

**A RELIGIOUS SHIFT: THE IMPACT OF CATHOLIC JUSTICES ON  
THE U.S. SUPREME COURT**

an Honors Thesis submitted by

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in partial fulfillment for the degree  
Bachelor of Arts in Political Science and History with Honors

9 February 2011

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Approval Sheet

A Religious Shift:  
The Impact of Catholic Justices on the U.S. Supreme Court

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## *Acknowledgements*

*I would like to express appreciation to all of who have played a role in the development of this thesis. Each of you, whether you realize it, have contributed your own special gifts.*

*To Mom and Dad, I'm everything I am because you loved me;*

*To Grandma, for taking the time to read me the encyclopedia as a child and stimulate an inquisitive mind;*

*To Mammaw Sue and Pappaw Junior, who taught me to use my faith to better the lives of others;*

*To Tyler, everyday is a holiday with you;*

*To my dear friends, who have rejoiced in times of gladness and consoled in times of troubles;*

*To Drs Ray Dalton, Ryan Fogg, and Charles Moffat, for serving on my Thesis committee;*

*And, finally, to Dr Kara Stooksbury, for her patience, extensive editorial comments, and for serving as advisor, instructor, and friend.*

*“When eating bamboo sprouts, remember the man who planted them.”*

*— Chinese Proverb*

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**Chapter One**  
Introduction

Throughout American history, there have been dramatic changes in the racial, ethnic, and religious composition of the American people. The colonies were originally settled by white Anglo-Saxon Protestants from Western Europe. These colonists became the dominant ethnic and religious force of the new society. However, new peoples began to immigrate to America throughout the 18<sup>th</sup> and 19<sup>th</sup> centuries. They left their native nations for a variety of reasons; yet, regardless of their means of arrival, all peoples, though not always considered equal to the puritanical WASPs, became “American.”

By the dawn of the great influx of immigration from Eastern Europe at the turn of the 20<sup>th</sup> century, the United States began to take on a new form—one which included a potpourri of religious and socio-cultural values. America had evolved from a standardized society featuring a majority of white Protestants to an amalgamated organism that featured a variety of races, ethnicities, cultures, and religions. In America Irish Catholics and Russian Jews worked side-by-side in industrial factories and lived as neighbors in cultural enclaves in America’s cities.

Within this cultural, religious, and ethnic mosaic, idiosyncratic values play into societal decision-making. As society places greater value on one’s cultural heritage, it makes sense that cultural identity plays an active role in one’s decision-making process. As a result of this evolving view of America’s identity, research begins to seek reasons. If cultural and religious identity are paramount, the question for political scientists, historians, and Supreme Court scholars is: what impact can religious and faith-based values have on the judicial decisions of the United States Supreme Court? From the perspective of America’s newfound love affair with multiculturalism, I will analyze the process of judicial decision-making in order to determine the

potential correlation between religion and judicial decisions, specifically among Roman Catholic justices who have served on the U.S. Supreme Court.

### ***Historical Significance***

The Supreme Court of the United States is composed of nine justices who “hold their offices during good behavior” (art. 3, sec. 1). Although the constitutional qualifications to preside as a justice are not enumerated, an unwritten list of requirements has been developed. Foremost, the majority of judges who have served on our Supreme Court have been white male Protestants of Anglo-Saxon descent (Segal and Spaeth 183). Of the 112 justices that have served on the Supreme Court of the United States, 108 have been male (Jost). Ronald Reagan appointed the first female justice, Sandra Day O’Connor, in 1981 (Jost). This under-representation has also been present in terms of ethnicity and race with only one Hispanic justice, Sonia Sotomayor, and two African-American justices, Thurgood Marshall and Clarence Thomas. However, there has been a recent shift in appointees of the Supreme Court in terms of religious affiliation. Today, with the retirement of John Paul Stevens and subsequent confirmation of Elena Kagan, no Protestant justices sit on the Supreme Court. Instead, the Court, once predominately Protestant, now has a Catholic majority.

Throughout the 220-year history of the Supreme Court, only thirteen Catholic justices have been appointed. In fact, the first Catholic justice, Roger B. Taney, was not appointed until 1836. Of the thirteen Catholic justices, six currently sit on the Court. For the first time in history, the Supreme Court has a Catholic majority. What is its importance? I will seek to answer this questions as I research the field of judicial decision-making and its relationship with religious values, specifically Catholicism. In regard to the U.S. Supreme Court and its recent influx of

Catholic justices, my purpose is to determine the correlation between a Catholic justice's religious doctrine and his or her judicial decision-making process. More explicitly, to what extent does a Catholic justice, specifically Justices Anthony Kennedy and Antonin Scalia, apply his or her religious values to a final Supreme Court decision?

### *Review of Literature*

In researching the correlation between a Supreme Court justice's judicial decision-making and his or her socio-religious ideals, I will base my research on several streams of pertinent scholarly literature. These research topics will include not only the basic process of judicial decision-making, but also the effects of individual cultural, gender, ethnic, and religious differences on judicial decision-making. Finally, I will evaluate Catholicism's effects on policy-making with emphasis placed on the United States Supreme Court.

### *Judicial Decision-Making*

A large body of literature attempts to illuminate the judicial decision-making process. The concept of judicial decision-making encompasses how judicial decisions are formed, what factors have historically affected these decisions, how the Constitution has been interpreted, and what methods justices use to formulate decisions. Epstein and Knight have published much research discussing the methods and processes that Supreme Court justices employ when making judicial evaluations. They state that a variety of factors influence judicial decision-making including personal political preferences, legal interpretations, upbringing, gender, race or ethnicity, socioeconomic status, and even religion. According to Epstein and Knight, "justices are strategic actors" who take their own ideas, the general tenor of other legal scholars, and the environment surrounding the decision before making a final judgment (xiii). In other words, they

use “strategic behavior, not solely as responses to either personal ideology or apolitical jurisprudence” (xiii). To Epstein and Knight, judicial decisions are not made in a vacuum; context and environment are essential to the outcome. Their research indicates that justices can easily possess policy preferences—examined through their selection of cases—and occasionally implement their policy preferences when given the opportunity (22-51). Ultimately, to Epstein and Knight, judicial decision-making is a strategic process.

Grossman states that social, religious, and cultural values have long been neglected in the study of judicial decision-making and sees the recognition of these factors as imperative (1552). He analyzes the methodology of several scholars who have investigated ideological factors as an important aspect of judicial decision-making and concludes that a more concrete methodology should be developed (1563).

Some scholars have heeded that call. One method has been developed by Lim. According to Lim, judicial decision-making has been analyzed through either a legal or attitudinal model (722). The legal model uses strict principles, precedents, and the Constitution as its main standards. The attitudinal model, in contrast, utilizes “ideological attitudes and values” (722). Statistical models, created from previous Court voting records, are used to develop a third view point which articulates that personal values can be more important than legal precedent. Two different definitions of *stare decisis*—institutional and individual—are designated in this model (724). Lim concludes that, in the case of individual *stare decisis*, justices utilize their ideological slants and personal world views when formulating judicial decisions.

Other research, conducted by Segal and Cover, indicates that the attitudinal model is the most accurate in analyzing the decision-making of Supreme Court justices. This study focuses on

the justices serving between the confirmations of Earl Warren and Anthony Kennedy. The test is conducted through “independent measures of the ideological values of justices” (Segal and Cover 557). In other words, this study is not isolated to official votes on the Court. The authors state that their belief is that “justices are free to use whatever doctrines fit their own preferences” when making decisions (562). While they admit that there are elements which restrict a justice’s absolute freedom, they ultimately believe the attitudinal model is most relevant to a justice’s decision-making.

Further research on the influence of ideological values on Supreme Court votes has been conducted by Segal with Epstein, Cameron, and Spaeth. This study expounds on the aforementioned article by updating the body of research to include the Supreme Court appointees during the George H.W. Bush administration and those prior. Their conclusions are that ideological principles and values “correlate strongly with votes cast in economic and civil liberties cases” for justices appointed by Eisenhower through George H.W. Bush (Segal, et al. 812). However, “justices appointed by Roosevelt and Truman” were “less robust” in their adherence to ideological values (812). In short, this study helps to cement the attitudinal model as the main view of analyzing Supreme Court decision-making, specifically among post-Warren Court justices (822).

Overall, the general scholarly view of judicial decision-making has evolved. Initially much research promulgated the idea of Murphy’s *Elements of Judicial Strategy*. Murphy, and others like him, publicized a view of strict judicial decision-making that utilized simple legal factors such as judicial precedent, standing laws, and the Constitution -- also known as mechanical jurisprudence as coined by Justice Owen Roberts in *U.S. v. Butler*.

This view remained until the development of the attitudinal model, which accounts for a variety of personal preferences that influence the decision-making process. These preferences can include, but are not limited to, policy stances, ideological principles, moral and ethical standards, cultural idiosyncrasies, and religious values. Per this model, an individual justice can possess a unique world view which can dictate the way in which votes are cast and decisions are made.

The literature referencing judicial decision-making has most recently progressed into a form which leaves room for the application of both the legal and attitudinal model as evidenced in Epstein and Knight's *The Choices Justices Make*. This new manner of judicial decision-making incorporates aspects of both models in order to develop a view which respects legal precedent and the Constitution while acknowledging the importance of individual preference. From this academic research environment, I will examine the evolution of judicial decision-making in order to determine the relevance religion plays in the context of an overwhelmingly Catholic Supreme Court.

### *Religion and Judicial Decision-Making*

Research highlighting religion and its effect on judicial decision-making is constantly growing. As the shift to the attitudinal model has occurred, more and more political scientists and judicial scholars have begun to examine the impact of religious values on judicial decisions.

Collett has focused on the role of religion in judicial decision-making. She discusses the use of self-recusal in order to maintain neutrality in cases which have religious implications, such as religious liberties questions, women's rights issues and abortion cases, or school voucher cases (Collett 1278). She also states that religious neutrality among justices who maintain a

religious identification is almost impossible and argues that religious influence actually has a positive impact on judicial decision-making in some cases (Collett 1290). This religious influence can aid in the writing of opinions, according to Collett, because the use of religious language, which has been used in previously-written opinions, eases the understanding of legal verbiage for the American public-at-large.

Idleman, like Collett, argues that religion can impact judicial decisions and that this impact is positive. According to him, religion already influences a seemingly secular process through the first prong of the well-known *Lemon* test created in *Lemon v. Kurtzman* (Idleman 433). Idleman sets forth a series of reasons why religion should not be involved with judicial decision-making; he then counters these arguments (455). Through his discussion of religion and judicial decision-making, Idleman makes arguments which indicate that religion has functioned and currently functions as a factor in Supreme Court decisions.

In the same vein, Modak-Truran examines how religion can influence judicial decision-making. Modak-Truran states that “religious convictions are the most comprehensive normative convictions that humans hold, and all humans who act with reflective self-understanding...are religious” (714). In regard to cases involving human life and sexual orientation, “religious convictions provide answers” (714). It is logical then to consider religion’s part in the decision-making process. The author formulates a series of models—separationist, religionist, separationist-religionist, and religionist-separationist—to explain a justice’s view of religion’s part in his or her duty as a Supreme Court justice (718). It should be noted that this article, published in a Catholic law review, could be perceived as a biased account of religion; from this

context, however, the ideas and values formulated and held by many Catholics in both the public and private spheres are easily examinable.

Perhaps the most relevant and important research that has been conducted in regard to the connection between religion and judicial choices is by Perry, who has examined the Supreme Court and the effect of minority groups on the Court. Currently Perry is researching and writing a book titled *Catholics and the Supreme Court* to determine the effect personal religious convictions can have on justices.

Earlier in Perry's career, she published *A "Representative" Supreme Court?: The Impact of Race, Religion, and Gender on Appointments*. As indicated by the title, this book examines the impression minority groups have had on the Supreme Court. She analyzes a variety of minority Supreme Court justices including African-Americans, females, Jews, and, most important to this research, Catholics. As one of the premiere scholars in her field, she has interviewed several Supreme Court justices in order to gauge their opinions on "representative" appointments for minority groups and what role their unique minority perspectives have on decisions.

The previous articles comment on the impact religion has on judicial decision-making. This concept is new to the field in comparison to the legal model of decision-making. However, since this research is in the early stages of development, few statistical models have been formulated to study the specific influence religion has; in this regard, it is different from the legal and attitudinal model studies. Through time, the hope of many scholars studying this component of judicial decision-making is that more research and more statistical evidence can be provided to cement a causal relationship as provided for the legal, attitudinal, and strategic action models.

### *Catholicism and Judicial Decision-Making*

A third aspect of my research is the specific impact of religion on the thirteen Catholic members of the Supreme Court. Perry, as aforementioned, has conducted extensive investigation into the study of minorities on the Supreme Court; Catholicism is one minority on which she has continually and comprehensively focused her inquiries. One of Perry's articles, featured in *Catholics and Politics* compiled by Heyer, Rozell, and Genovese, records a history of the Supreme Court's so-called "Catholic seat," first occupied by Roger B. Taney. Perry pays particular attention to the new Catholic majority and uses this article as a foundation for her new book *Catholics and the Supreme Court*.

Several recent newspaper articles also speak to the impact of Catholicism on the Supreme Court. Since the confirmation of Sonia Sotomayor as the sixth Catholic justice, many journalists have begun interviewing justices and legal scholars in order to determine the possible ramifications of a Catholic-majority Court.

In addition to the aforementioned references, Hitchcock has focused on the specific relationship between Catholics and the traditional Supreme Court establishment. He highlights the problems and the uneasy relationship between the two factions in regard to anti-Catholic sentiments. Obviously with a newly-created Catholic majority, this historical essay provides a basis of record for Catholic participation and acceptance to the Supreme Court.

Kannar examines the effect Justice Antonin Scalia's conservative Catholic value system impacts the manner in which he makes judicial determinations. In addition, Ward has completed an individual case study of Catholic justice Anthony Kennedy. Ward views Kennedy's Catholicism through the lens of abortion-related cases and how he formulates his decisions—

from neither a personal nor attitudinal model but rather from a fused model based on political preference.

The Pew Forum on Religion and Public Life surveys and records statistical information about the religious life of American citizens and public officials and the extent that this religious vigor affects the governmental functioning of the United States. As well as providing quantitative data, the Pew Forum also hosts panel discussions with some of today's foremost religious leaders and public governmental officials regarding the role of religion in public life.

As previously stated, this body of research is constantly expanding due to the newly-formed Catholic majority. On the horizon, several books are being written in regard to this topic, including the aforementioned work by Perry. Through the analysis of Supreme Court cases that have direct links to the policy endorsements made by the Catholic Church—such as gay rights, abortion, and the death penalty—I plan to add to the body of research. Though a new topic in the discussion of judicial decision-making, the inclusion of the impact of Catholicism on the United States Supreme Court provides another avenue for understanding judicial decision-making.

### *Methods*

I also seek to investigate the possible consequences a Catholic-majority Supreme Court may have on future Supreme Court decisions. I will provide an overview of the history of Catholicism on the Supreme Court. I also seek to answer the question: to what extent do justices use the Constitution and outside factors, such as faith and religious affiliation, to establish judicial precedent?

As a basis for my methodology, I will compare two Catholic justices in a study of a sample of their judicial opinions, case opinions, or majority votes. I will concentrate on two

Catholic Supreme Court justices with two very different ideologies, but very similar backgrounds -- a politically-moderate Catholic, Anthony Kennedy, and a conservative Catholic, Antonin Scalia. By examining two Catholic justices with dissimilar ideological convictions, I hope to highlight the impact their Catholicism had on each of their decisions in traditionally “Catholic cases” relating to gay rights, abortion, and the death penalty.

In the qualitative portion of my research, I will employ an original method I have constructed in order to analyze the decisions of Catholic justices. First, I will explore the official policy stances of the Catholic Church in America. On many issues, the Church has published its official stance. These policy opinions are articulated through statements issued by the Catholic hierarchy in America as well as from the Vatican. However, for a more concrete portrayal of the Holy See’s official policies in regard to political, social, and moral issues, many resources are available. One such resource is the United States Conference of Catholic Bishops (USCCB), which serves as a hierarchy for the Church within the United States. This group determines the Church’s stance on a variety of issues, including the aforementioned. The USCCB serves to unite the Catholic Church in America and help believers apply its teachings to their everyday lives.

After determining the Catholic Church’s official position on a variety of politically-important issues, I will then compare the determinations of both justices in order to clarify the similarities and distinctions between the Church’s position and that of the individual justices. Through this study, I will assemble a compilation of qualitative data which will further my inquiry into the influence that the Catholic faith can have on Supreme Court decisions.

Over three chapters, I will examine the likelihood that Supreme Court Justices Antonin Scalia and Anthony Kennedy have applied their own personal morality, influenced by their

devout Roman Catholicism, within the context of their judicial decision-making. I will examine three socio-religious issues that have had their constitutionality determined by the Supreme Court, specifically in regard to the opinions of Justices Scalia and Kennedy. These issues will include: (1) homosexuality and gay rights, (2) abortion law, and (3) capital punishment. In order to fully analyze each issue, I will provide the official stance of the Catholic Church on each topic as well as a brief history of each issue within the context of Supreme Court rulings. This portion will be followed by an analysis of relevant judicial decisions by Justices Scalia and Kennedy.

The main question that this study asks is: can religion, specifically Catholicism, influence Supreme Court decision-making? Furthermore, if the answer to this question is affirmative, can the argument be made that faith-based influence is able to supersede ideological principles and constitutional interpretations to provide the foundational element required for judicial decisions? Historically the answer to both of these questions has leaned toward the negative. However, with the recent influx of diversity into America's judicial institutions, a variety of social factors, including gender, race, ethnicity, socioeconomic status, and religion, is appearing in the realm of judicial decision-making study.

**Chapter Two**  
The Development of Judicial Thought

### *Development and Judicial Decision-Making*

Of the various court systems, the United States Supreme Court is the single body that can claim creation by the writers of the Constitution. Though sparsely described, Article III's court system solely created the Supreme Court with provisional clauses for the creation of lesser courts at the discretion of Congress.

Perhaps the most relevant aspect of the Supreme Court's jurisdiction to our discussion is the ability of the court to utilize judicial review. With this power, the Court is able to interpret the constitutionality of laws, regulations, and executive actions. Because of the increasing emphasis placed on constitutional interpretation, justices have become more and more scrutinized for their ideologies when being considered for Supreme Court nomination. No longer is it enough to be a legal scholar who can interpret, read, analyze, and apply the Constitution's articles and amendments, but in today's political climate, a prospective justice must also be willing to follow along with the desires of the majority of Congress, the White House, and the general public in order to be confirmed; without doubt, the role of a Supreme Court justice has become increasingly politicized.

Scholars of judicial decision-making continue to research the relevant factors which contribute to a justice's adjudication. Epstein and Knight point out the two main models of judicial-decision making -- the legal and attitudinal models. The legal model advocates a strict view of judicial interpretation based solely on the legality and constitutionality of a particular law, executive order, et cetera; however, Epstein and Knight state that "justices are strategic actors" who can sometimes act on personal impulses and apolitical influences as well as cultural or social factors when examining a case (22-51). In layman's terms, this can mean that policy is

not made inside of a context-free vacuum. Environmental influences and factors can, and will, often play a role in the decisions of justices. This model is referred to as the attitudinal model and has become the standard for most scholars in terms of judicial decision-making.

*Justice Identity: Ideological, Racial Ethnocentricity, Gender, and Religious*

There have been a total of 112 justices appointed to the US Supreme Court. Historically the composition of the Court maintained a static image which mirrored the ruling sector of citizens for the time period -- white male Protestants. Over time, several symbolic seats on the Court were “created” in order to represent a wider variety of the populace-at-large. Still, the control and ultimate impact of the Court was left up to white male Protestant justices.

One factor that has become important for justices, the presidents who appoint them, the Senate that approves them, and the public-at-large is ideological identity and preference. Each justice’s specific ideological preference may allow for the presentation of a predetermined agenda of public policy issues to be addressed and rectified. For instance, a justice with a conservative ideology may push for greater governmental involvement in personal issues while maintaining a hard-line of governmental non-intervention when dealing with economic, tax, and trade policies. In contrast, a justice who aligns him- or herself with a more moderate or liberal ideology may seek to ensure the promulgation of welfare policy. Regardless of ideological preference, both of the examples constitute a very active justice who seeks to use his or her ideology in order to influence public policy. The use of ideology in judicial identity has become particularly relevant to today’s political climate in which governmental officials use political issues as “litmus tests” in order to determine the viability of candidates who will continually side with their partisan views. This mindset from the executive and legislative branches, as well as the

public, changes the lens from which society views Supreme Court justices; they are no longer solely instruments of public policy, but also ideologically-categorized interpreters of the law. This newly-created lens creates the idea of so-called conservative and liberal justices.

In addition to ideology, race and ethnicity are other factors that aid in the construction of a justice's judicial identity. As previously mentioned, almost all of the justices of the United States Supreme Court have been white or Caucasian. The first African-American justice was not appointed until 1967 with the confirmation of Thurgood Marshall. Upon his retirement during the George H.W. Bush administration, there was a great deal of discussion about whether Marshall's seat would be replaced by another African-American (Greenburg 110). The creation of an "African-American" seat on the Court was something that plagued Bush as he made a decision about an appointment. He stated that he "was nervous about the 'optics'" of the situation (110). In other words, he was concerned that simply "replacing one black justice with another" would create a "quota seat," which he did not wish to do (110). However, with his nomination and eventual confirmation of Clarence Thomas, precedent was created for the presence of a black justice on the Court.

In addition, this idea for a racial-ethnocentric seat may have been furthered with the recent confirmation of Sonia Sotomayor, the first Hispanic justice to serve on the Supreme Court. Whether or not the decision of the Obama administration to nominate a Hispanic justice will lay the foundation for a Hispanic justice remains to be seen.

Ronald Reagan fulfilled his 1980 campaign promise to appoint the first woman to the Supreme Court by nominating Sandra Day O'Connor and thus, created symbolic representation for women. While this action was symbolic for the Women's Rights Movement, it was more of a

political move for Reagan, which O'Connor realized (Greenburg 12). She later stated, "It had nothing to do with me. He was hoping to get votes from women, I assume, and rightly so" (12). Reagan's public statements made O'Connor's nomination seem like he was carving out a spot for women on the Court in order to represent half of the nation's populace.

Upon the retirement of O'Connor, Greenburg also discusses her replacement on the Court by a male. O'Connor stated her disappointment that a woman was not being kept as a representative on the Court (213). To her, the choices made by the Bush White House indicated a failure "to appreciate the significance of more than one female voice on the bench" (213-14). Women, in her opinion, were able to bring "different life experiences" to the bench that could aid in their decision-making skills (214). O'Connor and other advocates for female justices have felt that the "female seat" should remain intact. At present, there are three women on the Court (Ruth Bader-Ginsburg, Sonia Sotomayor, and Elena Kagan;) as a result of this female presence, one could argue that the "female seat" may have been abandoned in favor of a gender-blind nomination process that seeks to find the best legal scholar, and not the best man or woman for a particular seat. Regardless, it is clear that gender has played a vital role in determining specific judicial identity.

Most important to the discussion of the emphasis of Catholicism on the Supreme Court is judicial identity derived from religion and religious beliefs. Of the 112 justices who have served on the Court, an overwhelming majority have been Protestant -- a total of ninety-one justices. However, at present, no Protestants serve on the Court. This shift, heralded by the retirement of John Paul Stevens, is attributable to many factors, including the embrace of multiculturalism in

American society, but it is yet to be determined whether or not this fact will have any effect on the Supreme Court's rulings.

The current Court is composed of three Jewish justices and six Catholic justices. A total of eight Jewish justices have served on the Supreme Court of the United States. The first of these was Louis Brandeis who was appointed in 1916. Between that time and the late 1960s, a Jewish judge continually rotated into that seat. Thus, it becomes evident that a "Jewish seat" has existed on the Supreme Court, similarly to that of African-Americans and women.

In addition to Jewish justices, there have been a total of thirteen Catholic justices appointed to the Supreme Court. The first Catholic justice to serve on the Court was Roger B. Taney, nominated in 1836. During the era surrounding World War II, Catholic justices, like Jewish justices, were continually given a single seat on the Court, a presumptive "Catholic seat." However, the idea of a "Catholic seat" has been shattered due to the contemporary shift of Presidents -- both Democrats and Republicans -- to nominate Catholic justices. With the current composition of the Court, Catholics have been statistically overrepresented to the point that the Court no longer looks like America (Rosen). The effect that this shift will have on the American legal system through the Supreme Court is yet to be determined and sets the stage for a multitude of research in regard to the increase of representative Catholicism on the Court.

**Chapter Three**  
A Tale of Two Justices -- A Mirage of Similarity

Justices, as human beings with malleable opinions, can be swayed by a variety of factors: personal political ideology, socioeconomic status, viewpoints on morality and ethics often shaped by religious belief and commitment, gender, ethnic background, educational experience, familial influence, and media opinion (Lindquist and Solberg). Of course, this list should also include Constitutional interpretation. All of these factors lead politicians, judges, and other policy-makers to the decisions they make, and often these influences are at their most-heightened effect during childhood, adolescence, and young adult stages when the foundations of many opinions begin forming. Thus, it stands to reason that examining the biographies of individuals can lead to important discoveries in regard to their beliefs and decision-making processes.

I will examine the biographies of two United States Supreme Court justices, Antonin Scalia and Anthony Kennedy, in order to ultimately determine the influences that aided in the formation of their decision-making, Constitutional interpretations, and opinions, specifically in regard to their shared religion -- Catholicism. At face value, these two justices appear very similar biographically. Both Scalia and Kennedy are seventy-six years old, educated at Harvard Law School, and were appointed during the second-term of President Ronald Reagan in the hopes that they would bring a conservative voice to the Court. And, finally, both men share the Catholic faith as their religion. However, by examining the lives of these two influential men, one can better understand the many similarities and differences between the two justices' approaches to decision-making, constitutional interpretations, and allowing their Catholicism to influence their votes. In order to do so, I will examine each justice's parental influence, education, adulthood and professional life, and, most importantly, religious background.

### *Antonin Scalia*

On March 11, 1936, Antonin Gregory Scalia was born to Salvatore Eugene Scalia and his wife Catherine Panaro Scalia at Mercer Hospital in Trenton, New Jersey. Antonin would be the Catholic couple's only child, a rarity for traditionalist Roman Catholic families of the time (Biskupic 11).

### *Parental Influence*

Antonin's mother, Catherine Panaro, came from a very large, Italian family that grew after her parents immigrated to the United States from Italy to Trenton via New York City, like many immigrants of the time. Catherine grew up as the daughter of a tailor who worked hard to assimilate into traditional and mainstream American society and eventually deserted the family for another woman. She eventually became a school teacher, and her siblings also found success by working hard and succeeding in a variety of jobs. One core traditional value of the Panaro family was their religion as they always gathered to "[attend] Mass at St. Mary's Cathedral on Sundays" followed by a family meal at the family home. Thus, family values and religious commitment were very important. (Biskupic 11-13)

Antonin's father arrived at Ellis Island in 1920 with his father, mother, and sister from Sicily. The family found their way to Trenton where they "surrounded themselves with others from their home country and found little reason to learn more than a few words of English." However, Salvatore Eugene, Antonin's father, sought to learn English and embrace American cultural standards as well as his own Italian ones. He was very successful and earned degrees from Rutgers University and Columbia University on the way to receiving his doctorate (Biskupic 13-14).

Salvatore and Catherine were married in 1929 and did not have a child until 1936 when Antonin, often called Nino, was born. Interestingly enough, despite Catherine's large family, Antonin would go on to be "the only child of his generation from both sides of the family" (Biskupic 14). Thus, Scalia received much attention from many of his family members as a child, particularly since his family unit often lived with various aunts and uncles while living in Trenton. Even after moving to Queens, the rest of the Scalia's family moved there, and Antonin continued to enjoy an attention-filled life (Biskupic 18).

Scalia's father began teaching at a New York City college while the family still lived in Trenton; then the family eventually moved to Queens. Biskupic, through interviews with Scalia himself, states that the younger Scalia thought his father to be "severe" and "demanding" (15). Perhaps this evaluation is a fair assessment considering the elder Scalia's rise to educational achievement came during a time when Italians were often discriminated against for a variety of reasons (Biskupic 16). Often, Italian Catholics were referred to as vagrants or anarchists, like Sacco and Vanzetti (Biskupic 16). Thus, Salvatore rose to great heights by sheer hard work and determination in the face of this ever-present discrimination against his cultural heritage.

Biskupic points out that the younger Scalia was kept away from the harsh discrimination through the "insular nature of his parents' families" (16). Yet, she notes that while Antonin was not heavily influenced by the criticism of his heritage, it was made up for by the transference of familial traits which have contributed to his judicial style. From the Panaros, his mother's family, Scalia received "a sense of showmanship and the gestures of comical exaggeration," characteristics he is well-known for by the style and delivery of his judicial decisions, as well as "his first legal and political model" in his uncle Vince, who was a lawyer and local politician

(Biskupic 17). From his father, Scalia learned “to value the words of a text and appreciate cast-iron rules...” (Biskupic 17). Based on that appreciation, it is no wonder that Scalia holds such a strict textual view of the Constitution. Because of these familial influences, which are easy to mark and trace in his character, Scalia has become the individual who sits on the bench of the highest court of the United States and is unafraid to state his opinions, beliefs, and decisions both compassionately and dramatically.

### *Education and Adulthood*

From an early age, Antonin Scalia was taught the importance of education. His parents “focused on their only child’s schooling” by providing a multitude of books and study materials within the home environment that “[fostered] an intellectualism that put Antonin a step ahead of the other striving sons of immigrants in the Irish-Italian neighborhood” (Biskupic 18). Besides this presence of academic pressure, Antonin’s father was constantly working on academic research at home. Scalia himself recalls his father “writing his doctorate downstairs in the basement” (Biskupic 18). Scalia also “idolized his father, whom he would later call ‘a much more scholarly and intellectual person than I am...he always had a book in front of his face” (Rosen 189). All in all, his parents saw their only child’s education as a stepping stone to success and accomplishment. Because of this they pushed him to seek out intellectual pursuits instead of recreational activities (Biskupic 18).

After finishing his elementary education at a public school in Queens that had been supplemented by Catholic education classes, Scalia sought to attend a well-known and highly-esteemed Catholic prep school in Manhattan but failed the entrance exam; instead, he was accepted, on full scholarship, to Xavier High School, a Jesuit-run high school (Biskupic 21). The

school was very strict, requiring students to wear uniforms and participate in Junior ROTC, as typical of Jesuit-run educational institutions (Biskupic 21). According to Biskupic, Xavier High School helped to “[establish] Antonin’s academic prowess, [entrench] his regard for Catholicism, and [reinforce] his rule-oriented nature” (21). The Jesuit teaching of the school stated that all activities, particularly academic ones, were “rooted in and quieted by religious principles” (Biskupic 21). In other words, religious principles were superior to all others; regardless of the subject matter, students of the school should seek out religion to aid in their overall understanding of the world-at-large.

While at Xavier, he also was known for his piety to the Catholic religion. A school newspaper profile called him a “leader in the Catholic life” and “an exemplary Catholic” (Biskupic 22). He even considered entering the priesthood after high school, but the pressure to continue the family line and the reality of being an only child discouraged him from joining the clergy (Biskupic 22).

After graduating as valedictorian of his high school class, Scalia continued his Jesuit education at Georgetown University (Biskupic 24). Scalia’s time at Georgetown seemed to “[reinforce] his Catholic beliefs and conservatism” (Biskupic 24). Completing his history major with oral examinations before a panel of professors, Scalia recalls being asked a question about what he considered the most significant event in history. Without a definitive answer for the panel, Scalia was told the Incarnation of Jesus Christ was the most significant event in history (Biskupic 25).

Clearly Georgetown’s Jesuit teachings emphasized Catholicism by teaching through the lens of its religious principles. Biskupic notes that Scalia later stated, “It was the last lesson I

learned at Georgetown: not to separate your religious life from your intellectual life. They're not separate" (Biskupic 25). It is this mentality that has marked Scalia's tenure as a justice of the United States Supreme Court; furthermore, "this revelation would indeed define the justice's life and his place among American leaders in the law" (Biskupic 25).

After graduating from Georgetown, Scalia enrolled at Harvard Law School where his passions for the logical and regulatory were acknowledged. His Catholicism remained an important aspect of his life as "he joined the St. Thomas More Society, a fellowship of Catholic students" that cemented his conservative Catholic viewpoints (Biskupic 27). In addition, while at Harvard, Scalia met his wife Maureen on a blind date. Both were devout Catholics, and Scalia himself notes that their religion "was perhaps the most important thing that we had in common (Biskupic 31). The pair married in 1960 and, according to Scalia, as Catholics they realized the importance of having children "when God gives them to you" (Biskupic 31). In fact, God gave the Scalia family nine children -- one of whom became a Catholic priest (Toobin 233). Thus, Scalia's Catholicism clearly remained important to him in both his private and professional lives.

### *Professional Life*

After graduating from Harvard Law as valedictorian and member of the law review, a highly-successful law school experience, Scalia worked for a law firm in Cleveland for a brief period of time (Toobin 233). He then became a law professor at several universities, including the University of Virginia (Rosen 191). It was during his tenure as a law professor in 1974 that Scalia was nominated to serve as the head of the Justice Department's Office of Legal Counsel, a position he maintained throughout the Ford administration (Rosen 191). Scalia, present during a tumultuous time considering the Watergate scandal, even "issued a legal opinion saying that

Nixon was entitled to keep the tapes of his presidential meetings and phone calls -- a position the Supreme Court later rejected” (Rosen 191). Clearly Scalia’s ideological conservatism had already been constructed in his support for Nixon.

Scalia, working for the executive branch, developed a strong bias against the excess power of Congress and advocated for “strong executive power shared by other conservatives of his era” (Rosen 191). By reading his judicial opinions, it becomes clear that this idea has stayed with him throughout his career.

After departing from the Justice Department at the conclusion of the Ford administration, Scalia returned to the classroom teaching law at the University of Chicago (Toobin 191). In 1982, Scalia returned to a governmental position when he was appointed by President Ronald Reagan to the U.S. Court of Appeals due to his overt conservative ideology (Toobin 192). According to Toobin, Scalia “distinguished himself with his caustic wit and his vigorous advocacy of judicial deference to administrative agencies” (192).

Only four years later, Reagan appointed Scalia to the United States Supreme Court as an associate justice, a position that he has held for twenty-five years. During confirmation hearings, Scalia “defended his judicial philosophy of ‘original meaning,’” a form of constitutional interpretation which reads the Constitution literally and does not attempt to view it as a malleable document (Rosen 192). All in all, Scalia was confirmed by the Senate overwhelmingly with “less than five minutes of debate by a vote of 98 to 0” (Rosen 193). At the time, according to Rosen, it was thought that Scalia would act as a peacemaker and a “masterful consensus builder because of his wit and charm” (193). However, it should be clear to anyone who follows the modern Court that Scalia has, in contrast, “[focused] more on defending his own ideological purity than

on persuading skeptical colleagues, and [has alienated] them in the process” (Rosen 193). As a justice of the US Supreme Court, Scalia has made his conservative opinions well-known and, many would argue, has allowed his ideology to cloud his constitutional interpretations on a variety of important issues -- both secular and religious.

### *Religion*

Scalia’s religious devotion has always played a key role in his life. From an early age, his parents and his family stressed their Catholicism on their son. While enrolled in a public elementary school in Queens, Scalia was a beneficiary of the “release time” program. This program “allowed public school students to take time off for religious training” and was upheld by the Supreme Court in 1940 (Rosen 189). With a note from Scalia’s parents in hand, he could leave public school during the middle of the day on Wednesdays and attend a Catholic school for further religious instruction (Rosen 189). As an adult, Scalia has applauded the efforts of Justice William O. Douglas for upholding the constitutionality of the program and also for “Douglas’s observation that ‘we are religious people whose institutions presuppose a Supreme Being’” (Rosen 189).

As a high school student during a controversial time in which the Catholic Church was becoming more progressive, one fellow classmate remarked that Scalia “could have been a member of the Curia,” the Roman Catholic body that operates on behalf of the Pope (Rosen 190). Scalia’s Catholicism only strengthened over the next several years as he became a father to a growing family.

During the 1970s, Scalia would drive his family from their home in Virginia to Washington, D.C., to attend the Cathedral of St. Matthew the Apostle Catholic Church, the same

church where Red Mass is held on the Sunday before the first Monday in October and the start of the Supreme Court's annual term (Biskupic 185). Scalia had become very disillusioned with the new liberalizations of the Catholic Church in American society as they "[veered] away from solemn organ music toward folksier guitar masses" (Biskupic 185). Scalia preferred a traditional Latin Mass in the style of Pre-Vatican II worship, and St. Matthew's provided that for him and his family (Biskupic 185). Regardless of the family's location, Scalia always made it important to attend a traditional Latin Mass despite the one-hour drives that might require. If a priest offended Scalia's traditional sensibilities, such as calling the manger "fanciful" or using gimmicks to engage the congregation, he quickly made his frustrations known and found another church he found to be more reverent (Biskupic 186).

According to Biskupic, "traditional Catholicism [is] integral to Scalia's identity" as a person (186). Even his place on the Supreme Court has been marked by his religious identification as only six Catholics had been named to the Court before his appointment (Biskupic 187). Scalia made himself known as a Catholic justice through his own actions and also those of the media, who sought to emphasize "the importance of Catholicism to his life and his sense of himself" (Biskupic 187).

Scalia was also very willing to speak about his religion before audiences and the media-at-large. While other Catholic justices of the past "had even taken pains to downplay their religion -- perhaps in response to earlier anti-Catholic bigotry," Scalia embraced his Catholicism and discussed it publicly (Biskupic 188). Because of this commitment to his religion, Scalia has often been applauded by conservative Christians across America regardless of their specific denomination.

In regard to his rulings as a justice of the United States Supreme Court, Scalia has “repeatedly rejected the notion that his Catholicism directed his rulings” (Biskupic 191). However, many scholars and journalists who study the decisions of Scalia and the Court itself have argued otherwise and have pointed out the parallels between his ideological conservatism and his constitutional interpretation. Rosen states:

One commentator argues that Scalia came to approach the Constitution in the same way that Catholics before the Second Vatican Council were taught to approach the Latin Mass: they were to ‘move through it with intent fidelity, with legalistic care,’ subordinating their personal desires to codified rules. (190)

Constantly criticized for his beliefs, actions, and court opinions, Scalia has almost taken it upon himself to act as a symbolic martyr and tool for the rest of the conservative religious community by calling on his fellow believers to “be fools for Christ” and “have the courage to suffer the contempt of the sophisticated world” (Toobin 234). By believing the tenets of a pre-Vatican II Catholicism, Scalia has made his Catholicism a key tenet of his character -- both public and private. Without a basic understanding of his religious commitment, one cannot fully understand the reasoning and the logic behind the Supreme Court decisions of Antonin Scalia.

### *Anthony Kennedy*

There is little literature chronicling the life and background of Anthony Kennedy, especially in comparison to Scalia. Perhaps this is due to Scalia’s magnetism and presence in the public sphere in regard to Kennedy who has always portrayed himself as a private man -- “a provincial lawyer tethered to the same small city for his entire life” (Toobin 212). While this idea

of Kennedy is somewhat of a reality, it is also an image that is “misleading” as Kennedy is not really an “insular man,” just a private one (Toobin 212).

### *Childhood and Youth*

Anthony McLeod Kennedy was born on July 23, 1936, just four months after Scalia, in Sacramento, California. He was the second of three children born to upper-middle class parents Anthony J. Kennedy, a lawyer and lobbyist, and Gladys McLeod (Goldman). Kennedy’s father was a well-known lobbyist in the California legislative assembly and was “best known for his rousing advocacy (and entertaining) on behalf of the California liquor industry” (Toobin 213). However, due to his father’s persona as a Sacramento “gladhandler,” the younger Kennedy sought a different image for himself once becoming a lawyer (Toobin 213). His mother, Gladys, “participated in many Sacramento civic activities” and was politically active (Goldman).

As a child, Kennedy was influenced by Chief Justice Earl Warren, a family friend of his father’s and, at the time, Governor of California (Rosen 15). Because of this close relationship, many scholars have noted the similarities between the two justice’s court-related actions. For example, Rosen notes:

Kennedy’s opinions, as a result, sometimes call to mind a high school civics lesson that aspires to be chiseled on a monument. In this sense, his performance on the Court resembles that of another even-tempered, goodhearted, moderate Republican from Sacramento: Earl Warren, a family friend at whose feet Kennedy played as a toddler. Warren had a similar impatience for the niceties of legal doctrine, a similar penchant for expressing simple constitutional principles in

ringing terms, and a similar lack of concern for the costs of short-circuiting political debates with extravagant demonstrations of judicial power. (15)

Thus, this early relationship with a Supreme Court Justice may have helped to form his own approach to judicial decision-making. In addition to this experience, Kennedy, as a teenager, worked for his uncle, an oil driller, on oil rigs in Canada and Louisiana (Toobin 213).

### *Education*

Upon graduation from a Sacramento high school, Kennedy enrolled at Stanford University, where he eventually graduated with a Bachelor of Arts degree in Political Science. At Stanford, Kennedy was given the opportunity to study abroad for a year at the London School of Economics and “reveled in the range of student opinion and the vehemence of political debate” (Toobin 213). Thus, at a young age, Kennedy had many political experiences -- both local and global. After graduation from Stanford, Kennedy enrolled at Harvard Law School, graduating cum laude in 1961; he was also a peer of Antonin Scalia as their study at Harvard overlapped (Goldman).

### *Professional Life*

After leaving Harvard, Kennedy obtained a job as an associate at a law firm in San Francisco (Goldman). During this time, he also “served a short term of active duty in the National Guard” (CQ Press). Hardly established at his new job, Kennedy’s father suddenly passed away in 1963, and Kennedy returned to Sacramento to take over the family law firm. Also in 1963, Kennedy married his wife Mary Davis; the couple would eventually have three children (Goldman).

Kennedy then began setting up the firm for himself with the many clients his father had accumulated over the years. Toobin states that Kennedy was able to maintain many of the clients of his father but had “a very different persona around Sacramento” as an academic (213). In fact, the clients Kennedy had inherited soon “discovered their new lawyer to have just as much, if not more, legal skills than his father” (Goldman). Kennedy, working as a lobbyist, became familiar with and well-known within California political circles, making connections to Ronald Reagan and Ed Meese (Goldman).

During this time period, Kennedy, fresh out of law school himself, began teaching constitutional law at a Sacramento’s McGeorge School of Law of the University of the Pacific (Goldman). Within his class, he was known to emphasize the Commerce Clause (CQ Press). Toobin points out that “Kennedy’s idea of himself as a teacher, and of law as a transmitter of society’s values, was central to his identity” (Toobin 213).

Through his connections with Ronald Reagan, Kennedy was appointed by President Gerald Ford to the bench of the Ninth Circuit of the US Court of Appeals in 1975 (CQ Press). At the time, he was thirty-nine years old -- “the youngest judge in any of the federal appellate courts and the third youngest ever appointed to a federal appellate court” (CQ Press). During his twelve-year tenure at the Ninth Circuit, he “took part in more than 1400 decisions and wrote more than 400 opinions” (CQ Press). In addition, both Kennedy and Scalia found their way into the judicial system during the administrations of Republican presidents.

Kennedy’s rise to the Supreme Court is interesting to note since he came on the heels of a failed Reagan nomination in that of Robert Bork and the withdrawal of nomination by Douglas H. Ginsburg. Kennedy, apparently third on the list of potential nominees, “carried the reputation

of a devoted family man, a devout Roman Catholic, and a loyal Republican” (CQ Press). Also, Kennedy was assuredly “less conservative” than his nominee predecessors. The CQ Press profile of Kennedy states:

Although Justice Kennedy has taken conservative positions in many important constitutional areas and voted more often with Chief Justice William Rehnquist than any member of the Court, he has in certain high-profile cases exhibited a streak of independence, parting company with those who anchored the Rehnquist Court’s right wing, the chief justice and Justices Antonin Scalia and Clarence Thomas. (CQ Press)

Overall, in 1988, Kennedy’s nomination to the Supreme Court, like Scalia’s, was overwhelmingly approved by the Senate due to a bipartisan approval which voted unanimously for his nomination (Goldman).

### *Religion*

Kennedy, in another similarity to Antonin Scalia, is a devout Roman Catholic. However, while Scalia has “relished the skepticism of critics” by overtly denouncing the elite and “sophisticated” world, Kennedy has advocated an opposite viewpoint keeping his own personal religious beliefs and Catholicism far more private (Toobin 234).

Although Kennedy’s personal devotion to his Catholicism has not been as publicly-noted as Scalia’s, it is clear that Kennedy does take his religious convictions seriously as a practicing Catholic. Toobin states that “Kennedy was also a serious Catholic, of pre-Vatican II vintage, who went to Mass every Sunday and prayed in the old-fashioned manner, hands clasped before

him” (Toobin 62). In addition, it is clear that Kennedy held the personal opinion that abortion is a moral injustice, an opinion shared by the Catholic Church:

Abortion repelled [Kennedy]. He fully adopted his church’s teachings on the subject. Once, before he joined the Court, he had called *Roe* the “*Dred Scott* of our time,” a reference to the infamous 1857 ruling that sanctioned slavery and helped spark the Civil War. (62-63)

This comparison to *Dred Scott* would indicate that Kennedy views abortion as an injustice on par with human slavery. Yet, it is clear, through his decisions and opinions, that “Kennedy knew the difference between his duties as a judge and his convictions as a Catholic” (Toobin 63). Kennedy himself once wrote, “The hard fact is that sometimes we must make decisions we do not like” (Toobin 63). Clearly, while appreciating his religion, Kennedy believes he has been able, in his tenure as a justice, to separate his religious life from his professional obligations as a justice.

#### *Importance on Supreme Court*

As a member of the Court, Kennedy has oft been viewed as a centrist conservative, and, with the recent developments and additions to the Court, he has become a swing vote in the context of a polarized Supreme Court with four clearly liberal justices and four clearly conservative justices. Thus, he as often be used to “build bridges between the Court’s conservatives and liberals” (Goldman). As a result, “Kennedy is an important pivot on which close decisions turn,” and his decisions are often essential to the outcome of cases (Goldman). With the casting of his vote, a Supreme Court case could result in a starkly-different outcome.

**Chapter Four**  
Homosexuality, Gay Rights, and *Lawrence v. Texas*

Many political and constitutional issues that find their way to the Supreme Court of the United States are charged with moral and religious undertones; thus, the justices are forced to make sometimes unpopular decisions that they see as constitutionally accurate. Often the mass public relies on their morality when analyzing and answering constitutional questions. However, the Supreme Court is supposed to rely on the Constitution when formulating its decisions. Despite this basis, scholars have determined that justices are occasionally willing to set aside the Constitution in favor of other attitudinal and environmental factors, which can shape their overall decision-making -- judicial or otherwise.

Constitutional questions involving gay rights are one example of this conflict. Today gay rights activists fight to eliminate the discrimination that they continually endure. Activist groups like the Human Rights Campaign work daily to “[advocate] on behalf of LGBT Americans, [mobilize] grassroots actions in diverse communities, [invest] strategically to elect fair-minded individuals to office and [educate] the public about LGBT issues” (Human Rights Campaign). These groups work to affect change within society on behalf of gay Americans. However, for every one of these groups there are also opponents of gay rights. Ultimately, it is up to the Supreme Court to make determinations regarding gay rights.

#### *Official Position of the Catholic Church*

The Catholic Church has fully-defined its theological and moral opinions of homosexuality, same-sex unions and marriages, and gay rights. While the Catholic community is not always wholly unified as to how to deal with issues regarding homosexuality, on the whole, over-arching Catholic bodies, as instruments of the Pope and, as a result, God, have carved clearly-defined opinions of the idea of homosexuality. As a result, these corporate bodies of the

Catholic Church expect their members to follow and consider the Church's stances when making decisions in their own lives -- both personal and public.

Ultimately standards of morality within the Catholic Church, in regard to a variety of issues, are handed down throughout the hierarchical structure of the Church, beginning with the Pope and the Vatican leadership. The Vatican has made their stance clear through a variety of papal bulls issued directly from the Pope and the Roman Curia. In particular, the Vatican released a statement entitled "Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons." Within the document, the Church issued a number of reasons, both scriptural and biological, as to why homosexual unions are disruptive to ensuring the sanctity of marriage in addition to perpetuating sin. The document issues a special charge for public policymakers who are a part of the Catholic Church:

The present Considerations are also intended to give direction to Catholic politicians by indicating the approaches to proposed legislation in this area which would be consistent with the Christian conscience. (Vatican)

In fact, an entire section of the document is devoted to instructing Catholic politicians how to behave in regard to legal recognition of homosexual unions. According to the document, a Catholic engaged in law-making "has a moral duty to express his opposition clearly and publicly and to vote against it" (Vatican). In conclusion, the document states:

Legal recognition of homosexual unions or placing them on the same level as marriage would mean not only the approval of deviant behaviour, with the consequence of making it a model in present-day society, but would also obscure basic values which belong to the common inheritance of humanity. (Vatican)

The Vatican makes their position on unions between gay men and lesbian women quite clear -- they are not to be tolerated or encouraged. In addition, the sitting Pope Benedict XVI has recently released a statement stating that “same-sex unions ‘penalize’ traditional couples and distort the true nature of the family” (Catholic News Service).

Specific to American Catholics, the United States Conference of Catholic Bishops (USCCB) has established clear-cut stances on homosexuality and the sanctity of marriage through their Ad Hoc Committee for the Defense of Marriage. Their message is not as negative as the Vatican in regard to homosexuality but, instead, focuses on supporting the traditional marriage union between a man and a woman. The mission of the committee is extremely straightforward:

The Ad Hoc Committee for the Defense of Marriage assists the bishops and State Catholic Conferences in promoting and defending the authentic teaching of the Church regarding the nature of marriage as a covenant between one man and one woman... (USCCB)

The website also provides a variety of resources and church documents from the USCCB and the Vatican supporting traditional marriage and discouraging the recognition of same-sex marriage and same-sex sexual relations.

As for the mass populace of American Catholics and their identification with the views of the Church, the results vary and have evolved over the past several decades. A survey conducted by the Pew Forum on Religion and Public Life has been carried out since 1996 in order to gauge the opinions of Americans in regard to gay rights, specifically same-sex unions and gay marriage (Pew Forum on Religion and Public Life, 2009). According to the 2009 edition of the survey,

across all demographics “opponents of legalizing same-sex marriage have consistently outnumbered supporters” (Pew Forum, 2009). While 81% of mainline Protestants say they oppose same-sex marriages, Catholics are divided in their opinions:

Meanwhile, in spite of the Catholic Church’s outspoken opposition to same-sex marriage, Catholics are closely divided on the issue, with 45% opposing gay marriage and 39% favoring it. (Pew Forum, 2009)

Catholics are even more supportive of the legal recognition of same-sex civil unions with a total of 59% favoring same-sex civil unions and 28% opposing their recognition (Pew Forum, 2009). Also, in a 2008 survey conducted by the same Pew Forum, a majority of white non-Hispanic Catholics (54%) “[expressed] support for allowing gays and lesbians to adopt children (Pew Forum). Because of these sentiments, the American government, specifically the judicial branch, has had the difficult decision of determining the degree of the extension of gay rights.

### *Legal Background*

In regard to homosexuality and gay rights, the Supreme Court has had few opportunities to determine the constitutionality of laws regulating the activities of homosexuals. There were no cases on the Supreme Court’s docket dealing with this issue until *Bowers v. Hardwick* (478 U.S. 186, 1986). Up until this time, several states had enacted legislation which barred homosexual activity and allowed for punishment through the judicial system. According to Epstein and Walker, at the time *Bowers* was decided by the Court, “half of the states outlawed sodomy” (423).

In *Bowers v. Hardwick*, the Supreme Court dealt with the constitutionality of a Georgia sodomy law that criminalized oral and anal sex between same-sex couples -- not only in public,

but also in the privacy of their own homes. The Georgia law criminalized both heterosexual and homosexual sodomy, but the Court chose only to deal with the law in regard to cases of homosexual sodomy. The Court eventually ruled, in a 5-4 decision, that the Georgia law was constitutional. In the majority opinion, Justice Byron White stated that there was no constitutional right to privacy protecting consensual sexual acts. White wrote that “to claim that a right to engage in [homosexual] conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious” (*Bowers v. Hardwick*, 478 U.S. 186, 1986).

Ten years would pass before the Court would make another ruling in regard to gay rights. During this ten-year period, little had changed in regard to gay rights on the national political landscape; it was a topic considered taboo. Despite the reservations of the mass populace, many more gay men, lesbian women, and transgendered people were willing to make their lifestyles more public than in the past. Colorado voters were among those who felt strongly about the immorality of homosexuality. *Romer v. Evans* (517 U.S. 620, 1996) dealt with an amendment to the Colorado state constitution which prohibited state, county, and city governments from passing laws establishing gay men, lesbian women, bisexual, and transgendered persons as a protected class of citizens. Persons included in a protected, or suspect, class are protected from discrimination and harassment. The Court ruled that the Colorado amendment was unconstitutional in a 6-3 decision. (*Romer v. Evans*, 517 U.S. 620, 1996)

Interestingly this was the first Supreme Court case regarding gay rights for both Justices Kennedy and Scalia. Both wrote opinions for the case with Kennedy in the majority and Scalia in dissent. Kennedy, in his majority opinion, pointed out that the Colorado amendment did the

opposite of what it was intended to do. Not only did it keep members of the homosexual community from receiving additional rights as a protected class, but, according to Kennedy, it led to the possibility of increased discrimination against such persons. Kennedy even went so far to iterate that the law failed the rational basis test, the simplest test for determining the constitutionality of a policy. Thus, the law was deemed unconstitutional because it did not allow for equal protection under the law. (*Romer v. Evans*, 517 U.S. 620, 1996)

Writing the dissent, Justice Scalia held a different viewpoint on the Colorado amendment. Scalia wrote that the majority of the Court had misinterpreted the attempt of the amendment:

[The Colorado amendment] is rather a modest attempt by the seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. (*Romer v. Evans*, 517 U.S. 620, 1996)

Scalia wrote on behalf of the constitutionality of the Colorado amendment and saw it as a contradiction of the Court's earlier ruling in *Bowers*. In addition, Scalia spoke out against what he viewed as judicial activism by the majority and stated that he saw it as "no business of the courts...to take sides in this culture war" (*Romer v. Evans*, 517 U.S. 620, 1996). He even accused his fellow Supreme Court justices of exerting their own political interests by stating that the majority's "opinion [had] no foundation in American constitutional law" and that "striking [the amendment] down [was] an act, not of judicial judgment, but of political will" (*Romer v. Evans*, 517 U.S. 620, 1996). Clearly the two justices had very differing opinions as to the judicial merits of *Romer*.

The next gay rights case the Court reviewed was *Boy Scouts of America v. Dale* (530 U.S. 640, 2000). This case involved an openly gay Scoutmaster, James Dale, who had been removed from his duties by the Boy Scouts of America (BSA) due to his sexual orientation. The private, non-profit organization saw his homosexuality as a blatant contradiction of their values and ethical standards. Because of this action, Dale filed a lawsuit against the BSA on the grounds that his removal had been a violation of the New Jersey state constitution which stipulated that a citizen could not be discriminated against based on a variety of classifications, including sexual orientation. (*Boy Scouts of America v. Dale*, 530 U.S. 640, 2000)

The Court ruled that the Boy Scouts of America, as a private organization, has the constitutional ability to exclude persons from their organization if the organization believes those persons to contradict their missions. Thus, the Court, in a 5-4 decision with a majority that included both Scalia and Kennedy, ruled that the Court could not dictate whether or not the BSA had acted justly or constitutionally since they are a private, non-profit organization. It is important to note that this case did not deal directly with gay rights as in *Bowers* or *Romer*, but rather with the issue of the First Amendment as applied to the potentially-discriminatory actions of private organizations. (*Boy Scouts of America v. Dale*, 530 U.S. 640, 2000)

#### *Lawrence v. Texas: To Overturn a Precedent?*

Perhaps the best measuring stick in regard to gay rights and the Supreme Court is *Lawrence v. Texas* (539 U.S. 558, 2003). Considered an important ruling, *Lawrence* overturned the ruling in *Bowers*. Neither Justice Kennedy nor Justice Scalia had served on the Court when *Bowers* had been decided, which upheld a Georgia state sodomy law criminalizing oral and anal

sex between same-sex couples. This case established a very clear precedent pertaining to gay rights issues, particularly in regard to homosexual sodomy laws.

The Texas Homosexual Conduct Law classified same-sex sexual behavior as a misdemeanor under Texas law. In *Lawrence*, two Texas men were arrested after police entered the home in which the couple were having sexual relations (Greenburg 36). The two men were then jailed and convicted before the case came to the Supreme Court as an appeal.

The Court, in a 6-3 decision, stated that the Texas Homosexual Conduct Law was unconstitutional and violated the Due Process Clause of the Fourteenth Amendment because the law had inhibited the private conduct of citizens inside private residences. As a result of this decision, the Court overturned *Bowers*. The six justices of the majority included Justice Kennedy while the three justices in dissent included Justice Scalia. In fact, Justice Kennedy wrote the majority opinion; Justice Scalia wrote on behalf of the dissenters.

Justice Kennedy discussed the Court's ruling in *Bowers* that had reaffirmed the criminalization of homosexual sodomy (*Lawrence v. Texas*, 2003). While delivering the opinion, Kennedy seemed to apologize for the Court's decision in *Bowers* and said that "the state cannot demean [homosexual's] existence or control their destiny by making their private homosexual conduct a crime" (*Lawrence v. Texas*, 2003). Kennedy's position was very clear. Within the text of the majority opinion, Kennedy decisively stated that *Bowers* was a misstep of the Court and provided many instances within American and international law to reinforce his logic. For instance, Kennedy pointed out that "American laws targeting same-sex couples did not develop until the last third of the 20th century" and only nine states had created laws to this effect to include Arkansas, Kansas, Kentucky, Missouri, Montana, Nevada, Tennessee, Texas, and

Oklahoma (*Lawrence v. Texas*, 2003). On a global level, Kennedy cited a similar decision (*Dudgeon v. United Kingdom*, 1981) handed down by the European Court of Human Rights which ultimately ruled that the laws in place were invalid. In addition, he stated:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. (*Lawrence v. Texas*, 2003)

In short, Kennedy believed that *Bowers* should be overturned; this decision resulted in the elimination of criminalized sodomy.

Despite his bold opinion that overturned precedent, Toobin remarks on Kennedy's Catholicism:

A devout and observant Catholic, [Kennedy] needed no instruction in religious and moral prohibitions on homosexual conduct. He was, simply, a man who had been transformed by the changing world around him. (221)

During the release of the Court's opinion, Kennedy spoke on behalf of the decision regarding morality and stated that America "has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family" (Toobin 221). Kennedy then went on to say that the rules of morality dictated by personal beliefs "*cannot* prescribe what the Constitution commands for all" (Toobin 221).

In stark contrast to Kennedy's opinion, Scalia's dissenting opinion was nothing less than inflammatory. Following the same arguments he made in his dissenting opinion in *Romer*, Scalia

made it extremely clear that he disagreed with Kennedy and the rest of the majority. From the bench, Scalia “asserted that the decision was the product of a law-profession culture that has largely signed on to ‘the homosexual agenda’” (Biskupic 226). To Scalia, by overturning *Bowers*, the Court was taking part in a culture war, not just asserting their powers of judicial review.

Within the text of the written opinion, Scalia found every possible method of ridiculing the justices in the majority. First, Scalia stated that the logic used to overturn *Bowers* was the same as the logic that was used to uphold *Roe v. Wade* (410 U.S. 113, 1973) in *Planned Parenthood v. Casey* (505 U.S. 833, 1992). Thus, he stated that the Court was inconsistent in their application of the Constitution as a result of the justices’ desire to assert their own political opinions (*Lawrence v. Texas*, 2003).

In defense of the Texas Homosexual Conduct Law, Scalia stated that its purpose was to maintain standards of decency and morality:

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are “immoral and unacceptable” -- the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. (*Lawrence v. Texas*, 2003)

Scalia, as in *Romer*, equated same-sex sexual relations with other moral conduct laws and saw the Court’s decisions in regard to sodomy, again, a contradiction of the law and an inconsistent application of the Constitution.

Scalia also drew assumptions about the majority’s opinions toward gay marriage in his written opinion:

This case “does not involve” the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of the Court. Many will hope that, as the Court comfortingly assures us, this is so. (*Lawrence v. Texas*, 2003).

Scalia believed that the Court’s decision in *Romer*, and now *Lawrence*, were merely stepping stones to legalized homosexual marriage or civil unions.

The Court’s opinion on *Lawrence* represented what Scalia most hated about American constitutional law -- judicial activism (Toobin 224). Scalia saw that the Court had kowtowed to “contemporary trends rather than by the immutable rules set down by the framers,” which he despised as an originalist, believing in a strict reading of the Constitution (Toobin 224). As a result, Scalia continued to make statements as to the Court’s mistake in *Lawrence* -- even months *after* the case was decided. While giving a speech to a conservative group, Scalia mocked the decision by stating that the decision “held to be a constitutional right what had been a criminal offense at the time of the founding and for nearly 200 years thereafter” (Biskupic 228). Overall, the timbre of Scalia’s comments was far from amiable.

Gordon points out that Scalia’s dissenting opinions in gay rights cases “[decry] the consequences of recognizing the constitutional equal protection of gays to be free from discrimination based on sexual orientation” (149). To Scalia, the “far-reaching implications” include disruptions to “the current American social order,” American political order, and the definition of marriage (149).

Toobin points out that *Lawrence* “cemented the breach between Kennedy and Scalia” (223). Despite their similar backgrounds, the two men were beginning to find many

disagreements in their judicial decisions. In Scalia's mind, the days of Kennedy conservatism, the reason he was appointed to the Court in the first place, had disappeared over the years in favor of a justice who advocated judicial activism and a living, bendable Constitution. At this point, the two justices, despite being the same age, having attended the same law school, and both being Catholic, could not have been any more ideologically different.

**Chapter Five**  
Abortion -- America's Undue Burden

Abortion is another morality-based, yet politically-charged, issue the Supreme Court has routinely considered. The divide between pro-life and pro-choice advocates in American society has not only plagued politicians seeking office, but it has also been of concern within the modern federal judiciary. Not only have abortion-related cases influenced judicial dockets, but the issue has become key in the Senate's decision to confirm judicial appointments. According to Greenburg's analysis, abortion has become an important issue:

Although abortion involves a fraction of a justice's time...on the Court, it takes on outsized importance among presidential advisers, senators, and interest groups trying to discern whether a nominee is on their side....The nominee's position on abortion becomes almost a marker of his or her liberalism or conservatism, indicating the way he or she views the role of a judge and the proper approach to the law. (221)

Thus, abortion has become a litmus test for determining a justice's political ideology, specifically in regard to moral issues with religious undertones (Greenburg 221).

#### *Official Position of the Catholic Church*

The Catholic Church has historically maintained a staunchly resistant position on abortion. Universally the Catholic Church has made their position clear; they value the sanctity of all life, which includes the unborn. In an excerpt of a Second Vatican Council document from 1965, the Church stated:

Furthermore, whatever is opposed to life itself, such as any type of murder, genocide, abortion, euthanasia or willful self-destruction....all these things and others of their like are infamies indeed. They poison human society, but they do

more harm to those who practice them than those who suffer from the injury.

Moreover, they are of supreme dishonor to the Creator. (USCCB)

The Church as a whole has continuously maintained, since the Second Vatican Council, that any abomination against the sanctity of life is a sin against God. Abortion is no exception to this statement. According to another portion of the same document, “therefore from the moment of its conception life must be guarded with the greatest care while abortion and infanticide are unspeakable crimes” (USCCB). The Church also holds the position that human life begins at the point of conception.

After the decision in *Roe v. Wade* (410 U.S. 113, 1973), which legalized the right of a woman to obtain an abortion, the Catholic Church was extremely vocal in regard to its official stances on abortion. In 1974, only one year after the *Roe* decision, the Vatican published a “Declaration on Procured Abortion.” Within the document the Church pointed out the “impassioned discussions” that had been ignited due to the legalization of abortion (USCCB). Furthermore the Church asserted that legalized abortion was discriminatory to the unborn fetus:

Any discrimination based on the various stages of life is no more justified than any other discrimination. The right to life remains complete in an old person....The right to life is no less to be respected in the small infant just born than in the mature person. From the time that the ovum is fertilized, a life is begun which is neither that of the father or the mother, it is rather the life of a new being with his own growth. (USCCB)

In sum, the Vatican has held a position that abortion is inherently unjust because it denies life to a human being. Even today, over forty years since *Roe*, Pope Benedict XVI has articulated that

“everyone must be helped to become aware of the intrinsic evil of the crime of abortion” (Vatican). Furthermore, he has stated that “politicians and legislators...are duty bound to defend the fundamental right to life” (Vatican).

The Catholic Church, specifically in America, has published many documents dealing with the reconciliation of public law, which legalize abortion procedures, and moral beliefs, which may outlaw abortion. In the United States Conference of Catholic Bishops’ statement, “Pastoral Plan for Pro-Life Activities: A Campaign in Support of Life,” the USCCB asserts that “Catholic civil leaders who reject or ignore the Church’s teaching on the sanctity of human life do so at risk of their own spiritual well-being” (USCCB). In addition, the USCCB website provides countless links to Catholics with papal documents and USCCB resolutions which promote the pro-life view for all Catholics.

Despite the views of the hierarchical Catholic Church, it is up to each individual Catholic to determine how he or she views abortion. The Pew Forum on Religion and Public Life has conducted various surveys in order to gauge public opinion on abortion with a variety of demographical categories, most importantly in regard to religious preference. According to a survey conducted in 2009, Catholics are evenly divided on their stance of abortion. This polarization is indicative of a national trend that has reverberated throughout many demographics. According to the survey, although “the public expresses support for finding a middle ground, most Americans are quite certain their own position on abortion is the right one...” (Pew Forum, 2009).

Overall, the study found that the number of Catholics who support abortion is declining. In a previous study conducted in 2007, 53% of Catholics stated that they believed abortion

should be legal while 42% of Catholics believed abortion should be illegal (Pew Forum, 2009). However, by 2009, only 45% of Catholics believed abortion should be used while 45% believed abortion should be illegal (Pew Forum, 2009). Thus, support seems to be declining even over the past few years.

In addition, it is important to note that one's stance on abortion appears to be linked to religious commitment based on church attendance. Catholics who attended church at least once a week "[exhibited] double-digit declines in support for legal abortion" from 36% to 26% (Pew Forum, 2009). However, among those Catholics who attend church infrequently, support for legal abortion only declined by three percentage points (Pew Forum, 2009). As a result, Catholics who are more likely to regularly attend religious services are more likely to agree with the criminalization of abortion, which is in line with the teachings of the Catholic Church.

The Pew Forum, in the same study, also considered the opinions of Catholics regarding restrictions placed on abortion procedures. Even though about half of all Catholics are in support of legalized abortion, 81% believe women under the age of eighteen should be required to acquire parental consent before terminating pregnancy (Pew Forum, 2009). Also, 67% of Catholics believe it would be best to reduce the overall number of abortions in the United States (Pew Forum, 2009).

More specifically, some studies have been coordinated regarding Catholic policymakers and the influence their Catholicism has on their political opinions, particularly in instances where the two intersect. One such study, conducted by D'Antonio, Tuch, and White, examined "how Roman Catholic members of the U.S. Congress have responded to abortion...by examining their roll-call votes from 1971 through 2006" (D'Antonio, et al. 130). The study's findings indicate

that a consistently high level of polarization” was present during this period, which is consistent with the findings in the previously-mentioned Pew Forum survey from 2009 (D’Antonio, et al. 143). As a result of this polarizing effect of abortion-related issues, Catholic Democrats and Catholic Republicans have been shown to be continually divided over the issue with Democrats more likely to be taking a pro-choice position and Republicans staunchly holding a pro-life position (D’Antonio, et al. 143).

### *Legal Background*

The Supreme Court did not consider any abortion-related cases until *Roe v. Wade* (410 U.S. 113, 1973). This landmark case was filed by Norma McCorvey, an unmarried, pregnant woman who sought an abortion despite the restriction of abortions in Texas. She held that, by refusing an abortion, the state was in violation of the Due Process Clause of the Fourteenth Amendment. The Court had established a constitutional right to privacy regarding sexual reproduction issues eight years earlier in *Griswold v. Connecticut* (381 U.S. 479, 1965). Thus, this right to privacy was argued on behalf in *Roe* by stating that a woman had the right to make a private decision regarding her own reproductive capabilities.

Ultimately the Court held, in a 7-2 decision, that the right for a woman to undergo an abortion procedure is constitutional. Thus, the Texas abortion law, and others like it, violated the Constitution. The dissenters in the case, Justices Byron White and William Rehnquist, argued against the majority’s decision and stated their disgust. Justice White wrote:

I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests

that right with sufficient substance to override most existing state abortion statutes. (*Roe v. Wade*, 410 U.S. 113, 1973)

Basically, as in a plethora of other Supreme Court dissents, Justices White and Rehnquist saw *Roe* as an exercise in judicial activism.

Ultimately *Roe* has been viewed as both a landmark and a controversial decision due to its moral repercussions. Greenburg notes:

[*Roe*] that is both a rallying cry and a dividing line, that is passionately viewed as either a key protector of women's rights or a lawless exercise in judicial overreaching...that has become the ultimate touchstone in the ongoing conflict over culture and values throughout America, has for more than two decades consumed Supreme Court nominations and confirmation proceedings. (223)

*Roe* has been more than just a case in the compendium of American constitutional law; it has also sparked serious, and sometimes violent, political debate.

Due to the controversy surrounding the result of *Roe*, many other abortion-related cases have sprung up to challenge the decision the Court made to legalize abortion over forty years ago. Initially the Court was willing to strike down laws that placed restrictions on the ability of a woman to obtain an abortion. However, as the dynamics of the Court have changed in favor of a more conservative majority, the willingness to uphold *Roe* has dwindled.

For example, the Court heard *Webster v. Reproductive Health Services* (492 U.S. 490, 1989) which was in response to a Missouri statute that restricted abortions by limiting the use of state-mandated funds in the administration of abortions. In addition, the statute's preamble articulated that life begins at conception and placed restrictions on abortions, including: the

prohibition of public employees and public facilities to administer abortions, the banning of counseling services that encouraged abortion, and the mandate that doctors must perform viability testing on women at least twenty weeks pregnant. (*Webster v. Reproductive Health Services*, 1989)

*Webster* is important to this study since it was the first abortion-related case for newly-appointed Justices Kennedy and Scalia. The Court held, in a complicated 5-4 decision, that the Missouri law was permissible under the precedent set by *Roe* and did not overturn the previous decision. Both Kennedy and Scalia voted in the majority. Despite the majority's assertions, due to a myriad of concurring opinions which only agreed with a portion of Chief Justice Rehnquist's majority opinion, *Roe* was not overturned. However, according to Toobin, this case "all but called for the end of *Roe*" and had it not been for the indecisive concurring opinion issued by Justice O'Connor *Roe's* case precedent would have been no more (60). Yet, due to the ultimate decision in *Webster*, abortion-related cases continued to make their way to the Supreme Court's docket.

*Planned Parenthood of Southeastern Pennsylvania v. Casey* (505 U.S. 833, 1992) dealt with the constitutional validity of a series of Pennsylvania laws, collectively the Pennsylvania Abortion Control Act, that mandated a variety of actions in regard to abortion including: parental consent for minors, informed consent through the articulation of abortion-related complications by doctors, a 24-hour waiting period before obtaining an abortion, and the institution of spousal notification for married women.

Although the petitioners and respondents of the case sought to clarify *Roe* and either affirm it or remove it as unconstitutional respectively, the Court issued an extremely ambiguous

decision. Due to the multi-part law and the various requirements it contained, the Court was divided with absolutely no majority and only a plurality of three justices that included O'Connor, Souter, and Kennedy, who had switched his vote from *Webster* only three years prior. The plurality set the only case precedent within *Casey* and "reaffirmed the 'central holding' of the 1973 decision that a woman should have 'some' freedom to terminate a pregnancy" (Epstein and Walker 416). In other words, the Pennsylvania law was in part a violation of the Due Process Clause of the Fourteenth Amendment because it restricted a woman's right to privacy; however, parental consent, informed consent, and a 24-hour waiting period before obtaining an abortion were considered valid restrictions within the law according to the Court's opinion. Only the spousal notification restriction was invalidated. Yet, the complicated, and disjointed, opinion of the Court left more room for abortion-related cases to reach the Court. Still yet, an absolute decision had not been made in regard to *Roe*.

More recently the Court, headed by Chief Justice John Roberts, has developed a more conservative ideological position. As a result, many believe that the *Roe* decision is in jeopardy, and it is only a matter of time until it is overturned. Two recent cases illustrate this point -- *Stenberg v. Carhart* (530 U.S. 914, 2000) and *Gonzales v. Carhart* (550 U.S. 124, 2007). Both cases dealt with statutes -- both state and federal -- that banned the use of partial-birth abortions, a type of abortion procedure "used to terminate pregnancies after four months" (Epstein and Walker 417). In *Stenberg*, the Court considered a Nebraska state law that banned the use of partial-birth abortions, and ultimately, in a 5-4 decision, the Court ruled that the law placed "an undue burden upon a woman's right to make an abortion decision" (*Stenberg v. Carhart*, 2000).

Although the Court's decision here did uphold the decision in *Roe* and reaffirmed in

*Casey*, the close decision seems to indicate some potential willingness to begin limiting abortions. This willingness was evidenced in *Gonzales v. Carhart* (2007) seven years later. The Court had become much more conservative after President George W. Bush's appointments of Chief Justice John Roberts and Justice Samuel Alito, both conservative *and* Catholic.

The *Gonzales* case dealt with a federal law, the Partial Birth Abortion Ban Act, banning partial-birth abortions and is the “only major abortion case decided by the Roberts Court” (Epstein and Walker 417). In contrast to the decision in *Stenberg* which struck down the Nebraska law, the Court in *Gonzales* was willing to uphold the partial-birth abortion ban. Writing the majority decision for a five-justice, all-Catholic majority, Justice Anthony Kennedy, who has often wavered on his judicial opinion regarding abortion, wrote that the respondents in the case did not demonstrate that the federal partial-birth abortion act “[imposed] an undue burden on a woman’s right to abortion based on its overbreadth or lack of a health exception” (*Gonzales v. Carhart*, 2007). Therefore, it was a valid, and constitutional, law.

#### *Kennedy and Scalia in a Post-Roe World*

As previously mentioned, abortion is a highly-controversial, morality-based issue. According to a Pew Forum study, “two-thirds of Americans say they never wonder whether their position on abortion is right or wrong” (Pew Forum, 2009). In a nation where confidence in one’s own opinion is so strong, it is difficult for people to see the benefits to a varying viewpoint. As public figures and policymakers, it becomes imperative that Supreme Court justices, while confident in their own moral opinions about the sanctity of life, focus on the prescribed constitutional guidelines and the legal precedent set before them when making decisions about the constitutionality of laws and statutes dealing with abortion.

During the tenures of Justices Kennedy and Scalia, there have been a few cases dealing with a woman's right to terminate her pregnancy. The specific cases, briefed in detail above, have lasting consequences. However, one must also consider the importance of each justice's individual vote as together they make up the Court's sole, binding opinion that may be used as *stare decisis*.

As previously stated, both Justice Kennedy and Justice Scalia entered the Court in the late 1980s. As a result, both justices' initial encounters with constitutional questions regarding abortion rights developed during *Webster v. Reproductive Health Services* (1989). In a fractured vote, Justice Kennedy voted with the plurality, which also included Chief Justice Rehnquist and Justice White. The plurality asserted that some restrictions could be placed on abortion by the state in question. In order to garner a majority, two other justices wrote concurring opinions, including Justice Scalia. However, since the Court did not reexamine *Roe*, it had no means to overturn the decision. The Court stated that they had no opportunity to reconsider the case due to the differences between *Roe* and *Webster*:

In *Roe*...the Texas statute criminalized the performance of all abortions, except when the mother's life was at stake. [*Webster*] therefore affords us no occasion to revisit the holding of *Roe*, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause, and we leave it undisturbed. To the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases. (*Webster v. Reproductive Health Services*, 1989)

The Court realized the case's parameters did not allow for a drastic change in precedent, but, as a member of the plurality, Kennedy pronounced a judgment consistent with restricting abortion rights.

In addition, Justice Scalia constructed a concurring opinion in *Webster*. While he agreed with many parts of the plurality opinion, he felt it had not gone far enough. In a sharp statement, Scalia stated that the Court should have attempted to take a quick and swift action against *Roe*:

It thus appears that the mansion of constitutionalized abortion law, constructed overnight in *Roe v. Wade*, must be disassembled doorjamb by doorjamb, and never entirely brought down, no matter how wrong it may be. (*Webster v. Reproductive Health Services*, 1989)

In sum, both Justices Kennedy and Scalia, in some form or fashion, voted in favor of abortion restrictions in *Webster*; which, to many, served as a warning sign that *Roe* could be overturned in the future.

However, a clear-cut divide between the opinions of Justices Kennedy and Scalia developed a mere three years later in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992). Kennedy joined a fragmented, three-justice plurality opinion, written by Justice Sandra Day O'Connor, that ultimately reaffirmed the Court's decision in *Roe*:

After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe* should be retained and once again reaffirmed. (*Planned Parenthood v. Casey*, 1992)

Writing for the plurality, Justice O'Connor, joined by Kennedy, asserted that the State should not interfere, via restrictions, with a woman's ability to terminate her pregnancy, sans reason, before the time of viability. Kennedy wholeheartedly agreed with the right of a woman to make her own abortion-related choice in the portion of the opinion he penned:

The liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. (*Planned Parenthood v. Casey*, 1992)

This portion, most assuredly, re-inforced the Court's holdings in *Roe*.

Of course, the issue in question is thus: why did Justice Kennedy so quickly alter his judicial opinion on abortion rights? Although Kennedy himself did not draft a concurring opinion to the plurality opinion written by Justice O'Connor, much study has been done to determine the reasoning behind his shift in position. Initially, as the justices met in preliminary conferences over *Casey*, Kennedy seemed to make his stance evident; as in previous cases, he would seek to restrict, and even possibly overturn, *Roe* (Greenburg 153). Kennedy asserted that "all the provisions [in *Casey*] were constitutional" (Greenburg 153).

However, somewhere along the path between oral argument and formalized opinions, Kennedy began to waver. After Chief Justice Rehnquist issued his majority opinion draft, Kennedy sent Justice Blackmun, who issued the *Roe* opinion in 1973, a note insinuating "developments" had taken place in regard to *Casey* (Toobin 64). Eventually Kennedy contributed to the aforementioned plurality opinion, which had been written privately (Greenburg 156).

Overall Kennedy's motives for change were not clear; however, by agreeing with Justice O'Connor's opinion, Kennedy retreated from his own judicial opinions regarding abortion as well as the teachings of the Catholic Church.

On the other side of the token, Scalia, as typical of his personality, fully indicated his frustrations with his fellow justices in his dissenting opinion in *Casey*. He stated that his legal interpretations remained unchanged from *Webster* while advocating the use of the democratic process in the decision over the legality of abortion. An avid despiser of the so-called culture wars, Scalia called for a system which would solve the abortion question based on "citizens trying to persuade one another and then voting" (*Planned Parenthood v. Casey*, 1992). Scalia went further by stating that "[The Court] should be out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining" (*Planned Parenthood v. Casey*, 1992). Clearly Scalia agreed with his earlier asserted position and sought to overturn *Roe* once and for all.

In the context of a more contemporary setting, the Court has dealt with both *Stenberg v. Carhart* (2000) and *Gonzales v. Carhart* (2007). In both of these cases, Justice Kennedy returned to the more conservative and more restrictive side of each issue. In *Stenberg*, both Kennedy and Scalia wrote dissenting opinions to iterate their displeasure with the majority's decision to strike down the Nebraska restrictions against partial-birth abortion, which Scalia referred to as a form of infanticide in oral argument (Toobin 157). Kennedy's dissent, in contrast with his opinion in *Casey*, asserted that the state should not be kept "from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential" which not only sounds extremely different from the verbiage of the *Casey* opinion but, in fact, sounds more like the

official documents of the Catholic Church that promote the sanctity of all human life. Kennedy also used other verbiage that seemed to align with the vocabulary of pro-life activists, such as his use of the term “abortionists” for doctors who perform abortions (*Stenberg v. Carhart*, 2000). In his conclusion, he even went so far as to state that “medical procedures” like abortion “must be governed by moral principles” (*Stenberg v. Carhart*, 2000). If one had read Kennedy’s prior ruling in *Casey*, it would be hard to imagine the same verbiage, citing morality, could be used by the same justice eight years later. As Toobin appropriately stated, “Kennedy’s hymn to women’s autonomy in 1992 turned into a paean to the life of the unborn in 2000” (380). These two opinions could not have been more divergent.

Scalia also penned his own dissent to the majority. In the text, Scalia asserted the future importance of *Stenberg*, placing it on the same level as *Dred Scott*, a parallel Justice Kennedy had made before in reference to *Roe* (*Stenberg v. Carhart*, 2000). Scalia even went so far as to assert that the majority’s rationale for voting to invalidate the partial-birth abortion ban was a “value judgment” that used a logic not based on legal argument:

[The “undue burden” test] is a value judgment, dependent upon how much one respects (or believes society ought to respect) the life of a partially delivered fetus, and how much one respects (or believes society ought to respect) the freedom of the woman who gave it life to kill it. Evidently, the five Justices in today’s majority value the former less, or the latter more, (or both), than the four of us in dissent. Case closed. (*Stenberg v. Carhart*, 2000)

Scalia’s further assertions make it clear that he believes *Roe* and *Casey* should be overturned. In his conclusion, Scalia stated that “the Court should return [abortion] to the people--where the

Constitution, by its silence on the subject, left it--and let them decide, State by State, whether this practice should be allowed” (*Stenberg v. Carhart*, 2000).

In *Gonzales v. Carhart* (2007), Justices Kennedy and Scalia again voted to restrict abortion procedures. Not only did Kennedy join the majority, but newly-appointed Chief Justice John Roberts assigned the majority opinion to his discretion. Kennedy and the rest of the majority upheld the federal ban on partial-birth abortion procedures while ignoring the question of abortions sought earlier in the term of the pregnancy. Kennedy wrote that the partial-birth abortion ban adopted by Congress was in the interest of the State because partial-birth abortions “[implicate] additional ethical and moral concerns that justify a special prohibition” (*Gonzales v. Carhart*, 2007). Furthermore, the Court had a history of “[confirming] the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned” such as in the cases of capital punishment and euthanasia practices (*Gonzales v. Carhart*, 2007).

Despite beginning their tenures on the Court with similar views about abortion, throughout the past twenty years Justices Kennedy and Scalia have diverged and realigned in regard to abortion rights and restrictions. Scalia has remained wholly consistent. He views abortion as a matter of each individual state and believes the process of regulation should be left up to the democratic process. In addition, he sees abortion as a horrific tragedy and is willing to assert such in his judicial opinions. On the other hand, Kennedy has wavered in his decisions regarding abortion. Although he voted on behalf of abortion restrictions in *Webster*, *Stenberg*, and *Gonzales*, his key vote in the plurality opinion of *Casey* led to the continued application of the

*Roe* decision. Regardless of whatever implicated Kennedy to alter his vote in *Casey*, more often than not he has been assuredly pro-life in the majority of his judicial opinions regarding abortion.

**Chapter Six**  
The Death Penalty's Evolving Standards of Decency

Abortion is not the only political issue revolving around the sanctity of human life. Many groups, including the Catholic Church, are just as passionate about capital punishment as they are the termination of pregnancies. To many, capital punishment is as heinous an act as abortion. Yet, many argue there is a difference between the two. Abortion harms the innocent unborn while the death penalty is used as a punishment for those who take or harm the lives of others.

However, many opponents of the death penalty argue that the American judicial system runs the risk of taking the lives of innocent citizens due to the “risks of errors of justice inherent in the legal system” that can be “aggravated by political, cultural, and personal corruption under certain social regimes” (Ehrlich 397). Because the legal system is powered by humans who are likely to err, these individuals believe that the death penalty is too harsh of a punishment and, furthermore, a violation of the Eighth Amendment to the United States Constitution which prohibits the use of “cruel and unusual punishment” by the federal government.

Because of this dichotomy, the death penalty issue has been controversial throughout the history of American constitutional law. Like many morality-based issues, the death penalty has been both supported and opposed passionately by a variety of groups, organizations, and religious bodies, including the Catholic Church. This desire to uphold or overturn the use of capital punishment has sparked political controversy that has led to its appearance in several Supreme Court cases throughout the history of the Court.

#### *The Official Position of the Catholic Church*

As in the case of abortion and other actions that harm life, the Catholic Church believes very strongly in the sanctity of all human life regardless of age, gender, race, and other factors.

Because of this commitment to the preservation of life, the Church, as a hierarchical religious body, has been passionate in its support of alternative punishments for murder.

The Vatican has issued many statements in regard to capital punishment. Often its statements are clearcut attacks against the use of the death penalty; furthermore, in a position paper issue in 2007, the Vatican stated that the death penalty is “not only of the right to life, but it also is an affront to human dignity” (Wooden). The former pontiff, John Paul II, also spoke out against the use of the death penalty, specifically in American society:

Today, given the means at the State's disposal to deal with crime and control those who commit it, without abandoning all hope of their redemption, the cases where it is absolutely necessary to do away with an offender ‘are now very rare, even non-existent practically.’ (USCCB)

The Church, at least from within the Vatican, believes the death penalty should not be forgotten as a sanctity of life issue. Although capital punishment is not always perceived as horrific, the Church gives it the same classification as abortion, infanticide, euthanasia, and suicide.

While the Catholic Church does not view the action as the most just course of punishment, the Church’s Catechism states that in many instances the death penalty could be the only appropriate sentence for some criminals:

Assuming that the guilty party's identity and responsibility have been fully determined, the traditional teaching of the Church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor. (USCCB)

In short, the Church is willing to concede to the use of capital punishment if, and only if, a court of law believes it to be the most appropriate form of sentencing after weighing other, less severe alternatives. The Catechism reaffirms this mentality:

If, however, non-lethal means are sufficient to defend and protect people's safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person. (USCCB, 2004)

Again, the sanctity of life is emphasized as the key factor in determining whether the death penalty should, or should not, be utilized as a form of disciplinary action within the legal system.

In America, more specifically, the United States Conference of Catholic Bishops has promulgated a variety of statements to guide American Catholics' views on capital punishment. As "the only Western industrialized country that retains the death penalty" for the punishment of crimes, the USCCB has a difficult, and different, task as opposed to other Catholic groups around the world who have made statements on the death penalty (Fletcher 815).

The history of the American Catholic Church's stances on the death penalty is intertwined with the Supreme Court's decisions in death penalty cases. Before several key rulings in the 1970s, the Church had very little to say in regard to the death penalty. It was not until the moratorium was placed on capital punishment in America that "the United States Conference of Catholic Bishops, by a substantial majority, voted to declare its opposition to capital punishment" (USCCB). Thus, the Catholic Church's literature following this decision began to mirror the ideals behind the moratorium in place in the United States. In a statement issued by the USCCB in 1980, the American Catholic Church argued that the "abolition" of the death

penalty “sends a message that we can break the cycle of violence” and “need not take life for life.” In addition, eliminating the death penalty supports the Church’s views on abortion by recognizing the “dignity of each person from the moment of conception” until the life of each person ceases. Despite these strong sentiments, the Church also has stated that it “does not propose the abolition of capital punishment” entirely and recognizes its use in rare instances. (United States Conference of Catholic Bishops, 1980)

In light of more contemporary trends, which have removed the moratorium on the death penalty while restricting its use in some instances, particularly among minors and the mentally retarded, the Catholic Church, through the USCCB, issued *A Culture of Life and the Penalty of Death* in 2005. The USCCB used this document as a renewed commitment to the abolition of the death penalty and stated that “the use of the death penalty is unnecessary and unjustified in our time and circumstances” (USCCB, 2005). Further, the USCCB stated that there are many inherent errors in the application of the death penalty as a criminal punishment:

Its application is deeply flawed and can be irreversibly wrong, is prone to errors, and is biased by factors such as race, the quality of legal representation, and where the crime was committed. (USCCB, 2005)

According to the document, the American Church has “worked with...state legislatures, in the courts, and in Congress to restrain or end the use of the death penalty” and has even issued *amicus curiae* briefs to the Supreme Court in many capital punishment cases to support the eradication of the penalty of death (USCCB, 2005). Over the past several decades, the Supreme Court was willing to restrict the use of capital punishment, and, concurrently, the Church has also taken a more passionate stance against the death penalty. Whether or not these two pronouncements are interrelated is debatable, but the association is certainly interesting.

Despite such strong stances by the Catholic Church to oppose the use of the death penalty, a majority of the American Catholic populace actually favors it as a punishment, according to a 2007 study conducted by the Pew Forum on Religion and Public Life (Pew Forum, 2007). A total of 67% of white, non-Hispanic, Catholic Americans are in favor of the use of capital punishment while only 28% disapprove of its use (Pew Forum, 2007).

### *Legal Background*

Throughout the history of America, the Supreme Court has struggled with the definition of cruel and unusual punishment as written in Article Eight of the United States Constitution. Historically the Court has been “divided about the meaning of cruel and unusual punishment” (Epstein and Walker 552). While many court decisions have resulted in restrictions to capital punishment, “never has a *majority* of the justices agreed that the death penalty is cruel and unusual” (Epstein and Walker 552).

However, several cases have been significant in the development of American constitutional law with regard to the use of capital punishment. In *Trop v. Dulles* (356 U.S. 86, 1958), the Court first used the terminology “evolving standards of decency” in the interpretation of the Eighth Amendment. Chief Justice Warren wrote that “the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society” (*Trop v. Dulles*, 1958). In sum, as society changes, the Constitution must bend. As a result of the Court’s application of this standard, this phrase has been used to determine whether a method of punishment is cruel and unusual.

In particular, there have been two Supreme Court cases that challenged the use of the death penalty in Georgia -- *Furman v. Georgia* (408 U.S. 238, 1972) and *Gregg v. Georgia* (428 U.S. 153, 1976). In *Furman*, the Court held, in a 5-4 decision, that the practice of issuing the

death penalty was inconsistent as there were no clear and established rules for determining which criminals were eligible to receive the punishment. According to Justice Potter's opinion, the Constitution could not allow "this unique penalty to be so wantonly and so freakishly imposed" (*Furman v. Georgia*, 1972). The Court determined, in this instance, that capital punishment was a violation of the Eighth Amendment and deemed the death penalty a cruel and unusual punishment. In addition, the Court also ruled that the application of the death penalty in *Furman* was a violation of the Due Process Clause of the Fourteenth Amendment.

Despite this determination, the Court disagreed internally as all nine justices issued their own opinion. The total opinion totaled 243 pages and is "the longest in Court history" (Epstein and Walker 552). Following the decision, many states issued a moratorium on the death penalty in order to avoid conflict with the rulings of the Court. In addition, other states developed new policies that would ensure consistency in sentencing and meet the criterion listed within the *Furman* decision. (*Furman v. Georgia*, 408 U.S. 238, 1972)

Four years later, in *Gregg*, the Court dealt with these newly-developed laws in order to determine their constitutionality. Georgia, in response to *Furman*, had developed new policies in regard to the death penalty, including the use of a bifurcated trial, "which consisted of two stages -- the guilt phase and the penalty phase" (Epstein and Walker 553). The hope of this idea was that one jury could be responsible for determining guilt; then, the same jury could, at a later time, consider a variety of aggravating and mitigating factors to determine the severity of the penalty. Mitigating factors, provided by the defense, include "the individual's record, family responsibility, psychiatric reports, chances for rehabilitation, and age" (Epstein and Walker 553). In addition, the jury must "find and identify at least one statutory aggravating factor before it

may impose a penalty of death” (*Gregg v. Georgia*, 1976). The Court upheld and solidified the use of the death penalty within the American legal system in a 7-2 decision, agreeing on the constitutionality of the new Georgia law. As a result, many states removed their moratorium of the death penalty and issued laws similar to the one considered in *Gregg*. In fact, thirty-five states currently have similar death penalty statutes contained in their law codes (Death Penalty Information Center).

As mentioned, the decision in *Gregg* did much to reaffirm the use of the death penalty in America, yet many parties still sought to challenge the use of the death penalty in connection to an array of mitigating factors. In particular, the Court has issued opinions on cases involving the applicability of the death penalty as a sentence for two types of criminals -- the mentally-retarded and minors.

#### *Mentally-Retarded Defendants*

After the Court began considering a variety of mitigating factors in the latter portion of bifurcated murder trials, issues began appearing about the sentencing of the developmentally- and intellectually-challenged or mentally-retarded. In *Penry v. Lynaugh* (492 U.S. 302, 1989), the Court first considered capital punishment for mentally-retarded defendants who had been convicted of murder. The convicted murderer in the case was profoundly mentally-retarded and had been sentenced to death in a Texas court. The Supreme Court, in a close 5-4 decision, ruled that issuing capital punishment sentences to the mentally-retarded was not considered cruel and unusual punishment as long as the sentencing jury understood that mental retardation was included as a mitigating factor. Justice O’Connor, writing for the majority, stated that “while a national consensus against execution of the mentally retarded may someday emerge reflecting

the ‘evolving standards of decency’ ...there is insufficient evidence of such a consensus today” (*Penry v. Lynaugh*, 1989). Therefore, the Eighth Amendment was not violated. (*Penry v. Lynaugh*, 1989)

Over a decade later, the Court once again decided a case dealing with the application of capital punishment and mental retardation in *Atkins v. Virginia* (536 U.S. 304, 2002). Despite their earlier ruling, the Court overturned *Penry* in a 6-3 vote and stated that the utilization of capital punishment in the sentencing of the mentally retarded is cruel and unusual and a violation of the Eighth Amendment. In the majority opinion, Justice John Paul Stevens, who had dissented in *Penry*, wrote that mentally-retarded individuals do not process emotions as rationally as individuals who are developmentally normal:

Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. (*Atkins v. Virginia*, 2002)

In making this ruling, the Court considered a variety of factors, including accompanying *amicus curiae* briefs, expert opinion of forensic psychologists and researchers, and evolving state laws. According to Stevens’ opinion, a total of twenty-one states had passed laws restricting the use of the death penalty for mentally-retarded individuals convicted of murder. Because of this trend, the Court recognized evolving standards of decency and “the consistency of the direction of the change” when making their ultimate determination. (*Atkins v. Virginia*, 2002)

In regard to the issuance of capital punishment for mentally-retarded offenders, the Court has handed down decisions in both *Penry v. Lynaugh* and *Atkins v. Virginia*. In *Penry*, the Court ruled that in many instances the execution of mentally-retarded individuals was not a violation of

the Eighth Amendment's clause on cruel and unusual punishment. In the face of the majority opinion, Justice Scalia wrote a dissenting opinion representing four justices that included Justice Kennedy. In his opinion, Scalia, and Kennedy as a result, agreed with portions of Justice O'Connor's majority opinion yet dissented in part. Scalia stated that there was no need for further discussion regarding the execution of the mentally retarded and that the Constitution itself permitted this action. Thus, Scalia did not see it necessary to respond to the evolving standards of decency that O'Connor so ardently invoked. Again, Scalia *was joined* in this opinion by Justice Kennedy.

However, only thirteen years later the Court reversed its prior decision in *Penry*. In *Atkins v. Virginia* (2002), the Court determined that sentencing the mentally-handicapped to death was a form of cruel and unusual punishment. Yet, this time the six-justice majority had received an additional vote. Justice Kennedy had completely reversed his previous opinion and supported restrictions against the use of the death penalty, a belief that is in alignment with the officially-mandated views of the American Catholic Church.

In the majority opinion, Justice John Paul Stevens, joined by five other justices that included Kennedy, stated that because of the evolving standards of decency at work in American society, it is no longer acceptable to execute the mentally retarded. Because of the number of states who have outlawed or completely ignored the use of execution for the mentally retarded, such practices were outmoded and archaic. (*Atkins v. Virginia*, 2002)

Justice Scalia, ever the writer, issued a dissent in this case which reaffirmed many of his statements in *Penry*. His dissatisfaction with the majority opinion is evident in a quick reading of his written dissent. Scalia wrote that the *Atkins* decision was "the pinnacle of our Eighth

Amendment death-is-different jurisprudence” and has “no support in the text or history of the Eighth Amendment” (*Atkins v. Virginia*, 2002). Further, Scalia asserted that the majority opinion “rested so obviously upon nothing but the personal views of its members....” (*Atkins v. Virginia*, 2002). Scalia scoffed at the main argument of the majority, the appearance of a national consensus against the execution of the mentally retarded convicted of murder:

The Court pays lip service to these precedents as it miraculously extracts a “national consensus” forbidding execution of the mentally retarded from the fact that 18 states -- less than *half* (47%) of the 38 states that permit capital punishment (for whom the issue exists) -- have very recently enacted legislation barring execution of the mentally retarded. (*Atkins v. Virginia*, 2002)

Clearly Scalia saw the majority opinion as nothing more than an exertion of six justices’ will to alter the law. Interestingly enough, Kennedy, who had previously agreed with Scalia, experienced an about-face in the thirteen years between *Penry* and *Atkins*. The exact reasoning is unknown, as Kennedy is very ardent to conceal his patterns of judicial decision-making. However, his vote does carry much weight on both the Rehnquist and the Roberts Courts. To invoke a popular phrase, how Kennedy goes, so goes the Court.

### *Juvenile Defendants*

Another constraint on capital punishment that the Court has considered pertains to minors convicted of murder. The Supreme Court ruled on this circumstance in *Stanford v. Kentucky* (492 U.S. 361, 1989). In this case, the Court held that the death penalty could be used to punish juvenile transgressors who were over the age of fifteen but less than the legal age of eighteen. This action did not constitute cruel and unusual punishment according to the Court in a 5-4

decision. The age range was not lowered due to the Court's ruling in *Thompson v. Oklahoma* (487 U.S. 815, 1988) which "[prohibited] the execution of any person who was under 16 years of age at the time of his or her offense" (*Thompson v. Oklahoma*, 1988).

The Court returned to the question of whether juveniles should be given the death penalty in *Roper v. Simmons* (543 U.S. 551, 2005). The Court again ruled in a 5-4 decision; however, this time the justices overturned *Stanford* and held that it is cruel and unusual, and thus unconstitutional, to use the death penalty as a punishment for minors under 18 years old.

As in the latter decision regarding mental retardation (*Atkins v. Virginia*, 2002), the Court found a growing movement against the execution of juveniles as retribution for murder -- both nationally and internationally. Due to evolving standards of decency present in American society, Justice Kennedy, in his majority opinion, stated that "30 States prohibit the juvenile death penalty" (*Roper v. Simmons*, 2005). Further, Kennedy cited the United Nations Convention on the Rights of the Child as an explicit appeal for the elimination of the juvenile death penalty; Kennedy asserted that this call has been effective:

...Only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty. (*Roper v. Simmons*, 2005)

Because of this evolving standard of decency, the Court overturned *Stanford* and eliminated the use of the death penalty as a punishment for minors.

The above cases' implications are very similar to the *Penry* and *Atkins* decisions. In regard to *Stanford v. Kentucky* (1989), even the case opinions and voting lineup played very similar to *Penry*. The Court, led by Justice Scalia, stated that it was not cruel or unusual to execute juveniles who had committed murder. Scalia, joined by Kennedy, Chief Justice Rehnquist, and Justice Byron White and partially by Justice O'Connor, called to history to make the ultimate determination as to whether the execution of minors was cruel or unusual:

At that time, the common law set the rebuttable presumption of incapacity to commit any felony at the age of 14, and theoretically permitted capital punishment to be imposed on anyone over the age of 7. (*Stanford v. Kentucky*, 1989)

Thus, Scalia shunned the ideas and arguments of evolving standards of decency in favor of discerning the historical case law at present when the Eighth Amendment was passed. Typical of Scalia, he read the case through the eyes of the original drafting of the Constitution.

Scalia also ridiculed the petitioner's attempts to assert the lack of judgment and cognitive development present in minors. He stated that such socioscientific evidence was not enough to assert that the juvenile death penalty could be considered cruel and unusual punishment. Instead, the Court must look to the Eighth Amendment and case history regarding the death penalty:

The battle must be fought, then, on the field of the Eighth Amendment; and, in that struggle, socioscientific, ethicoscience, or even purely scientific evidence is not an available weapon. (*Stanford v. Kentucky*, 1989)

Scalia's opinion supports capital punishment, even for the sentencing of juveniles when necessary. It is essential to recognize that Justice Kennedy agreed with Scalia's majority opinion in its totality. At the time of *Stanford*, Justice Kennedy, while not vocal in judicial decisions, agreed that the use of the juvenile death penalty was *not* cruel *nor* unusual.

In an extremely similar chain of events, the Court, in *Roper v. Simmons* (2005), followed their actions three years earlier in *Atkins* and placed further restrictions on the use of the death penalty. This time, however, Kennedy got his chance to articulate his views in the majority opinion. He also received the opportunity to oppose Scalia, who circulated his own dissent. Furthermore, this decision, as well as *Atkins*, signaled an impasse between the two justices.

In the opinion of the Court, Kennedy employed the ever-present concept of evolving standards of decency, which "must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design" (*Roper v. Simmons*, 2005). Citing a large body of social science research, Kennedy articulated that juveniles are more likely to cave to peer pressure and make irrational decisions as compared to adults due to the average juvenile's lack of cognitive development (*Roper v. Simmons*, 2005). Because minors are at an emotional, cognitive, and character disadvantage due to psychological, sociological, and biological factors, it is cruel and unusual to subject them to the death penalty.

Kennedy relied heavily on the Court's decision in *Atkins* in his majority opinion; thus, he uses this case not only to present his rationale in *Roper* in regard to minors, but also in *Atkins* in regard to the mentally challenged. In total, there are twenty-six direct references to *Atkins* in the majority opinion. Moreover, Kennedy even recognized the similarity between the two cases:

The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence Atkins held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded. (*Roper v. Simmons*, 2005)

This “national consensus” supports the postulation of an evolving standard of decency that can dictate what American society deems cruel and unusual. In order to support this national consensus, Kennedy provided several appendices listing the state statutes in regard to the juvenile death penalty, along with legal voting and jury service ages.

In regard to Kennedy’s changing views on this issue, Gordon states that Justice Kennedy “gauges the consequences” of the death penalty and its use for the punishment of minors (153). By looking at these consequences, Kennedy thus considers the evolving standards of decency in society. Through the evolution of American society, Kennedy notes that we have come to realize that teenagers are “statistically overrepresented in reckless behavior” as well as being especially vulnerable to peer pressure (154). Most importantly, Gordon notes Kennedy realizes, due to his reliance on social science research, that the moral and cognitive characters of minors are still developing; thus, older teenagers are “immature, psychologically-weak people” who should not be given death sentences (154).

Writing the dissent, Justice Scalia echoed many of the same sentiments as his dissent in *Atkins*. Viewing the evolving standards of decency test and the idea of a national consensus as a ridiculous means of determining the constitutionality of laws, Scalia stated that:

...The Court dutifully recites this test and claims halfheartedly that a national consensus has emerged since our decision in *Stanford*, because 18 States -- or

47% of States that permit capital punishment -- now have legislation prohibiting the execution of offenders under 18... (*Roper v. Simmons*, 2005)

However, to Scalia, “words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus” (*Roper v. Simmons*, 2005). He even went so far as to criticize, as he often does, the majority for making considerations for states that wholly oppose the death penalty, stating that doing so was “rather like including old-order Amishmen in a consumer-preference poll on the electric car” (*Roper v. Simmons*, 2005). To Scalia, the Court’s attempt to push on behalf of a national consensus made their arguments appear invalid because it stressed the definition of the term “consensus.” As usual, Scalia also invoked his typical rhetorical stance by issuing the question -- “By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?” -- favoring *vox populi* over *simplex dictum* (*Roper v. Simmons*, 2005).

Justices Kennedy and Scalia played key roles in both sets of these cases. At the time *Penry* and *Stanford* were decided both men had recently been appointed to the Court and were, as a result, beginning the development of an evident judicial philosophy. However, by the time that *Atkins* and *Roper* were handed down, the two justices had served on the Court for over twenty years and were, on the whole, more consistent in their judicial decision-making.

Overall the Court’s decisions pertaining to the death penalty for developmentally and intellectually-challenged persons as well as juveniles have become far more restrictive. Between the Court’s earlier decisions in 1989 compared to their twenty-first century decisions, the Court has clearly shifted toward a belief that restrictions on capital punishment are acceptable. One could certainly argue that this alteration in *stare decisis* in death penalty case law is due to the

evolving judicial philosophy of Anthony Kennedy. Because of his change of heart -- and more importantly, head -- the Court has been far more willing to deem certain aspects of the death penalty as cruel and unusual punishment.

**Chapter Seven**  
Analysis and Conclusions

Every October the United States Supreme Court convenes to listen to oral arguments and issue rulings about the legal controversies America encounters. These cases vary in topic -- from civil liberties and civil rights to constraints on the federal government. The decisions of the nine members of the Court dictate how we as a nation behave whether or not the mass populace realizes the Court's authorization to alter the legal system in one swift movement.

However, despite the Court's dominance over the American judiciary, a Zogby poll found that only 24% of Americans were able to name two Supreme Court justices when asked (Zogby, 2006). To put things in perspective, 77% of Americans polled in this survey were able to name at least two of Snow White's Seven Dwarfs (Zogby, 2006). Thus, the question must be asked: do the decisions of the Court matter to the American public? In my opinion, the answer to that question is a definitive yes. Because of the Court's power to make decisions which shape the actions of the three branches of the federal government, state and local governments, and the citizenry, the effects and the impact of the Court's decisions are felt throughout society and cannot be shortchanged.

As previously mentioned by looking at a history of the demographics of the Court, the presence of minorities -- in race, ethnicity, gender, and religious preference -- has been an important development. In this paper, I have sought to determine the potential relationship between religion and the judicial decision-making of a Supreme Court justice, specifically among Catholics. Since Catholics have been the only former minority group to emerge as a majority on the Court, the group possesses a unique distinction that is stimulating for study.

In addition, facing the prospect of no Protestant justices after the retirement of John Paul Stevens, a Gallup poll found that 66% of Americans state that it "doesn't matter" whether or not the next appointee is Protestant (Newport). Specifically, among religious groups, Protestant

Christians were the only group to respond positively to the need for a Protestant justice. A total of 40% of Protestants polled stated that it was “essential” or “a good idea” to have a Protestant religious perspective on the Supreme Court (Newport). However, Justice Elena Kagan, a Jew, would later be confirmed to fill Stevens’ seat leaving the Court without a Protestant, “the majority religious group in America” (Newport).

In light of these considerations, we must return to the initial question posed in the first chapter of this document: can religion, specifically Catholicism, influence Supreme Court decision-making? Religion can definitely have a place alongside other factors that can influence decision-making, such as gender, race, ethnicity, socioeconomic status, childhood experiences, and ideology according to the attitudinal model of judicial decision-making (Epstein and Knight).

In this study, Justices Antonin Scalia and Anthony Kennedy were chosen for further examination because of their similarities in religion, age, and biography and differences in ideological persuasion. By examining each justice wholly, and in light of their judicial decisions in regard to gay rights, abortion, and the death penalty as compared to the official stances of the Catholic Church, some conclusions can be reached.

### *Antonin Scalia*

Justice Antonin Scalia’s judicial opinions are varied in regard to the official stances of the Catholic Church. In some areas, he is very consistent with their official dictations. However, in other areas, he could not be any more polarized. Despite his occasional inconsistencies with the policies of the Church, Scalia has publicly displayed his Catholicism in a variety of ways, including public statements and media interviews -- which is uncharacteristic of most Supreme Court justices.

Scalia's upbringing definitely leads one to believe that his Catholicism has played a vital role in his private and professional development. As previously stated, he experienced a religious-centered upbringing as well as a Catholic education throughout his academic life. Attending a Roman Catholic high school and college helped to solidify Scalia's commitment to his religious doctrine. Further, Scalia has rallied against reforms of the Catholic Church, favoring Pre-Vatican II Church ideas like the use of the Latin Mass (Biskupic 185). Because of this strict adherence to his religious preference, it stands to reason that Scalia would be influenced by the opinions of the Catholic Church.

It is also important to recognize Scalia's particular view of constitutional interpretation in order to establish his view of judicial decision-making. Determining his philosophies of constitutional interpretation are not difficult since "he is not the slightest bit reticent about saying exactly what he means, on the bench or off" (Kannar 1299). In regard to his methods of interpretation, Scalia is a self-proclaimed originalist, focusing on what the text of the Constitution strictly states rather than "[determining] what seems like good policy at the present time" (Kannar 1303). Scalia has articulated that this method is the only one free from bias since a strict textualist approach does not allow for outside influences and creates "limits on what the Justices may do" (Kannar 1304). Because of his adherence to textualism, Scalia's judicial decision-making could be viewed as a type of mechanical jurisprudence or rational choice model that focuses solely on legal interpretation; yet, Scalia's opinions and recognition of attempts to regulate morality indicate that his own views of his decision-making are clouded. Scalia, like most justices, exhibits the characteristics of the attitudinal model as well. This view of judicial

decision-making, discussed by Epstein and Knight, is a way for justices to reconcile legal arguments and external factors in the judicial decision-making process.

Scalia's view regarding gay rights is closely-aligned with the Catholic Church. As stated earlier, the Church considers same-sex marriage or unions incongruous with their teaching. In spite of that fact, the Church does not have a clearly-defined policy on the morality of homosexuality in general, and Catholic public opinion reflects this lack of influence. Considering American Catholics are divided on their views of the morality of homosexuality, it is interesting that Scalia has been so vocal in his denial of rights to gay men, lesbian women, bisexuals, and transgendered peoples. Scalia believes that morality-based issues should be left to the public, not decided by nine justices of the Court. Thus, his distaste may stem from his judicial philosophy rather than his Catholicism.

Scalia has previously stated, in his dissenting opinion in *Romer v. Evans* (1996), that his opinions are not because of his disdain for homosexuals, but rather because of his belief that "the Court has mistaken a Kulturkampf for a fit of spite" (*Romer v. Evans*, 1996). In regard to homosexual rights, Scalia believes, as with many other morality issues, that it should be left to the democratic process. Publicly, Scalia has supported this view, and in a recent interview, affirmed his view that the Fourteenth Amendment only guarantees equal protection based on race -- not sex, sexual orientation, or any other class of citizens (University of California, Hastings). Overall Scalia's opinions on gay rights take a stronger approach than the Catholic Church. While the Church does maintain policies in opposition to homosexual marriage, it does not formally challenge sexual orientation. Thus, it appears Scalia does not completely rely on his religious doctrine when forming determinations regarding homosexuality and gay rights. Regarding

abortion, both the Catholic Church and Scalia take the same view. However, they have done this through two different means. The Church has articulated countless times that Catholics must respect the sanctity of life in all capacities (USCCB). Because human life begins at conception, abortion is equated with infanticide, genocide, murder, euthanasia, and other methods that violate the sanctity of life (USCCB). Scalia, in contrast, has articulated in his opinions that abortion rights are unconstitutional. In decisions, Scalia has continually voted in favor of restrictions on abortion as well the use of judicial review to overturn *Roe v. Wade*. Scalia, similar to his views on gay rights, has stated that the Court should not make decisions regarding this issue as the Constitution does not mention abortion (*Planned Parenthood v. Casey*, 1992). It is a moral issue that should be left to the democratic process.

In addition, Scalia has also made public statements supporting his consistent opposition to abortion. In a televised debate at the 2006 ACLU Membership Conference, Scalia stated that “unelected judges have no place deciding politically charged questions when the Constitution is silent on those issues” (Roberts). This supports his textualist approach to the Constitution. Also, his views on the democratic process were supported when he stated that “controversial issues” like homosexual rights and abortion should be handled by “representatives or a constitutional amendment,” not handled by the Supreme Court (Roberts). Ultimately abortion is the issue for which Scalia and the Catholic Church find the most uniformity of opinions. Both the Church and Scalia view abortion as a reprehensible act. This issue seems to provide the strongest evidence that Scalia’s judicial decision-making is influenced by the Catholic Church.

The death penalty proves to be the marked divide between the Church and Scalia. The Church has been unambiguous in its fight for the abolition of the death penalty as a means of

punishment in America. It views capital punishment as a sanctity of life issue similar to abortion. Therefore, it has asserted itself against the death penalty and has been active in the push for a moratorium of its utilization (USCCB).

Despite this evident policy stance from the Church, Scalia, a typically-devout Catholic, has continually and consistently advocated on behalf of the death penalty in his judicial decisions. In all of the death penalty cases I outlined above, Scalia voted on behalf of the the death penalty as a punishment for the mentally retarded as well as minors. Although many of the justices believe that the “evolving standards of decency” test, first used in *Trop v. Dulles*, is enough to invalidate the use of capital punishment in America, Scalia does not agree. Based on an analysis of Scalia’s opinions, he views the “evolving standards of decency” as a value judgment not based on constitutional text; therefore, it has no validity and should not be used by the Court.

Publicly Scalia has made many statements supporting the use of the death penalty -- mostly based on his originalist reading of the Constitution and historical context. In an article titled “God’s Justice and Ours,” Scalia justified the use of the death penalty. Before giving his personal reasonings, he stated that his “views on the subject have nothing to do with how I vote in capital cases that come before the Supreme Court” (Scalia). Scalia states that the restrictions that the Court has placed on the death penalty “did not exist when the Eighth Amendment was adopted,” which supports his originalist stance (Scalia). Furthermore, Scalia states that the death penalty is not a “difficult, soul-wrenching question” (Scalia). In fact, to Scalia, it is not a question at all:

It was clearly permitted when the Eighth Amendment was adopted (not merely for murder, by the way, but for all felonies—including, for example, horse–thieving, as anyone can verify by watching a western movie). And so it is clearly permitted today. (Scalia)

Based on this quotation, it appears Scalia would advocate the use of the death penalty for the simplest of felonies -- maybe the use or sale of an illegal substance or burglary. Furthermore, in regard to the morality of the death penalty, Scalia stated that he does not believe his votes have been immoral:

When I sit on a Court that reviews and affirms capital convictions, I am part of “the machinery of death.” My vote, when joined with at least four others, is, in most cases, the last step that permits an execution to proceed. I could not take part in that process if I believed what was being done to be immoral. (Scalia)

By stating that he could not participate in a process that advocated immorality, Scalia was inadvertently stating that he believed the death penalty was both legal and moral.

Scalia’s logic is at direct odds with the belief of the Catholic Church. In sum, “surely it is among the worst sins, under Catholic teaching, to kill an innocent human being intentionally. Yet that is precisely what Scalia would authorize under his skewed view of the United States Constitution” (Dershowitz). Thus, his judicial decision-making in regard to the death penalty has no foundation in the teachings of the Catholic Church.

By examining Scalia’s judicial opinions on gay rights, abortion, and the death penalty, it is clear that Scalia primarily relies on the textual interpretation of the Constitution in his decision-making process. Although he does not always singularly rely on legal arguments, his

decisions do not appear to be consistently reliant on the doctrine of the Catholic Church. While there is some evidence that he utilizes his religion in his decision-making, particularly in regard to abortion, his views on the death penalty demonstrate a man willing to defy a fundamental tenet of his religion because of his constitutional interpretation. Because of this, I believe that Scalia relies on his ideology and constitutional interpretation as the primary factors for his decisions, not his religious beliefs.

### *Anthony Kennedy*

Unlike Justice Scalia, Justice Anthony Kennedy is an insulated justice who adheres to the traditions of the Court, which dictate very little interaction with the news media and few public statements. Thus, it is hard to discern Kennedy's exact commitment to the Catholic Church. However, it is evident that Kennedy is, like Scalia, a pre-Vatican II Catholic who prefers the Latin mass to more progressive methods of worship and attends church regularly (Toobin 62). Although Kennedy has shown some deviation with the Church, overall he aligns more closely with its official doctrines than Scalia.

Even though Kennedy is far more private than Scalia, there is some evidence that his Catholicism is important to his personal identity. As previously stated, Kennedy attends mass each Sunday. Also, he has articulated his own personal disdain for abortion but has also articulated that, as a public policymaker, he believes he should compartmentalize his religious life from his professional obligations. Overall, because of his commitment to privacy, it is difficult to determine the exact effect his religion has played in his judicial decision-making, but it appears to carry some weight.

Compared to Justice Scalia, Kennedy is much more moderate. In many cases, he has become the vote which ultimately determines the outcome -- “the decisive central judge that neither side can do without” (Brust). Because of this centrality of his judicial decision-making, Kennedy is a “super median” justice, according to Epstein and Jacobi (40). His position as a “super median” is solidified by his high level of activity in adjudication:

Over the course of the 2006 Term, Kennedy helped form majorities in all but two cases; he was a member of the winning coalition in each and every case decided by a five-to-four vote....Justice Kennedy joined or wrote the opinion of the Court in virtually every high-profile dispute of the 2006 Term, whether over employment discrimination, abortion, or environmental protection. (Epstein and Jacobi)

Clearly Justice Kennedy’s judicial decision-making and opinions are vital to the decisions handed down by the Court. As I stated earlier, it becomes evident that as Kennedy goes, so goes the Court. This point cannot be emphasized enough.

In regard to gay rights, Kennedy has been an advocate for eliminating unconstitutional statutes that are perceived as discriminatory against LGBT persons. In both *Romer v. Evans* (1996) and *Lawrence v. Texas* (2003), Kennedy issued majority opinions on behalf of invalidating laws considered discriminatory to the rights of homosexual persons. Although the Catholic Church, as previously articulated, has proscribed homosexual marriage, it has not formally stated that homosexuality is an immoral activity (USCCB). Kennedy’s viewpoints on gay rights are almost identical to the Church. Although one cannot be certain, it appears that

Kennedy has been able, at least in regard to this issue, to separate his religious beliefs from his public policy obligations.

Despite his consistency in the previous issue, Kennedy has wavered in regard to abortion. In his first abortion-related case on the Court, *Webster v. Reproductive Health Services* (1989), Kennedy voted with the majority that allowed for restrictions on abortions. However, three years later in *Planned Parenthood v. Casey* (1992), Kennedy changed his vote and invalidated only a portion of a law passed to restrict abortions. If Kennedy had voted with the minority in this case, *Roe* might have been overturned. More recently Kennedy has upheld laws that have banned partial-birth abortions (*Stenberg v. Carhart*, 2000 and *Gonzales v. Carhart*, 2007). Thus, despite one misstep, Kennedy has been an ardent believer in limiting the circumstances when a woman has the right to choose an abortion.

Kennedy has commented on his personal opposition to abortion, but only in brief as a visiting law professor at the University of Salzburg (Rosen 82). While teaching a class, Kennedy revealed a portion of his rationale for the *Casey* decision but also stated his personal disdain for abortion by stating that he would encourage a female family member not to terminate her pregnancy and would even consider adopting the child to prevent the abortion (Rosen 82). However, he went on to state that he realized, in *Casey*, that “he couldn’t impose his personal views on the nation” (Rosen 82). This statement is certainly a passionate declaration from such a typically reticent justice.

The death penalty marks Justice Kennedy’s potential interdependence with the Catholic Church. For Scalia, this proved to be an impasse, but for Kennedy, it appears to be a coupling of like-minded ideas. In both sets of cases -- mental retardation and minors -- Kennedy initially

voted with the justices seeking to limit constraints on the death penalty and appeared to advocate its use. However, by the early 2000s, Kennedy shifts his judgments. In *Atkins v. Virginia* (2002) and *Roper v. Simmons* (2005), Kennedy voted with those barring the death penalty for the developmentally-and-intellectually challenged and for minors. Kennedy, as noted earlier, even wrote the majority opinion in *Roper*. Because of Kennedy's willingness to recognize the "evolving standards of decency" that have developed in society since the penning of the Constitution, he is willing to adjust his judicial opinions based on the consensus of public opinion. As a result of the shift of Kennedy in both of these cases, the death penalty was considered cruel and unusual punishment as the Eighth Amendment applies to the mentally retarded and juveniles. Again, Kennedy is the major determinant of the judicial decisions and public policy.

Kennedy's shift in death penalty cases supports the view of the Catholic Church, which believes that the death penalty should be abolished because it is detrimental to the sanctity of life (USCCB). In my opinion, taking Kennedy's opinions on these three issues solely -- gay rights, abortion, and the death penalty -- indicates that Kennedy's religious beliefs are at least tangentially related to his scheme of judicial decision-making. While his religion may not be the sole indicator of his vote choice, based on his votes in past cases, I believe that his religion at least plays a foundational role in the development of his judicial philosophy and decision-making process.

### ***Conclusions***

As I began the research involved with this project and narrowly tailored my thesis, I believed that Justice Antonin Scalia was highly influenced by his religious beliefs, his

Catholicism. However, as my research and analysis into this topic deepened, I soon began to realize the error in my logic. Through a variety of Supreme Court cases related to religiously-charged moral issues, I have found that Anthony Kennedy's votes more closely align with the doctrinal teachings of the Catholic Church while Antonin Scalia's votes appear to be based on his conservative ideology and textualist method of constitutional interpretation.

Of course, further study should be done to determine a more exacting conclusion. In order to gauge the specific impact religious belief has on judicial decision-making, I believe more analysis is necessary and could be better proven through the acquisition of quantitative data. By developing statistical models and data for determining the impact religion has had on Supreme Court decisions, a stronger correlation could be discovered. Justice Kennedy's opinions appear to have the potential for a correlation between religious belief and judicial decision-making. His obvious struggle with abortion lends credence to this thought, and it is possible that his Catholic beliefs have played a role in his changing opinions.

The attitudinal model of judicial decision-making advocates that a plethora of factors influence the process justices use when making legal decisions. These factors, as previously noted, include not only constitutional interpretation, but also political ideology, gender, race, ethnicity, socioeconomic status, and childhood upbringing. I believe that this research may indicate that an attitudinal model of decision-making could also include religion as a factor. Further quantitative study analyzing the pattern of judicial voting could provide factual evidence that religion is a factor of the attitudinal model as well as an influence on the judicial decision-making process.

As President John F. Kennedy stated in a campaign address, America is a nation “where no Catholic prelate would tell the president (should he be a Catholic) how to act and no Protestant minister would tell his parishioners for whom to vote...” (Perry 164). At this time, it does not appear that a justice of the highest court in the United States would ever utilize their public role as magistrate to exercise their private role as religious congregant. Religion -- like gender, race, ethnicity, socioeconomic status, childhood experiences, ideology, and constitutional interpretation -- is just one piece of an immense, amalgamated jigsaw puzzle of factors influencing judicial decision-making.

As William Howard Taft, 27th President of the United States and 10th Chief Justice of the U.S. Supreme Court, stated, “Presidents come and go, but the Supreme Court goes on forever” (Pringle). This statement could not be more true. The lasting impact each Court has on the legal system and society is felt through the precedents set in each individual decision. Thus, when we ask the question “does the Supreme Court matter?”, we must answer in the affirmative. Because of the implications of Supreme Court decisions, the Court possesses the unique ability for eternal influence.

## *Works Cited*

- "Address of His Holiness Benedict XVI at a Meeting on Family and Life Issues in Latin America." The Vatican. The Vatican, 3 December 2005. Web. 20 Jan. 2011. <[http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2005/december/documents/hf\\_ben\\_xvi\\_spe\\_20051203\\_family-america-latina\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2005/december/documents/hf_ben_xvi_spe_20051203_family-america-latina_en.html)>.
- "Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons." The Vatican. The Vatican, 3 June 2003. Web. 14 Jan. 2011. <[http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20030731\\_homosexual-unions\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html)>.
- "Enduring Majority: Americans Continue to Support the Death Penalty, An." Pew Forum on Religion and Public Life. Pew Research Center, 19 December 2007. Web. 26 Jan. 2011. <<http://pewforum.org/Death-Penalty/An-Enduring-Majority-Americans-Continue-to-Support-the-Death-Penalty.aspx>>.
- "Kennedy, Anthony McLeod." Biographical Encyclopedia of the Supreme Court. Ed. Melvin I. Urofsky. Washington: CQ Press, 2006. 307. CQ Supreme Court Collection. Web. 3 Jan. 2011.
- "New National Poll Finds: More Americans Know Snow White's Dwarfs Than Supreme Court Judges, Homer Simpson Than Homer's Odyssey, and Harry Potter Than Tony Blair." *Zogby International*. Zogby International, 15 Aug. 2006. Web. 7 Feb. 2011. <[http://www.zogby.com/templates/prints\\_b.cfm?id=13498](http://www.zogby.com/templates/prints_b.cfm?id=13498)>.
- "Public Opinion on Gay Marriage: Opponents Consistently Outnumber Supporters ." Pew Forum on Religion and Public Life. Pew Research Center, 9 July 2009. Web. 11 Jan. 2011. <<http://pewforum.org/Gay-Marriage-and-Homosexuality/Public-Opinion-on-Gay-Marriage-Opponents-Consistently-Outnumber-Supporters.aspx#4>>.
- "Same-sex Unions 'Penalize' Traditional Marriage, Pope Says." Catholic News Service. USCCB, 14 Jan. 2011. Web. 14 Jan. 2011. <<http://www.catholicnews.com/data/stories/cns/1100161.htm>>.
- "Statements on the Death Penalty By the Holy Father." *Catholic Campaign to End the Use of the Death Penalty*. United States Conference of Catholic Bishops, - . Web. 29 Jan. 2011. <<http://www.usccb.org/sdwp/national/deathpenalty/holyfather.shtml>>.
- "Support for Abortion Slips: Issue Ranks Lower on the Agenda." Pew Forum on Religion and Public Life. Pew Research Center, 1 October 2009. Web. 18 Jan. 2011.
- "U.S. Constitution." Art. III, Sec. 1.

- Antonin Scalia: The Originalist*. University of California, Hastings, 2010. Web. 7 Feb. 2011. <<http://www.callawyer.com/legallyspeaking.cfm#>>.
- Biskupic, Joan. *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia*. New York: Farrar, Straus, and Giroux, 2009. Print.
- Brust, Richard. "The 'Super Median'." *ABA Journal*. ABA, 1 July 2010. Web. 7 Feb. 2011. <[http://www.abajournal.com/magazine/article/the\\_super\\_median/](http://www.abajournal.com/magazine/article/the_super_median/)>.
- Catechism of the Catholic Church*. N.p.: United States Conference of Catholic Bishops, 2004. N. pag. Web. 29 Jan. 2011. <<http://www.usccb.org/catechism/text/>>.
- Collett, Teresa S. "'The King's Good Servant, but God's First': The Role of Religion in Judicial Decisionmaking." *South Texas Law Review* 41 (2000): 1277-1300. LexisNexis. Web. 9 Feb. 2010.
- D'Antonio, William V., Steven A. Tuch, and John Kenneth White. "Catholicism, Abortion, and the Emergence of the 'Culture Wars' in the U.S. Congress, 1971-2006." *Catholics and Politics*. Ed. Kristin E. Heyer, Mark J. Rozell, and Michael A. Genovese. Washington, D.C.: Georgetown UP, 2008. 129-53. Print.
- Death Penalty Information Center. . DPIC, - . Web. 30 Jan. 2011. <<http://www.deathpenaltyinfo.org/>>.
- Dershowitz, Alan M. "Scalia's Catholic Betrayal." *The Daily Beast*, 18 Aug. 2009. Web. 7 Feb. 2011. <<http://www.thedailybeast.com/blogs-and-stories/2009-08-18/scalias-catholic-betrayal/>>.
- Duin, Julia. "The Catholic majority; Sotomayor would be court's 6th." *The Washington Times*, 27 May 2009, sec. CULTURE, p. A16. <http://www.lexisnexis.com>.
- Ehrlich, Isaac. "The Deterrent Effect of Capital Punishment: A Question of Life and Death." *The American Economic Review* 65.3 June (1975): 397-417. *JSTOR*. Web. 25 Jan. 2011. <<http://www.jstor.org/stable/1804842>>.
- Epstein, Lee, and Tonja Jacobi. "Super Medians." *Stanford Law Review* 61.1 Oct. (2008): 39-95. *LexisNexis*. Web. 7 Feb. 2011.
- Epstein, Lee, and Jack Knight. *The Choices Justices Make*. Washington, D.C: CQ Press, 1998.
- Epstein, Lee, and Thomas G. Walker. *Constitutional Law for a Changing America: Rights, Liberties, and Justice*. 7th ed. Washington, DC: CQ Press, 2010. Print.

- Fletcher, Betty B. "Madison Lecture: The Death Penalty in America: Can Justice Be Done?" *New York University Law Review* 70.4 Oct. (1995): 811-28. *LexisNexis*. Web. 4 Feb. 2011.
- Goldman, Jerry. "Justice Anthony M. Kennedy." The Oyez Project. The Oyez Project, - . Web. Jan. 2011. <[http://www.oyez.org/justices/anthony\\_kennedy](http://www.oyez.org/justices/anthony_kennedy)>.
- Gordon, Daniel. "Examining Justice Breyer's Consequential Thinking: Can Justice Scalia Be Wrong and Justice Kennedy Be Right?" *St. John's Journal of Legal Commentary* 23.123 Apr. (2008): 137-66. *LexisNexis*. Web. 5 Feb. 2011.
- Greenburg, Jan C. *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court*. New York: The Penguin Press, 2007. N. pag. Print.
- Grossman, Joel B. "Social Backgrounds and Judicial Decision-Making." *Harvard Law Review* 79.8 (1966): 1551-64. JSTOR. Web. 9 Feb. 2010. <<http://www.jstor.org/stable/1339008>>.
- Hitchcock, James. "Catholics and the Supreme Court: An Uneasy Relationship." *Catalyst* 10, no. 5 (2004) <http://www.catholicleague.org/rer.php?topic=Church+and+State&id=73>.
- Human Rights Campaign. HRC, - . Web. 31 Jan. 2011. <<http://www.hrc.org/>>.
- Idleman, Scott C. "The Role of Religious Values in Judicial Decision Making." *Indiana Law Journal* 68 (1993): 433-87. *LexisNexis*. Web. 9 Feb. 2010.
- Jost, Kenneth. "Background of Justices." *The Supreme Court A to Z, 4th ed.* Washington: CQ Press, 2007. 36-41. *CQ Supreme Court Collection*. Web. 6 Feb. 2011.
- Kannar, George. "The Constitutional Catechism of Antonin Scalia." *The Yale Law Journal* 99, no. 6 (1990): 1297-1357. <http://www.jstor.org>.
- Lim, Youngsik. "An Empirical Analysis of Supreme Court Justices' Decision Making." *The Journal of Legal Studies* 29.2 (2000): 721-52. JSTOR. Web. 9 Feb. 2010. <<http://www.jstor.org/stable/724702>>.
- Lindquist, Stefanie A., and Rorie S. Solberg. "Judicial Review by the Burger and Rehnquist Courts: Explaining Justices' Responses to Constitutional Challenges." *Political Research Quarterly* 60.1 Mar. (2007): 71-90. JSTOR. Web. 6 Feb. 2011. <<http://www.jstor.org.library.acaweb.org/stable/4623808>>.
- Modak-Truran, Mark C. "Reenchanting the Law: The Religious Dimension of Judicial Decision Making." *Catholic University Law Review* 53 (2004): 709-816. *LexisNexis*. Web. 9 Feb. 2010.

- Newport, Frank. "No Mandate for Protestant Justice; 42% Want Conservative Pick ." *Gallup, Inc.*. Gallup, Inc., 7 May 2010. Web. 7 Feb. 2011. <<http://www.gallup.com/poll/127742/no-mandate-protestant-justice-conservative-pick.aspx>>.
- Perry, Barbara A. "Catholics and The Supreme Court." *Catholics and Politics*. Ed. Kristin E. Heyer, Mark J. Rozell, and Michael A. Genovese. Washington, D.C.: Georgetown UP, 2008. 155-71. Print.
- Perry, Barbara A. A "Representative" Supreme Court?: The Impact of Race, Religion, and Gender on Appointments . N.p.: Greenwood Press, 1991. Print.
- Pringle, Henry F. *The Life and Times of William Howard Taft*. N.p.: Archon Books, 1964. Web. 8 Feb. 2011.
- Prothero, Stephen. "A yawn greets Catholic court." *USA TODAY*, 13 July 2009, sec. NEWS, p. 7A. <http://www.lexisnexis.com>.
- Roberts, Joel. "Scalia: Abortion Rights Not Constitutional." *CBS News*. CBS, 16 Oct. 2006. Web. 7 Feb. 2011. <<http://www.cbsnews.com/stories/2006/10/16/supremecourt/main2090280.shtml>>.
- Rosen, Jefferey. "The Agonizer." *The New Yorker* 11 Nov. 1996: 82-90. Web. 7 Feb. 2011.
- Rosen, Jefferey. *The Supreme Court: The Personalities and Rivalries That Defined America*. New York: Times Books, 2007. Print.
- Scalia, Antonin. "God's Justice and Ours." *First Things* May 2002: 17-21. Web. 7 Feb. 2011. <[http://homepages.gac.edu/~arosenh/395/Scalia\\_God's\\_Justice\\_and\\_Ours.pdf](http://homepages.gac.edu/~arosenh/395/Scalia_God's_Justice_and_Ours.pdf)>.
- Segal, Jeffrey A., and Albert D. Cover. "Ideological Values and the Votes of U.S. Supreme Court Justices." *The American Political Science Review* 83.2 (1989): 557-65. JSTOR. Web. 3 Apr. 2010.
- Segal, Jeffrey A., Lee Epstein, Charles M. Cameron, and Harold J. Spaeth. "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited." *The Journal of Politics* 57.3 (1995): 812-23. Print.
- Segal, Jeffrey A., and Harold J. Spaeth. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University Press, 2002. 183. Print.
- Toner, Robin. "The Supreme Court's Catholic Majority." *The New York Times*, 25 May 2007. [http://www.nytimes.com/2007/04/25/us/politics/26web-toner.html?\\_r=1](http://www.nytimes.com/2007/04/25/us/politics/26web-toner.html?_r=1).

Toobin, Jeffrey. *The Nine: Inside the Secret World of the Supreme Court*. New York: Random House, 2007. Print.

United States Conference of Catholic Bishops. USCCB. <http://www.usccb.org/>.

United States Conference of Catholic Bishops. Abortion. USCCB, - . Web. 20 Jan. 2011. <<http://www.usccb.org/prolife/issues/abortion/index.shtml>>.

United States Conference of Catholic Bishops. Capital Punishment. USCCB, - . Web. 24 Jan. 2011. <<http://www.usccb.org/prolife/issues/cappunish/index.shtml>>.

United States Conference of Catholic Bishops. Defense of Marriage. USCCB, - . Web. 14 Jan. 2011. <<http://www.usccb.org/defenseofmarriage/index.shtml>>.

Wan, William. "How Catholics Became Majority on High Court." *The Washington Post*, 20 June 2009, sec. METRO, p. B02. <http://www.lexisnexis.com>.

Ward, Artemus. "Roman Catholic Agony: Justice Anthony Kennedy and the Politics of Abortion on the U.S. Supreme Court." (2005). AllAcademic Research. Web. 3 Apr. 2010.

Wooden, Cindy. "Vatican paper condemns death penalty as affront to human dignity ." *Catholic News Service*. Catholic News Service, 7 Feb. 2007. Web. 29 Jan. 2011. <<http://www.catholicnews.com/data/stories/cns/0700736.htm>>.

### ***Cases Cited***

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

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

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

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

*Gonzales v. Carhart*, 550 U.S. 124 (2007)

*Gregg v. Georgia*, 428 U.S. 153 (1976)

*Griswold v. Connecticut*, 381 U.S. 479 (1965)

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

*Penry v. Lynaugh*, 492 U.S. 302 (1989)

*Planned Parenthood v. Casey*, 505 U.S. 833 (1992)

*Roe v. Wade*, 410 U.S. 113 (1973)

*Romer v. Evans*, 517 U.S. 620 (1996)

*Roper v. Simmons*, 543 U.S. 551 (2005)

*Stanford v. Kentucky*, 492 U.S. 361 (1989)

*Stenberg v. Carhart*, 530 U.S. 914 (2000)

*Thompson v. Oklahoma*, 487 U.S. 815 (1988)

*Trop v. Dulles*, 356 U.S. 86 (1958)

*Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)