

# ADDRESSING THREE PROBLEMS IN COMMENTARY ON CATHOLICS AT THE SUPREME COURT BY REFERENCE TO THREE DECADES OF CATHOLIC BISHOPS’ AMICUS BRIEFS

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*Much commentary about Catholic Justices serving on the Supreme Court suffers from three related shortcomings: (1) episodic, one-case-at-a-time commentary; (2) asymmetric causal attributions resulting from inattention to cases in which Catholic Justices vote for outcomes opposite those advocated by the Catholic Bishops’ Conference; and (3) inattention to broader jurisprudential and ideological factors. This article uses an overlooked resource to identify and counteract these shortcomings. It assesses the votes of the Justices—Catholic and non-Catholic alike—in the full set of cases from the Rehnquist Court and the Roberts Court (through June 2014) in which the United States Conference of Catholic Bishops filed an amicus curiae brief. By opening up critical consideration of the Catholic Justices within a wider set of cases, this Article raises more questions than it answers. But the first step toward getting better answers is to ask better questions.*

INTRODUCTION .....	412
I. THE CATHOLIC JUSTICES IN CONTEMPORARY COMMENTARY .....	415
II. THE BISHOPS’ CONFERENCE AND THE CATHOLIC JUSTICES ON THE REHNQUIST AND EARLY ROBERTS COURTS .....	422
A. <i>The Rehnquist Court</i> .....	423
B. <i>The Roberts Court Through October Term 2013</i> .....	428
III. THE COMPLEXITY OF CATHOLIC INFLUENCE .....	431
CONCLUSION .....	435

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## INTRODUCTION

Catholics have commanded a majority on the Supreme Court since early 2006 when Justice Alito joined the Court as its fifth sitting Catholic Justice.<sup>1</sup> The Court's Catholic ranks swelled to a supermajority in August 2009 when Justice Sotomayor ascended to the Court.<sup>2</sup> These developments have resulted in plenty of commentary over the past several years linking the religious identity of the Catholic Justices with their votes and opinions. This commentary will continue as long as there are enough Catholics on the Supreme Court to make a difference in how cases turn out.

There are three principal problems with much of this commentary. First, it pops up—and will continue to pop up—in the same way that the Supreme Court decides cases: one case at a time. As a result, commentary on Catholic Justices voting *for* the outcome supported by the Catholic bishops in an abortion case, for example, is not linked to commentary on Catholic Justices voting *against* the outcome supported by the Catholic bishops in a death penalty case. And the commentary on Catholic Justices voting *for* the outcome supported by the Catholic bishops in the contraceptives mandate cases will not be linked to commentary on Catholic Justices voting *against* the outcome supported by the Catholic bishops in deciding on a constitutional right to same-sex marriage.

Second, there is a curious asymmetry in causal attributions. It is not deemed news- or noteworthy that Catholic Justices sometimes vote against outcomes advocated by Catholic bishops. And yet commentators somehow think it plausible to assert that when these Justices vote for an outcome supported by the Catholic bishops, they do so because they are Catholics. For example, if Justice Kennedy votes to uphold a ban on partial-birth abortion, he does so *because* he is a Catholic; but if he votes to find a constitutional right to same-sex marriage, he does so *despite* being a Catholic. This asymmetry was on display most recently when some commentary used Justice Sotomayor's Catholic background to explain her *grant* of an injunction to protect the Little Sisters of the Poor from the contraceptives mandate, while coverage of her

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1. Robert F. Drinan, *Catholics on the Supreme Court: The Jury Is Out on Chief Justice John Roberts*, NAT'L CATHOLIC REP., Sept. 8, 2006, at 15, available at <http://www.thefreelibrary.com/Catholics+on+the+Supreme+Court%3a+the+jury+is+out+on+Justice+John...-a0151842970>.

2. See Robert Barnes & Jennifer Agiesta, *Poll Affirms a Vote for Judicial Know-How*, WASH. POST (Apr. 30, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/29/AR2010042904893.html>.

*dissent* from a different injunction regarding the same mandate focused on her gender rather than her religious background.<sup>3</sup>

Third, this commentary tends to ignore the legal and ideological coherence of the particular Justices' votes considered apart from their identity as Catholics. Justice Scalia's votes in abortion and death-penalty cases are explained by similar jurisprudential commitments that align him with the Bishops' Conference's position in one set of cases and against their position in the other. The same may be said of Justice Kennedy's votes in death-penalty and same-sex-marriage cases, to pick another example. Academic attitudinalists, who view Justices' votes as a function of the Justices' attitudes, attribute little significance to religion as an ideological variable. Yet armchair attitudinalists nevertheless insist on ecclesial affiliation as explanatory.

This Article addresses these problems in a new way. It assesses the relationship between the religious identity of the Catholic Justices and their votes in Catholic-salient cases by drawing on an overlooked resource setting forth an institutional Catholic position in a wide range of cases—the Supreme Court filings of the United States Conference of Catholic Bishops. The Bishops' Conference is a corporate body that includes all the Catholic bishops in the United States and speaks on matters of public importance, such as the relationship between morality and law.<sup>4</sup> The Conference's briefs supply the closest thing one can find to *the* Catholic position on questions of constitutional law, but it is important to note at the outset that *there is no such thing*. To be clear: there is no “Catholic answer” to questions of federal constitutional law (or any questions of federal law, for that matter). There is, for example, a Catholic teaching about the morality of the death penalty.<sup>5</sup> But there is no Catholic teaching about the legal meaning of the Eighth Amendment. There is, to pick another example, a Catholic teaching about the necessity for the Church to have the freedom to be a Church: to administer sacraments and to gather the People of God.<sup>6</sup> But there is no Catholic teaching about the meaning of the Free Exercise Clause of the First Amendment. And so on. When bringing

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3. Compare Jamie Stiehm, *The Catholic Supreme Court's War on Women*, U.S. NEWS & WORLD REP. (Jan. 7, 2014), <http://www.usnews.com/opinion/blogs/jamie-stiehm/2014/01/07/the-catholic-supreme-courts-war-on-women> (using Justice Sotomayor's Catholic identity to explain her grant of an injunction against the contraceptive mandate), with Brett Logiurato, *Female Justices Issue Scathing Dissent In the First Post-Hobby Lobby Birth Control Exemption*, BUS. INSIDER (July 3, 2014), <http://www.businessinsider.com/sotomayor-ginsburg-kagan-dissent-wheaton-college-decision-supreme-court-2014-7> (emphasizing Justice Sotomayor's gender while discussing her dissent from a different injunction against the contraceptive mandate).

4. See, e.g., Brief of the United States Conference of Catholic Bishops as Amici Curiae Supporting Respondents at 1-2, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 544 U.S. 973 (2005) (No. 04-1084); see also THOMAS J. REESE, A FLOCK OF SHEPHERDS: THE NATIONAL CONFERENCE OF CATHOLIC BISHOPS vii, 187-88 (1992).

5. CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2268-69 (Ignatius Press, 1994).

6. Pope Paul VI, *Declaration on Religious Liberty: Dignitatis Humanae*, in VATICAN COUNCIL II: THE CONCILIAL AND POST CONCILIAL DOCUMENTS 799, 800 (Laurence Ryan trans., Costello Publ'g Co. new rev. ed. 1992).

Catholic teaching to bear on questions of federal law before the Supreme Court of the United States, the Bishops' Conference makes prudential, strategic, tactical, and legal judgments in deciding whether to file a brief and what to include in it.<sup>7</sup>

Even while affirming that there is no single "Catholic answer" to questions of federal law, it is important not to overemphasize this point. Catholic social teaching guides the Bishops' Conference's amicus briefs, and all of these briefs ask the Court to implement the insights of that teaching in some way. Moreover, it is hard to imagine the Bishops' Conference weighing in on the opposite side of most of the cases in which they file. Take, for instance, a case involving the constitutionality of a capital sentence or a law restricting abortion. As a potential amicus curiae, the Conference's principal decision is whether to file or not. In these cases, there is little doubt what outcome the Conference would advocate in any contemplated filing. When filing on something like immigration law, by contrast, the Bishops' Conference's judgment about what side to support is likely to be more heavily influenced by prudential considerations relating to which particular governmental actors and policies are more likely to align more consistently with Catholic social thought.

The Bishops' Conference does not file an amicus curiae brief in every case in which Catholic social teaching has something to say about the subject matter. But every case in which the Conference has filed an amicus curiae brief is one such case. And considering these cases as a group provides a way of getting beyond the single-issue focus that too often results from the episodic way in which questions about the relationship between religious faith and role fidelity typically arise with respect to Catholic Justices. Taking these as a group, one can also see that virtually every Catholic Justice now on the Court has voted against the outcome advocated by the Bishops' Conference at least once (Chief Justice Roberts is currently the sole exception). By comparing the majority-Catholic Roberts Court to the Rehnquist Court, which included both non-Catholic conservatives like Chief Justice Rehnquist and Catholic liberals like Justice Brennan, one can see that the high rate of agreement between the Catholic Justices and the Bishops' Conference during the Roberts Court is largely a function of ideology rather than ecclesial affiliation. And one can also see how the Justices' votes in cases in which the Bishops' Conference has participated as amicus curiae make sense given the Justices' broader ideological and legal commitments. Their identity as Catholics may have shaped those commitments in some way, but one does not need to look through or underneath those commitments to explain the Justices' votes. In short, this Article's identification and exploration of areas of consonance and dissonance at the level of outcome in the cases in which the Bishops' Conference participated as amicus curiae provides a new and useful way to examine complex matters about which too many simplistic observations have too often been made.

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7. See REESE, *supra* note 4, at 215-17.

This Article has three parts. Part I locates the Catholic Justices in recent popular and academic commentary and reveals the three problems highlighted above. Part II examines the votes of the Justices (Catholic and non-Catholic alike) in cases in which the Bishops' Conference filed an amicus curiae brief over an approximately thirty-year period that begins with the opening of the Rehnquist Court and ends with the October 2013 Term of the Roberts Court. Part III analyzes the results of Part II's assessment in light of the distinctive and limited roles of both the Bishops' Conference and the Catholic Justices.

#### I. THE CATHOLIC JUSTICES IN CONTEMPORARY COMMENTARY

One knock on American Catholics historically has been the suspicion that they do not think for themselves, a suspicion reinforced by the hierarchical nature of the institutional Church and the initially uncertain position of American Catholics in public life.<sup>8</sup> This suspicion has had less purchase over time, but still lingers in some quarters. Indeed, some continue to express a version of this suspicion with respect to the six Catholic Justices now on the Supreme Court of the United States when some salient issue or case brings the Catholic Justices' religious identity to the fore.

When Justice Sotomayor granted temporary injunctive relief in response to an emergency application filed by the Little Sisters of the Poor, for example, many news reports noted that Justice Sotomayor is Catholic.<sup>9</sup> In a *U.S. News and World Report* posting titled, "The Catholic Supreme Court's War on Women," one particularly strident commentator explicitly asserted that Sotomayor "is a Catholic who put her religion ahead of her jurisprudence."<sup>10</sup> This commentator went on to speculate that "[t]he seemingly innocent Little Sisters likely were . . . not acting alone in their trouble-making."<sup>11</sup> Instead, they were acting in cahoots with (or maybe under the direct control of) "[t]heir big brothers, the meddlesome American Roman Catholic Archbishops," who "seek and wield tremendous power and influence in the political sphere."<sup>12</sup> While this kind of direct accusation is rare and may not be widely embraced, one wonders sometimes whether elite journalists like Linda Greenhouse of the *New York Times* subscribe to a version of this view. Consider her recent commentary criticizing "sustained aggressiveness by religious groups that sense weakness in

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8. See MARK S. MASSA, *ANTI-CATHOLICISM IN AMERICA: THE LAST ACCEPTABLE PREJUDICE* 12 (2003) (describing an "intellectualist reading of American cultural roots" according to which "the common cultural faith was rooted in profoundly egalitarian, rationalist presuppositions about the world, and anti-authoritarian impulses against which the Catholic tradition appeared to many as an easy target").

9. See Stiehm, *supra* note 3.

10. *Id.*

11. *Id.*

12. *Id.*

the executive branch and welcoming arms at the Roberts Court.”<sup>13</sup> Is it reading too much into the subtext of this commentary to wonder whether it is a coincidence that Greenhouse asserts there that “[t]he church plays a long game?”<sup>14</sup> That is the same phrase she has used to describe the judicial approach of Chief Justice Roberts—he of the “welcoming arms.”<sup>15</sup>

There is no need to wonder about other claims. Consider, for example, National Public Radio (“NPR”) commentator Diane Rehm’s question for a lawyer from the National Women’s Law Center in a program discussing how the Supreme Court might evaluate religious freedom objections to the federal government’s contraceptives mandate: “[H]ow many Roman Catholics now sit on the Supreme Court, Judy?”<sup>16</sup> The implied premise, of course, is that a majority-Catholic institution would support religious-freedom objections rooted in Catholicism. That’s what Catholics do.

NPR listeners are an educated group. But most of them would have no idea that a Catholic, Justice Scalia, wrote the principal Supreme Court decision standing in the way of an easy win on a Free Exercise challenge to the contraceptives mandate.<sup>17</sup> Nor would many know that all three Catholics then on the Court voted to hold unconstitutional, as applied to state and local governments, the Religious Freedom Restoration Act that Congress passed in response to that Scalia-authored Supreme Court decision.<sup>18</sup>

Legal scholars might know both of these facts about Free Exercise Clause doctrine. But many of them harbor doubts about how at least some of the Catholic Justices operate at the intersection of religious faith and role fidelity. Although often uncommonly articulate, legal academics have been known to utter some real doozies in unguarded moments—as discussed below—usually when making comments in passing that they might not wish to defend critically.

The truth is that most people are just confused. While many have noted the abundance of Catholics on the Supreme Court of the United States, most are at a loss for what to think about this phenomenon. What does a Justice’s religious identity as a Catholic imply about that Justice’s votes on legal issues, particularly those about which there is clear Catholic moral teaching? The American public is episodically interested in—and consistently confused about—this question. And the same observation can be made about large segments of the legal academy.

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13. Linda Greenhouse, Op-Ed., *The Stories We Tell*, N.Y. TIMES (Feb. 5, 2014), [http://www.nytimes.com/2014/02/06/opinion/greenhouse-the-stories-we-tell.html?\\_r=0](http://www.nytimes.com/2014/02/06/opinion/greenhouse-the-stories-we-tell.html?_r=0).

14. *Id.*

15. See Linda Greenhouse, Op-Ed., *A Justice in Chief*, N.Y. TIMES OPINIONATOR (June 28, 2012, 5:19 PM), <http://opinionator.blogs.nytimes.com/2012/06/28/a-justice-in-chief>.

16. *Catholics, Contraception and the New Health Care Law*, THE DIANE REHM SHOW (Feb. 2, 2012), <http://thedianerehmshow.org/shows/2012-02-02/catholics-contraception-and-new-health-care-law/transcript>.

17. *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990).

18. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Puzzlement persists, in part, because of an inchoate sense that the influence of a Justice's religion is something that should not be discussed too openly or probed too thoroughly. Journalistic observers have occasionally given voice to the unease induced by this sense, realizing the need to say something about religious identity while not knowing quite what to say. For example, a *Washington Post* article previewing the potential retirement of Justice Stevens in 2010 began: "Here's the kind of question that might violate the rules you learned about proper dinner conversation: Does President Obama's next Supreme Court nominee need to be a Protestant?"<sup>19</sup> Nina Totenberg's story for NPR began by highlighting the "hint of taboo" surrounding the subject of the Justices' religious identities.<sup>20</sup> "Let's face it," Totenberg stated, "[t]his is a radioactive subject."<sup>21</sup> Author and historian Jeff Shesol noted that "religion is the third rail of Supreme Court politics. It's not something that's talked about in polite company."<sup>22</sup> Shesol observed that, although people talk privately "about the surprising fact that there are so many Catholics on the Supreme Court, this is not a subject that people openly discuss."<sup>23</sup> In the same story, political scientist Henry Abraham declared that discussing a nominee's religious identity "would certainly raise a lot of eyebrows."<sup>24</sup> If the subject were to be directly investigated as part of a confirmation hearing, Abraham suspected that "all hell would break loose," and that he "cannot imagine that being brought up openly." Covertly, perhaps in some ways—but it's a highly delicate problem."<sup>25</sup> Indeed, as Adam Liptak noted in the *New York Times*, the topic of a Justice's religious identity "seems to make people uncomfortable on the rare occasions it is raised."<sup>26</sup>

The inhibitions that keep discussion suppressed are occasionally overcome, as when a five-justice Catholic majority voted against a four-justice non-Catholic minority to uphold the federal ban on partial-birth abortions in

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19. Robert Barnes, *High Court: Does Religion Still Matter?*, WASH. POST (Mar. 8, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/07/AR2010030702705.html>. The bounds of propriety for dinner conversation apparently do not extend to pollsters (although if they call at dinner, they might not get much of a response). Seventy percent of respondents to a Fox News poll indicated that it did not matter to them if there were no Protestants on the bench. Eighty percent of respondents to a Washington Post/ABC News poll said it was not important to them whether the nominee to replace Justice Stevens is a woman, an African American, or a Protestant. See Barnes & Agiesta, *supra* note 2.

20. Nina Totenberg, *Supreme Court May Soon Lack Protestant Justices*, NAT'L PUB. RADIO (Apr. 7, 2010, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=125641988>.

21. *Id.*

22. *Id.*

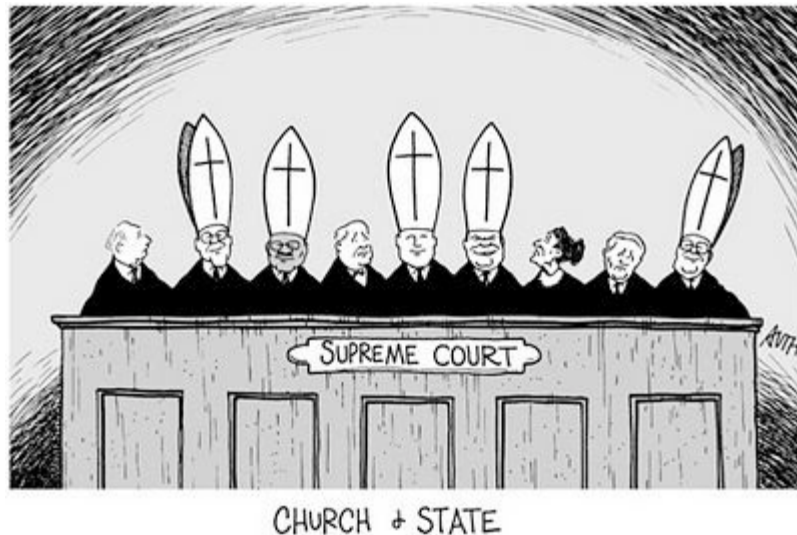
23. *Id.*

24. *Id.*

25. *Id.*

26. Adam Liptak, *Stevens, the Only Protestant on the Supreme Court*, N.Y. TIMES (Apr. 9, 2010), <http://www.nytimes.com/2010/04/11/weekinreview/11liptak.html?> (stating, in the course of a discussion of Justice Stevens as the lone Protestant on the Supreme Court, that "religion, which once mattered deeply, has fallen out of the conversation").

*Gonzales v. Carhart*.<sup>27</sup> Both lowbrow and highbrow commentary trotted out the claim that the Catholic Justices were voting their religion rather than their best view of the law, and some of this commentary traded on the long-festering suspicion that Catholics do not think for themselves. The *Philadelphia Inquirer* ran a cartoon that depicted the Court's Catholic Justices wearing bishop's miters:



And on ABC's "The View," Rosie O'Donnell railed against the ruling, eventually arriving at the same point as the cartoonist:

O'DONNELL: You know what concerns me? How many Supreme Court judges are Catholic, Barbara?

WALTERS: Five.

O'DONNELL: Five. How about separation of church and state in America?<sup>28</sup>

A more refined presentation of a similar worry emerged from the legal academy. Professor Geoffrey Stone of the University of Chicago Law School suggested in an op-ed that the five Catholic Justices in the *Gonzales v. Carhart* majority failed to respect the critical line between their personal religious

27. 550 U.S. 124 (2007).

28. See Catholic League, *Cartoon Guilty of Anti-Catholicism*, CATALYST ONLINE (June 2007), <http://www.catholicleague.org/cartoon-guilty-of-anti-catholicism> (providing copy of and information about the cartoon); see also Patrick Archbold, *Catholics in the Crosshairs-Update*, CREATIVE MINORITY REP. (Apr. 20, 2007, 12:34 PM), [http://www.creativeminorityreport.com/2007\\_04\\_15\\_archive.html](http://www.creativeminorityreport.com/2007_04_15_archive.html) (quoting this interchange). Barbara Walters pushed back, invoking each Justice's assertions during their confirmation hearings that he would not vote a particular way because he is Catholic. *Id.* Presumably, this did not persuade Ms. O'Donnell.



beliefs and their responsibilities as jurists.<sup>29</sup> In a later commentary revisiting the topic, however, Stone retreated from his position and struck a more tentative note, stating that *Gonzales v. Carhart* raises “interesting questions about whether and to what extent judges are and should be influenced by their religion, their ethnic background, their race, their life experiences, and their personal values.”<sup>30</sup>

More recently, the Supreme Court’s 5-4 decision in *Burwell v. Hobby Lobby* became a flashpoint for discussion of the Catholic Justices on the Supreme Court. The Freedom From Religion Foundation took out a full-page advertisement in the *New York Times* proclaiming “All-Male All-Roman Catholic Majority on Supreme Court Puts Religious Wrongs Over Women’s Rights.”<sup>31</sup> Cardinal Timothy Dolan of the Archdiocese of New York responded by describing the advertisement as an example of anti-Catholic prejudice: “[I]n keeping with a long, shadowy legacy of antipathy, justices who happen to be Catholics—never mind their past frequent votes hardly consonant with the public teaching of their faith—are branded and bullied by a group who only succeed in providing the latest example of a prejudice that has haunted us for centuries.”<sup>32</sup>

Like *Gonzales v. Carhart*, *Burwell v. Hobby Lobby* simply provided another high-profile occasion for expression of a suspicion of Catholics in public office.<sup>33</sup> But this suspicion is sometimes expressed unprompted by any particular decision of the Supreme Court. At the conclusion of his review of a book about the original understanding of the Establishment Clause, for example, legal historian Scot Powe suggests that five Catholic Justices might one day rely on the book under review “with or without citation” in implementing “a Catholic interpretation of the Establishment Clause.”<sup>34</sup> This passing reference to the possibility of a religiously motivated shaping of the law is similar to an earlier assertion made by Ronald Dworkin, who in 2008 described the five Catholic Justices then on the Court as a “right-wing phalanx”

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29. See Geoffrey R. Stone, *Our Faith-Based Justices*, CHI. TRIB. (Apr. 30, 2007), [http://articles.chicagotribune.com/2007-04-30/news/0704290277\\_1\\_partial-birth-four-justices-abortion](http://articles.chicagotribune.com/2007-04-30/news/0704290277_1_partial-birth-four-justices-abortion).

30. Geoffrey R. Stone, *Justice Sotomayor, Justice Scalia and Our Six Catholic Justices*, HUFFINGTON POST (Sept. 28, 2009), [http://www.huffingtonpost.com/geoffrey-r-stone/justice-sotomayor-justice\\_b\\_271229.html](http://www.huffingtonpost.com/geoffrey-r-stone/justice-sotomayor-justice_b_271229.html).

31. See *FFRF’s Full-Page Ad in New York Times to Protest Hobby Lobby Ruling*, FREEDOM FROM RELIGION FOUND. (July 2, 2014), <http://ffrf.org/news/news-releases/item/20870-ffrf-s-full-page-ad-in-new-york-times-to-protest-hobby-lobby-ruling> (“The Supreme Court’s ultra-conservative, Roman Catholic majority . . . has sided with zealous fundamentalists who equate contraception with abortion.”).

32. Timothy M. Dolan, *Thank You, FFRF*, CATHOLIC NEW YORK (July 3, 2014), <http://cny.org/stories/Thank-You-FFRF,11266>.

33. 134 S. Ct. 2751 (2014).

34. Scot Powe, *Robes and Vestments*, NEW REPUBLIC (Apr. 13, 2010), <http://www.newrepublic.com/book/review/robes-and-vestments>.

that “seems guided by no judicial or political principle at all, but only by partisan, cultural, and perhaps religious allegiance.”<sup>35</sup>

These glancing comments and passing observations do not amount to much. The academic observers, at least, offer observations that are tentative and undeveloped, and they express a commitment to open-mindedness. Discussing Stone’s claim about *Gonzales v. Carhart*, for example, Powe observes: “Perhaps Stone was correct in his correlation of public jurisprudence with private faith, although evidence is hard to come by.”<sup>36</sup>

Judge John T. Noonan, Jr., a senior Ninth Circuit judge and legal historian who has written extensively on the development of Catholic moral teaching, has provided the most sensitive account to date of the influence of Catholic identity on the decisions of Catholic Supreme Court Justices. Judge Noonan concludes from his own research and reflection that “in the course of 170 years of Catholics on the Supreme Court, it does not appear that the identification of a Justice as a Catholic carries with it predictive value as to his vote.”<sup>37</sup> A similar conclusion about the absence of a generalizable, predictive influence of religious identity could be drawn, Noonan asserts, from an examination of the constitutional decision making of the Jewish Justices: Louis Brandeis, Benjamin Cardozo, Felix Frankfurter, Arthur Goldberg, Abe Fortas, Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan.<sup>38</sup> According to Noonan, “if Catholic or Jewish Justices had been as numerous as Episcopalian Justices, the idea that the Catholic’s religion predicted his vote would have died long ago.”<sup>39</sup>

Noonan’s historical observations also find resonance in contemporary journalistic observations. As more Catholics have joined the Court, observers have recognized the differences among them and embraced the conclusion that each Justice’s Catholic identity affects him or her in different ways. For example, a *New York Times* article on the relationship between Justice Sotomayor’s religious identity and her approach to judging bore the headline “Sotomayor Would Be Sixth Catholic Justice, but the Pigeonholing Ends

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35. RONALD DWORKIN, *THE SUPREME COURT PHALANX: THE COURT’S NEW RIGHT-WING BLOC* 47-48 (2008).

36. Powe, *supra* note 34.

37. John T. Noonan, Jr., *The Religion of the Justice: Does It Affect Constitutional Decision Making?*, 42 *TULSA L. REV.* 761, 764 (2006). This written adaptation of Judge Noonan’s Constitution Day lecture expanded on the research that then-Professor Noonan set forth twenty-five years earlier in John T. Noonan, Jr., *The Catholic Justices of the United States Supreme Court*, 67 *CATH. HIST. REV.* 369, 369 (July 1981).

38. See Noonan, *The Religion of the Justice*, *supra* note 37, at 764 (“I doubt that one could find a single tenet of Judaism that played a decisive part in their decisions. As individuals, who could have been more different in their approach to judging than Brandeis and Fortas or than Cardozo and Frankfurter?”). Extending the point even further, “[n]o one has suggested that there is an Episcopalian or Presbyterian color to any Court’s decision.” *Id.*

39. *Id.* at 765.

There.”<sup>40</sup> The article quoted law and theology professor M. Cathleen Kaveny that there is no “‘one Catholic stance on the law,’ . . . ‘Catholicism is a big tent, so different people are drawn to different aspects of it. A Dorothy Day Catholic is going to be different than an Opus Dei Catholic.’”<sup>41</sup>

The absence of any general effect of Catholicism on Catholic Justices need not exclude the presence of particularized effects. And it is these effects, not some general orientation, that critics worry about. They worry that a Justice—because he or she is Catholic—will tilt toward a “Catholic answer” to a particular legal issue (such as the moral status of an embryo, fetus, or baby in utero).<sup>42</sup>

The challenge in assessing this worry is to get beyond soupy descriptive “realism.” It is true, but trivial, to observe that the Justices are human; that they have passions, predilections, and “can’t helps”; that their outlook on life is shaped by a welter of forces and beliefs, including religious beliefs; and that their votes in cases cannot help but reflect their outlook on life. These observations provide little guidance in identifying influences on judicial behavior, which may depart from what one might assume from assessing a judge’s outlook on life divorced from the specifically legal filters that the judge has shaped, and that have shaped that judge, over time.

Empirical studies and statistical analyses conducted to date provide helpful but limited insight. In particular, studies of lower court judges have found that religious background provides a robust and salient correlation with outcomes in certain kinds of religious liberty cases.<sup>43</sup> But these findings cannot be (or at least, have not been) extrapolated to other kinds of cases. Nor are they transferable to the Supreme Court, which makes sense given the small number of Justices and the small number of cases that raise worries about undue

40. Laurie Goodstein, *Sotomayor Would Be Sixth Catholic Justice, but the Pigeonholing Ends There*, N.Y. TIMES (May 30, 2009), <http://www.nytimes.com/2009/05/31/us/politics/31catholics.html>.

41. *Id.* Simultaneously illustrating and addressing the lack of public knowledge (by Catholics and non-Catholics alike) of the many strands of American Catholic religious identity, the article explains, parenthetically, that “Dorothy Day founded the Catholic Worker movement that promotes justice for the poor; Opus Dei is a church prelature that promotes personal orthodoxy.” *Id.* The article also quotes Reverend Joseph O’Hare, “a Jesuit priest and the former president of Fordham University, who came to know Judge Sotomayor when they both served on the New York City Campaign Finance Board in the 1980s,” who commented: “I just don’t think Sonia would fit in with Roberts, exactly, and certainly not Scalia. I think they’re very different Catholics.” *Id.*

42. With respect to the terminological objection that many readers may have at this point, see John Finnis, *The Other F-Word*, PUB. DISCOURSE (Oct. 20, 2010), <http://www.thepublicdiscourse.com/2010/10/1849>.

43. See, e.g., Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 491 (2004); see also Michael Heise & Gregory C. Sisk, *Ideology “All the Way Down”?: An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201 (2012).

religious influence.<sup>44</sup> Attitudinalist and strategic decisionmaking accounts of Supreme Court Justices' votes have not, to date, assigned much significance to religious background.<sup>45</sup> One exception is a recent statistical study of the Catholic Justices' votes between 1953 and 2008 by William Blake, which concludes that "[a]cross a wide range of legal issues, it appears that the Catholic variable plays a role in judicial decision making independent of ideology."<sup>46</sup> The biggest religion-specific effects identified in this study occurred in the abortion, Establishment Clause, and Free Exercise areas, while effects were smaller in other areas.<sup>47</sup> This makes sense given that some of the other hypothesized effects tested by the study's statistical analyses relate to areas in which Catholic social teaching provides only the most general guidance about the appropriate role of law in implementing that teaching.<sup>48</sup>

When considering the correlation of "public jurisprudence and private faith" for the Catholic Justices, then, Powe was right that "evidence is hard to come by."<sup>49</sup> Fortunately, however, there is an illuminating set of cases that has been largely overlooked: those cases in which United States Conference of Catholic Bishops filed an amicus curiae brief. The next section examines the Justices' votes in those cases beginning with the Rehnquist Court and continuing through the October 2013 term of the Roberts Court.

## II. THE BISHOPS' CONFERENCE AND THE CATHOLIC JUSTICES ON THE REHNQUIST AND EARLY ROBERTS COURTS

The advent of the Rehnquist Court in 1986 is a useful point at which to begin an assessment of how Catholic and non-Catholic Justices voted in cases in which the United States Conference of Catholic Bishops filed an amicus brief. Justice Scalia joined the Court then, both doubling and diversifying the Court's Catholic presence, which immediately before then consisted only of Justice Brennan. Over the course of the Rehnquist Court, the number of Catholics on the nine-Justice Supreme Court moved from two (William Brennan and Antonin Scalia) to three (when Anthony Kennedy replaced Lewis Powell) to four (when Clarence Thomas replaced Thurgood Marshall), and then

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44. See Michael Heise & Gregory C. Sisk, *Religion, Schools, and Judicial Decision Making: An Empirical Perspective*, 79 U. CHI. L. REV. 185, 191 (2012) ("[O]wing to the small and stable number of justices serving on the Court, we find that empirical studies of the members of that unique institution sometimes migrate from social science to biography.").

45. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

46. William Blake, *God Save This Honorable Court: Religion as a Source of Judicial Policy Preferences*, 65 POL. RES. Q. 814, 820 (Dec. 2012).

47. See *id.* at 822 tbl. 3.

48. It is true, for example, that "the Second Vatican Council in 1965 took a strong stance against racial and gender discrimination." *Id.* at 818. But Catholic social teaching does not provide significant guidance about how that stance is to be operationalized in law.

49. Powe, *supra* note 34.

back down to three (when David Souter replaced William Brennan).<sup>50</sup> The Roberts Court began in October Term 2005, when John Roberts began to preside as Chief Justice. In the first few years of the Roberts Court, the number of Catholics on the Court increased from three (Antonin Scalia, Anthony Kennedy, Clarence Thomas) to four (when John Roberts replaced William Rehnquist) to five (when Samuel Alito replaced Sandra Day O'Connor) to six (when Sonia Sotomayor replaced David Souter). One can, of course, only speculate when the next change in Court composition will be and how that might affect the Catholic nose-count.

During the twenty-eight year period from the beginning of the Rehnquist Court in 1986 term through the October 2013 Term, the Bishops' Conference filed an amicus curiae brief in thirty-two cases. An examination of the extent to which the Justices voted for the outcome advocated by the Bishops' Conference in these cases allows for a crude comparison among the Justices, placing them in an array of more or less agreement with the outcomes sought by the Bishops' Conference. A direct comparison of Justices cannot be made because the Court's changing composition over time results in different numbers of cases voted on by each of the Justices. Moreover, a Justice's agreement with the outcome advocated by the Bishops' Conference does not mean agreement with the Bishops' Conference's reasoning or even that the Justices reached the specific issue addressed by the Bishops' Conference.

#### A. *The Rehnquist Court*

We begin with the Rehnquist Court. During this time, the Bishops' Conference filed amicus curiae briefs in twenty-two cases. Ten of the briefs dealt with religious liberty (encompassing statutory, Free Exercise, and Establishment Clause cases);<sup>51</sup> six addressed abortion;<sup>52</sup> three were about end-of-life issues;<sup>53</sup> two involved the death penalty;<sup>54</sup> and one addressed

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50. This timeline is a little simplified. Clarence Thomas was raised Roman Catholic, but he attended an Episcopal church at the time of his nomination, returning to Catholicism in the mid-1990s. See SEGAL & SPAETH, *supra* note 45, at 183 n.17.

51. *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Locke v. Davey*, 540 U.S. 712 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Agostini v. Felton*, 521 U.S. 203 (1997); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

52. *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

53. *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

54. *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

associational freedom.<sup>55</sup> Table 1 shows the rate of agreement between the outcomes supported by each Justice's vote and that supported by the Bishops' Conference, along with the raw numbers of total cases and total outcome-agreeing votes.<sup>56</sup>

Table 1: Justices' Agreement with the United States Conference of Catholic Bishops

	Agreement with Bishops' Conference as Percentage of Cases	Agreement with Bishops' Conference as Fraction of Cases
Justice White	100%	10/10
Justice Scalia (Cath.)	86%	19/22
Justice Kennedy (Cath.)	86%	18/21
Chief Justice Rehnquist	82%	18/22
Justice Thomas (Cath.)	79%	11/14
Justice O'Connor	77%	17/22
Justice Breyer	58%	7/12
Justice Souter	53%	8/15
Justice Brennan (Cath.)	43%	3/7
Justice Ginsburg	42%	5/12
Justice Stevens	36%	8/22
Justice Blackmun	20%	2/10
Justice Marshall	13%	1/8

These numbers show that six Justices voted for the outcome advocated by the Bishops more than three-fourths of the time. That group is split evenly between Catholics and non-Catholics. Three of the Court's four Catholic Justices voted with the Bishops more than three-fourths of the time. The fourth Catholic Justice, William Brennan, voted with the Bishops in fewer than one-half of the cases.

55. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

56. The table does not include Justice Powell, who only participated in one case in which the Bishops' Conference filed an amicus curiae brief during this time.

The low rate of agreement between Justice Brennan and the Bishops' Conference is notable given that Justice Brennan was the last beneficiary of a so-called "Catholic seat" on the Supreme Court.<sup>57</sup> And Justice Brennan's voting pattern presents an interesting contrast with Justice White's. The contrast is noteworthy because President Kennedy appointed White. As the country's first (and thus far only) Catholic President, Kennedy could not politically afford to nominate a Catholic to the Supreme Court.<sup>58</sup> By contrast, Brennan's Catholicism was an important factor in making him an attractive nominee for Eisenhower.<sup>59</sup> Thus, one reason that Brennan was appointed is that he *was* a Catholic, while one reason White was appointed is that he *was not* a Catholic. Yet White ended up consistently voting with the Catholic bishops on the Rehnquist Court, while Justice Brennan had one of the lowest rates of agreement during the same time period.

The Bishops' Conference filed amicus briefs in seven cases that both Justices Brennan and White voted on during the Rehnquist Court. These Justices agreed with each other and with the Bishops' Conference in two of those cases.<sup>60</sup> In the remaining five cases, they voted on opposite sides—White with the Bishops' Conference and Brennan against. Those cases involved end-of-life medical treatment,<sup>61</sup> parental notification for a minor's abortion,<sup>62</sup> various other regulations placing limits on abortion,<sup>63</sup> and the constitutionality of federal funding for adolescent sexuality and pregnancy-related services performed by religiously affiliated and other organizations.<sup>64</sup> The distinction between a Catholic Justice, on the one hand, and a Justice whose votes accord with those sought by the Bishops' Conference, on the other, emerges in high relief.

Indeed, Justice White—not a Catholic—agreed with the Bishops' Conference in every Rehnquist Court case in which the Conference filed an

57. See Barbara A. Perry, *The Life and Death of the "Catholic Seat" on the United States Supreme Court*, 6 J.L. & POL. 55, 83-85 (1989).

58. See DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 75 (1999) ("During the 1960 campaign[,] Kennedy had weathered charges that as the first Catholic president his allegiance would be split between the interests of America and those of the politically powerful Catholic Church. Clearly Kennedy wanted to avoid naming a fellow Catholic to this first vacancy."). Yalof also observed that Illinois Supreme Court Justice Walter Schaefer, who had been included on a list of potential nominees drawn up by Theodore Sorenson, "received short shrift in the discussion . . . because he had been born Catholic." *Id.* at 78-79.

59. See *id.* at 55; see also PETER H. IRONS, BRENNAN VS. REHNQUIST: THE BATTLE FOR THE CONSTITUTION 24-25 (1994).

60. See *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

61. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

62. *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

63. *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

64. *Bowen v. Kendrick*, 487 U.S. 589 (1988).

amicus brief, leaving him with the highest rate of agreement. Yet this observation highlights a limitation of the comparisons in the table. As the third column reveals, Justice White participated in less than half of the cases involving the Bishops' Conference that Chief Justice Rehnquist and Justice Scalia participated in throughout this entire time period. In the ten cases in which Justice White participated, Chief Justice Rehnquist and Justice Scalia also had a 100% agreement rate with the Bishops' Conference.<sup>65</sup> This group of three Justices with a 100% agreement rate in these ten cases had one Catholic and two non-Catholics.<sup>66</sup>

Justices Scalia and Thomas had a high rate of agreement with the Bishops' Conference during the Rehnquist Court. These two justices had identical voting records in the fourteen cases that they both voted on in which the Bishops' Conference filed an amicus brief.<sup>67</sup> Notwithstanding the substantial attention often paid to abortion cases, however, just two of these fourteen cases involved abortion.<sup>68</sup> An equal number involved the death penalty, and Justices Scalia and Thomas voted against the Bishops' Conference in both.<sup>69</sup> Indeed, no Justice has been more explicitly critical of current Catholic teaching on the death penalty than Justice Scalia has.<sup>70</sup> In one dissenting opinion, Justice Scalia directly criticized the Bishops' Conference, questioning the organization's decision to lay claim to authority to discern evolving standards of decency.<sup>71</sup>

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65. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

66. Justice Kennedy voted in nine of the ten Bishops' Conference cases that Justice White voted in, agreeing with the Bishops' Conference eight of nine times (with *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992), as the exception).

67. See Table 1. Justice Scalia had a higher rate of agreement than Justice Thomas because he voted on eight cases in which the Bishops' Conference filed an amicus brief that were decided before Justice Thomas joined the Court. Justice Scalia voted with the Bishops' Conference in all eight of those cases.

68. See *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Planned Parenthood of Se. Pa.*, 505 U.S. at 833 (plurality opinion).

69. See *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the execution of juvenile offenders violates the Eighth Amendment); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the execution of mentally retarded offenders violates the Eighth Amendment).

70. See Antonin Scalia, *God's Justice and Ours*, FIRST THINGS (May 2002), <http://www.firstthings.com/article/2002/05/gods-justice-and-ours>.

71. *Atkins v. Virginia*, 536 U.S. 304, 322, 347 n.6 (criticizing the Court's reliance on "the views of professional and religious organizations, and opinion polls" and singling out the United States Conference of Catholic Bishops by noting that "[t]he attitudes of that body regarding crime and punishment are so far from being representative, even of the views of Catholics, that they are currently the object of intense national (and entirely ecumenical) criticism"). The not-so-subtle referent is, of course, the then-emerging criticism of the Bishops' handling of sexually abusive priests.



Half of the fourteen cases involved either the Establishment Clause (four cases)<sup>72</sup> or the Free Exercise Clause (three cases).<sup>73</sup> Justices Scalia and Thomas voted with the Bishops' Conference in all four Establishment Clause cases, loosening restrictions on the flow of government funds and services to religious institutions.<sup>74</sup> They also voted with the Bishops' Conference in two out of three Free Exercise cases,<sup>75</sup> although these numbers mask an important rift over the scope of Free Exercise doctrine.

In 1990, Justice Scalia authored the Court's opinion in *Employment Division v. Smith*, which some have described as the greatest setback in decades for religious freedom in the United States.<sup>76</sup> The Bishops' Conference did not file an amicus curiae brief in *Smith*, but that could be only because they—like many others—might have viewed the case as calling for a relatively fact-bound application of prior doctrine. The Bishops' Conference responded virtually immediately when the *Smith* decision was handed down.<sup>77</sup> Although avoiding early endorsement of the Religious Freedom Restoration Act ("RFRA") out of concerns for potential effects that this legislation in response to *Smith* could have on abortion cases, the Bishops' Conference eventually joined a coalition of other groups to push for passage of the RFRA.<sup>78</sup> The avowed purpose of the RFRA was "to restore the compelling interest test as set forth in [two earlier Supreme Court decisions] and to guarantee its application in all cases where free exercise of religion is substantially burdened."<sup>79</sup>

Justice Thomas had not yet joined the Court at the time of the 1990 decision in *Smith*. But he was on the Court when the constitutional validity of the RFRA came before the Supreme Court in *City of Boerne v. Flores*. Both Justices Thomas and Scalia joined the opinion of the Court holding the RFRA unconstitutional.<sup>80</sup> The only other Catholic then on the Court, Anthony Kennedy, wrote the opinion for the Court.<sup>81</sup>

*City of Boerne* is not the only—or even the most prominent—case in which Justice Kennedy voted against a position advocated by the Bishops' Conference. More than any other Justice currently on the Court, Justice Kennedy is responsible for the persistence of the broad abortion right first

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72. See *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion); *Agostini v. Felton*, 521 U.S. 203 (1997).

73. See *Locke v. Davey*, 540 U.S. 712 (2004); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

74. See cases cited *supra* note 72.

75. See *Flores*, 521 U.S. at 511; *Church of Lukumi*, 508 U.S. at 523.

76. *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990).

77. See Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 15 (1994).

78. *Id.*

79. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b)(1) (2013).

80. *Flores*, 521 U.S. at 509, 537.

81. *Id.* at 511.

recognized in *Roe v. Wade*.<sup>82</sup> In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice Kennedy joined with Justices O'Connor and Souter to reaffirm the “core holding” of *Roe v. Wade*.<sup>83</sup> In later cases, Justice Kennedy has sought to apply *Casey* in a way that provides government with greater latitude to regulate abortion.<sup>84</sup> But in *Casey* itself, the opinion co-authored by Justice Kennedy sets forth an understanding of liberty deeply at odds with that embraced by the Bishops' Conference.

In sum, a review of the performance of the Catholic Justices on the Rehnquist Court from the perspective of the Bishops' Conference shows a decidedly mixed picture. Catholic identity did not prevent Justice Brennan from voting for outcomes sought by the Bishops' Conference at a much lower rate than other non-Catholic Justices. And Catholic Justices who more consistently voted in favor of the outcomes sought by the Bishops' Conference disappointed the hierarchs—often predictably so—on several important issues, including abortion, capital punishment, and free exercise. Given the support received from non-Catholics like Chief Justice Rehnquist and Justice White, the Bishops' Conference would not have assessed its likely allies on the Rehnquist Court by reference to their ecclesial affiliation. Like other careful courtwatchers, the Bishops' Conference would have been much more attentive to jurisprudential and ideological factors.

#### B. *The Roberts Court Through October Term 2013*

The transition to the Roberts Court marked a new era in commentary on the Catholic Justices because the replacement of Chief Justice Rehnquist by Chief Justice Roberts, followed shortly thereafter by the replacement of Justice O'Connor with Justice Alito, brought the Court to a majority-Catholic institution. In the first nine years of the Roberts Court (2005 term through 2013 term), the Bishops' Conference filed amicus curiae briefs in ten cases. Four of the briefs dealt with religious liberty;<sup>85</sup> two addressed abortion;<sup>86</sup> two were

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82. 410 U.S. 113 (1973).

83. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837, 860 (1992) (plurality opinion). At present, only three of the nine Justices who cast votes in *Casey* are still on the Court. Justice Kennedy voted to reaffirm the core holding of *Roe v. Wade*. *Id.* Justices Scalia and Thomas dissented. *Id.* at 979 (Scalia, J., concurring in the judgment in part and dissenting in part).

84. *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Stenberg v. Carhart*, 530 U.S. 914 (2000).

85. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012); *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011); *Christian Legal Soc'y Chapter v. Martinez*, 561 U.S. 661 (2010); *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 544 U.S. 973 (2005).

86. *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006).

about same-sex marriage;<sup>87</sup> one was about assisted suicide;<sup>88</sup> and one addressed a cluster of issues surrounding immigration.<sup>89</sup> Because the Court decided one of these ten cases, *Hollingsworth v. Perry*, on standing grounds unrelated to the merits, the analysis that follows excludes this case. Although the Court decided another of these cases, *Arizona School Tuition Organization v. Winn*, on standing grounds, that case's Establishment-Clause-specific standing reasoning is sufficiently related to the merits that it is included in the analysis. The rate of agreement between the outcomes supported by each Justices' vote and that supported by the Bishops' Conference in the remaining nine cases, along with the raw numbers of total cases and total outcome-agreeing votes, can be seen in Table 2 below:

Table 2: Justices' Agreement with the United States Conference of Catholic Bishops

	Agreement with Bishops' Conference as Percentage of Cases	Agreement with Bishops' Conference as Fraction of Cases
Chief Justice Roberts (Cath.)	100%	9/9
Justice Scalia (Cath.)	89%	8/9
Justice Thomas (Cath.)	89%	8/9
Justice Alito (Cath.)	83%	5/6
Justice Kennedy (Cath.)	67%	6/9
Justice Stevens	50%	2/4
Justice Souter	50%	2/4
Justice O'Connor	50%	1/2
Justice Ginsburg	44%	4/9
Justice Breyer	44%	4/9
Justice Sotomayor (Cath.)	40%	2/5
Justice Kagan	25%	1/4

These statistics reveal a stark division between the Catholic and non-Catholic Justices on the Roberts Court in the rate of outcome agreement with

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87. *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

88. *Gonzales v. Oregon*, 546 U.S. 243 (2006).

89. *Arizona v. United States*, 132 S. Ct. 2492 (2012).

the Bishops' Conference. The Chief Justice agreed with the Bishops' Conference on the outcome in every case in which it filed a brief. Justices Scalia, Thomas, and Alito agreed in every case but one. And Justice Kennedy agreed in six out of nine cases, or two-thirds of them. Of the Catholic Justices, only Justice Sotomayor agreed with the Bishops' Conference less than half of the time. By contrast, the six non-Catholic Justices agreed with the Bishops' Conference in half the cases or fewer. The set of cases is, of course, small in absolute terms. But there is every reason to believe that the divide they reveal will hold steady for as long as the Court's population and the ideological valence of the Bishops' Conference's filings remain the same.

While the difference between Catholics and non-Catholics in outcome agreement with the Bishops' Conference is certainly notable, it is important to recognize the limits of the measurement. As previously noted, a notation of outcome agreement means only that the vote cast by a Justice was for a ruling in favor of the same party as supported by the Bishops' Conference; it does not necessarily mean even that a Justice voted for the same merits outcome advocated by the Bishops' Conference. For example, in *Arizona Christian School Tuition Organization v. Winn*, the Supreme Court ruled by a five-to-four vote to dismiss an Establishment Clause challenge to a tax credit scheme that provided significant funds to Catholic schools (among other private schools).<sup>90</sup> The five Catholic Justices in the majority voted to dismiss the case for lack of standing, while the Bishops' Conference had advocated for a rejection of the Establishment Clause challenge on its merits.<sup>91</sup> And even when Catholic Justices voted for the same merits determination as that advocated by the Bishops' Conference, the Justices did not necessarily do so for the same reasons as those presented by the Bishops' Conference.

Notwithstanding the foregoing qualifications about the limited meaning of the outcome-agreement numbers, the clustering of the Catholic Justices' votes remains noteworthy. And if Justice Sotomayor or some other Catholic with similar views had not joined the Court in 2009, the Catholic/non-Catholic divide would be even more striking. Yet Justice Sotomayor's presence near the bottom of the Bishops' Conference outcome-agreement chart also suggests that something other than religious identity may explain how the Catholic Justices vote in cases that the Bishops' Conference cares about.

That other explanatory factor is, of course, ideology. It is a striking fact of the pre-Sotomayor Roberts Court that it featured a complete overlap of Catholicism and conservatism. There were no conservative non-Catholics. Nor were there any Catholics not on the more conservative end of the judicial spectrum. The outcomes advocated by the Bishops' Conference in each of the cases in which it filed an amicus curiae brief during this time were outcomes

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90. 131 S. Ct. 1436, 1442-48 (2011).

91. See Brief of the United States Conference of Catholic Bishops et al. as Amici Curiae in Support of Petitioners, *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (Nos. 09-987, 09-991).

more likely to be supported by conservatives. That does not mean that only conservatives could support the advocated outcomes. Three of the cases, after all, resulted in unanimous decisions.<sup>92</sup> In the remaining cases resulting in split decisions, however, the more conservative Justices on the Court agreed with the Bishops' Conference. By contrast, the Conference was unable to attract the votes of *any* of the non-Catholic Justices in these cases, none of whom could be classified as conservatives.

### III. THE COMPLEXITY OF CATHOLIC INFLUENCE

Let us now consider how reviewing the votes of the Catholic Justices in cases in which the Bishops' Conference filed an amicus curiae brief over the past almost three decades addresses the problems identified at the outset. First is the sporadic "one case at a time" nature of the commentary. When one views a fuller set of cases in which a Catholic Justice's religious identity might be thought to make a difference, one sees that the simple stories spun on a one-off basis are misleading. It is irresponsible to assert, for instance, that Justice Kennedy voted to uphold the federal partial-birth abortion ban in *Gonzales v. Carhart* because he is Catholic without accounting for his votes and reasoning in *Casey* or *Windsor*. Nor can one responsibly assert, for example, that Justice Thomas votes as he does in abortion cases because he is a Catholic, without explaining why that religious identity does not change his votes in death-penalty cases. And so on.

The second problem is the asymmetry in causal attributions. Looking at the set of cases in which the Bishops' Conference has filed an amicus curiae brief enables one to see the scope of this problem. Not only are there a number of cases in which Catholic Justices, despite being Catholic, voted against outcomes advocated by the Bishops' Conference. There are also many cases in which the Catholic Justices voted for outcomes advocated by the Bishops' Conference but in which it is nonetheless difficult to say they did so *because* of their Catholicism. The disconnect between the Bishops' Conference and the Catholic Justices on matters of federal law is most obvious for Catholic Justices like Justice Brennan and Justice Sotomayor. But there is a disconnect for all of them to some extent. Even though there have not yet been any cases in which Chief Justice Roberts has voted against the outcome supported by the Bishops' Conference in a case which the Conference filed an amicus curiae brief, and the number of such cases for several of the Justices is small, nobody thinks (or ought to think) that any of the Catholic Justices' votes in every case line up with how a hypothetical "Bishops' Justice" would vote.

And this leads to the third problem: inattention to broader legal, jurisprudential, and ideological commitments. Nobody familiar with the

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92. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006); *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2005).

Justices' respective approaches to the law in any of the areas addressed in the Bishops' Conference's amicus curiae briefs would be surprised by the Justices' votes in those cases. And one could not generalize across the Catholic Justices as a group to identify one "Catholic factor" that they all have in common. This has been so historically and remains so today.<sup>93</sup> The very idea of a hypothetical "Bishops' Justice" shows the problem with considering Catholic identity apart from the Justices' broader legal, jurisprudential, and ideological commitments. We would not know enough to predict how such a Justice would or should vote on cases that the Bishops' Conference cares about unless we knew more about such a Justice's broader commitments beyond an affinity for outcomes consonant with Catholic social teaching.

Perhaps the best evidence demonstrating that unwavering commitment to Catholic social teaching does not translate directly into legal outcomes are the Bishops' Conference's briefs themselves. These briefs contain conventional legal argument rooted firmly within Supreme Court precedent, not extensive quotations from theological sources. Even the Eighth Amendment briefs, which set forth the distinctive views of the Catholic Church on capital punishment, along with many other Christian denominations and non-Christian religions that joined these briefs, are presented within the framework of existing doctrine that requires the Court to ascertain evolving standards of decency.<sup>94</sup> When other filings ask the Court to limit or overrule a precedent, such as *Roe v. Wade*, they do so with legal arguments virtually indistinguishable from those that would be filed by any other group with a similar legal objective.<sup>95</sup> And although emerging from a particular faith tradition, the arguments aspire for more universal appeal, both before and after filing. It is common for other religious organizations to join the Bishops' Conference's briefs, and those briefs are aimed at all the Justices (particularly swing Justices), not just the Catholics.

An examination of the conventional legal arguments in the Bishops' Conference's briefs also reveals why it makes sense that the Catholic Justices could not uniformly support them as a bloc. The briefs do not map well onto the broader legal, jurisprudential, and ideological commitments of any one of the Justices. Consider, for instance, the great extent to which the Conference's amicus curiae briefs in the death penalty cases advance arguments that appeal to the Justices to make moral judgments, in contrast with the Conference's amicus curiae briefs in abortion, assisted suicide, and same-sex marriage cases.<sup>96</sup> The Conference's death penalty briefs call on the Justices to resolve

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93. See Noonan, *The Religion of the Justice*, *supra* note 37.

94. See, e.g., Brief of the United States Conference of Catholics Bishops and Other Religious Organizations as Amici Curiae in Support of Respondent, *Roper v. Simmons*, 534 U.S. 551 (2005) (No. 03-633).

95. See, e.g., Brief Amicus Curiae of the United States Catholic Conference et al., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902).

96. Compare, e.g., Brief of the United States Conference of Catholics Bishops and Other Religious Organizations as Amici Curiae in Support of Respondent, *Roper v.*

what the briefs describe as “essentially moral questions” involving the death penalty.<sup>97</sup> These briefs appeal to the expertise and experience developed by the Bishops’ Conference (and the many other religious organizations that joined the Conference’s death penalty briefs) in “working with and studying the conscience of the human person and related questions of guilt, blame and punishment.”<sup>98</sup> By contrast with their death penalty briefs, the Conference’s briefs in abortion and assisted suicide cases contemplate a more restrained role for the Justices in exercising their moral judgment. That is to be expected, of course, given the Church’s evaluation of the Court’s capacity for moral judgment in these areas.

There is nothing in Catholic teaching that prevents the Bishops’ Conference from seeking greater consonance between American law and Catholic social teaching at the level of Supreme Court outcomes. But because there is no Catholic teaching about the meaning of federal law, the Bishops’ Conference does this by opportunistically embracing differing understandings of the propriety of the Court’s exercise of moral judgment in order to make conventional legal arguments within the differing doctrinal frameworks for the death penalty, on the one hand, and substantive due process, on the other. One should not mistake the resulting body of Supreme Court briefs as reflecting an overall consistent understanding of constitutional law. If individual Justices were to exhibit as judges the opportunism of the Bishops’ Conference as advocates, they would be open to criticism as bad judges.<sup>99</sup>

To state the obvious point that the influence of the Catholic Justices’ religious identity is always filtered through broader legal, jurisprudential, and ideological commitments is not to deny that Catholic identity matters to how the Catholic Justices decide cases. But the way in which it does so is deeply individualized and not susceptible of generalization. It is a matter more fit for biographers and legal historians. In contrast with the simplistic way in which the commentary on the Catholic Justices in a case like *Gonzales v. Carhart* depicts the influence of Catholicism, the reality is much more complex.

As one example, consider political scientist Frank Colucci’s claims about Justice Kennedy. In his book-length study of Justice Kennedy’s output in

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Simmons, 534 U.S. 551 (2005) (No. 03-633) (death penalty), with Brief Amicus Curiae of the United States Catholic Conference et al., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902) (abortion), and Brief Amici Curiae of the United States Catholic Conference et al., *Washington v. Glucksberg*, 521 U.S. 702 (1997) (No. 96-110) (assisted suicide), and Brief Amicus Curiae of United States Conference of Catholic Bishops in Support of Petitioners and Supporting Reversal, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (same-sex marriage).

97. See, e.g., Brief of the United States Conference of Catholic Bishops and Other Religious Organizations as Amici Curiae in Support of Respondent, *Roper v. Simmons*, 534 U.S. 551 (2005) (No. 03-633).

98. *Id.*

99. Cf. *Bond v. United States* No. 12-158, at 3 (2014) (Scalia, J., concurring in the judgment) (criticizing the opinion for the Court by saying that it “reads likely a really good lawyer’s brief for the wrong side”).

constitutional cases, Colucci contends that “Kennedy’s rhetoric of liberty and human dignity” in cases involving school prayer (*Lee v. Weisman*), the juvenile death penalty (*Roper v. Simmons*), and sexual liberty (*Lawrence v. Texas*) “appears to be profoundly shaped by his Catholicism.”<sup>100</sup> Colucci bases his argument on similarities between the language in these opinions and that in Church documents setting forth Catholic social teaching, such as the Catechism of the Catholic Church, Vatican II’s Declaration on Religious Freedom (*Dignitatis Humanae*), the Apostolic Letter by Pope John Paul II on the Dignity and Vocation of Women (*Mulieris Dignitatem*), the Address to Women in Pope Paul VI’s Closing Address for Vatican II, and a papal encyclical by Pope John Paul II (*Evangelium Vitae*).<sup>101</sup> Colucci also finds an influence of various documents of Catholic social teaching on Justice Kennedy’s opinions for the Court in abortion cases like *Gonzales v. Carhart* and *Planned Parenthood v. Casey*. According to Colucci, “[t]he influence of [these] Catholic documents can be seen most clearly in Kennedy’s language in *Casey* about the mystery of life, the dignity of women, and the nature of the abortion decision.”<sup>102</sup>

The rhetorical similarities between Justice Kennedy’s opinions and these Church documents are indeed noteworthy. But it does not follow, of course, that Justice Kennedy voted as he did in *Planned Parenthood v. Casey*, *Gonzales v. Carhart*, *Lee v. Weisman*, *Roper v. Simmons*, or *Lawrence v. Texas* because he is Catholic. Consider the two cases of this group to which Catholic social teaching speaks most directly: *Casey* and *Roper*. Of these two, *Roper* is consistent with Catholic social teaching at the level of outcome, while *Casey* is fundamentally incompatible.

It is curious that Justice Kennedy apparently thought it worthwhile to model some of his language in these cases on Church documents. But if he intended to implement Catholic social teaching through his votes, Justice Kennedy did not do a very good job. *Casey* provides as good an example as any of the coupling of rhetorical similarity with substantive divergence. The *Casey* plurality treats the “mystery of life” as something that an individual woman, as a subjective decision maker, creates and gives meaning to through her choice; *Mulieris Dignitatem*, by contrast, treats the “mystery of life, as it develops in the womb” as a source of meaning that itself gives rise to acceptance and love, “an attitude towards human beings—not only towards her own child, but every human being—which marks the woman’s personality.”<sup>103</sup> Indeed, Kennedy’s co-authorship of “the joint opinion in *Casey*, with its famous ‘sweet mystery of

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100. FRANK J. COLUCCI, JUSTICE KENNEDY’S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY 31 (2009).

101. *See id.* at 31-33, 71-73. Although Colucci refers generically to the documents with rhetorical similarities to Justice Kennedy’s opinions as post-Vatican II pronouncements, one of the most central documents, *Dignitatis Humanae*, was not issued after Vatican II. rather, *Dignitatis Humanae* was Vatican II’s pronouncement on religious liberty.

102. *Id.* at 72.

103. JOHN PAUL II, MULIERIS DIGNITATEM ¶18.6 (1988).



life' passage" is a significant data point for those skeptical of the idea that Justice Kennedy is "a Catholic jurist."<sup>104</sup>

Or consider Justice Kennedy's views on same-sex marriage. There is little in Catholic social teaching that would predictably yield something like his opinion for the Court in *United States v. Windsor*. And if *Windsor* was a sign of things to come regarding the recognition of a new constitutional right to same-sex marriage (as most lower courts took it to be and as it proved to be as this volume went to print), then the distance between Catholic social teaching and Justice Kennedy's constitutional corpus juris is even bigger.

The point here is limited: to highlight some difficulties accounting for the multifarious ways in which any one Justice may be influenced in some way by his or her beliefs as a Catholic. There is much more that one could say about Justice Kennedy alone, and biographers and legal historians writing about other Justices could generate similar reflections for those Justices. It would be surprising, though, if one were to end up finding similar narratives for any of the individual Catholic Justices. And this, in the end, is the primary contribution made by insisting on thinking about the full set of cases in which the Bishops' Conference has filed amicus briefs. Instead of trading one simplistic approach for another, this Article insists on the complexity of Catholic influence.

#### CONCLUSION

Scholars and others are far from having a general descriptive account of how the Catholic Justices' religious background has interacted with their role fidelity as Supreme Court Justices. But that may be because a general descriptive account is not possible. The problematic type of commentary that has prompted this examination of the Justices' votes in cases in which the Bishops' Conference has filed an amicus brief will nevertheless continue. But the problems that plague this commentary are better appreciated and more easily addressed when one appreciates the full breadth of cases in which the Bishops' Conference has filed amicus briefs. By opening up critical consideration of the Catholic Justices through the lens of this overlooked resource, this Article raises more questions than it answers. But the first step toward getting better answers is to ask better questions.

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104. See Mark Movsesian, *Anthony Kennedy: Catholic Jurist?*, FIRST THINGS (Mar. 28, 2013), <http://www.firstthings.com/blogs/firstthoughts/2013/03/anthony-kennedy-catholic-jurist>.

