some cases, a long way—in explaining the presence of any five Catholics on the Court? What could not happen—was not dreamed of—in 1850 when a mass of Catholic Irish immigrants flooded the country, or in 1928 when a New York Catholic failed in his presidential bid, or even in 1960 when a Massachusetts Catholic succeeded, what could not happen back then, finally happened in 2005—there are a majority of Catholics on the Supreme Court. We could say it's about time.

5. See Supreme Court of the United States, *The Justices of the Supreme Court*, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Feb. 1, 2007).

That said, let's look at the implicit organizing question here: Were the five appointed because they were Catholics who could be counted on as Catholics with their majority status to weigh in definitively on several neuralgic issues dear to the hearts of the Republican presidents who appointed them?

First, has there been or is there a strategy to put Catholics on the Court? It is no secret that the Republican Party and the Republican National Committee have developed a Catholic electoral strategy based in part on the statistical factoid that Catholics who attend Mass every Sunday (or more often) share the social-values agenda that Republicans have come to represent—an agenda they have carefully advanced beginning with the 1972 campaign of Richard Nixon and its Southern strategy, also called “playing the race card.” Since then, the Republican Party has done a strenuous job of organizing and campaigning to secure those Catholic voters along with those of other conservative religious voters, including Evangelicals and Jews.⁶

This social-values agenda has accumulated many action items over three decades: overthrowing *Roe v. Wade*, promoting judicial restraint, supporting family values, reducing federal taxes and federal regulations, neutralizing affirmative action, eliminating pornography, preventing the legalization of gay marriage, keeping federal monies from embryonic stem cell research, encouraging adolescent sexual abstinence, and so on. Several of these items are on the Catholic agenda as shaped by Catholic doctrine and enunciated by the bishops; several are not on that agenda. There are also items on the Catholic agenda missing from the Republican one. The complete official Catholic agenda is summarized in a quadrennial publication of the bishops called “Faithful Citizenship.”⁷

The battles of the 2004 presidential election campaign displayed some of the divisions within the Catholic community, including among the bishops. That campaign also saw Republicans deploy wedge issues to further divide Catholics along the line of the party's social-values agenda, for example, in promoting five non-negotiable issues on which Catholics should scrutinize candidates and cast their vote (abortion, embryonic stem cell research, euthanasia, same-sex marriage, and human cloning).⁸

Until the 2006 campaign cycle, the Democrats seemed to have written off the Catholic vote and Catholic sensibilities. Indeed, on occasion they

6. DAVID C. LEEGE ET AL., *THE POLITICS OF CULTURAL DIFFERENCES: SOCIAL CHANGE AND VOTER MOBILIZATION STRATEGIES IN THE POST-NEW DEAL PERIOD* ch. 10 (2002); see also David C. Leege & Paul D. Mueller, *How Catholic Is the Catholic Vote?* in *1 AM. CATH. & CIVIC ENGAGEMENT: A DISTINCTIVE VOICE* 213 (Margaret O'Brien Steinfels ed., 2004).

7. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *FAITHFUL CITIZENSHIP: A CATHOLIC CALL TO POLITICAL RESPONSIBILITY* (2003), available at http://www.nccbuscc.org/faithfulcitizenship/_faithfulcitizenship03.pdf.

8. CATHOLIC ANSWERS ACTION, *VOTER'S GUIDE FOR SERIOUS CATHOLICS* (2d ed. 2006), available at <http://www.caaction.com/pdf/Voters-Guide-Catholic-English-1p.pdf>.

insulted it, seeming to want to drive Catholic Democrats to the Republican Party (two items that still stick in the craw of many Catholics: the refusal to allow a pro-life Democrat, Governor Robert Casey of Pennsylvania, to speak at the 1992 convention, and President Bill Clinton's very public veto of the Partial-Birth Abortion Act in 1996).⁹ Will the election of Governor Casey's son as a Democratic Senator redeem the party? Only if it signals a genuine rethinking in the Democratic party. Nonetheless, Catholics are still more likely to be registered Democrats than registered Republicans. As E.J. Dionne puts it, "there is no Catholic vote, and that's why it's so important." That is to say, Catholics are not bloc voters, but have become swing voters in several critical states and by slim margins are able to deliver the winning numbers.¹⁰ Though they went for Reagan, they did not go for Bush I. They went for Clinton in 1992 and 1996, and for Gore in 2000, but gave George W. Bush his margin of victory in Ohio in 2004.¹¹ Exit polls in the 2006 congressional elections pointed to a swing back to the Democrats.

Second, there being a Republican strategy to attract Catholic voters, are the Supreme Court nominations part of that strategy? Maybe yes; maybe no. Or, maybe it didn't start out as a strategy but has become one. The five Catholic members have joined the Court over two decades. Antonin Scalia and Anthony Kennedy were nominated by Ronald Reagan in 1986 and 1988. Scalia seemed to fit a conservative and Republican agenda of scaling back the tendency of the Supreme Court to usurp the legislature. Judicial restraint was the watch word in stories about Scalia's nomination to fill Justice Rehnquist's seat, who had been nominated to be Chief Justice. In news reports at the time, Scalia's most distinctive feature seemed to be that he was the first Italian-American to be appointed to the Court. His Catholicism was mentioned in this manner: his views on abortion are not known; he is a Catholic.¹² Anthony Kennedy was the not-Robert Bork, not-Douglas Ginsburg nomination, and he seems to have been a known quantity to Reagan and the California kitchen cabinet. At least in news stories charting the

9. Todd S. Purdum, *President Vetoes Measure Banning Type of Abortion*, N.Y. TIMES, Apr. 11, 1996, at A1.

10. E.J. Dionne, Jr., *There is No Catholic Vote—And It's Important*, in 1 AM. CATH. & CIVIC ENGAGEMENT: A DISTINCTIVE VOICE 251 (Margaret O'Brien Steinfelds ed., 2004).

11. JOHN C. GREENE ET AL., THE AMERICAN RELIGIOUS LANDSCAPE AND THE 2004 PRESIDENTIAL VOTE: INCREASED POLARIZATION (Feb. 2005), available at <http://pewforum.org/publications/surveys/postelection.pdf>; see also Luis Lugo et al., Remarks at the Pew Forum on Religion & Public Life Event: How the Faithful Voted: Political Alignments & the Religious Divide in Election 2004 (Nov. 17, 2004) (transcript available at <http://pewforum.org/events/index.php?EventID=64>).

12. Linda Greenhouse, *Rehnquist Panel Gets More Memos*, N.Y. TIMES, Aug. 8, 1986, at A1; Linda Greenhouse, *The Rehnquist Factor; His Supreme Court Opinions Clearly Show an Abiding Conservatism, Past and Present*, N.Y. TIMES, June 19, 1986, at A1; Anthony Lewis, *Abroad at Home; The Court: Rehnquist*, N.Y. TIMES, June 23, 1986, at A15; Stuart Taylor Jr., *More Vigor for the Right; Court Would Ease Toward Conservatism Without Abruptly Changing in Direction*, N.Y. TIMES, June 18, 1986, at A1.

nomination process, his Catholicism was never mentioned.¹³ Indeed, it is instructive to go back and read news accounts of these nominations; you could come away oblivious to any Republican Catholic strategy, at least with respect to the Court.

Clarence Thomas was appointed in 1991 by George H.W. Bush—his qualifying characteristic not that he was a Catholic, but an African-American. (Though let us remember that President Bush denied Thomas's race was a factor in his selection; President Bush, when pressed on the matter, said he is "the best man for the job on the merits. And the fact he's minority, so much the better." So, I guess neither religion nor race figured in the nomination.) Thomas's godfather in that enterprise was Senator John Danforth, an Episcopal priest. (In point of fact, I have long been under the impression that Thomas had left the Catholic Church for the Episcopal Church; he has apparently rejoined the Catholic Church.) John Roberts and Samuel Alito were appointed by George W. Bush. But Roberts was not his first choice. The president's first choice for the vacancy created by the retirement of Justice O'Connor was Harriet Miers, a White House counsel, a friend, and an Evangelical.

Where are we now? We have five Justices who are graduates of the nation's top law schools, who were members of an elite pool of likely nominees, who fit the conservative judicial profile that the Republicans have long sought to dominate the Supreme Court. The five have been appointed by three Republican presidents over a twenty-year period. And they are all Catholic.

So third, will or how will their Catholicism count in the Supreme Court's work?

This may be harder to predict than pundits are predicting. Here are some factors that we should take under advisement. What do you mean by conservative? What do you mean by Catholic? Remember my characterization of Catholic laypeople: automatic deference to the preachments of bishops and priests cannot be counted upon—Catholics are well educated; they can think for themselves when they want to. And there is a well-established and broad tradition in Catholic thinking that permits a range of prudential judgments in the decisions of public officials, judges included. So, Catholics can think for themselves and so too can conservatives think for themselves when they want to. Just as there are fissures in the Catholic Church on major policy issues, there are fissures in the Republican Party and even more among conservatives. Disagreements, to name only a few, have opened up on immigration legislation, on judicial proceedings for enemy combatants, on business interests in the flexible labor pool supplied by

13. Joel Brinkley, *White House Says Probable Nominee is Judge Kennedy*, N.Y. TIMES, Nov. 10, 1987, at A1; Linda Greenhouse, *Reagan Nominates Anthony Kennedy to Supreme Court*, N.Y. TIMES, Nov. 12, 1987, at A1; Stuart Taylor Jr., *Judge Kennedy: Tilting Right but Not Far*, N.Y. TIMES, Nov. 15, 1987, at A1.

undocumented workers, on wiretapping, the war in Iraq, and yes, on abortion.

And then, there is the mysterious subject of judicial temperament and the inner dynamics of the Court itself. I don't know Justice Scalia or Justice Kennedy; perhaps they are friends. Given what seem to be their contrasting temperaments, why do I doubt it? Is the buttoned-down Chief Justice Roberts more likely to find allies with Thomas and Scalia, or Breyer and Souter? What role will precedent play in the thinking of the five Catholics? How radical will any one of them turn out to be in overturning previous decisions? Overturning ones that have been strongly confirmed? Would the five alone vote to overturn *Roe v. Wade*? They would have to develop some very powerful arguments to persuade the country—powerful arguments about which even the five might not agree. Or instead, might they go about crimping *Roe*'s expansive time frame, or enlarging the right of states to set limits, or returning doctors to the decision-making process, as *Roe* originally described it: a decision to be made by the woman and her doctor. Partial-birth abortion legislation cases may give some clues. On other matters, of course, the conservative bent of at least four of the Catholic justices may shift rules and regulatory powers on inter-state commerce, environmental regulation, education, executive power and other arenas where conservatives believe there has been judicial overreaching. I enter for discussion here two questions: Is Justice Kennedy a conservative? Will he take on the role of former Justice O'Connor as the swing vote in tight cases? In some of the cases likely to come before the Court, should they vote together, the five are likely to face stiff criticism from the Catholic community and perhaps even from church authorities, but in other cases they may face stiff criticism from Republicans and conservatives. I guess that's why they're appointed for life.

Perhaps the only sure prediction on the "Catholic Five," if five they are, is: the justices can think for themselves, and presumably they will.