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**The Supremes on Religion:
How Do the Justices' Religious Beliefs Influence their Legal Opinions?**

This discussion is essentially an inquiry into the effect which religious beliefs have on the jurisprudence of the highest court of the land, the United States Supreme Court. With regard to actually creating laws, the Supreme Court wields an incredible amount of influence over the judiciary by way of precedent in federal courts, and persuasive authority in state courts. However, decisions by the most famed court in the country also mold and form the political and social climate of eras. Supreme Court decisions have defined our nation's history, for example in *US v. Nixon*¹ or *Roe v. Wade*.² Thus, it seems worthwhile to explore the considerations taken into account by the Justices when they craft opinions which will inevitably shape the course of our national and personal histories.

It is true that the religious beliefs of the people of the United States and their elected officials also play a leading role in the creation of laws which affect our lives; and people are entitled to be governed and live by the rules which they chose for society. This type of law-making, however, is checked by the nature of our democratic republic: if the people are unhappy with the laws by which they are required to abide, new representatives can be elected and new laws drafted.

¹ *US v. Nixon*, 418 U.S. 904 (1974).

² *Roe v. Wade*, 410 U.S. 113 (1973).

The law-making powers of the Justices of the United States Supreme Court are different. Article III of the Constitution of the United States requires that there be one supreme court of the land³, and the Justices which sit upon it are appointed by the President pursuant to Article II⁴. The power of the Supreme Court was substantially increased by *Marbury v. Madison*⁵, in which the Court bestowed upon itself the power of judicial review. In sum, a group of politically appointed individuals have the power to make law for life, and answer (practically⁶) to no one.

Unlike a wheeling, dealing, and negotiating electorate body which comes to an ultimate consensus, the Justices' legal determinations are viewed through subjective lenses created by unique individuals with differing life experiences. Those individual perspectives often shine through the text of an opinion, or patterns can be found in similar opinions. To have this discussion, an assumption must be made that religious beliefs at least somewhat inform the decisions made by the Justices, even if only by way of secular morality⁷. Moreover, it is readily

³ U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.”)

⁴ U.S. CONST. art II, § 2, cl. 2 ([The President] shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”)

⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁶ Of the 109 Justices to have served, only Samuel Chase, an Associate Justice of the Supreme Court of the United States, was accused of behaving badly. He was impeached on March 12, 1804, and acquitted on March 1, 1805. RICHARD ELLIS, *THE IMPEACHMENT OF SAMUEL CHASE 57-76* (Michael R. Belknap, ed., AMERICAN POLITICAL TRIALS Praeger Publishers 1994).

⁷ Professor Ritter provides an excellent explanation of the ties between secular and religious morality integral to this assumption: “The ethics of modern liberalism accordingly proclaims as its fundamental moral principle an absolute, universal, and egalitarian regard for the value of each human being, but which refrains from reliance upon religious belief. In its enthusiasm to elide religion from morality, secular esteem for the inherent value of human being turns not on divine regard for the human, but on human self-regard. Such human self-regard consequently truncates the value of human being into its autonomy: rational, independent, self-sufficient, unencumbered and unconnected to others except by choice. For secularism, the value of being human thus becomes intrinsic to humanity – therefore not a function of its endowment by divinity...Secular morality is a truncated version of religious morality.” Matthew A. Ritter, *The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection upon Bar Admissions*,

apparent that religious belief and religion-based morality have a stronger impact on the opinions of some Justices than others. The next logical step is to question the depth of impact made by religious belief in informing the most powerful arbiters of law in the nation.

Thus, the aim of this discussion will be to identify how and under which circumstances the Justices' religious beliefs are translated into US Supreme Court opinions, how those beliefs have influenced Supreme Court jurisprudence, and how religion will influence future jurisprudence.

The first section of this paper will discuss the methodology used in choosing the opinions to evaluate. The second will explain and evaluate those opinions in light of the religious beliefs stated therein; and connect them to the opining Justice's individual perspective. The last section will identify trends in Supreme Court jurisprudence and, considering the perspectives of the current Justices, predict the role of religion in future rulings.

Section 1: Methodology and Hypothesis

I suspect that because organized religion is a prevalent aspect of our society that informs every individual's upbringing and social perspective, it must necessarily play into a Justice's mindset when constructing an opinion. Determining how to evaluate the way religion has been used in Supreme Court opinions presents two challenges: determining the inquiry's interplay

39 Cal W. L. Rev. 1, 43 (2002) (discussing the development of morality in the US and its imposition on bar-admission applicants).

with the Establishment and Free Exercise Clauses, and ascertaining the distinction between moral considerations and religious beliefs.

Although a very interesting topic, this paper will not discuss the Establishment Clause or Free Exercise Clause. It will also not address whether the Justices' use of their own religious background to inform opinions is a violation of the so-called Religion Clauses.

“The Establishment Clause⁸ provides a certain limit to the support that government may give to religion.”⁹ Conversely, the Free Exercise Clause “requires that government give religion a certain measure of support.”¹⁰ Teasing out the Justices' individual perspectives' on religion as a part of their own moral foundation from the Justices' attitudes about the extent to which religious practice can be proscribed in society would likely be difficult. Additionally determining whether a Justice's reliance on his or her own religious belief to inform an opinion is a violation of the Establishment Clause, is too attenuated to be discussed here. However, it would certainly be an interesting inquiry.

The second difficulty presented by this topic is finding a way to distinguish moral from religious considerations. It is integral to this discussion that morality is somewhat drawn from religion. See Professor Ritter's discussion, *supra* note 4. However, morality legislation is distinctive because it is reflective of societal norms which *may or may not* be religiously

⁸ U.S. CONST. art I. The Establishment Clause and the Free Exercise Clause state: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

⁹ John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 Calif. L. Rev. 847, 849 (1984) (arguing that an examination of the philosophy behind the intent of the Framers in drafting the Establishment clause is more helpful in understanding the aspirational separation of church and state than the dicta of the U.S. Supreme Court.)

¹⁰ *Id.*

motivated. Moreover, the Court has determined that a “moral norm is sufficient grounding for government action.”¹¹ Thus, to avoid assessing opinions which discuss morality legislation using religious concepts (e.g. “adultery” in property hearings for divorce actions), this discussion focuses on US Supreme Court opinions that include terms like “judeo-christian” or “Christianity” but not in the context of Title VII or zoning regulations, for example.

The exact search terms used to identify applicable case law from LEXISNEXIS are: “judeo-christian” or “christian-Judeo” or “judaeo-christian”, and the search string: christian or judia! or buddhis! or islam! or jew! or muslim w/p tradition or history or heritage NOT "establishment clause" NOT "monitor" NOT "valley forge" NOT "Title VII" NOT "religion clauses" NOT "establishment" NOT "crucifix" NOT "commandments".

The goal of this methodology is to take into account only those circumstances in which the opining Justice has consulted religious, not moral tenants. After ascertaining a body of acceptable cases, I excluded those which dealt with the religion clauses or parties named one of the key terms. Below is a summary of the search results. Please also see the graphical representations of these results in the Appendix.

Section 2: Case Studies and Judicial Personalities

Vidal v. The Mayor, Aldermen, and Citizens of Phila., 43 U.S. 127 (1844).

¹¹ *Bowers v. Hardwicke*, 478 U.S. 186, 196 (1986).

In 1844, Justice Roger Brooke Taney wrote the majority opinion in *Vidal*.¹² The case held that under the Pennsylvania Constitution, property may be bequeathed to the city of Pennsylvania to create a college. His opinion states:

That if otherwise capable of taking effect, the trust would be void, because the plan of education proposed is anti-Christian, and therefore repugnant to the law of Pennsylvania....By the laws of Pennsylvania it is blasphemy to attack the Christian religion, but in this case nothing is to be taught but the doctrines of a pure morality, and all the advantages of early impressions upon the youthful mind are entirely abrogated.¹³

Where did the favour with which charities are regarded and the motive by which they are established spring from? The doctrine is traced up to the civil law. But where did Justinian get these ideas? They came from Constantine, the first Christian emperor, and they can be traced up to a higher source than that – the Bible....The Jewish lawyer asked who his neighbor was, and it was hard to convince him that a Samaritan could be so....Even in the older Jewish records, we find the same lesson on philanthropy taught where the sheaf is left for the unknown and unacknowledged stranger.¹⁴

Roger Brooke Taney was born March 17, 1777 on the Taney Plantation on the Patuxent River in Maryland. The Taney family had come to the colony as indentured servants but later

¹² *Vidal v. The Mayor, Aldermen, and Citizens of Phila.*, 43 U.S. 127 (1844).

¹³ *Id.* at 37.

¹⁴ *Id.* at 48-9.

established themselves as successful tobacco farmers in southern Maryland.¹⁵ Although most settlers in the area were Protestant¹⁶, Taney grew up as a privileged English Roman Catholic of rural gentry.¹⁷ Biographers have written that his mother was pious and gentle, but his father had a hot temper.¹⁸ Because it was difficult to find Catholic schools in Maryland during Taney's childhood, and Catholics were not allowed to be teachers, Taney and his siblings were taught by an old, self-professed Episcopal man who lived ten miles away. The only school books they used were a spelling book, and the King James Bible.¹⁹ Taney was then instructed by a series of tutors, one of whom was a graduate of Princeton and encouraged his attending Dickinson College in Pennsylvania.²⁰ He then studied law in Annapolis under the tutelage of an attorney.²¹ Taney was admitted to the Maryland bar on June 19, 1799. He met and married Anne Phoebe Charlton Key, the sister of Francis Scott Key, in January, 1806. The couple would have six daughters.

On March 28, 1836²², Taney became the fifth Chief Justice and the first Catholic appointed to the Court, despite serious Whig opposition. However, Taney's actions in his first decades calmed Whig apprehension that his appointment would politicize the Court. The hallmark of Taney's tenure as Chief Justice was his opinion in *Dred Scott v. Sandford*, confirming slaves as property and then declaring that the Compromise of 1820 was

¹⁵ John Osborne and James W. Gerencser, eds., *Roger Brooke Taney*, DICKINSON CHRONICLES, http://chronicles.dickinson.edu/encyclo/t/ed_taneyR.htm.

¹⁶ BERNARD C. STEINER, *LIFE OF ROGER BROOKE TANEY* 8 (1997).

¹⁷ Hampton I. Carson, *Roger B. Taney* in *THE LIBRARY OF HISTORICAL CHARACTERS AND FAMOUS EVENTS* 343-353 (J.P. Lamberton ed.) (1909).

¹⁸ STEINER, *supra* note 16, at 9.

¹⁹ STEINER, *supra* note 16, at 10.

²⁰ STEINER, *supra* note 16, at 12-13.

²¹ STEINER, *supra* note 16, at 20.

²² McNeal, James, *Roger Brooke Taney*, *THE CATHOLIC ENCYCLOPEDIA*, May 1, 2010, <http://www.newadvent.org/cathen/14442c.htm>.

unconstitutional. Ironically, he was personally opposed to slavery and had freed his own slaves. Roger Brooke Taney died on October 12, 1864 at 87 years old.²³

Although Taney was Roman Catholic, the thrust of his opinions do not seem to contain religious underpinnings. In particular, the use of anti-Christian in *Vidal* is likely meant to summarize Pennsylvania's law, not to express his personal beliefs.

***Thurlow v. Commonwealth of Mass.*, 46 U.S. 504 (1847).**

In 1847, Justice John Catron wrote the majority opinion in *Thurlow*,²⁴ holding that Congress had the power to regulate importations of gin, even though Congress had made no specific regulation. The opinion states:

[Plaintiff] commented on the various acts of the General Assembly of the State of Rhode Island, in relation to the licensing of taverns, ale-houses, and the like, and the sale of spirituous liquors therein...for the purpose of showing, that, from the earliest period in the history of the Colony to the last-named period in the history of the State of Rhode Island, her policy had been uniform on this subject, and similar to that of most Christian and civilized countries, and of all the Colonies and States of the Union, -- that is, to license and regulate the sale of spirituous liquors, that it might be consistent with the preservation of good order, and with

²³ Osborne and Gerencser, eds., *Roger Brooke Taney*, *supra* note 16.

²⁴ *Thurlow v. Commonwealth of Mass.*, 46 U.S. 504 (1847).

the Christian virtue of temperance, and not to inhibit it, in enforcement of the Mahometan rule of abstinence.²⁵

John Catron was probably born in 1786, and grew up poor in Virginia and Kentucky. Little is known of his early years.²⁶ Catron served under General Andrew Jackson as a young man, and forever after had similar political affinities.²⁷

Catron joined a Court on which he was largely overshadowed by the other Justices, and wrote fewer opinions than his colleagues.²⁸ Although it is debated, some scholars posit it a likely consequence of Chief Justice Taney and Catron's shared jurisprudential outlook, which resulted in Taney's taking the lead on constitutional questions. Moreover, Catron did not share in the nationalist feelings of Justice Story; the nationalism, moralism, and interest in individual rights articulated by Justice John McLean; or, for the most part, support for states' rights favored by Justice Daniel.²⁹ He thus fell into the mainstream.

With regard to the duty of judges themselves, Catron believed "that a judge ought not to view the law as 'a system of ethical philosophy.'³⁰ Rather, one should approach it as set of rules

²⁵ *Thurlow, supra* note 24.

²⁶ A.E. Keir Nash, BIOGRAPHICAL ENCYCLOPEDIA OF THE SUPREME COURT: THE LIVES AND LEGAL PHILOSOPHIES OF THE JUSTICES 99 (Melvin I. Urofsky ed. 2006).

²⁷ TIMOTHY L. HALL SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 99-1012 (2001).

²⁸ SUSAN NAVARRO SMELCER, SUPREME COURT JUSTICES; DEMOGRAPHIC CHARACTERISTICS, PROFESSIONAL EXPERIENCE, AND LEGAL EDUCATION, 1789 – 2009, NO. R40802 (Congressional Research Service, 2009), *available at* <http://www.fas.org/sgp/crs/misc/R40802.pdf> (indicating that other than Justice Wayne, Justice Catron averaged the fewest number of opinions per term on the Taney Court with only 7.5).

²⁹ *Id.* (citing AUSTIN ALLEN, ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837–1857, at 30–35 (discussing the varied opinions of the Taney Court's internal critics).

³⁰ *Id.* (citing AUSTIN ALLEN, ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT 1837–1857, at 18).

‘to maintain the ancient state of things regardless of the sanctions giving rise to it.’³¹” Although not selected for use in this paper, Catron’s opinion in *State v. Foreman*, 16 Tenn. 256, 272–74 (1835) echoed these sentiments. Catron considered the doctrine of conquest upon which he drew to be “in conflict with our religion, and with our best convictions of a refined and sound morality.”³² Yet he felt compelled to invoke it: “[O]ur individual titles to lands, from the Atlantic to the western Missouri line, depend upon its firm and unquailing support, regardless of its origin. . . . Time and necessity have lent it their sanction; it is the law of the land.”³³

Very little authoritative information is available on which religion was practiced by Catron, if any. *Foreman* is a state supreme court case, but it is evident that religion played some role in Catron’s conscience, even outside the context of morality. Therefore, it is also likely that his personal religious beliefs led him to opine that liquor was an evil which Rhode Island had a right to ban.

***Smith v. Turner*, 48 U.S. 283 (1840).**

In 1840, Justice McLean wrote the majority opinion in *Smith*.³⁴ He opined that marine physicians were entitled to sums certain, stating: “To turn away the stranger to perish was uncivilized and unchristian; but long experience proved that it was also unsafe.” “The perception of this necessity, increasing wealth, a better civilization, and a larger infusion of the Christian maxim, ‘Do as you would be done by,’...” “It is the cherished policy of the general government to encourage and invite Christian foreigners of our own race to seek an asylum within our

³¹ See AUSTIN ALLEN, ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT 1837–1857, at 18.

³² *State v. Foreman*, 16 Tenn. 256, 333 (1835).

³³ *Id.*

³⁴ *Id.* at 283.

borders, and to convert these waste lands into productive farms, and thus add to the wealth, population, and power of the nation.”³⁵

Justice John McLean, often called the “Politician on the Supreme Court” was born in 1785 in Northern New Jersey.³⁶ He came from a strong Presbyterian background owing to familial history and a course of study taught by two schoolmasters who were also Presbyterian ministers.³⁷ However, just after being appointed to the U.S. Land Office in Cincinnati, McLean met John Collins, an evangelist, who converted him to Methodism. Aided by his political connections, McLean became the most prominent Methodist layman in the country. He was active in church activities and wrote a series of articles about the Bible.³⁸

McLean was a strong supporter of the War of 1812, but was not a devout nationalist, as evidenced by his opposition to the creation of the Second National Bank. McLean was strongly opposed to slavery as well, and his dissent in the infamous *Dred Scott* decision was praised by an Ohio news paper as one which should be ‘read with admiration.’³⁹ As a result of his dissent, McLean gained a considerable amount of popularity among Northerners.⁴⁰ Although not utilizing the specific terms explored by this discussion, McLean revealed his religious leanings in another slave case, *Ohio v. Carneal*, in which he stated that, slavery was inconsistent with immutable principles of natural justice.”⁴¹ He died of pneumonia on April 4, 1861.⁴²

³⁵ *Id.* at 121-2.

³⁶ 1 FRANK OTTO GATELL, THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 301 (Leon Friedman and Fred L. Israel, eds.) (1995).

³⁷ *Id.*

³⁸ *Id.* at 302.

³⁹ *Id.* at 310-11.

⁴⁰ *Id.* at 312.

⁴¹ HALL, *supra* note 27.

⁴² GATELL, *supra* note 36, at 312.

There seems to be plenty of evidence that religion was a formidable force in Justice McLean's private and public life. It is likely that his Methodist leanings informed his judicial perspective and made appearances in his opinions.

***Davis v. Beason*, 133 U.S. 333 (1890).**

Justice Field wrote the majority opinion in *Davis*,⁴³ which held that statutes which conditioned voting rights on an individual's refusal to practice bigamy or polygamy were lawful. The opinion states

Bigamy and polygamy are crimes by the laws of the United States, by the laws of Idaho, and by the laws of all civilized and Christian countries; and to call their advocacy a tenet of religion is to offend the common sense of mankind. Probably never before in the history of this country has it been seriously contended that the whold (sic) punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.⁴⁴

Justice Stephen Johnson Field served on the Court for 35 years. He was born on November 4, 1816 to a Congregationalist minister⁴⁵, and was brought up in the strict tenants of

⁴³ *Davis v. Beason*, 133 U.S. 333 (1890).

⁴⁴ *Id.* at 343.

⁴⁵ HALL, *supra* note 27, at 148.

Calvinism.⁴⁶ Field served as a missionary in modern-day Turkey from the ages of 13 to 15,⁴⁷ and through being introduced to Catholics, Mahometans, Armenians, gained respect and tolerance for other religious beliefs.⁴⁸ “In later years [religious] qualities, in a secularized form, were duly reflected in the mind and character of Stephen; even his judicial opinions often suggested the spirit and cadences of an Old Testament prophet.”⁴⁹ Field was appointed by Lincoln⁵⁰ to serve as the tenth Justice on the Court, an addition which was suspected to be an attempt to secure the cooperation of the Pacific states, as Field hailed from California⁵¹. Field was most noted for his amalgamation of Constitutional principles and laissez-fair economics.

In the *Slaughter House Cases*, Field dissented forcefully, stating that the 14th Amendment was not intended to write into the Constitution “the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes.”⁵² He also wrote, “The only loyalty which I can admit consists in obedience to the Constitution and the laws made in pursuance of it. It is only by obedience that affection and reverence can be shown to a superior having a right to command. So thought our great Master when he said to his disciples: ‘If ye love me, keep my commandments.’”⁵³

⁴⁶ JOHN NORTON POMEROY, SOME ACCOUNT OF THE WORK OF STEPHEN J. FIELD: AS A LEGISLATOR, STATE JUDGE, AND JUDGE OF THE SUPREME COURT OF THE UNITED STATES 9 (2003).

⁴⁷ HALL, *supra* note 27, at 148.

⁴⁸ POMEROY, *supra* note 46, at 10.

⁴⁹ 2 ROBERT MCCLOSKEY, THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS, 530 (Leon Friedman and Fred L. Israel, eds.) (1995).

⁵⁰ HALL, *supra* note 27, at 149.

⁵¹ *Id.* at 150.

⁵² MCCLOSKEY, *supra* note 49 at 540.

⁵³ *Id.* at 539 (citing *The Slaughter House Cases*, 83 U.S. 36, 105 (1873)).

Field had become lame, feeble-minded and irritable, and was asked to resign from the bench by Justice Harlan toward the end of 1896, and so did.⁵⁴ He died on April 9, 1899.⁵⁵

As with Justice McLean, Field's religious propensities were obvious. Even the sentence construction within the *Davis* opinion makes clear that he saw religious sentiment as being distinct from moral or social inclinations: "crimes...of the United States,... laws of Idaho,... the laws of all civilized and Christian countries..." Moreover, he opines that the Mormon faith is depraved in its teachings ("and to call their advocacy a tenet of religion is to offend the common sense of mankind"), suggesting that Christianity is superior to the Church of Latter-Day Saints.⁵⁶

***Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921).**

In *Marcus*,⁵⁷ Justice Holmes wrote a majority opinion which upheld a law that required landlords to provide tenants basic light, heat, and water services. He opined

Some of our opponents have indulged at some length in citations from historians. They have also referred to alleged *responsa* of rabbis rendered in mediaeval times, in their capacity as arbitrators....The very fact that the Jews, in the days when these arbitraments took place, could not own real property of itself indicates how far afield these alleged precedents are apt to lead one."⁵⁸

⁵⁴ *Id.* at 548.

⁵⁵ HALL, *supra* note 27, at 151.

⁵⁶ This is ironic because followers of the Church of Latter-Day Saints proclaim themselves to be Christian. See Jeff Lindsay, *Are Latter-day Saints Christian? Certainly!*, LDS FAQ, Feb. 24, 2007, http://www.jefflindsay.com/LDSFAQ/FQ_Christian.shtml.

⁵⁷ *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921).

⁵⁸ *Id.*

Oliver Wendell Holmes was born in Boston on March 8, 1841. Holmes' father was a famous doctor, and his mother was a daughter of a justice of the Supreme Judicial Court of Massachusetts.⁵⁹ Holmes was well educated, attending Harvard and becoming a member of its Metaphysical Club. He also served three years in the army which deeply ingrained his natural propensity toward skepticism.⁶⁰ Holmes' grandfather was a Congregationalist minister, but no other reference is made to his participation in organized religion.⁶¹ It does not seem that Holmes was a religious man. Rather, he believed, for example, that transgression of criminal law did not evidence a moral defect, but instead simple failure to measure up to community standards.⁶²

Holmes served for twenty years on the Massachusetts Supreme Judicial Court and wrote almost 1,300 opinions.⁶³ He was appointed to the United States Supreme Court by President Theodore Roosevelt in 1902 and served an additional 29 years.⁶⁴ He was considered by many a radical empiricist, and some of his opinions have come under attack in recent years.⁶⁵ He resigned in 1932 and died three years later.⁶⁶

Even if one were to disregard Holmes' apparent lack of religious conviction, his use of the term "Jews" in *Marcus Brown Holdings* is likely nothing more than an assessment of the historic treatment of the subject. That Holmes was ideologically wedded to empiricism is further evidence that religion did not play a role in his determination.

⁵⁹ 3 PAUL A. FREUND, THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 874 (Leon Friedman and Fred L. Israel, eds.) (1995).

⁶⁰ *Id.* at 875.

⁶¹ G. EDWARD WHITE, OLIVER WENDELL HOLMES: SAGE OF THE SUPREME COURT 18 (2000).

⁶² FREUND, *supra* note 59, at 876.

⁶³ *Id.* at 877.

⁶⁴ *Id.* at 880.

⁶⁵ *Id.* at 874 *see e.g. Abrams v. United States*, 250 U.S. 616 (1919)(a case grounded in relativity to the dismay of natural-law thinkers)).

⁶⁶ *Id.* at 881.

***Ullman v. United States*, 350 U.S. 422 (1956).**

In 1956, Justice Douglas wrote a dissenting opinion in *Ullman*,⁶⁷ in which the majority held that Congress's interest in national security trumped even the important grant of immunity against state prosecution. Douglas' dissenting opinion explains the genesis of immunity:

[The defendant] marshalled many arguments against the oath *ex officio*, one of them being the sanctity of conscience and the dignity of man before God: as for that Oath that was put upon me, I did refuse to take it as a sinful and unlawful oath, and by the strength of my God enabling me, I will never take it, though I be pulled in pieces by wild horses, as the antient Christians were by the bloody tyrants in the Primitive Church; neither shall I think that man a faithful subject of Christ's kingdom, that shall at any time hereafter take it, seeing the wickedness of it hath been so apparently laid open by so many, for the refusal whereof many do suffer cruel persecution to this day."⁶⁸

***A Book Named "John Cleland's Memoires of a Woman of Pleasure" (Fanny Hill) v. A.G. of Mass.*, 383 U.S. 413 (1966).**

Douglas also wrote a concurring opinion in *Fanny Hill*, in which the majority held that because a controversial book had some literary value, it should not be proscribed. Douglas' concurrence states:

⁶⁷ *Ullman v. United States*, 350 U.S. 422 (1956).

⁶⁸ *Ullman* at 446 (citing *The Trial of Lilburn and Wharton*, 3 How. St. Tr. 1315, 1332).

He readily admits that the traditional Judeo-Christian standards of conduct and behavior no longer serve as strong and forceful guides....[T]he values contained in the Judeo-Christian tradition and ‘the American way of life’ must never be abandoned for they emanate from the wellsprings of ‘Truth.’ What has previously been only an external force must now be internalized by individuals. [T]he story of Fanny Hill is a tragedy because she did not demonstrate self-control. She refused to internalize the values inherent in the Judeo-Christian tradition and the catalog of sexual scenes in the book, fifty-two in all, are a symbol of the debased individual and the society in which he lives.⁶⁹

***Furman v. Georgia*, 408 U.S. 238 (1972).**

Douglas also wrote a concurring opinion in *Furman*, which held that sentencing mentally retarded criminals to death constituted cruel and unusual punishment.

The danger of subjective judgment is acute if the question posed is whether a punishment shocks the most fundamental instincts of civilized man...or whether a cry of horror would rise from every civilized and Christian community of the country....

⁶⁹ *A Book Named “John Cleland’s Memories of a Woman of Pleasure” (Fanny Hill) v. A.G. of Mass.*, 383 U.S. 413, 435-46 (1966).

The House of Lords rejected his petition, but a minority of its members concluded that the King's Bench had no jurisdiction to compel defrocking and that the other punishments were barbarous, inhumane, unchristian, and unauthorized by law.⁷⁰

William Orville Douglas was born in 1898 in Minnesota to a Presbyterian minister. The family moved to Washington, and Douglas' father died. He left Douglas impoverished and crippled by polio.⁷¹ Douglas attended Columbia Law School and had two children with Mildred Riddle. Douglas and Riddle divorced in 1953. Interestingly, he remarried three times: when he was 56 to Mercedes Davidson; when he was 65 to Joan Martin, 25; and when he was 68 to Cathleen Heffernan, 22.⁷²

Douglas was generally known as an aggressive civil libertarian, and fought for the rights of minorities and outcasts.⁷³ He was an avid hiker and environmentalist, and was frequently criticized for shirking his judicial duties or writing sloppy opinions.⁷⁴ Supporters, however, tout Douglas for his "power to emphasize with brevity."⁷⁵ Conservatives disliked Douglas for his support of judicial activism and Gerald Ford, then the Republican leader of the House of Representatives attempted to impeach Douglas and failed.⁷⁶ Despite significant experience writing about many areas of the law, it is supposed that Douglas' greatest contribution to

⁷⁰ *Furman v. Georgia*, 408 U.S. 238, 278 (1972).

⁷¹ HALL, *supra* note 27, at 316.

⁷² *Id.* at 316. Opinions differ on the correct spelling of Douglas' third wife's name. According to the Washington Post, the correct spelling is Cathleen Heffernan. See Roxanne Roberts and Amy Argetsinger, *Sotomayor: A Single Supreme?*, WASHINGTONPOST.COM, May 27, 2009, <http://voices.washingtonpost.com/reliable-source/2009/05/rs-sonia27.html>; *But see* 5 JOHN P. FRANK AND VERN COUNTRYMAN, THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1243 (Leon Friedman and Fred L. Israel, eds.) (1995) (Kathleen Heffernan). Conflicting information about her life is available depending on which source is consulted.

⁷³ HALL, *supra* note 27, at 317.

⁷⁴ *Id.*

⁷⁵ 5 JOHN P. FRANK AND VERN COUNTRYMAN, THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1243 (Leon Friedman and Fred L. Israel, eds.) (1995).

⁷⁶ HALL, *supra* note 27, at 318.

Supreme Court jurisprudence is in the area of individual liberty. On December 13, 1974, Douglas suffered a stroke from which he never fully recovered. He retired in 1975 and died in 1980.⁷⁷

Although Douglas apparently had a religious upbringing, at least before his father died, religion does not seem to have played a large role in his adult life. The reference to God and religion in Douglas' dissent in *Ullman* was likely meant to strengthen the respect for the antiquity of the privilege Douglas sought to defend. That is was a religious reference is seemingly irrelevant to the case at hand.

In *Fanny Hill*, Douglas is not referencing religious beliefs at all, other than to compare the controversial nature of the book in question to general standards of acceptability.

In *Furman*, Douglas is comparing Christian treatment of proper punishment to that which guided society at the time of his writing. With regard to the first use of "Christian" in the concurrence, Douglas' inclusion of the second clause, which is religiously oriented despite having used perfectly explanatory and nonsecular verbiage directly before, sheds light on his religious convictions. ("...(1) shocks the most fundamental instincts of civilized man...(2) or whether a cry of horror would rise from every civilized and Christian community of the country...") A similar assessment may be made of the second use of "Christian". Because Douglas clearly identified the standard to be used in making a determination of what was socially acceptable, there was no need to also use a religious reference. ("...punishments were barbarous, inhumane, unchristian, and unauthorized by law.")

⁷⁷*Id.*

***Bartkus v. Illinois*, 359 U.S. 121 (1959).**

The famed Justice Hugo Black wrote a dissenting opinion in *Bartkus*,⁷⁸ in which the majority held that no double jeopardy was present because successive trials did not deny the petitioner due process. He wrote

Even in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of the early Christian writers...Few principles have been more deeply rooted in the traditions and conscience of our people.⁷⁹

Justice Hugo Lafayette Black was born on February 27, 1886 in Harlan, Alabama. He is widely held to be one of the Supreme Court's most influential justices. Black was a strict textualist, utilizing this view to protect personal liberties from government infringement.⁸⁰ His parents were farmers, and later keepers of a general store. The general store afforded Black close proximity to political and legal conversation.⁸¹

Black served as a senator and made it apparent that he supported Roosevelt's court-packing plan. This, along with other shared perspectives, likely earned Black's appointment to the Court in 1937.⁸² Black was also a member of the Ku Klux Klan, but renounced his association upon appointment.⁸³ Oddly, Black's first client had been a black man who, as was

⁷⁸ *Bartkus v. Illinois*, 359 U.S. 121 (1959).

⁷⁹ *Bartkus* at 152.

⁸⁰ HALL, *supra* note 27, at 303.

⁸¹ *Id.*

⁸² *Id.* at 304.

⁸³ *Id.*

the custom, was leased out to perform labor under slave-like conditions. Black defended him vigorously and won a verdict of \$137.50.⁸⁴

There is no authoritative indication of which religion practiced by Black, other than that the Bible and Bunyan's *Pilgrim's Progress* were the two most read books of his childhood.⁸⁵ Black once commented that the Bible was the only book his mother ever read to him.⁸⁶ Additionally, he had the support of the Baptists during his Senate campaigns,⁸⁷ and his family's genesis in the so-called "Bible Belt" indicates that he was probably Baptist. Whatever Black's religious affiliation, it seems as though his upbringing was at least influenced by religious thought.

Black's dissenting opinion in *Bartkus* seems consistent with his interest in criminal procedure. Black's religious influences seem few, if any, and the above statement seems to be a reflection on society's moral influences, as opposed to his own religious beliefs. Moreover, use of "Christian" in response to the authors of the texts from which he draws seems, from the context of the case, nothing more than an identification of a source, not an offering of a particular belief system.

***Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)**

⁸⁴ 3 JOHN P. FRANK, *THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS* 1155-6 (Leon Friedman and Fred L. Israel, eds.) (1995).

⁸⁵ ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 9 (1997).

⁸⁶ *Id.* at 12.

⁸⁷ FRANK, *supra* note 84, at 1156.

In *Calero-Toledo*,⁸⁸ Justice Brennan, writing for the majority, held that a company was not deprived of due process or just compensation because the seizure of its interest in a yacht was necessary to secure an important governmental interest. The opinion states “The origins of the deodand are traceable to the Biblical and pre-Judeo-Christian practices, which reflected the view that the instrument of death was accused and that religious expiation was required.”⁸⁹

Justice William J. Brennan was born on April 25, 1906, the son of an Irish coal miner, who later became active in the union politics of Newark, New Jersey.⁹⁰ His family was Catholic.⁹¹ Brennan was a liberal, but managed to politik his way into dissenting an average of only six times per year, despite the conservative stance of the rest of the court.⁹² Interestingly, he has said that, despite media and the Bush administration’s labels, he does not view himself as an extreme liberal, especially compared to Black and Douglas.⁹³ In a speech given at Georgetown University, Brennan commented, “[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.”⁹⁴

Here, Brennan is simply tracing the development of forfeiture law. The religious referenced used in *Calero-Toledo* serves to establish its long and embedded history in our culture.

⁸⁸ *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

⁸⁹ *Id.* at 681.

⁹⁰ 4 NATHAN LEWIN, *THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS* 1522 (Leon Friedman and Fred L. Israel, eds.) (1995).

⁹¹ The Oyez Project, *Justice Brennan*, http://www.oyez.org/justices/william_j_brennan_jr.

⁹² LEWIN, *supra* note 88 at 1521-2.

⁹³ ROGER GOLDMAN, *WILLIAM J. BRENNAN, JR.: FREEDOM FIRST* 7 (1994).

⁹⁴ *Id.* at 30.

***Harris v. McRae*, 448 U.S. 297 (1980)**

*Harris*⁹⁵ held that Medicaid abortions not funded by Congress due to the Hyde Amendment, and other funding restrictions on abortions, did not violate the Establishment Clause or the Fifth Amendment. Justice Stewart's majority opinion notes that

the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny. The Hyde Amendment, as the District Court noted, is as much a reflection of 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion. In sum, ...[the] restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church...⁹⁶

Potter Stewart was born in Jackson, Michigan, the son of James Garfield Stewart, a chief justice of the Supreme Court of Ohio.⁹⁷ His religious background is Episcopalian.⁹⁸ He was appointed to the US Supreme Court when he was only 39. On the Warren Court, Stewart frequently stood outside the prevailing liberal consensus, particularly on matters concerning state criminal law enforcement. His centrist inclinations meant, however, that he also declined to align himself with the Burger court's occasionally aggressive pursuit of politically conservative causes.⁹⁹

⁹⁵ *Harris v. McRae*, 448 U.S. 297 (1980).

⁹⁶ *Id.* at 319.

⁹⁷ The Ohio Judicial Center, *Potter Stewart*, http://www.ohiojudicialcenter.gov/p_stewart.asp.

⁹⁸ The Oyez Project, *Potter Stewart*, *supra* note 91.

⁹⁹ *Supra* note 97.

While Justice Stewart may not be infusing the opinion with his own religious beliefs, he is certainly recognizing the role of religion in making the law. Perhaps his religious background has influenced his perspective on whether religion has a place in law-making.

***Bowers v. Hardwick*, 478 U.S. 186 (1986)**

*Bowers*¹⁰⁰ was written by Justice White, and held that the Due Process Clause did not confer upon homosexuals, a fundamental right to practice homosexual sodomy. Justice Blackmun dissented, stating:

I believe we must analyze respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an abominable crime not fit to be named among Christians.¹⁰¹

Moreover, he opined that

[t]he assertion that traditional Judeo-Christian values proscribe the conduct involved, Brief for Petitioner 20, cannot provide an adequate justification for [Georgia's statute]. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether

¹⁰⁰ *Bowers* at 186.

¹⁰¹ *Id.* at 199-200.

the State can advance some justification for its law beyond its conformity to religious doctrine.¹⁰²

In footnote, he includes:

The parallel between Loving and this case is almost uncanny. There, too, the State relied on a religious justification for its law...that Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix[.] ...Petitioner...rel[ied] on the Old and New Testaments and the writings of St. Thomas Aquinas to show that traditional Judeo-Christian values proscribe such conduct[.]¹⁰³

Justice Byron White is one of the more mysterious characters to have served on the United States Supreme Court. He was born in Fort Collins, Colorado in 1917. There is very little authoritative information available about his upbringing, except that he grew up in the small sugar-beet farming town of Wellington where his father managed a lumberyard and was the mayor.¹⁰⁴ Some less reliable sources indicate that White was either Episcopalian or Anglican.¹⁰⁵

¹⁰² *Bowers* at 211.

¹⁰³ *Id.*

¹⁰⁴ Bootie Cosgrove-Mather, *Former Justice Byron White Dies*, CBS NEWS ONLINE, Apr. 15, 2002, <http://www.cbsnews.com/stories/2002/04/15/national/main506208.shtml>.

¹⁰⁵ The Oyez Project, *Byron White*, *supra* note 97; NNDB, NNDB.com, *Byron White*, <http://www.nndb.com/people/401/000059224/>.

White went on to play a variety of collegiate sports, and ultimately played a year of football for the Pittsburg Pirates. A Rhodes Scholar, White spent a year at Oxford before joining the US Navy after Pearl Harbor was attacked. White also organized President John F. Kennedy's presidential campaign in Colorado. Kennedy then appointed White to the Supreme Court.¹⁰⁶ Despite being appointed by a democratic administration, White frequently sided with the conservative side of the court, for example, dissenting in *Roe v. Wade*, and again in *Casey*.¹⁰⁷

White's reasoning in *Bowers*, cited above, clearly states that religious belief cannot be exported to the rest of society, even though he ultimately determined that Georgia's law should not be struck down. White's view is commensurate with the impact that religion seems to have had on his life.

***Austin v. United States*, 509 U.S. 602 (1993)**

In *Austin*,¹⁰⁸ Justice Blackmun held that the Eighth Amendment's excessive fines clause applied to drug-related property forfeiture to the United States. In his opinion for the majority, he wrote:

Three kinds of forfeiture were established in England at the time the Eight Amendment was ratified in the United States: deodand, forfeiture upon conviction of felony or treason, and statutory forfeiture. Each was understood, at least in part, as imposing punishment.... The origins of deodand are traceable to Biblical

¹⁰⁶ *Supra* note 104.

¹⁰⁷ *Id.*

¹⁰⁸ *Austin v. United States*, 509 U.S. 602 (1993).

and pre-Judeo-Christian practices, which reflected the view that the instrument of death was accused and that religious expatriation was required.¹⁰⁹

Justice Blackmun was born on November 12, 1908 in the same room in which his mother had been born. His parents had met at a Methodist university, Central Wesleyan College.¹¹⁰ His childhood had been scarring; his father had trouble holding a job and his mother worried constantly about the family's financial well-being. Blackmun graduated summa cum laude from Harvard undergraduate and law school, despite holding a multitude of jobs to supplement his scholarship.

Blackmun was appointed to the Court by Richard Nixon in 1970. An affection for the disadvantaged, the underdogs, and the poor, marked Blackmun's twenty-four year tenure on the court. A feeling of solidarity with the "little people" was most evident when he exclaimed, "Poor Joshua!" in *DeShaney v. Winnebago County Department of Social Services*.¹¹¹ He frequently alluded to feeling like an outsider on the Court, but gained fame and notoriety for opinion in *Roe v. Wade*. He had to travel with security detail and a bullet was once shot into his apartment.

As in *Calero-Toledo*,¹¹² the purpose of the religious reference utilized by Blackmun is not tied to a religious belief, but rather traces the history of forfeiture law.

¹⁰⁹ *Austin* at 611.

¹¹⁰ LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN 2* (2005).

¹¹¹ *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 213 (1989) (J. Blackmun, dissenting).

¹¹² *Calero* at 663.

***Rice v. Cayetano*, 528 U.S. 495 (2000)**

Rice held that one may not be prevented from exercising the right to vote based on his ancestry, because the ancestral inquiry created a race-based voting qualification in violation of the Fifteenth Amendment. Justice Kennedy, opining for the majority, wrote, “[New England Congregationalists] sought to teach Hawaiians to abandon religious beliefs and customs that were contrary to Christian teachings and practices.”¹¹³

***Atkins v. Virginia*, 536 U.S. 304 (2002)**

Atkins v. Virginia held that the Eighth Amendment’s prohibition against cruel and unusual punishment was violated by the execution of mentally retarded criminals. Both Justices Stevens and Rehnquist’s opinions are relevant to this paper’s inquiry. Stevens opined for the majority

In addition, representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an *amicus curiae* brief explaining that even though their views about the death penalty differ, they all ‘share a conviction that the execution of persons with mental retardation cannot be morally justified.’¹¹⁴

Justice Rehnquist references the above portion of the majority opinion, saying that none of the *amicus* briefs should be given any weight when the legislature has chosen not to do so.¹¹⁵

¹¹³ *Rice v. Cayetano*, 528 U.S. 501, 495 (2000).

¹¹⁴ *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

¹¹⁵ *See Id.* at 353.

Justice John Paul Stevens was the only protestant on the Roberts court.¹¹⁶ He was born into a prominent Chicago family, the youngest of four sons.¹¹⁷ Justice William Hubbs Rehnquist grew up in a conservative Lutheran¹¹⁸ household in Milwaukee, Wisconsin. His father was a paper salesman, and his mother a translator. Rehnquist enlisted in the army during World War II and utilized GI Bill scholarship money to attend Stanford. He was very conservative and had served many posts for the Republican party.¹¹⁹ Rehnquist's unattained, but well documented goal was to overturn *Roe v. Wade*.¹²⁰

In their opinions, neither justice is importing their own religious beliefs. Rather, they are assessing whether *amicus* briefs are relevant in light of our law-making system.

Lawrence v. Texas, 539 U.S. 558 (2003)

The majority opinion in *Lawrence v. Texas*¹²¹ was written by Justice Kennedy. It held that the convictions of two adults for consensual homosexual sodomy under a Texas statute violated their due process liberty and privacy interests. Kennedy's opinion references *Bowers v. Hardwick*, and states

¹¹⁶ Adam Liptak, *Stevens, The Only Protestant On the Court*, THE NEW YORK TIMES, Apr. 9, 2010, <http://www.nytimes.com/2010/04/11/weekinreview/11liptak.html>.

¹¹⁷ Karen Yourish, Kat Downs and Sisi Wei, *Timeline: The Life and Times of Justice Stevens*, THE WASHINGTON POST, Apr. 9, 2010, <http://www.washingtonpost.com/wp-srv/special/nation/justice-stevens-timeline/>.

¹¹⁸ Findlaw.com, *William Hubbs Rehnquist*, http://supreme.lp.findlaw.com/supreme_court/justices/rehnquist.html.

¹¹⁹ The Oyez Project, *William H. Rehnquist*, *supra* note 97.

¹²⁰ Ronald K.L. Collins, Esq., *Should Roe v. Wade Be Overturned? Wrong Question...*, JURIST.LAW.PITT.EDU, Jan. 22, 2003, <http://jurist.law.pitt.edu/forum/forumnew88.php>.

¹²¹ *Lawrence* at 558.

The sweeping references by Chief Justice Burger to the history of Western Civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction.¹²²

Anthony McLeod Kennedy was born and raised in Sacramento, California. His father worked his way through law school as a dock worker, then built a lobbying and law practice. Kennedy attended Stanford University and the London School of Economics, then Harvard Law School. He accepted a job with a law firm in San Francisco, but returned to Sacramento to take charge of his father's firm after his death in 1963.¹²³

Kennedy is Catholic¹²⁴, but stated during an interview,

Our system presumes that there are certain principles that are more important than the temper of the times...And you must have a judge who is detached, who is independent, who is fair, who is committed only to those principles, and not public pressures of other sort. That's the meaning of neutrality.¹²⁵

In the above opinion, Kennedy is rejecting Chief Burger's use of religious standards to justify morality legislation. Kennedy's quote about neutrality indicates that, even if he did strongly espouse religious tenants, he would try not to let them skew his legal judgments. This seems to be the unspoken practice of most of the justices discussed in this paper. Thus far, there has been very little use of personal religious beliefs in Supreme Court opinions.

¹²² *Lawrence at 572.*

¹²³ Academy of Achievement, Anthony Kennedy Biography, Sept. 4, 2005, <http://www.achievement.org/autodoc/page/ken0bio-1>.

¹²⁴ Congress.org, *Associate Justice Anthony Kennedy*, <http://www.congress.org/bio/id/33896>.

¹²⁵ Maureen Hoch, *Supreme Court Watch: Justice Anthony Kennedy*, PBS NEWSHOUR ON PBS.COM, http://www.pbs.org/newshour/indepth_coverage/law/supreme_court/justices/kennedy.html.

Zuni Public School District No. 89 v. Dep't of Ed., 550 U.S. 81 (2007)

*Zuni Public School District No. 89*¹²⁶ held that the Secretary of Education, in determining which school districts to disregard in calculating disparity in per-pupil expenditures among state's states districts pursuant to the Federal Impact Aid Program, was allowed to look to the number of the district's pupils. Justice Scalia dissented, stating

In *Church of the Holy Trinity*,¹²⁷ every Justice on this Court disregarded the plain language of a statute that forbade the firing of clergyman from abroad because, after all (they thought), 'this is a Christian nation,' so Congress could not have meant what it said.¹²⁸

Justice Antonin Scalia is "one of the most provocative and controversial public officials in modern times."¹²⁹ Scalia, called "Nino", was born in 1936 in New Jersey. His father was a professor, and the family moved to Queens, New York, for a job at Brooklyn College. His mother was also a school teacher. His parents were also both devout Roman Catholics. As a result, Scalia attended an all boy's Catholic military prep school, St. Francis Xavier High School. It is well known in Manhattan. William Stern, a friend and classmate, who later went on to run Mario Cuomo's 1982 gubernatorial campaign said about Scalia: "This kid was a conservative

¹²⁶ *Zuni Public School District No. 89 v. Dep't of Ed.*, 550 U.S. 81 (2007).

¹²⁷ *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

¹²⁸ *Zuni* at 117.

¹²⁹ JAMES STAAB, *THE POLITICAL THOUGHT OF ANTONIN SCALIA: A HAMILTONIAN ON THE SUPREME COURT* xv (2006).

when he was 17 years old. An archconservative Catholic. He could have been a member of the Curia. He was a top student in the class. He was brilliant, way above everybody else.”¹³⁰

Scalia married Maureen McCarthy, also a devout Catholic. The couple have nine children. They have also been known to leave churches where they perceive the practices as being too liberal.¹³¹ On the Court, Scalia’s propensities have been similar. He strongly criticizes pragmatic approaches to decision making, and instead supports rule of law.

Across a wide range of issues, including abortion, homosexual rights, church-state issues, and the death penalty, Scalia charges his colleagues with imposing their ‘elite’ values on the majority of people.¹³²

For Scalia, these sorts of judicially created tests erode traditional moral values and allow the Court to engage in policy making. Scalia has also been willing to criticize the analysis used by his colleagues in particular cases and often uses words like ‘irrational’ ‘absurd’ or ‘ludacris’ in describing their opinions.¹³³

Justice Scalia is the most religious justice to sit on the modern supreme court. As is evident from his biography and his comment in *Holy Trinity*, Scalia is more committed to the rule of law than pragmatic decision making or personal prejudice. Although there is some

¹³⁰ *Id.* at 3.

¹³¹ *Id.* at 4.

¹³² *Id.* at 28.

¹³³ *Id.* at 29.

connection between religion and conservatism, Scalia's legal perspective seems to be strictly conservative and not informed by religion.

Section 3: Trends and Predictions

In conclusion, the experiment conducted in this paper is a failed one. Instead of utilizing biographies of the justices to shed light on the possible religious underpinnings which influence the text of their opinions, the methodology encouraged attenuated linking based on too little information.

First, there is very little information available about the justices' experiences with religion. For the earlier justices, this is likely a product of poor recordkeeping, or lack of interest in the subject when more information was available. With regard to more recent justices, there seems to be an intentional lack of focus on their personal, as opposed to professional lives. Information seems to become more available once the justice enters the public arena. As such, it is impossible to obtain enough information to determine how such a bias would manifest itself in their writing, if at all.

The second problem which arose involved how the analyzed cases were chosen. The search methodology is detailed in Section 1, above. A problem is that word proximity is only one indication of relatedness. It is likely that a great number of cases were missed that discuss religion in a context which would be appropriate for this paper, because the search method was under inclusive. The other problem was choosing the right terms and excluding the right terms.

For example, “Catholic” and “Jewish” tend to come up in the context of the Establishment Clause, which was not meant to be discussed. By excluding cases where “Catholic” is in the same sentence as “Establishment,” cases were omitted that were irrelevant, and probably some which would have been informative.

For example, in *Bowers* above, Justice White notes,

The parallel between *Loving* and this case is almost uncanny. There, too, the State relied on a religious justification for its law...that Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix[.] ...Petitioner...rel[ied] on the Old and New Testaments and the writings of St. Thomas Aquinas to show that traditional Judeo-Christian values proscribe such conduct[.]¹³⁴

yet *Loving v. Virginia*, 388 U.S. 1 (1967) was not included in the search results.

Given the opportunity to conduct this research again, I would probably have chosen a handful of cases which espouse religious tenants, and conducted in depth research on the opining justices and their other opinions. Alternatively, I’d have chosen a single justice who has a reputation for being unusually religious, Scalia for example, and tracked whether those religious leanings were manifested in their work. Simply put, the question deserves more focused analysis.

¹³⁴ *Bowers* at 211.

It may simply be the case that justices' religious beliefs do not play a role in their assessment of the law. "The practical reality of life in America is that religion plays much less of a role in everyday life than it did 50 or 100 years ago,"¹³⁵ "These days, we've moved to other sources of diversity," including race, gender and ethnicity.¹³⁶

That move reflects a profound shift in the way we think about law, and in the very meaning of identity politics.... [S]ociety seems to demand that the court carry a certain demographic mix. It is hard to imagine the court without a black justice, for instance, and it may well turn out that Justice Sonia Sotomayor is sitting in a new "Hispanic seat." It would surprise no one if President Obama tried to increase the number of women on the court to three. Not so long ago, there was similar casual talk, but of a "Catholic seat" or a "Jewish seat" on the Supreme Court. Today, the court is made up of six Roman Catholics, two Jews and Justice Stevens. It was not ever thus.¹³⁷

"Historically, religion was huge...it was up there with geography as the key factor."¹³⁸

Other writers have uncovered similar results: that background, ideology, and other non-legal factors are less influential in judicial decision-making than is suggested by social scientists.¹³⁹ However, research on religious decision-making in lower courts is being conducted. It seems as though the religious background of judges and parties to a claim are the

¹³⁵ Liptak, *supra* note 116 (quoting Professor Geoffrey R. Stone of University of Chicago).

¹³⁶ Liptak, *supra* note 116 (quoting Professor Lee Epstein of Northwestern University).

¹³⁷ Liptak, *supra* note 116.

¹³⁸ *Id.* (quoting Professor Lee Epstein of Northwestern University).

¹³⁹ Gregory C. Sisk and Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 Nw. U. L. Rev. 743 (2005).

most indicative and correlated factors to outcomes.¹⁴⁰

¹⁴⁰ See e.g. Gregory C. Sisk, Michael Heise, and Andrew P. Morriss, *An Empirical Study of Religious Freedom Decisions*, 65 Ohio St. L.J. 491 (2004); Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. Colo. L. Rev. 1021 (2005).