2012

The Catholic and Jewish Court: Explaining the Absence of Protestants on the Nation's Highest Judicial Body

Zachary Baron Shemtob
THE CATHOLIC AND JEWISH COURT: 
EXPLAINING THE ABSENCE OF PROTESTANTS ON THE 
NATION’S HIGHEST JUDICIAL BODY 

Zachary Baron Shemtob*

Following the 2006 retirement of Sandra Day O’Connor and the confirmation of Samuel Alito to succeed her, Roman Catholics formed a 
majority on the United States Supreme Court for the first time in this 
institution’s 210-year history.¹ This Catholic majority was further 
strengthened by the appointment of Sonia Sotomayor in 2009. By the 
time of Elena Kagan’s first case in October of 2010,² not a single 
Protestant sat on the nation’s highest judicial body. 

By way of comparison, in 1960 the Court consisted of seven 
Protestants, one Catholic and one Jew; in 1985, eight Protestants and one 
Catholic sat on the Court.³ This phenomenon is further reflected in 
judicial appointments. Since 1985, only one Protestant has been 
appointed,⁴ Justice David Souter, compared to seven Catholics and three 
Jews. The prima facie reason for this transformation is simple: 
President Reagan began the Protestant erosion by appointing two 
Catholics; George H.W. Bush followed by appointing a Catholic; and 
Bill Clinton, George W. Bush, and Barack Obama chose only Jewish 
and Catholic nominees. The deeper reasons, which are considerably 
more complex, are the focus of this article.

I. IMPORTANCE

The Supreme Court’s lack of Protestants is important for two 
reasons. First, perhaps most obviously, is the issue of representation. 
According to Court scholar Jeffrey Rosen, it is more than just “a 
fascinating truth that we’ve allowed religion to drop out of consideration

* Assistant Professor, Criminology and Criminal Justice, Central Connecticut State 
University.
1. See Christina Capocchi, Alito confirmed gives Court Catholic majority, impact remains 
yet unclear, CATHOLIC ONLINE (Jan. 31, 2006), available at 
3. See Religious Affiliation of the U.S. Supreme Court, Adherents.com, available at 
4. Id. (last visited October 3, 2011).
on the Supreme Court,’” so that an entire branch of government, now “religiously at least, by no means looks like America.”5 This is especially relevant to a representative democracy, predicated on the very notion of majority rule. Second, if Catholic and Jewish justices vote differently than Protestant justices (for whatever reason) this may have larger ramifications for the American political system.

A. Representation

Many commentators have expressed concern about balanced representation on the Court. Following Elena Kagan’s nomination, former Presidential candidate Patrick Buchanan created a media firestorm by suggesting there were too many Jews and too few Protestants on the nation’s highest judicial body.6 Whereas Buchanan decried the absence of Anglo-Saxon values, others framed this concern around the Court’s striking lack of religious diversity. According to Jim Winkler, top executive of the United Methodist Board of Church and Society, while the vast majority of Americans may be uninterested in “the religious background of Supreme Court justices . . . balance on the Court is” nevertheless an important consideration.7 Sandra Day O’Connor, the first female justice, has further criticized the Court’s lack of Protestant members.8 And while scholar Dahlia Lithwick believes most Americans treat this lack of Protestants as “quirky news,” “for a small handful of . . . citizens . . . , the fact that six of the nine justices on the current court are Catholics is an underreported scandal.”9 Similarly


9. See Dalia Lithwick, Why Americans Can’t Talk About Religion on the Supreme Court, Slate.com (Dec. 10, 2009), available at http://www.slate.com/id/2238088/. (This appears to have some empirical backing. According to a recent poll, 70% of Americans expressed that having a Protestant justice does not matter, with 27% saying it does. Among Protestants this was split more evenly, with 57% saying it matters and 39% saying it does not. Perhaps most relevant was among Republicans, 41% of whom thought it matters. See Robert Barnes & Jennifer Agiesta, Poll affirms a vote for judicial know-how, WASH. POST (Apr. 30, 2010), available at http://www.washingtonpost.com/wp-dyn/content/article/2010/04/29/AR2010042904893.html.
Rabbi Julia Neuberger argues that, in a democracy, each government branch should “reflect the people they serve,” in terms of race, gender, sexuality and religion.  

B. Jurisprudence

Considerably more controversial has been whether justices’ religion affects their jurisprudence, and if so, in regard to what particular issues. While these questions exceed the scope of the present article, they must be put in some context here. The issue recently gained prominence through a piece by University of Chicago law professor Geoffrey Stone, who highlighted that all five justices upholding the federal Partial-Birth Abortion Ban Act in Gonzales v. Carhart (2007) were Roman-Catholic. While Stone drew no definitive conclusions, he suggested that religion played a role in these justices’ decision-making process. According to him, “Given the nature of the issue” and “the strength of the relevant precedent,” the “painfully awkward question of religion’” was simply too “obvious to ignore.”

Perhaps the most notable response came from Justice Antonin Scalia, who not only declared Stone’s implication a “damned lie,” but even refused to visit the University of Chicago until Stone is removed from their faculty. According to Scalia, “I had been very pleased and sort of proud that Americans didn’t pay any attention to that . . . it isn’t religion that divides us anymore.”

Most scholars have agreed with Scalia, finding the impact of justices’ religions on their larger jurisprudence either “negligible or inconclusive.” Dahlia Lithwick believes that “because matters of faith are so intimate, personal, and so visceral, it boggles the mind to imagine how they might shape judicial reasoning.” William B. Lawrence, Dean of Southern Methodist University’s Perkins School of Theology, recognizes that “religious values have a way of affecting what people would do.”


12. Id.


16. See Lithwick, supra note 9.
define as justice,” but points out that Protestantism, like many religious denominations, is too multivariate to reveal much of anything. Specifically, he argues that Protestantism “includes Quakers, Baptists, Pentecostals and Episcopalians. It’s hard to say what brand of Protestant we have in mind . . . One can make the case that Southern Baptists have more in common theologically and ideologically with Roman Catholics than they do with United Methodists.”\(^{17}\) This diversity makes it particularly difficult to evaluate the impact of “Protestantism” on judicial decision making.

II. HISTORY

The Supreme Court’s religious shift is only comprehensible within a larger historical framework. Of the Court’s 112 justices, ninety-one (81%) have been Protestant, thirteen (12%) have been Roman Catholic, eight (7%) have been Jewish, and one (1%) was without any stated religious affiliation (though born into a Protestant family).\(^{18}\)

Table 3: Catholics and Jews on the United States Supreme Court (in order of appointment).

<table>
<thead>
<tr>
<th>Catholic Justices (Year appointed)</th>
<th>Jewish Justices (Year appointed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Roger Brooke Taney (1836)</td>
<td>Louis Dembitz Brandeis (1921)</td>
</tr>
<tr>
<td>Edward Douglass White (1894)</td>
<td>Benjamin Nathan Cardoso (1932)</td>
</tr>
<tr>
<td>Joseph McKenna (1898)</td>
<td>Felix Frankfurter (1939)</td>
</tr>
<tr>
<td>Pierce Butler (1923)</td>
<td>Arthur Joseph Goldberg (1962)</td>
</tr>
<tr>
<td>Frank Murphy (1940)</td>
<td>Abe Fortas (1965)</td>
</tr>
<tr>
<td>Sherman Minton (1949)(^{19})</td>
<td>Ruth Bader Ginsburg (1993)</td>
</tr>
<tr>
<td>Anthony McLeod Kennedy (1988)</td>
<td></td>
</tr>
</tbody>
</table>

\(^{17}\) See Hahn, supra note 7.


\(^{19}\) This was Associate Justice David Davis, who served from 1862-77.
Prior to the last two decades, the most religiously diverse Court sat from 1916-1921, and included two Catholics (Justices White and McKenna) and one Jew (Justice Brandeis). The Court included only one Catholic from 1969 to 1986, two Catholics from 1986 to 1993, and no Jews from the late 1960s until the mid-1990s.

The next section explores the Court’s Catholic and Jewish justices in greater depth. Beginning in the mid-19th century, presidents often reserved an unofficial Court seat for Catholic justices. In the early 20th-Century a Jewish seat was also informally established. These seats depended upon the nation’s political atmosphere and perceived effect on the electorate.

A. The Catholic Seat

Table 4: The Catholic Seat Timeline

During the country’s early history, Presidents’ most important consideration in selecting Supreme Court justices was geography, with religion given little due. During this period, Protestants dominated the federal government and even occasionally encouraged hostility toward Catholics. According to Barbara Perry, “such provocations came often

---

23. See Nativism in 19th c. America, available at http://score.rims.k12.ca.us/score_
as relentless waves of immigrants” [from Ireland and Italy] “carved out enclaves and reshaped the political (and social) landscape of the United States.”

Catholics were often derided as owing allegiance to the Pope and having cultural practices incompatible with the nation’s religious majority.

Given this environment, the 1834 ascension of Chief Justice Roger B. Taney is all the more remarkable. Though secularly educated, Taney was a devout Catholic. The justice’s success must partially be attributed to his wealthy family, who sent him to the most prestigious schools and allowed him access to the nation’s most elite organizations. Taney became childhood friends with future President Andrew Jackson, who rightly surmised that Taney’s natural political skills and personal loyalty could be politically useful. After becoming president, Jackson appointed Taney Secretary of the Treasury, commanding him to dismantle the Bank of the United States. Jackson then “determined to reward Taney’s” successful “efforts” with the Court’s center chair, believing that he would rule more favorably for the executive branch than the recently departed John Marshall.

There is no indication that Taney’s Catholicism motivated Jackson’s decision either negatively or positively. The day’s broadsheets were relatively silent on this issue, treating the future justice’s religion as “almost an afterthought.” Taney was vehemently attacked for his Catholicism by some of Jackson’s critics, who alleged that the future justice would prove loyal to a “foreign potentate.” This storm subsided relatively quickly, however, and the President was able to push through his desired appointment, leading Taney to serve for over three decades.

Throughout Chief Justice Taney’s tenure on the Court, scores of


25. See Nativism, supra note 23.


27. See Perry, supra note 24, at 58.

28. Id. at 59.

29. Id.

30. Id.

31. Id.

32. Id.

33. Id. at 60.

34. Id.

Catholic immigrants arrived in America, especially from Ireland. Irish immigrants formed successful political machines and soon became a reliable backbone of the Democratic Party. From this background arose Edward D. White, Jr. Whereas Taney was secularly educated, White was a product of Jesuit schools. He was also deeply religious and rarely masked his Catholic heritage.

Grover Cleveland’s 1864 decision to appoint White to the Supreme Court was almost entirely strategic. As a senator, White deeply opposed the President’s tariff reduction bill, and Cleveland hoped to neutralize the senator by “kicking him upstairs.” Neither the media nor Cleveland’s opponents focused on White’s Catholicism, and it may have even proven a benefit. As Perry notes regarding this time, “either from gratitude for Catholic principles... or from fear of the increasing Catholic voting power, politicians began to extend governmental” positions to representatives of the Church, White likely among them.

Unlike Taney or White, the next Catholic Justice, Joseph McKenna, faced a greater deal of religious scrutiny. President William McKinley consciously courted the Catholic vote and hoped McKenna’s selection would improve his reelection prospects. The reactionary American Bar Association disliked the prospect of two Catholics serving at once, and vociferously criticized the President’s choice of the Ninth Circuit judge. This influenced numerous senators to also oppose the nomination, and they (predictably) questioned whether McKenna would prove more loyal to the country or the Church. The senators increasingly feared getting bogged down in an abstract religious controversy, however, and their opposition gradually faded.

This issue reappeared with President Taft’s nomination of Edward White for Chief Justice, following the demise of Melville Fuller, a

37. See Irish Identity, Influence, and Opportunity, LIBRARY OF CONGRESS: IRISH, available at http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/immigration/irish7.html (“Building on principles of loyalty to the individual and the organization, they (the Irish) built powerful political machines capable of getting the vote.”).
38. See Perry, supra note 24, at 61.
39. Id.
40. See Perry, supra note 24, at 63.
41. Id. at 64.
42. Id. at 65.
43. Id. at 66.
44. Id. at 68 (Senators who opposed McKenna’s Catholicism ultimately “abandoned their stance for fear that any legitimate opposition would be undermined by a prolonged religious controversy”).
Protestant. While Taft publicly claimed White’s religion had nothing to do with his nomination, the President privately confided it would likely help garner him the Catholic vote. Archie Butt, the President’s naval secretary, expressed the benefits and dangers of Taft’s choice in a contemporaneous letter to his sister-in-law: “He says he will get the solid Catholic vote—and I think he will, but he might pay very dearly . . . . The great Protestant denominations are beginning to see the way that he panders to Catholics and are becoming resentful.”

Despite Butt’s fears, White was successfully appointed to lead the Court in 1910.

Warren G. Harding’s nomination of Pierce Butler in 1922 proved even less contentious. The Court had recently lost Chief Justice White, and Justice McKenna’s health was quickly deteriorating. Chief Justice Taft’s colleague and Court strategist Willis Van Devanter suggested a “representative” Catholic, knowing Harding sought to shore up support from this particular constituency. Butler, an able but undistinguished lawyer, was thus selected largely due to his Catholicism. Indeed, according to Perry, “with Butler’s selection, religion” became, for the first time, “one of the primary considerations in choosing a Supreme Court Justice.”

With Butler on the Court, presidents saw less need to handpick another Catholic justice. Following Butler’s 1949 death, however, the issue dramatically resurfaced. President Franklin Roosevelt had long targeted the Catholic vote, and the Catholic community desired a Catholic replacement. Accordingly, Roosevelt nominated Frank Murphy, whose devout Catholic mother had exposed him to a deeply religious upbringing. Murphy had long been a supporter of Roosevelt’s New Deal and, as Mayor of Detroit, had helped carry

46. See Perry, supra note 24, at 70.
47. Id.
48. See Pratt, Jr., supra note 46, at 5-6.
49. Id.
50. Id. at 74-75.
51. Id. at 74.
53. See Perry, supra note 24, at 76 (Quoting Sydney Fine, one of Murphy’s biographers: “Roosevelt was anxious to provide suitable recognition of the substantial Catholic element in the Democratic party, and a major appointment for Frank Murphy nicely served this objective.”).
54. Id. at 75.
Illinois for the then one-term President. In choosing Murphy, Roosevelt was able to both “provide suitable recognition” of the Democratic Party’s Catholic constituency, while also securing a sympathetic vote on the nation’s highest judicial body.

Justice Murphy’s 1949 death led to a brief vacancy of the Catholic seat. President Truman nominated Protestant Tom C. Clark to replace him, refusing to consider religion when making his judicial selections. The influential Catholic Commonweal agreed with Truman’s “faith-blind test,” but nevertheless observed that Catholics constituted twenty percent of the total population and should reasonably make up at least a ninth of the Court.

It was the Republicans who eventually seized on this opportunity. President Eisenhower noted Senator Kennedy’s near victory at the 1956 Democratic convention and sought to garner votes from the highly Catholic northeastern United States. In this context, William Brennan quickly came to the President’s attention. Although nominally a Democrat, Brennan was raised in a Catholic household and was a widely respected northeastern jurist.

A New York Times editorialist recognized at the time that Eisenhower’s subsequent nomination was “not only service to a fine American tradition [but] good politics as well.”

Ironically, this “fine American tradition” soon proved a victim of Catholics’ very success. With the 1960 election of President John F. Kennedy, Catholics were no longer viewed as an aggrieved minority, and politicians became increasingly less likely to focus on a specifically “Catholic seat.” Kennedy further feared that selecting a Catholic would reignite smears of his allegiance to the papacy, and consequently, he strictly focused his gaze on Protestant and Jewish candidates.

Brennan thus remained the sole Catholic for exactly thirty years, until the arrival of Antonin Scalia in 1985. The Court’s first Italian-American was followed shortly thereafter by another first, the presence

55. See Heyer, Rozell, & Genovese, supra note 53, at 162.
56. See Perry, supra note 24, at 76.
57. Id. at 80 (“Upon Justice Murphy’s death in 1949, President Harry S. Truman nominated a Protestant, Tom C. Clark, and stated defiantly: “I do not believe religions have anything to do with Supreme Court. If an individual has the qualifications, I do not care if he is a Protestant, Catholic, or Jew.”).
58. Id.
59. Id. at 81.
60. See STEPHEN WERMIEL & SETH STERN, JUSTICE BRENNAN LIBERAL CHAMPION 71 (Houghton Mifflin Harcourt 2010).
61. See Perry, supra note 24, at 84.
62. Id. at 85.
63. See DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES 75 (1999).
of a third Catholic, Anthony Kennedy. The subsequent nominations of John Roberts, Samuel Alito and Sonia Sotomayor eventually resulted in a two-thirds Catholic Court.

B. The Jewish Seat

The history of Jews on the Supreme Court follows a different trajectory than the history of Catholics. Because Jews constituted a much smaller religious group, Jewish appointments tended not to result from presidents’ desire to obtain the Jewish vote. Rather, Jewish appointments arose from this group’s remarkable success in obtaining key government positions.

Interestingly, the first Jewish nominee arose nearly seventy-five years before the first Jew was actually appointed, with President Millard Fillmore’s nomination of Judah P. Benjamin in 1853. Acknowledged as a singular lawyer and political strategist, the then Louisiana senator declined this offer, however, choosing to retain his congressional seat. Even had Benjamin accepted, his tenure would likely have been short-lived. Louisiana seceded from the Union in early 1861, and Benjamin went on to serve as Attorney General, Secretary of War and eventually Secretary of State for the Confederacy.

The first Jew to accept a seat on the Court, Louis D. Brandeis, also remains among its most celebrated justices. Although not particularly religious, Brandeis both embraced his Jewish heritage and eventually became an influential leader of American Zionism. An ally and

---

64. In late 2005 there occurred two absences at once, as Chief Justice Rehnquist suddenly passed away only three months after Justice Sandra Day O’Connor’s retirement.
67. Id.
68. Id. at 69 (Escaping the country after the War dressed as a woman, Benjamin eventually became a successful lawyer in England).
advisor to President Woodrow Wilson, Brandeis was viewed as providing a sure progressive vote on a largely conservative court. And while he encountered an extremely contentious nomination process, the role of religion in that process remains unclear. The so-called “People’s Attorney” had made countless enemies crusading against corporations and exposing corruption in the Taft administration, many of whom consolidated to oppose his confirmation. Political opponents did occasionally ridicule Brandeis’s Hebrew heritage, though this was largely done in private circles. Regardless, such opposition proved unsuccessful, and Brandeis accepted his seat in 1921.

After serving on the Court for nearly a decade, Brandeis was eventually joined by Benjamin Cardozo, a fellow (secular) Jew. Unlike with Brandeis’s selection, there was practically no opposition to the respected Second Circuit Judge’s selection, nor was President Roosevelt likely influenced by the rather marginal Jewish vote. Interestingly, the only notable anti-Semitism came from within the Court itself; fellow Justice James Clarke McReynolds reportedly decried the appointment of “another Hebrew,” rudely read the newspaper when Brandeis and Cardozo spoke in conference, and even refused to sit next to Brandeis for the official Court photograph in 1924, resulting in no portrait for that year.

The so-called “Jewish seat” was informally established with the nomination of Felix Frankfurter, chosen to replace a stricken Cardozo in 1939. The President felt it appropriate that Frankfurter should replace a fellow Jew, and there was little resistance to the Harvard Law Professor’s nomination. It is clear Frankfurter was chosen less for his Judaism, however, than his considerable aid to Roosevelt’s New Deal and long-standing connections to the High Court. With Brandeis’s retirement shortly thereafter, Frankfurter remained the only Jewish justice until 1962, when he was replaced by Arthur J. Goldberg.

Goldberg, President Kennedy’s Secretary of Labor, was considered a guaranteed liberal voice and appropriate match for the progressive
Warren Court. Further, the administration purposely sought to maintain the Jewish seat, as Robert Kennedy acknowledged in a 1964 interview. The justice’s tenure proved short lived, however, as Goldberg resigned to become Secretary to the United Nations in 1965. President Johnson chose his good friend Abe Fortas, a notable defense attorney, though inexperienced jurist, to preserve the Jewish seat. Yet, like Goldberg’s tenure, Fortas’s tenure proved fleeting, although for entirely different reasons. The justice was soon caught in a series of corruption scandals, and he resigned from the Court in 1970. President Nixon subsequently appointed a Protestant, Harry A. Blackmun, to take the disgraced Fortas’s place.

Following Fortas’s resignation, the Jewish seat remained vacant for almost three decades. Yet this vacancy likely had less to do with religion than politics. Save for the one-term Carter administration, the 1970s and 1980s saw an era of Republic dominance, while Jews were (and are) overwhelmingly Democratic. It was therefore not surprising that the next Jewish appointments came under a more liberal President, with President Clinton’s nominations of Ruth Bader Ginsburg in 1993 and Stephen Breyer in 1994. President Obama’s 2010 nomination of Elena Kagan placed three Jews on the Court for the very first time.

III. ANALYSIS

A. Hypotheses

There seem four potential hypotheses to explain the Court’s dramatic shift from a body composed almost entirely of Protestants to one composed exclusively of Catholics and Jews:

(1) Catholics and Jews have come to dominate those areas from...
which justices are chosen.

(2) Jews and Catholics are better Supreme Court appointees than Protestants.

(3) A combination of distinct yet related factors have favored Catholic and Jewish nominees, ranging from ethnic correlations to geographical considerations.

(4) The Court’s current religious makeup is simply a result of random chance, or, in the words of Sheldon Goldman, the outcome of “a unique configuration of circumstances,” having nothing (or very little) to do with religion.

B. Testing the Hypotheses

Hypothesis 1: Catholics and Jews have come to dominate those areas from which justices are chosen.

Numerous factors could explain this hypothesis. Perhaps Catholics and Jews are more qualified than their Protestant peers or somehow better able to obtain key positions, or perhaps the latter group has simply lost interest in the law. Before evaluating these potential claims, however, it is necessary to first establish the underlying validity of this hypothesis.

In analyzing the judicial selection pool (Table 6 below), a striking pattern emerges. Whereas past Courts were composed of justices from a variety of government sectors, the current court almost exclusively includes former circuit court judges. If the circuit courts consist of a majority of Catholic and Jewish judges, this would surely help explain the Court’s lack of Protestant justices.

<table>
<thead>
<tr>
<th>The 1960 Court</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
</tbody>
</table>

86. In other words, future justices’ religion had nothing to do with their availability or selection, and it is therefore entirely coincidental that everyone on the current Court is either Catholic or Jewish.

87. See Goldman, supra note 81, at 218.

88. I chose to review the 1960, 1985, and 2010 Courts since these intervals offer three discrete glimpses into Supreme Court history. The 1960 Court was religiously typical of the twentieth century, containing seven Protestants, one Catholic, and one Jew; 1985 was shortly before Antonin Scalia, the Court’s current oldest member, was nominated; and the current Court marks the first government branch in American history that includes no Protestants.

89. Why this is so lies well beyond the current paper’s scope.

From 1801-2009, a total of 701 circuit court judges were appointed. Of those judges whose religions are known (685), 481

91. This data was gathered from three primary sources: All information from 1801-2000 came from Professor Gerard S. Gryski (Auburn University) who emailed me his extensive data set on circuit court judges (many pieces of which are publicly available at http://www.icpsr.umich.edu/icpsrweb/ICPSR/) (e-mail received on Apr. 22, 2011); circuit court information from 2000 to the end of George W. Bush’s presidency came from Professor Sheldon Goldman (University of Massachusetts) (received on Apr. 18, 2011); and finally, all remaining circuit court information was obtained from the website NNDB (http://www.nndb.com/about/) (last visited May 11, 2011). All three strands of data were then compiled and combined into a
(approximately 70.2%) were Protestant, 138 (20.1%) were Catholic, 64 (9.3%) were Jewish, and 1 was (.001%) B’hai. As the data indicate (Table 7 and Graph 1 below), while Protestant appointments have waned considerably since the 1950s (reaching their lowest ebb in the 1990s at 52%), they have nevertheless held a majority of seats until the present day, refuting any simple speculation that Catholics and Jews dominate the circuit courts.

Table 7. Circuit Judges Historical Breakdown

<table>
<thead>
<tr>
<th>Period</th>
<th>Total Judges Appointed</th>
<th>Protestants</th>
<th>Catholics</th>
<th>Jews</th>
</tr>
</thead>
<tbody>
<tr>
<td>1801-1825</td>
<td>25</td>
<td>24 (96%)</td>
<td>1 (4%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>1826-1850</td>
<td>1</td>
<td>1 (100%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>1851-1875</td>
<td>11</td>
<td>10 (91%)</td>
<td>1 (9%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>1876-1900</td>
<td>37</td>
<td>35 (95%)</td>
<td>2 (5%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>1901-1925</td>
<td>76</td>
<td>68 (90%)</td>
<td>5 (7%)</td>
<td>2 (3%)</td>
</tr>
<tr>
<td>1926-1950</td>
<td>98</td>
<td>82 (84%)</td>
<td>12 (12%)</td>
<td>4 (4%)</td>
</tr>
<tr>
<td>1951-1960</td>
<td>47</td>
<td>38 (81%)</td>
<td>7 (15%)</td>
<td>2 (4%)</td>
</tr>
<tr>
<td>1961-1970</td>
<td>80</td>
<td>54 (68%)</td>
<td>17 (21%)</td>
<td>9 (11%)</td>
</tr>
<tr>
<td>1971-1980</td>
<td>92</td>
<td>54 (62%)</td>
<td>21 (23%)</td>
<td>12 (14%)</td>
</tr>
<tr>
<td>1981-1990</td>
<td>95</td>
<td>48 (63%)</td>
<td>31 (34%)</td>
<td>12 (13%)</td>
</tr>
<tr>
<td>1991-2000</td>
<td>79</td>
<td>38 (52%)</td>
<td>17 (23%)</td>
<td>18 (25%)</td>
</tr>
<tr>
<td>2001-2010</td>
<td>60</td>
<td>36 (62%)</td>
<td>19 (33%)</td>
<td>3 (5%)</td>
</tr>
</tbody>
</table>

Graph 1. Twentieth Century Appointments by Religion (%)
The circuit courts’ actual makeup further reflects this finding (see Graph 2 below).\textsuperscript{94} In 1960, the entire Circuit Court consisted of 46 (73\%) Protestants, 12 Catholics (19\%), and 5 (8\%) Jews.\textsuperscript{95} By 1985, the Circuit Court’s religious makeup was considerably more diverse. Of those judges whose religions are known (135),\textsuperscript{96} 80 (59\%) were Protestant, 36 (27\%) Catholic, 19 (14\%) Jewish, and 1 Baha’i.\textsuperscript{97} In 2009, Protestants still, albeit barely, held a majority, accounting for slightly over 70 (50\%) of the 139 judges whose religions could be confirmed,\textsuperscript{98} with Catholics and Jews following at 44 (32\%) and 25 (18\%), respectively.\textsuperscript{99}

Graph 2. Total Religious Makeup of the Circuit Courts (%)

One gains additional insight by comparing the makeup of the circuit courts to the nation’s overall religious makeup (see Graph 3 below). Notably, up until the 1980s Catholics were underrepresented on the circuit courts. And while Catholics and Jews are currently overrepresented (by approximately ten percent and sixteen percent, respectively), this is dramatically less so than on the Supreme Court.

Graph 3. Religious Makeup of the Nation, 1901-2008 (%)

\textsuperscript{94} This analyses ends in 2009 rather than 2010 due to the lack of available reliable data for the latter year, much of which is still being collected.

\textsuperscript{95} Unsurprisingly, this varied considerably by geographical location. Whereas the diverse Third Circuit (representing New Jersey, Delaware, and Pennsylvania) contained three Protestants, two Catholics, and two Jews, the Fifth (representing Louisiana, Mississippi, and Texas) and Tenth (representing Kansas, Colorado, New Mexico, Oklahoma, Utah, and Wyoming) circuits were composed entirely of Protestants.

\textsuperscript{96} This excludes the eleven judges on the Federal Circuit, whose information is not publicly available.

\textsuperscript{97} Again, this varied considerably by geography; while Protestants held a majority in most circuits, they were outnumbered by Catholics in the Third, Seventh (representing Illinois, Indiana, and Wisconsin) and Tenth circuits, and by both Catholics and Jews in the First circuit (representing Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island).

\textsuperscript{98} This again excludes the eleven federal circuit judges, whose information is not publicly available.

\textsuperscript{99} The Third, Seventh, and Tenth circuits were again dominated by Catholics, with the First circuit containing more Catholic and Jewish than Protestant judges.
Discussion, Hypothesis 1

While Catholics and Jews are overrepresented in the federal appellate division, this fails to explain the total absence of Protestants from the Supreme Court. Until at least 2009, when the most recent circuit court judge, Sonia Sotomayor, was nominated to the Supreme Court, Protestants continued to hold a majority of circuit court appointments and judgeships. Our first hypothesis, that Catholics and Jews dominate those areas from which justices are chosen, must consequently be rejected.

Hypothesis 2: Jews and Catholics are better Supreme Court appointees than Protestants.

This hypothesis has a number of potential explanations. First, presidents may gain voter support by picking a Catholic or Jew, whereas no political capital results from selecting a Protestant. Second, perhaps Catholics and Jews have certain political compatibilities absent in Protestants. It has been speculated that issues like abortion, for example, have led more conservative presidents to pick Catholics, who are thought more likely to have rigid stances on this issue. One scholar even speculates that Catholics have “habits of thinking” making them particularly well suited to the Supreme Court. In theory, these include

100. If this hypothesis were valid, the Supreme Court should consist of a bare majority of Protestants.
101. Notably, four justices have come from the D.C. Circuit alone, and perhaps this can shed some additional light on Protestants’ absence from the high court. In 1960, the D.C. Court consisted of five Protestants, two Catholics, and one Jew; in 1985, four Protestants, three Catholics, three Jews, and one unknown; and in 2009, four Protestants, two Catholics, and three Jews. While the overrepresentation of Jews is interesting to note here, Protestants still form a Court plurality.
103. See Robert F. Cochran, Jr., Catholic and Evangelical Supreme Court Justices, 4 UNIV.
(1) beliefs that are consistent with America’s national, right-based traditions; (2) a doctrine of subsidiarity, or the notion that human flourishing demands balance between state and individual needs; and (3) an overall dedication to religious freedom.\textsuperscript{104} Judaism, meanwhile, stresses the importance of social justice (an admittedly nebulous concept),a quality that may be more appealing to liberal/Democratic politicians.\textsuperscript{105}

One could also hypothesize the very opposite, that Catholics and Jews are somehow less politically contentious than their Protestant peers. In the wake of Robert Bork’s failed candidacy (discussed below), judicial confirmation hearings have forced nominees to eschew or at least hide their more controversial positions. For whatever reason, perhaps Catholics and Jews are simply better than Protestants at masking such beliefs or less likely to be attacked for them during confirmation hearings.

Testing this hypothesis entails exploring the importance of each justice’s religion in his or her selection and confirmation process.

\textit{Justice Antonin Scalia}

Justice Scalia’s Catholicism is a central aspect of his life.\textsuperscript{106} His entire family is reportedly quite religious, and one of his sons is a priest.\textsuperscript{107} Educated at a Jesuit high school, Scalia attends weekly mass, reportedly driving long distances to traditionally more conservative parishes.\textsuperscript{108} He has also expressed discomfort with some of the more liberal reformations of Vatican II, preferring the Orthodox Latin Mass.\textsuperscript{109}

Prior to his tenure on the Supreme Court, Scalia was a widely respected and relatively young circuit court judge,\textsuperscript{110} and had served as United States Assistant Attorney General under Presidents Nixon and Ford.\textsuperscript{111} The future justice had initially been considered by Reagan for

\textsuperscript{104} See Biskupic, supra note 109, at 107.
\textsuperscript{105} See, e.g., Kate Shellnut, \textit{Social justice” more than a buzzword in Judaism}, Houston Chron. (Oct. 7, 2010), available at \url{http://www.chron.com/disp/story.mpl/life/religion/7236938.html}.
\textsuperscript{106} See \textit{Joan Biskupic, American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia 22} (2009) (describing Scalia’s devotion to Catholicism from high school until the present day).
\textsuperscript{107} Id. at 187.
\textsuperscript{108} Id. at 40-41.
\textsuperscript{109} Id.
\textsuperscript{110} See Biskupic, \textit{supra} note 109, at 107.
\textsuperscript{111} Id. at 34-36.
Solicitor General (coming in second to Rex E. Lee), and topped Attorney General Edwin Meese’s list (along with Robert Bork) to replace the recently named Chief Justice Rehnquist. President Ronald Reagan promised an end to so-called judicial activism and sought an accomplished candidate preaching a philosophy of restraint. Scalia fit well here. An evaluation of his jurisprudence revealed that he did not differ from the administration on a single conservative matter.

Regarding Scalia’s biographical details, the future justice’s most noted feature was not his devout Catholicism, but his Italian-American ethnic heritage, since he was the first Italian-American nominated to the Supreme Court. Reagan himself expressed interest in this fact, and Scalia was warmly embraced by a number of Italian-American politicians. Very little reference was made to Scalia’s Catholicism either on Capitol Hill or in the media, nor does any evidence indicate that Reagan even considered this factor when making his selection.

When asked what role Catholicism plays in his jurisprudence, Scalia himself has been noticeably hostile. As noted earlier, the justice harshly condemned one scholar for implying his jurisprudence was ever religiously motivated, and he once remarked that “just as there is no Catholic way to cook a hamburger, I am hard-pressed to tell you of a single opinion of mine that would have come out differently if I were not Catholic.”

Regardless, Scalia’s strict Catholicism undoubtedly made him an appealing candidate concerning the era’s most controversial matter: abortion. Ronald Reagan had made clear his distaste for Roe v. Wade and his administration’s firm desire to overturn it. And although

112. Id. at 73-74.
113. Id. at 78.
114. Id. at 144.
115. See Yalof, supra note 64, at 146 (“A thorough search of Scalia’s judicial record uncovered not a single opinion in which either the result or the ground of decision seemed problematic from a conservative point of view.”).
116. Id. at 107; Yalof, supra note 64, at 155; Margaret O’Brien Steinfels, Catholicism and the Court: The Relevance of Faith Traditions In Jurisprudence, 4 UNIV. ST. THOMAS L.J. 170 (2006-07).
117. See Yalof, supra note 64, at 153.
118. Id.
119. See Goldman, supra note 81, at 201. (“It would appear that religious affiliation of potential Supreme Court nominees was simply irrelevant as long as their real politics was in line with the President’s”);
120. See Biskupic, supra note 109, at 107.
122. See Biskupic, supra note 109, at 107; Ronald Reagan on Roe v. Wade, History.com,
Scalia rarely revealed his own stance during his confirmation hearings, few doubted where he stood.\textsuperscript{123} Far more controversial was the known conservative Justice Rehnquist’s recent ascension to Chief Justice,\textsuperscript{124} however, and Scalia’s brief ninety-eight to zero confirmation vote thus came as a virtual afterthought to this more contentious event.\textsuperscript{125}

\textit{Justice Anthony Kennedy}

President Reagan’s next nominee, Anthony Kennedy, a former Catholic altar boy,\textsuperscript{126} has called himself a “practicing Catholic,”\textsuperscript{127} though he has given little context for this statement. Following Scalia’s nomination, before nominating Kennedy, President Reagan first nominated a Protestant, Judge Robert Bork and then a Jew, Judge Douglas Ginsburg.\textsuperscript{128} Whereas the former was rejected by the Senate for his controversial “paper trail” and contentious defense of originalism,\textsuperscript{129} the latter withdrew from consideration after admitting to having smoked marijuana with his former law students.\textsuperscript{130} The administration felt understandably chastened, desiring a nominee with duly conservative credentials but a relatively tamer background.\textsuperscript{131}

Anthony Kennedy fit this bill nicely. As a Ninth Circuit judge, Kennedy had written many respected and generally conservative opinions and was considered a firm believer in judicial restraint.\textsuperscript{132} A presidential background committee further determined Kennedy was a safe (albeit none too exciting) pick, and Reagan nominated him with

\textsuperscript{123} Id.
\textsuperscript{124} See Yalof, supra note 64, at 146 (“a thorough search of Scalia’s judicial record uncovered not a single opinion in which either the result or the ground of decision seemed problematic from a conservative point of view”).
\textsuperscript{125} A fact Senator Joseph Biden, head of the Senate Judiciary Committee, admittedly came to regret (See Biskupic, supra note 109, at 121).
\textsuperscript{128} Id. at 161.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 164; see generally, \textit{Ethan Bronner, Battle for Justice: How the Bork Nomination Shook America} (Union Square Press 2007).
\textsuperscript{131} See Yalof, supra note 64, at 164 (“the (initial) feelings of anger and vindictiveness over Bork’s defeat had turned into feelings of outright embarrassment”).
\textsuperscript{132} Id. at 165.
little fanfare. Neither the President nor his advisors ever stressed (or even openly mentioned) the justice’s Catholic heritage. Kennedy’s religion was barely discussed during his confirmation hearings, which were brief and non-contentious, and the hearings culminated in a unanimous vote.

Justice Clarence Thomas

Clarence Thomas was raised by a Catholic grandfather, though he distanced himself from the Church up until the early 1990s and once even considered converting to Episcopalianism. While Thomas has now fully reconciled himself with his Catholicism and resumed attending mass, at the time of his nomination he declared himself a “non-practicing Catholic,” expressing no affiliation with any particular congregation.

There is no indication that Thomas’s religion or lack thereof had anything to do with President Bush’s selection of him. Rather, the justice was nominated because he brought both conservatism and racial diversity to the Court. The Bush administration had been heavily criticized by Republicans for its recent appointment of Justice David Souter, a political and judicial moderate. Further, Thurgood Marshall, the Court’s first African-American justice, had recently retired, and African-American interest groups demanded a black replacement.

Thomas, a recently appointed D.C. Circuit judge, had worked for

133. Id.
134. See Perry, supra note 24; Goldman, supra note 81.
135. See Perry, supra note 24, at 89; Goldman, supra note 81, at 201 (“there is no evidence that Kennedy’s Catholicism played a role in his selection or confirmation.”).
136. See Yalof, supra note 64, at 164 (Undoubtedly letting out much of the bad air during the Bork and Ginsburg debacles).
137. Id.
140. See Steinfelds, supra note 119, at 171.
141. Id.
143. See Steinfelds, supra note 119, at 171.
144. Thomas grew up in the Deep South.
145. See Yalof, supra note 64, at 190.
146. Id. at 193.
the federal government under two Republican presidents and was considered an impressive (if relatively untested) legal mind. The subsequent controversies of the future justice’s nomination are well known and culminated in a historically close fifty-two to forty-eight confirmation vote. Whereas issues of race and sexuality often came into play—resulting in Thomas’s famous accusation of a “high tech lynching”—his religion went entirely unmentioned during this arduous process.

Justice Ruth Bader Ginsburg

Justice Ginsburg was the first Jewish nominee to the Supreme Court in nearly thirty years. While Ginsburg does not attend any specific synagogue, she has admitted having a strong “devotion to Jewish ethical values” and a great sensitivity to her “Jewish identity.” Ginsburg has particularly praised Judaism’s commitment to social justice, though she has denied that being Jewish has ever directly affected her jurisprudence.

Ginsburg was not the first candidate President Clinton considered for the Supreme Court. The President went through a long list of candidates, ranging from his wife Hillary to political philosopher Michael Sandel. A number of potential candidates also rejected President Clinton’s initial offers, including George J. Mitchell, a Protestant; Richard Riley, a Protestant; and Mario Cuomo, a Catholic. Clinton then interviewed a number of so-called “diversity candidates” (in both gender and race), eventually settling on Ginsburg.

Clinton advisor George Stephanopulous recalls that Ginsburg’s Judaism played some role in the President’s deliberations, as she would be the first “Jewish justice since Abe Fortas.” More importantly, however, Ginsburg would be the first woman justice appointed by a

147. Id.
149. Id. at 20.
151. Id.
153. Id.
154. Also included on this list was the blind lawyer David Tatel, and Joseph Cabranes, a Hispanic federal district court judge.
155. Id. at 169.
Democrat. She would also appeal to moderates, since she supported abortion rights but was somewhat tough on crime.\textsuperscript{156} Her husband Martin, a prominent attorney and acquaintance of Clinton’s, also helped win influence during her confirmation hearing.\textsuperscript{157}

Ginsburg has denied that Judaism had anything to do with her selection. According to the justice, “In contrast to Frankfurter, Goldberg, and Fortas... no one regarded Ginsburg and Breyer as filling a Jewish seat. Both of us take pride in and draw strength from our heritage, but our religion simply was not relevant to President Clinton’s appointments.”\textsuperscript{158}

In light of Stephanopoulos’s remarks, Ginsburg’s comments do not seem entirely accurate. While Judaism appears to have played some role in her selection, however, it was surely a small one.\textsuperscript{159} This biographical detail went unmentioned during her hearings, which focused on Ginsburg being the second female ever nominated to the Supreme Court.\textsuperscript{160} And while some senators criticized the future justice for being overly vague during questioning, she was easily confirmed by a ninty-six to three vote.\textsuperscript{161}

\textit{Justice Stephen Breyer}

Justice Breyer is perhaps the Court’s most secular member. He is not known to attend synagogue, and be rarely mentions his Jewish heritage. Further, Breyer is married to a non-Jew, and one of his daughters is an Episcopal priest.\textsuperscript{162} At no time during Breyer’s confirmation hearing was his Judaism mentioned,\textsuperscript{163} and there is no evidence that Clinton considered this factor in selecting the highly

\begin{footnotes}
\item[156] Id.
\item[159] See Yalof, supra note 64, at 291 (“The fact that Ginsburg was Jewish...was barely a factor in the decisionmaking calculus.”).
\item[161] See Yalof, supra note 64, at 202.
\end{footnotes}
respected and generally moderate circuit court judge, who had previously helped craft the nation’s sentencing guidelines.164

Interestingly, like Ginsburg before him, Breyer was not President Clinton’s first choice. Upon the resignation of Justice Blackmun, Clinton had first asked his Interior Secretary, Bruce Babbitt, a Catholic, if he was interested in serving.165 When Babbitt refused, Clinton then considered Eighth Circuit Judge Richard S. Arnold, a Protestant. Arnold had recently been afflicted with cancer, however, and admitted this would inevitably interfere with his judicial duties.166 Following Babitt and Arnold, Breyer emerged as a compromise candidate. The President originally found Breyer dry and unfriendly, privately remarking that he wanted a justice with more “heart.”167 But the President Clinton’s proposed healthcare reform was quickly approaching Congress, and he had only limited political capital.168 Breyer’s nomination would likely evoke little controversy, and the President could focus on the more important battles to come.169 Indeed, while healthcare would eventually polarize the nation, Breyer’s confirmation went expectedly smoothly, culminating in an eighty-nine to seven vote.170

Chief Justice John G. Roberts, Jr.

Educated in a strict Catholic high school, Roberts attends weekly mass and is deeply involved in his local parish.171 As a friend of the chief justice remarked shortly after his nomination, while “[John and his wife] are not the kind of people who would be in your face,” they “are devout Catholics” whose religion plays an enormous role in their “personal lives.”172

166. Id.
167. See Stephanopoulos, supra note 155, at 153; Yalof, supra note 64, at 204 (Breyer had also evoked some criticism by apparently failing to pay social security taxes on a home employee years before).
168. See Yalof, supra note 64, at 205.
During the search for his first Supreme Court nominee, President George W. Bush repeatedly stated he wanted a “strict constructionist” and proven practitioner of judicial restraint. While there was early speculation that Alberto Gonzales, Bush’s Attorney General, would be nominated, conservative groups demanded someone with greater judicial experience and a clearer stance on reproductive rights. Bush consequently turned to Roberts, a highly respected and reliably conservative D.C. Circuit Court judge.

It is unclear how large a role Roberts’s Catholicism played in his selection. Bush continually criticized the Court’s decision in Roe, and the Catholic Church has always placed special emphasis on the abortion issue. In choosing Roberts, the President fulfilled dual goals; Roberts was an accomplished conservative candidate likely (though certainly not guaranteed) to share his political base’s views on abortion, and was also an ardent “man of faith.”

Unlike in previous nominees’ hearings, during Roberts’s confirmation hearings, his faith was openly addressed. Senators Arlen Spector and Dianne Feinstein questioned what “role Catholicism would play” in Robert’s legal decisions. Journalist Christopher Hitchens went even further, citing a report stating that Roberts would supposedly recuse himself from cases the Catholic Church considered immoral. According to Hitchens, “The newly installed Pope Benedict XVI . . . has ruled that Catholic politicians who endorse the right to abortion should be denied the sacraments: no light matter for believers of the sincerity that Judge Roberts and his wife are said to exhibit.”

This questioning resulted in considerable backlash. A number

180. Id.
of diverse religious organizations condemned any religious criticism, with Catholic League President Bill Donohue remarking that “any scratching around this area would suggest that there’s a veiled religious test by asking questions about his deeply held views.” Others demanded that religious questions be entirely “off limits.” Nevertheless, by the time of Roberts’s confirmation, his Catholicism had largely faded into the background. He was confirmed as chief justice by a vote of seventy-eight to twenty-two, garnering fewer votes than Ginsburg, Breyer, Kennedy or Scalia, but with a relatively comfortable margin given the time’s partisan rancor.

Justice Samuel A. Alito

Justice Alito, a Catholic, is a parishioner at the very traditional St. Alyosius of Caldwell, New Jersey, but also belongs to and attends mass at the more progressive Our Lady of the Blessed Sacrement, of Roseland, New Jersey. Alito was not President Bush’s initial choice. The President first nominated Harriet Miers, a Methodist, to fill O’Connor’s recently vacated seat. Meirs was both Bush’s deputy chief of staff and a close personal friend, and the President reportedly thought the Court’s first female should be replaced with another woman.


184. The controversy about Roberts’s Catholicism was replaced by controversy about his more general views on federalism and stare decisis.


186. See Maurice Timothy Reidy, Tracking Alito’s Catholicism, BELIEFNET (Nov. 10, 2005), available at http://www.freerepublic.com/focus/f-religion/1519707/posts (discusses this Church’s more progressive liturgical practices).


190. See Dahlia Lithwick, Diversity Jurisdiction, Slate.com (Sept. 8, 2005), available at
Immediately following Bush’s nomination, however, Miers was attacked for a lack of legal experience. She had never been a judge and appeared to be uninformed regarding basic issues of constitutional law.191 The Right further feared Miers’s unclear stance on abortion.192 These concerns were then compounded by a series of ill-prepared interviews with the Senate Judiciary Committee, who characterized Miers’s reticence in answering many important legal questions as “insufficient” and “insulting.”193 Even Republicans requested that the candidate be more forthcoming, demanding that Bush release any legal memoranda drafted or written by Miers.194 Attacked from all sides and unlikely to survive confirmation, Miers abruptly withdrew from consideration in October of 2005.195

Samuel Alito’s name was submitted shortly thereafter. Alito’s qualifications were unimpeachable. Appointed to the Third Circuit in 1982 by Bush’s father, Alito had previously argued twelve cases before the Supreme Court and two dozen cases before different courts of appeals.196 As one conservative memo proudly summarized, “Alito has more federal judicial experience than 105 of the 109 justices appointed in Supreme Court history.”197 Further, Alito had the paper trail Meirs lacked, having taken a conservative stance on everything from the Establishment Clause to prison litigation.198 Alito had also explicitly rejected abortion as a constitutional right.199

While Democrats openly criticized Alito’s conservative

---


198. Id.

jurisprudence, even dubbing him “Scalito,” his confirmation went relatively smoothly. Perhaps sensitive to the significant criticism generated when they questioned Roberts’s Catholicism, senators did not mention Alito’s Catholicism during his confirmation hearings, though the specter of religion undoubtedly loomed over questions of Roe as “settled law.” Ultimately, most of the hearing was more philosophical, focused on the justice’s potential adherence to precedent and his understanding of strict constructionism. And though Alito’s confirmation vote, fifty-eight to forty-two, was considerably closer than Robert’s vote, his success was not really in question.

There is no evidence that President Bush purposely sought to create a Catholic Court, as his original nominee, Harriet Miers, had been Protestant. When confronted with the opportunity to appoint another Catholic, however, the President did not hesitate. More than anything else, Alito’s considerable judicial experience and conservative jurisprudence, particularly regarding reproductive rights, secured his nomination and confirmation.

Justice Sonia Sotomayor

If Bush had little hesitation in creating the first Catholic majority Court, President Obama was equally untroubled cementing the majority with the Court’s sixth Catholic justice, Sonia Sotomayor. Although she was raised in a relatively conservative Catholic household and attended Catholic schools, Sotomayor is seemingly less devout than her immediate predecessors, mainly attending church for family celebrations


201. One notable exception occurred when Alito was pointedly asked if he was a “racist” by Senator Graham, following Senator Edward Kennedy’s remarks that Alito had belonged to a Princeton group opposing minority admissions. This exchange apparently prompted Alito’s wife to flee from the hearing in tears. See Liz Marlantes, Alito Grilling Gets Too Intense for Some, ABCNEWS.com (Jan. 11, 2005), available at http://abcnews.go.com/WNT/SupremeCourt/story?id=1495804.


205. See Goldman, supra note 81, at 202 (“Although both Roberts and Alito are Roman Catholics, there is no indication in the public record that their Catholicism played a role in their selection”).
and major religious events.\textsuperscript{206} The justice’s divorce and pro-choice leanings have further generated some criticism from more traditional Catholics.\textsuperscript{207}

Sotomayor’s Catholicism ultimately played less of a role in her nomination process than did her Hispanic heritage. President Obama had promised a more diverse Court,\textsuperscript{208} and Sotomayor was an early (if not the) favorite: a respected (though not exalted) female jurist,\textsuperscript{209} she would also be the Court’s first Hispanic member.\textsuperscript{210} Ironically, Sotomayor’s ethnic heritage proved a double edged sword, as the media became fixated on a statement she made during a 2001 Berkeley law lecture that “a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”\textsuperscript{211} A number of conservative pundits and politicians pounced on this statement, decrying its supposedly racist implications.\textsuperscript{212} Even White House Press Secretary Robert Gibbs decried Sotomayor’s “poor” choice of words,\textsuperscript{213} while President Obama urged more focus on her judicial experience and personal “empathy,” a notion itself criticized by conservatives as a potential sign of judicial activism.\textsuperscript{214}


\textsuperscript{209} See, e.g., Jeffrey Rosen, The Case Against Sotomayor, NEW REPUBLIC, May 4, 2009, available at http://www.tnr.com/article/politics/the-case-against-sotomayor (“The most consistent concern was that Sotomayor, although an able lawyer, was “not that smart and kind of a bully on the bench,” as one former Second Circuit clerk for another judge put it . . . Her opinions, although competent, are viewed by former prosecutors as not especially clean or tight, and sometimes miss the forest for the trees.”).

\textsuperscript{210} Some contend the Court’s first Hispanic was Benjamin Cardozo, a Sephardic Jew of Portuguese origins. Most reject this, however, arguing the term was neither then in vogue nor should white Europeans be included in this ethnic category. See, e.g., Jeffrey Passel & Paul Taylor, Is Sotomayor the Court’s First Hispanic?, PEW RESEARCH CTR. PUBL’G, May 28, 2009, available at http://pewresearch.org/pubs/1238/sotomayor-supreme-court-first-hispanic.

\textsuperscript{211} See Sotomayor’s ‘wise Latina’ comment a staple of her speeches, CNN.com (June 5, 2009), available at http://articles.cnn.com/2009/06/05/politics/sotomayor.speeches_1_sotomayor-s-confirmation-sotomayor-supporters-judge-sonia-sotomayor?_s=PM:POLITICS.

\textsuperscript{212} Id.


\textsuperscript{214} See ‘The Empathy’ Nominee, WALL STREET J., May 27, 2009, available at http://online.wsj.com/article/SB124338457658756731.html (“Republicans can use the process (Sotomayor’s confirmation hearings) as a teaching moment . . . to educate Americans about the
Sotomayor’s Catholicism was ignored during her Senate confirmation hearings, which were dominated by her “wise Latina” remark and potential racial bias in a controversial discrimination case.215 The nominee spent much of her hearing both distancing herself from these earlier statements and couching her jurisprudence as primarily precedent-based.216 Akin to her predecessors, Sotomayor further avoided discussing specifics, echoing Roberts’ proclamation that judges were essentially umpires, mechanically applying law rather than fostering social change.217 The Senate eventually confirmed Obama’s choice with a relatively healthy sixty-eight to thirty-one vote, and the Court’s first Latina justice joined the bench in the fall of 2007.218

While Sotomayor’s Hispanic heritage undoubtedly played a key role in her nomination, her Catholicism was a relative afterthought. Though Sotomayor and Scalia are ideological opposites, their nominations had much in common. While neither justice was nominated because of religion, their ethnic backgrounds played some role in their selections.

Justice Elena Kagan

President Obama’s most recent Supreme Court appointment not only placed a third Jewish justice on the nation’s highest bench, but resulted in the first Supreme Court in American history with no Protestant members. Though this latter fact sparked a great deal of media attention, Kagan’s Jewish heritage generated relatively little discussion.

The Court’s youngest justice seems to have a stronger Jewish identity than either Ginsburg or Breyer. She was the first female Bat Mitzvah of the Orthodox Lincoln Square Synagogue of Manhattan219 and was raised in a Conservative Jewish household (couched between

proper role of the judiciary and to explore whether Judge Sotomayor’s Constitutional principles are as free-form as they seem from her record.”).

216. See Transcript, Id.
217. Id. at 23.
the liberal Reform and traditional Orthodox branches). And although her family eventually joined a more progressive, Reconstructionist synagogue, Kagan still considers herself a Conservative Jew.

There is no indication that President Obama considered Kagan’s Judaism when selecting her. Most accounts report that President Obama ultimately decided between four candidates: Kagan; Diane Wood, a Protestant and judge on the Seventh Circuit; Sidney Thomas, a Protestant and judge on the Ninth Circuit; and Merrick Garland, a Jew and judge on the D.C. Circuit. The President was reportedly most impressed by Kagan’s service to the administration as Solicitor General. He was also drawn to her relatively sparse paper trail and generally moderate, pragmatic political outlook.

While some liberals initially criticized Kagan’s centrism, the conservative opposition coalesced around four distinct issues: Kagan’s lack of experience as a judge; the liberal positions she took as a clerk to Justice Thurgood Marshall and as Dean of Harvard Law School (especially her disallowal of ROTC recruiting due to the Military’s Don’t Ask, Don’t Tell policy); an article she had written years early expressing (supposed) sympathy for socialism; and her “elitist” Upper West Side upbringing.

Some Jewish commentators construed the final claim as an indirect form of anti-Semitism. According to Salon Editor-in-Chief Joan Wolf, for example, the Upper West Side was essentially a stand-in for “the neighborhood known for Zabar’s and bagels, and, well, Jews.”

221. Id.
222. Id.
224. See Jeffrey Rosen, At Center Court: Can Kagan Be a Consensus Builder?, TIME, May 13, 2010, available at http://www.time.com/time/nation/article/0,8599,1988976,00.html (“If Republicans were already trying to paint Kagan as too liberal, some Democrats wondered whether she might be too centrist”).
229. Id.
against such associations, calling any euphemism for “Jewish... inappropriate in the confirmation process.” Kagan’s praise for Justice Aharon Barak, the activist Israel Supreme Court Chief, was also criticized. This led to Kagan’s only mention of her Judaism during the confirmation hearings, remarking that Israel had meant “a lot to her and her family,” and that Justice Barak had helped make it a “very strong rule-of-law nation.”

Critiques of Kagan’s Upper West Side elitism and her praise for the Israeli jurist faded relatively quickly, likely having more to do with concerns about leftist jurisprudence than with any implicit anti-Semitism. During her confirmation hearings, members of Congress focused far more energy on her decisions as Dean of Harvard Law School and possible sympathy for judicial activism. No particular narrative proved overly damaging, however, and Kagan was confirmed by a vote of sixty-three to thirty-seven in August of 2011.

There is no evidence that either President Obama’s choice of Elena Kagan or her successful confirmation was in any way motivated by her Jewish heritage. As in the cases of Justices Ginsburg and Breyer, Kagan’s religion may have played an indirect role in her nomination, as Jewish culture’s emphasis on higher education and communal solidarity perhaps influenced her career success. Further, Kagan has repeatedly praised the importance of social justice in her Jewish upbringing and its importance to the legal field. How these factors differently impact


235. The reasons for this have been debated ad nauseam. See Paul Berstein, Jewish Educational and Economic Success in the United States: A Search for Explanations, 50 SOCIOLOGICAL PERSPECTIVES 2 (2007) (for a sociological exploration of this matter).

236. See Hillary Lelia Krieger, Jewish woman for US Supreme Court, JERUSALEM POST, May 11, 2010, available at http://www.jpost.com/International/Article.aspx?id=175213. (Mikva, whom Kagan praised in her remarks upon being nominated Monday, also told THE JERUSALEM POST how Kagan’s sense of Jewishness connected to her work: “Her (Kagan’s) yiddishkeit, as I call it, informs her views on social justice and compassion and understanding what law is about,” he said. “We the Jews invented the law, and it’s only fitting that someone of Jewish heritage
equally qualified Protestant nominees, however, is empirically impossible to determine.

Discussion, Hypothesis 2

The preceding analyses produce two potentially significant correlations:

(1) Republican presidents have preferred ideologically conservative Catholic nominees, especially because of their positions on the issue of abortion.

As discussed, five of the Court’s six Catholics have been selected by Republican presidents. Unsurprisingly, previous accounts have proposed a direct link between these two variables. According to Michael J. Gerhardt, for example,

[F]or five years, President George W. Bush and his counselors labored to solve the puzzle of how to pick justices who remain rigidly committed to the course of decision-making they preferred... President Bush’s apparent solution was to pick people... who exhibited consciences morally bound by their church’s fundamental and official teachings, and whose characters were inextricably linked to and defined by moral faith... In this regard, justices Scalia and Thomas were models.

Though an interesting premise, it is overly broad. Alito’s nomination was preceded by the failed nomination of Harriet Meirs, a Protestant with an ambiguous position on reproductive rights. And Thomas, despite Gerhardt’s speculations, provides a rather dubious “model”: he was not even religious when chosen. And he was preceded by Robert Bork, a Presbyterian at the time. Further, such accounts only hold for conservative presidents, lending no explanation for Obama’s nomination of Justice Sotomayor.

This is not to deny any correlation between Republican presidents and Catholic justices, especially regarding the issue of abortion. Orrin Kerr recognizes that

[G]iven the Catholic church’s strong pro-life position, and the fact that Supreme Court nominees are not directly asked their view of such matters, affiliation with the Catholic church may be seen by

would fall in love with the law and make it a career.”).

237. Such as Judge Diane Wood, for example.

238. See Michael J. Gerhardt, Why the Catholic Majority on the Supreme Court May Be Unconstitutional, 4 UNIV. ST. THOMAS L.J. 184 (2006).

239. Bork, interestingly enough, has converted to Catholicism (see Tim Drake, Judge Bork Converts to the Catholic Faith, NAT’L CATH. REG., July 20-16, 2003, available at http://www.catholiceducation.org/articles/catholic_stories/cs0048.html)).
Republican Administrations and conservative judicial groups as signaling a likelihood of a nominee’s view toward abortion rights while not providing any direct evidence that could itself cause controversy.\footnote{See Kerr, supra note 103.}

Some support exists for this contention. The pro-choice credentials of Justices Scalia, Roberts, and Alito undoubtedly helped influence their selection and steer them through the Senate. Protestant nominees may have been seen as less ideologically rigid on this issue, and therefore riskier nominees. This notion is strengthened by the case of Harriet Meirs, whose ambiguous stance on reproductive rights helped ensure her political abandonment. Again, however, an “abortion correlation” fails to explain the botched nominations of Ginsburg or Bork, whose rejections had nothing to do with the issue of abortion.\footnote{As discussed, in Bork’s case this may have actively worked against him.} While an “abortion correlation” therefore holds some merit, it is hardly conclusive.

(2) Democratic presidents have preferred moderately liberal and legally accomplished jurists, which often happens to correlate with the selection of many Jewish nominees.

Justices Ginsburg and Kagan have directly attributed their foundational beliefs in social justice to their Jewish faith. And while the reasons are deeply contested, the Jewish community has produced a vastly disproportionate number of successful scholars, lawyers and judges.\footnote{See, e.g., Russell G. Pearce, \textit{Reflections on the American Jewish Lawyer}, 17 J.L. \& RELIGION 179 (2002).}

Yet, save for perhaps Justice Ginsburg, there is little indication that any presidents selected justices because they were Jewish, nor did their Jewishness play to any larger political base. Further, had Richard Riley or Mario Cuomo accepted Clinton’s initial offers, the Court would likely have only one Jewish member if that. The Court’s impressive Jewish makeup thus seems largely a result of chance, combined with the undeniable legal talents of this particular community.

Hypothesis 3: A combination of factors have favored Catholic and Jewish nominees, ranging from ethnic correlations to geographical variables.

1. \textit{Ethnicity and Gender}

As discussed, Sonia Sotomayor’s Latina heritage clearly helped her...
prospects as a Supreme Court nominee, and Antonin Scalia’s Italian-American background may well have improved his, although to a much lesser extent. Diversity concerns also played a role in the nominations of Clarence Thomas and Ruth Bader Ginsburg. While ethnicity and gender have certainly helped motivate presidents to nominate certain justices, these variables appear only tenuously linked to their religious affiliations: African-Americans are not strongly tied to Catholicism,243 and the first female justice, Sandra Day O’Connor, was a Protestant.

2. **Geography**

Geography was the dominant concern in the selection of early justices and has played some role in the nomination process throughout, at least as late as the Nixon administration.244 It is thus logical to wonder whether the current justices’ regional and religious affiliations are correlated. As David Bernstein recognizes, each justice, except for Anthony Kennedy, served on “the Boston-Washington Corridor” before being selected,245 a region home to a disproportionate number of Catholics and Jews.246

This fact alone, however, remains insufficient to explain these groups’ prevalence on the Supreme Court, as the majority of the residents of this area still belong to Protestant affiliations.247 Further, the connection between geography and jurisprudence is convoluted. Unlike in eras past, many justices lived and practiced in a number of different locales, often far from where they were born. The case of Clarence Thomas is illustrative here. Thomas has long stressed his Georgian roots,248 and he is the only current justice born in the Deep South. He practiced law in Washington, D.C., however, and was nominated to the D.C. Circuit Court. Stephen Breyer’s case is even more complicated. Born in San Francisco, Breyer practiced and taught in Boston before...
moving to Washington, D.C. He was eventually nominated to the First Circuit, representing Maine, Massachusetts, Puerto Rico and Rhode Island.

3. The Yale/Harvard Connection

Conceding that geography alone is inadequate to explain the current Catholic and Jewish Court, David Bernstein has proposed another potential correlation:

We can’t neglect the issue of Harvard/Yale laws schools dominance of the nominee pool. Both schools have a lot more conservative Catholics than conservative Protestants, and of course Catholics are much more likely to be conservative Republicans, and especially to have anti-abortion sympathies. As for Jews and the Democrats, Yale was at least one-third Jewish when I attended, and I think has been so for a long time.

Indeed, with the retirement of Northwestern law alumnus John Paul Stephens and the recent confirmation of Harvard’s Elena Kagan, the current Court is exclusively composed of Harvard and Yale Law graduates. While these schools have a disproportionate number of Jewish students, it is considerably more difficult to determine their Catholic populations. Even granting a healthy Catholic presence, however, we encounter the same dilemma as before, in that many (if not a bare majority) of these schools’ alumni are likely of Protestant affiliation. While Catholic and Jewish overrepresentation at Harvard and Yale perhaps helps explain the considerable presence of Catholics and Jews on the Supreme Court, this correlation fails to account for its lack of a single Protestant.

4. The Kitchen Sink Hypothesis

While each correlation is alone insufficient, perhaps uniting them can yield a more complete picture. One can contend, for example, that presidents’ concern with a more diverse Court, combined with their preference for Washington-Boston candidates and Yale or Harvard Law graduates, ultimately eliminated Protestant candidates from the judicial

250. See Bernstein, supra note 248.
251. Why this is has naturally engendered a great deal of debate. For one summary of this matter, see Patrick J. Glen, Harvard and Yale Ascendant: The Legal Education of Justices from Holmes to Kagan, 58 UCLA L. REV. DISCOURSE 129 (2010).
nomination and confirmation process. Or as Bernstein argues, the Catholic and Jewish Court is “no surprise” given conservatives’ predilection for well-schooled candidates likely to oppose abortion, matched with Democrats’ preference for diverse women from the Northeast.253

Yet as I explored in a previous paper,254 such totalizing claims conceal far more than they reveal. Simply listing a number of correlations both masks scholars’ inability to gauge the importance of each and provides neither original nor particularly useful information. Throw out enough correlations and one can answer nearly any question, but doing so will enlighten no one.

CONCLUSIONS

A. Defining Representativeness

Having analyzed our religiously non-representative Court, it seems crucial to re-evaluate the very concept of representativeness. This is especially pertinent given such an elite, small institution.

Of course, representativeness extends far beyond religion. Most obvious here is race: although African-Americans constitute about thirteen percent of the American population (and that number has been relatively stable for quite some time),255 there have been only two African-American justices. And while the nation’s Hispanic population has increased substantially in the last few decades,256 only recently has a member of this group entered the Marble Palace. Supreme Court justices are also significantly wealthier than the general citizenry,257 attended the same elite academic institutions, as described earlier, and were nearly all nominated from the circuit courts.

Many, if not all, of these categories are likely more important to the public than justices’ religions. Yet which are crucial to a representative

253 See Bernstein, supra note 248.
democracy? With only nine justices serving at once, can the Court ever really claim to authentically represent the general citizenry? It lies well beyond the scope of the present study to determine what counts as truly representative. Yet this seems an important discussion. As justices are selected by the president and confirmed by Congress, such discussions must also invariably involve these branches.

B. The Contingent Court

On a more specific note, it may be helpful to speculate about how the Court would appear had the last few failed nominations succeeded, yet everything else stayed constant.258 Antonin Scalia would preside alongside Douglas Ginsburg and Robert Bork. Ruth Bader Ginsburg, Stephen Breyer and John Roberts would be joined by Harriet Miers. Since Obama’s two selections have been successful, Sonia Sotomayor and Elena Kagan would then round out the Court. Instead of six Catholics and three Jews, the Court would consist of two Protestants, three Catholics and four Jews, a more diverse, though still primarily Jewish- and Catholic-dominated body.

This counter-factualist history may seem idle speculation, but it ultimately hints at the importance of historical contingency. Had Patrick Riley or Bruce Babbitt accepted Clinton’s early entreaties, for example, scholars might be more concerned with the continued lack of Jewish or female justices than anything else. Still, everything is not thrown to chance; the issue of abortion seems to have motivated some Catholic nominees, and one cannot disregard the disproportionate legal success of Catholic and, especially, Jewish candidates. The lack of a single Protestant justice seems less a result of these groups’ success, however, and more the product of Jewish and Catholic candidates being in the right place at the right time. The result is thus predicated, in the words of Sheldon Goldman, on a random “configuration of circumstances.”259

Of course, if the Court remains without a Protestant for the next few decades, this tentative conclusion may need to be reevaluated. For now at least, the bottom line is this: as more progressive times allowed for Jewish and Catholic advancement, these groups took full advantage of the novel opportunities available, forming their own unique majorities. Ironically, as diversity interests increase, under-represented Protestants may well find themselves back in favor. Or room may be demanded for Muslim or even avowedly atheist jurists.260 While people

---

258. An absurd scenario, of course, but that is the advantage of hypotheticals.
259. See Goldman, supra note 248, at 218.
260. This seems unlikely anytime soon, but one never knows.
like Patrick Buchanan would undoubtedly disdain the latter scenario, such demands may be the price of living in a more open society, where diversity and political representation need not coexist.