Notre Dame Journal of Law, Ethics & Public Policy

Volume 20
Issue 1 *Symposium on Law & Politics as Vocation*

Article 19

February 2014

The Unbearable Unimportance of the Catholic Moment in Supreme Court History

Matthew J. Franck

THE UNBEARABLE UNIMPORTANCE OF THE CATHOLIC MOMENT IN SUPREME COURT HISTORY†

MATTHEW J. FRANCK*

Our topic is a cornucopia that is overflowing with somewhat disparate considerations. In general, what "commitments" do we expect nominees to the federal bench, especially to the Supreme Court, to bring with them to judicial service? What difference, if any, should it make what a nominee's religious commitments happen to be? What can properly be a subject of inquiry with respect to those commitments—religious or otherwise—by either Presidents or Senators? What assurances on such matters, if any, can the nominees properly make in response to such inquiries?

Back behind these questions is another one that deserves some preliminary exploration: Why are we talking about this now, in the year of Our Lord 2005? Yes, it has been much remarked that should Judge Samuel Alito, now the President's nominee to fill the seat to be vacated by Justice Sandra Day O'Connor, be confirmed as an Associate Justice, the U.S. Supreme Court will have a majority of Justices—five of nine—who are Catholics. Judge Alito would be the eleventh Catholic member in the entire history of the Supreme Court, and the 110th Justice of the Court, making Catholics an exact ten percent of the Court's historic membership.[1] That five of those eleven Catholics should be serving together, at the same moment in his-

† On November 9, 2005, the *Notre Dame Journal of Law, Ethics & Public Policy* hosted a symposium entitled The Religious Commitments of Judicial Nominees. Professor Franck was the second speaker at the Symposium. His remarks have been revised for publication. *See also* D'Army Bailey, The Religious Commitments of Judicial Nominees—Address by Judge Bailey (Nov. 9, 2005), *in* 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 443 (2006); Francis J. Beckwith, Taking Theology Seriously: The Status of The Religious Beliefs of Judicial Nominees for the Federal Bench (Nov. 9, 2005), *in* 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 455 (2006).

* Professor and Chairman of Political Science at Radford University. The author wishes to thank the editors of this Journal and the organizers of the Symposium, as well as his fellow symposiasts Judge D'Army and Dr. Francis Beckwith, and especially the moderator Professor Gerard Bradley.

1. *See* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 46 (new and rev. ed. 1999).

tory, is nearly as remarkable as that they should together make up a majority of the current Court.

It is a good sign of the waning of anti-Catholic prejudice in America that a Protestant President should appoint John Roberts and Samuel Alito, two Catholics, to replace two Protestants, and that there should be nothing terribly surprising or alarming about that fact in the view of most Protestant Americans. In fact, while the religious views of political candidates have sometimes been a matter of great interest and controversy—think of Thomas Jefferson and Abraham Lincoln dealing with their reputations as men untethered to any church, or of Al Smith and John F. Kennedy facing open worries that they were too tightly tethered to Rome—the religious faith of Supreme Court Justices has really never been all that important.

The Court's first Catholic, Roger B. Taney, was the victim of a Senate stalling tactic on the occasion of his first nomination as an Associate Justice by Andrew Jackson. The President had his revenge on his political enemies by re-nominating Taney as Chief Justice and seeing it through some months later. This opposition to Taney had nothing to do with religion and everything to do with his actions as Treasury Secretary in the political furor over the National Bank.[2] When Edward D. White, the second Catholic on the Court, was appointed in 1894, the nominee was already the majority leader of the Senate, which unanimously confirmed him to the Court on the same day his nomination arrived from the White House.[3] White would later join the very exclusive club of persons confirmed to the Court twice, when in 1910 he became the first Associate Justice ever elevated to Chief Justice.[4] One can hardly see any sign in either of these cases that the "religious commitments" of judicial nominees mattered at all. From White's day to the present, with the exception of a seven-year gap before the arrival of Justice William Brennan in 1956, there has always been at least one Catholic on the Court.[5]

The other religious minority in this majority-Protestant country that has been represented on the Court in the last century is American Jewry. The first Jewish Justice was Louis Brandeis, and his appointment in 1916 occasioned much controversy. It prompted the first public hearings by a Senate committee on the subject of a Supreme Court nomination (though Brandeis

2. *See id.* at 74.

3. *Id.* at 109.

4. *Id.* at 108–09, 128.

5. JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES 125 (1995).

himself was not a witness at those hearings), and "the delay of more than four months" between nomination and confirmation "is still a record."[6] Brandeis, a non-observant Jew, yet an active Zionist political leader, was openly opposed not because of his religious heritage but because of his allegedly "radical" politics. Very little did anti-Semitism come out into the open in the debate over his nomination, and historians disagree over how much importance to attach to it even in the background.[7]

As Edward White had earlier become the first holder of a "Catholic seat," Brandeis inaugurated the tradition of a "Jewish seat," though here, too, there was one significant interval, an even longer one (1969–1993), when no one occupied the seat.[8] When Benjamin Cardozo joined Brandeis on the Court in 1932, no one appears to have objected to the notion of two Jews on the Court simultaneously—with the exception of the virulently anti-Semitic Justice James McReynolds, who could not bring himself to speak to either of his Jewish colleagues[9] (and that was the least of his offenses). Indeed, Herbert Hoover found himself badgered relentlessly into nominating Cardozo, a Democrat, by Senators of both parties, and the Senate approved the appointment "instantly and unanimously—in ten seconds—without debate or roll call" when it reached the floor.[10]

The parallel traditions of appointing "token" Catholics and Jews to the Supreme Court went their merry and separate ways for many years, with nary a question about what these Justices' "religious commitments" might mean when it came to interpreting the Constitution and other laws. The appointments were pure interest-group politics and nothing more. Nobody seems to have asked Joseph McKenna, Pierce Butler, or Frank Murphy what his Catholicism might ever have to do with his decision-making, and the episode in William Brennan's hearings, of which Professor Gerard Bradley has reminded us, was but a passing moment. Not even Antonin Scalia or Anthony Kennedy faced such questions in more recent years, and as for Clarence Thomas, a Catholic now, he was safely Episcopalian when he was roasted slowly over the Senate's coals for other reasons altogether. No one seems to have cared about the Judaism of Felix Frankfurter, Arthur Goldberg, or Abe Fortas—or more recently

6. ABRAHAM, *supra* note 1, at 135.

7. *Cf. id.* at 136; *see also* Philippa Strum, *Louis D. Brandeis*, *in* THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1995, at 331, 334 (Clare Cushman ed., 2d ed. 1995).

8. *See* MALTESE, *supra* note 5, at 125.

9. *See* ABRAHAM, *supra* note 1, at 133–34.

10. *Id.* at 154.

about that of Ruth Bader Ginsburg or Stephen Breyer—as it might be brought to bear on constitutional law.

So what has changed to bring questions about the "religious commitments" of the Catholic Chief Justice John Roberts and Judge Samuel Alito to the forefront of our attention—or for that matter, the faith of the nondenominational evangelical Harriet Miers during the course of her unhappy October?

Three things have changed, which we can take in ascending order of importance. The first is numbers. Two Jews out of nine Justices—okay, that's mildly interesting. Two or even three Catholics out of nine Justices—likewise of passing interest. But four or five Catholics? A critical mass, the biggest religious "bloc" on the Court, or even a majority? That is an occasion for asking, "Gee, how did that happen?" This becomes still more interesting if it is thought that the Justices might ever think of themselves as banding together in a case for shared religious reasons (a doubtful proposition, but bear with me).

The second thing that has changed is that nominees now routinely appear before the Senate Judiciary Committee to testify and to answer questions as part of the process of Senate advice and consent. Yet in a strange dance of indirection, the Senators and the nominees manage to avoid discussing the most important thing that could possibly be discussed at such hearings: what the nominee actually thinks the Constitution means. Senators of the President's party, or most of them, anyway, declare that sound principles call for deference to the President's choice, as though an electoral mandate creates a nearly irrebuttable presumption of trust in the President (this may have been the presumption in which President Bush placed his own trust on October 3, 2005).[11] The nominee's myrmidons also argue, as a corollary to this deference principle, that examination of the nominee should be limited to the most arid considerations of his or her "qualifications"—i.e., knowledge of and experience in the law, particularly constitutional law; ethics and personal integrity; and judicial "temperament," however that is understood. No trace of a principle favoring such deference, or such a limited inquiry, can be located in the Constitution or in history, but it is an obviously useful political argument to make.

On the other side, Senators predisposed to oppose the nominee circle warily; they look for vulnerabilities and probe for them with questions designed to elicit the telling hint or the unguarded declaration of a plain opinion about legal principles.

11. President George W. Bush nominated Harriet Miers to the Supreme Court on October 3, 2005.

The nominee, meanwhile, tries to fend off these jabs with vague pleas about the need to maintain "judicial independence" (as if that were some kind of solution rather than a problem), should the questions that a Senator asks actually come before the Court, or return to it in the form of opportunities to reconsider past rulings and their vitality as precedents. With the help of the aforementioned myrmidons and assorted others making unpersuasive arguments about the requirements of various judicial ethics standards, the nominee almost always exits the committee room leaving behind as much mystery about his or her views as was present when the hearings began.

This has been the pattern at least since the hearings on Robert Bork's nomination in 1987, and even before, if we recall that in 1986 Antonin Scalia refused even to affirm his conviction that *Marbury v. Madison* was sound precedent[12] (we still do not know the answer to that, come to think of it). Bork's candor—a product of his paper trail and his pride—cost him all in the vote of a Senate with a Democratic majority. Every nominee since then has behaved more like Scalia. It is a strange result of this pattern of nomination politics that anyone should now think of inquiring into a nominee's "religious commitments," while that never mattered in the past when the United States was a less tolerant and inclusive country where religion was concerned. There were a few such inquiries, delicately ventured and gently rebuffed, in the hearings for Chief Justice John Roberts.[13] I doubt very much that we will cross the line any time soon to actually hearing deeply probing questions in the hearings on matters of faith and belief, but "out of doors," as the framers would have said, this is where we are. Since the hearings prove so uninformative about the only questions that can justify holding them at all—nominees' views on plainly stated questions of constitutional meaning and Supreme Court decisions of the past—we who stand outside that process find ourselves turning to information that will serve as a proxy for what is denied to us; hence the interest of the press and the public in the religious faith of judicial nominees. The Bush White House even tried, with terrible clumsiness, to make broad hints about the conservative evangelical faith of Harriet Miers do double duty—to inform its usual supporters obliquely of her views on constitutional law and to divert them from the question of her qualifications for a seat on the Court.

12. *See* MALTESE, *supra* note 5, at 110.

13. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary, United States Senate,* 109th Cong. 227–28 (2005) (colloquy with Sen. Diane Feinstein).

I have not yet uttered the "A" word: "abortion." This brings me to the third thing that has changed since the days of Taney and White, Brandeis and Cardozo. It is the thing that alone makes the prospect of five Catholics on the high bench more than interesting; the thing that draws our eyes and ears to our television sets even to listen to one more interminable speech masquerading as a question from Senator Joseph Biden. It is that the Court today, like at no time in its history, with the possible exceptions of 1857 and 1937, is at the center of a great political war between contending forces intent on capturing and controlling the authoritative understanding of the Constitution. We could use an overused phrase and call it a "culture war," or we could say that we live in a time of great moral upheaval: an upheaval into which the Court has thrust itself for the last three to five decades, and in which it has played a significant role as an agent, and sometimes the instigator, of change. Ripples and eddies of this upheaval play themselves out in cases involving the rights of homosexuals, the right to die, and cases under the religion clause of the First Amendment. But at the center of the upheaval stands *Roe v. Wade*,[14] and the buttresses and stanchions propping up the unfettered abortion license in such subsequent rulings as *Planned Parenthood v. Casey*[15] and *Stenberg v. Carhart*.[16]

I need not expatiate on the obvious distortions that *Roe* has caused in our law and politics in the last thirty-two years. But now it bids fair to achieve one more ill effect: the violation of the spirit, though not the letter, of the "no religious test" clause of Article VI of the Constitution.[17] Hampered by the uneasy truce that largely bars the asking and answering of direct questions about *Roe* and similar matters, we are tempted to turn instead to hints and tea leaves about how a prospective Justice of the Court might rule in future cases brought to it by the moral maelstrom it has itself helped to unleash.

So, too, we reach the final, absurd ugliness: discussing *what kind* of Catholic or Christian a nominee might be, for (to stick with the present nominee for now) we know that there are Catholics and then there are *Catholics*. How frequent the churchgoing? To what sort of parish? What sort of information can we pry out of the nominee's pastor? Or his elderly mother? Are there hints to be gleaned from how many children he has? Or where he sends them to school? Does the nominee or his wife

14. 410 U.S. 113 (1973).
15. 505 U.S. 833 (1992).
16. 530 U.S. 913 (2000).
17. *See* U.S. CONST. art. VI ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

teach Sunday School? What views on theological questions, church doctrine, or the authority of the Magisterium has the nominee ever been heard or seen to express? Has he been heard to compliment his pastor on a pro-life homily? Does he take the host in the mouth or in the hand?

Should it not go without saying that such questions as these are wholly inappropriate, and that if any Senator had the temerity to ask them face-to-face, a nominee would be more than entitled to respond, "None of your business. Ask me something else?"

If it is crossing the line for a Senator to ask a nominee such questions, what is it for the rest of us to muse about them "out of doors"? Little better, I should think. This is the consequence of the Supreme Court's self-politicization and its assumption of a central role in our ongoing moral fracas. The Court's self-politicization now threatens to politicize the religious faith of judicial nominees and thus to exacerbate the political conflict between people of differing faiths and even within certain churches themselves.

The only way out of this unseemly dilemma is to use the occasion of judicial nominations to ask nominees about what *is* the public's business—the constitutional opinions they will bring to the bench. To paraphrase Woodrow Wilson, we need open commitments, openly arrived at, but they must be constitutional commitments rather than religious ones. Only that way lies a political settlement of our moral upheavals with which the contending forces in American society can peaceably live.