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RESEARCH ARTICLE

Bishops and Friends: History and Legal Interpretation in Recent *Amicus Curiae* Briefs before the Supreme Court

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Abstract

With the rise of originalism as an interpretive strategy, history has come to play an increasingly prominent role in the reasoning and methodology of the United States Supreme Court. That development has, by necessity, also shaped the approach to constitutional interpretation taken by other parties, including the large and growing number of groups who file amicus curiae briefs. When the amici in question are religious entities, this article suggests, this "historical turn" at times takes the shape of narrating aspects of a tradition's sacred history for the benefit of both the Court and other, lay audiences. This article examines three recent amicus briefs by one of the most consistent and prolific religious amici, the United States Conference of Catholic Bishops. Across these briefs, this author traces the construction and deployment of history—both Catholic and American—as a middle term for negotiating the relationship between the US Constitution and its interpretation, on the one hand, and the interests and priorities of the religious tradition, on the other.

Keywords: Supreme Court of the United States; United States Conference of Catholic Bishops; amicus curiae; early Christianity; history

In his concurring opinion in *Fulton v. City of Philadelphia*, handed down by the United States Supreme Court in June 2021, Justice Samuel Alito dug deep into the historical roots of the case at hand. By denying a license to Catholic Support Service, a foster care agency, Alito decreed, the city of Philadelphia had forced the latter to forsake "a mission that dates back to the earliest days of the Church—providing for the care of orphaned and abandoned children."[1] The origins of that religious vocation, according to Alito, date back to the early centuries of Christianity and had remained central to that tradition throughout history: "One of the first known orphanages is said to have been founded by St. Basil the Great in the fourth century, and for centuries, the care of orphaned and abandoned children was carried out by religious orders." This was the case even for the American context, inasmuch as, the justice informed his readers, "[i]n the New World, religious groups continued to take the lead."[2] To care for those at the very margins of society, the brief suggests, was "work … that religious groups have performed since time immemorial."[3]

[1] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1884 (Alito, J., concurring).
[2] *Fulton*, 141 S. Ct. at 1885 (Alito, J., concurring).
[3] *Fulton*, 141 S. Ct. at 1926 (Alito, J., concurring).

Within the context of Alito's seventy-seven-page opinion and its central focus on overturning *Employment Division v. Smith*, these remarks are merely peripheral, confined to the concurrence's opening and closing paragraphs. In these framing passages, however, the brief seems to follow an argument urged upon the Court by one of its "friends": the brief *amici curiae* of the United States Conference of Catholic Bishops (USCCB) and the Philadelphia Catholic Conference.[4] While Alito thus does not rely explicitly on the bishops' document, their shared emphasis on history—and particularly the history of the Christian tradition—as key to the case's resolution is striking.

History and historical narrative have come to occupy a central place in the Court's interpretive methodology in recent decades. It is thus perhaps not surprising that they also take center stage in many of the writings addressed to the Court, including those submitted by *amici curiae.* The latter role is one of the most distinctively American ways for public entities to participate in the legal process. An *amicus*, according to *Black's Law Dictionary*, is a "person [or entity] who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter."[5] *Black's* does not discuss the root and reason of such interest; the Supreme Court rule governing such participation nevertheless assumes that part of *amici*'s motivation involves the desire to educate the Court, or at least to make their voices heard. In this vein, the *Rules* aver, "[a]n *amicus curiae* brief … brings to the attention of the Court relevant matter not already brought to its attention by the parties."[6]

The phenomenon of individuals, groups, or even government entities serving in this capacity has increased considerably throughout the twentieth century. Religious institutions have benefited from and participated in this development: one recent study identified nearly seven hundred *amicus curiae* briefs submitted by religious groups across one hundred cases, with the most prolific contributors generating as many as fifty briefs per organization.[7] As with their nonreligious counterparts, these briefs reflect an effort on the part of religious institutions to participate in both legal and political discourse, by advocating for particularly congenial interpretations of federal and constitutional law. As one commentator has noted regarding the USCCB, one of the most prolific religious *amici*: "[the Conference] does not file an *amicus curiae* brief in every case in which Catholic social teaching has

[4] On its website, the USCCB describes itself as "an assembly of the hierarchy of bishops who jointly exercise pastoral functions on behalf of the Christian faithful of the United States and the U.S. Virgin Islands." "About USCCB: Our Role and Mission," United States Conference of Catholic Bishops (website), accessed December 5, 2020, https://www.usccb.org/about. Its self-presentation in legal documents is somewhat more extensive. The USCCB amicus brief in *Fulton v. City of Philadelphia*, discussed in depth below, for example, notes that "[t]he bishops themselves constitute the membership of the conference. The conference is organized as a corporation in the District of Columbia. Its purposes under civil law are as follows: 'To unify, coordinate, encourage, promote and carry on Catholic activities in the United States; to organize and conduct religious, charitable and social welfare work at home and abroad; to aid in education; to care for immigrants; and generally to enter into and promote by education, publication and direction the objects of its being.'" In this vein, "[t]he Conference advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in … diverse areas of the nation's life." Brief for United States Conference of Catholic Bishops and Philadelphia Catholic Conference as Amici Curiae Supporting Petitioners, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-124) (hereafter Brief for USCCB in *Fulton*). For its evolution and institutional history through the 1990s, see also Thomas J. Reese, *A Flock of Shepherds: The National Conference of Catholic Bishops* (Kansas City: Sheed & Ward, 1992).

[5] Bryan A. Garner and Henry Campbell Black, s.v. "Amicus curiae," *Black's Law Dictionary* (St. Paul: West, 2009), 98.

[6] Rule 37.1, in Supreme Court of the United States, *Rules of the Supreme Court, Adopted April 18, 2019, Effective July 1, 2019* (Washington, DC: Department of Justice, 2019), 51.

[7] For a list of the most prolific amicus brief filers, see Kathryn Lindsay Oates, "Group Efficacy: Religious Interests in the Court" (PhD diss. University of Florida, 2010), 69.

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something to say about the subject matter. But every case in which the Conference has filed an *amicus curiae* brief is one such case."[8]

Oftentimes, of course, religious groups couch their efforts in legal terms rather than their own theological and philosophical idiom. In many instances, however, and, as I suggest in what follows, with increasing frequency in the opening decades of the twenty-first century, *amicus curiae* briefs nevertheless also function as spaces in which religious groups tell their stories and expound aspects of their sacred histories. The suggestion that law and the processes by which it is created, interpreted, and enforced ought to be understood as narrative-driven—as constituted by stories and their creation as much as, if not more than, by rules and their disinterested application to facts—has been part of the landscape of legal theory for some decades. Emerging in the 1980s, the twin disciplines of law *and* fiction and law *as* fiction have continued to thrive in European and North American scholarship.[9] Each of these fields encompasses an extensive set of questions focused on expanding beyond doctrinal analysis the methodological tools by which scholars engage different facets of law.

Scholars have argued, for example, that juries base their decisions on case narratives rather than the presence and reliability of evidence;[10] that lawyers function as translators for their clients, reframing and at times distorting their stories in narrative and language;[11] and that judges construct their own opinions in narrative form.[12] By the same token, scholars have examined the ways in which legal change, including in the realm of American civil rights legislation, emerges from the gradual shift of narrative frameworks;[13] have championed the role of the imagination in the construction of law;[14] have asked questions about how one might go about distinguishing "good" legal fictions from bad;[15] and have even produced quasi-prescriptive handbooks for legal practitioner's use of narrative.[16]

This article builds upon this rich vein of scholarship by examining the ways in which *amicus* briefs, too, serve as venues for storytelling. The briefs in question narrate aspects of sacred history for the USCCB and, by extension, for Roman Catholics in America: their origins, both in the Jesus-movement and in the new world; their experience of persecution and role as a champion of marginalized groups; their relationship with empire and with the American government. These narratives reflect in more or less obvious ways invented traditions: stories created from the building blocks of historical data in light of recent exigencies, to present audiences with the specter of unbroken continuity, from antiquity to the present. In the process, the briefs draw on accounts of traditions' origins and discourses

[8] Kevin C. Walsh, "Addressing Three Problems in Commentary on Catholics at the Supreme Court by Reference to Three Decades of Catholic Bishops' Amicus Briefs," *Stanford Law & Policy Review* 26, no. 2 (2015): 411–35, at 414.

[9] For a concise introduction to these twin strands, see, for example, Paul Gerwitz, "Narrative and Rhetoric in the Law," in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gerwitz (New Haven: Yale University Press, 1996), 2–13. A more up-to-date, if still more concise, commentary appears in Steven Cammiss, "Law *as* Narrative: Narrative Interpretation and Appropriation as an Element of Theft," *Statute Law Review* 40, no. 1 (2019): 25–39, esp. 26–28.

[10] W. Lance Bennett and Martha S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in the American Courtroom* (New Brunswick: Rutgers University Press, 1981).

[11] For different facets of legal labor as translation, see, for example, James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press,1990); Clark D. Cunningham "The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse," *Cornell Law Review* 77, no. 6 (1992): 1298–1387.

[12] Audun Kjus, *Stories at Trial* (Liverpool: Deborah Charles Publications, 2011).

[13] Anthony G. Amsterdam and Jerome S. Bruner, *Minding the Law: How Courts Rely on Storytelling, and How Their Stories Change the Ways We Understand the Law—and Ourselves* (Cambridge, MA: Harvard University Press, 2002).

[14] Janet Malcolm, "The Sidebar Conference," in Brooks and Gerwitz, eds., *Law's Stories*, 106–09.

[15] See, for example, Lewis H. LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* (University Park: Pennsylvania State University Press, 1995), esp. 121–53.

[16] See, for example, Philip N. Meyer, *Storytelling for Lawyers* (Oxford: Oxford University Press, 2014).

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of suffering and violence. The briefs' efforts to present the stories they tell as inevitable monuments to historical fact notwithstanding, however, they, like other historical accounts, are created for a specific purpose: to establish a kind of authority for the *amici*, to instruct the Court, and to shape the law.

Given the particularities of the genre, below I discuss the phenomenon of the *amicus curiae* brief, its appropriation by religious interest groups, and its historical impact—or lack thereof—on the Supreme Court. I then turn to an analysis of the USCCB's engagement with the Court in three *amicus* briefs: *Fulton v. City of Philadelphia* (2020); *Trump v. Hawaii* (2018); and *Dailey v. Florida* (2020). I conclude with an analysis of these briefs' construction of sacred history at the intersection of tradition, suffering, and authority, and an assessment of the motivations behind their deployment of history.

Becoming *Friends*: Amici Curiae, Religion, and the Supreme Court

> An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court.[17]
>
> [*Amicus curiae*] briefs play an important role in educating the judges on potentially relevant technical matters, helping make us not experts, but moderately educated lay persons, and that education helps to improve the quality of our decisions.[18]

Statements like the ones noted above proliferate in official reflections on the role and function of the *amicus curiae.* They highlight the importance of and appreciation for the Court's "friends," the value of the information they provide for the Court concerning law, policy, and other matters relevant to the cases before them, and the Court's concomitant reliance on thoughtful, knowledgeable *amicus* participation. Since 1939, the latter has been governed by the Court's formal rules. These have changed little over the past century.[19] At their center stands the supposition that putative *amici* must gain the consent of both parties to a lawsuit for submitting their brief.[20] Where that consent is not forthcoming, the *amicus* may petition the Court for leave to file, emphasizing "friends" standing in cases as "a matter of grace, rather than right."[21]

Especially since the 1960s, *amicus* participation has increased dramatically: by the 1990s, the Court received on average five *amicus* briefs per case,[22] by the 2011–12 term that average had doubled to about ten briefs per case.[23] Religious organizations have not lagged behind their non-religious counterparts in appropriating the role of *amici curiae.*[24] Since the 1950s, a

[17] Rule 37.1, Supreme Court, *Rules*, 51.

[18] Stephen Breyer, "The Interdependence of Science and Law," *Judicature* 82, no. 1 (1998): 24–27, at 26.

[19] The most recent edit to the Supreme Court Rules for *amicus curiae* participation took place as recently as 2007, and is potentially one of the most impactful. Rule 37.6 thus requires that the first footnote of an *amicus* brief to disclose "whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of a brief," and to identify "every person other than the *amicus* … who made such a monetary contribution." Rule 37.6, Supreme Court, *Rules*, 51.

[20] Rule 37.2a, Supreme Court, *Rules*, 51.

[21] Samuel Krislov, "The Amicus Curiae Brief: From Friendship to Advocacy," *Yale Law Journal* 72, no. 4 (1963): 694–721. The exception to this pattern is the Solicitor General—a privileged *amicus* by many standards—who, under Rule 37. 4, need not file a motion for leave before submitting an *amicus curiae* brief.

[22] Kearney and Merrill, "Influence of Amicus Curiae Briefs on the Supreme Court," 752–54, 765.

[23] Anthony J. Franze and R. Reeves Anderson, "The Supreme Court's Reliance on Amicus Curiae in the 2011–12 Term," *National Law Journal*, September 18, 2013, https://perma.cc/4QLRU958.

[24] A problem that bedevils studies on this topic is the question of how to define what constitutes and does not constitute a religious organization for these purposes—not least of all since the American religious landscape is shifting palpably, with, for the example, the Satanic Temple, a secular humanist organization assuming the mantle

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growing number of religious groups have lodged briefs with the Court on questions concerning diverse issues. Andrew S. Mansfield, in a study encompassing court cases from 1954 to 2006, accordingly identifies fourteen separate religious organizations acting as *amici*, including four who filed briefs in eight or more cases, weighing in on topics like the constitutionality of the death penalty, the definition of marriage, assisted suicide, and abortion.[25]

For observers—and indeed perhaps for the justices themselves—these briefs have often raised more pressing concerns than those of other "friends." This is due in large part to the fact that religious organizations' participation in this forum intersects with two aspects of the Court's activity that have historically attracted intense scrutiny: the question of whether and how *amici* exercise influence upon the Court; and the impact the Justices' own religious views may have on their office. We will attend to these in turn.

The question of the efficaciousness of *amicus* briefs in shaping the Court's reasoning and verdicts has generated significant scholarly interest—understandably so, considering the resources expended on the by now up to eight hundred *amicus* briefs submitted annually.[26] Similarly intuitive, however, are the challenges that attend these questions: "influence exercised," after all, is difficult to gauge for a process that takes place, but for the disclosure of its final product, behind closed doors. Scholarship surrounding the success or failure of *amicus* briefs has focused historically on two general measures: that of the relative success or failure enjoyed by parties with or without *amicus* support; and that of the Court's explicit reference to a brief or use of its argument and language.[27]

The first of these strategies focuses on calculating the proportion of successful litigants with *amicus* support—or, as in Kearney and Merrill's landmark study of *amicus* influence across half a century of Supreme Court activity, with greater numbers of *amici* supporting their cause than their opponents.[28] Other studies have sought to assess *amici*'s influence by

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of a religious institution, entering civil rights litigation. See Joseph P. Laycock, *Speak of the Devil: How the Satanic Temple Is Changing the Way We Talk about Religion* (Oxford: Oxford University Press, 2020). The primary subject of my inquiry here, the United States Conference of Catholic Bishops, qualifies, of course, by most standards as a religious institution; the broader landscape of scholarship on this topic, however, calls out for consideration and nuance by scholars of religious studies and sociology and those of political science and legal procedure.

[25] These include the Family Research Council (10); Focus on the Family (9); the Unitarian Universalist Association (8); and the United States Conference of Catholic Bishops (8). Andrew S. Mansfield, "Religious Arguments and the United States Supreme Court: A Review of Amicus Curiae Briefs Files by Religious Organizations," *Cardozo Public Law, Policy, and Ethics Journal* 7, no. 2 (2009): 343–94, at 394.

[26] The Court reached this "record breaking" figure in the 2014/15 term: Anthony J. Franze and R. Reeves Anderson, "Record Breaking Term for Amicus Curiae in Supreme Court Reflects New Norm," *National Law Journal*, August 19, 2015, https://www.law.com/supremecourtbrief/almID/1202735095655/?slreturn=20220121135402. By 2018/19, that number had dropped somewhat to just over seven hundred briefs: Anthony J. Franze and R. Reeves Anderson, "A Calm but Impressive 2018–19 Term for 'Friends of the Court,'" *Supreme Court Brief*, November 25, 2019, https://www.law.com/supremecourtbrief/2019/11/25/a-calm-but-impressive-2018-19-term-for-friends-of-the-court/. During the 2019 term, *amicus* brief filings averaged more than twelve for each case for which the Court had granted certiorari: Adam Feldman, "Empirical SCOTUS: About this Term: OT 2019," *SCOTUSblog*, February 12, 2020, https://www.scotusblog.com/2020/02/empirical-scotus-about-this-term-ot-2019/.

[27] A more sophisticated model has been proposed by Collins in his 2008 study of *amicus* influence across the 1946–2001 terms: for an overview of Collins's own methodology and other approaches to addressing this question, see Paul M. Collins, Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (Oxford: Oxford University Press, 2008), 6–12.

[28] See, for example, Lee Epstein, "Interest Group Litigation during the Rehnquist Court Era," *Journal of Law and Politics* 9, no. 4 (1993): 639–717; Gregory L. Hassler and Karen O'Connor, "Woodsy Witch-Doctors versus Judicial Guerrillas: The Role and Impact of Competing Interest Groups in Environmental Litigation," *Boston College Environmental Affairs Law Review* 13, no. 4 (1986): 487–520; Gregg Ivers and Karen O'Connor, "Friends as Foe: The Amicus Curiae Participation and Effectiveness of the American Civil Liberties Union and Americans for Effective Law Enforcement in Criminal Cases 1969–1982," *Law and Policy* 9, no. 2 (1987): 161–78; Kearney and Merrill, "Influence of Amicus Curiae Briefs on the Supreme Court"; Robert Rushin and Karen O'Connor, "Judicial Lobbying:

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tallying and tracking the number and nature of the Court's citations to or quotations from such briefs.[29] A 2015 study, for example, sought to investigate the Court's incorporation of *amicus* briefs' language with the assistance of plagiarism detection software. This strategy arguably allowed the investigators to discern influence even in the absence of explicit citation, in the process identifying the characteristics of most successful *amicus* briefs.[30]

A common denominator of particularly the most recent wave of these studies is the conclusion that both individual Justices and the Court as a whole do, indeed, listen to their "friends."[31] Such responsiveness is, generally speaking, regarded positively: as a democratic element in the Court's otherwise pointedly un-democratic function, *amici*'s participation and Justices' engagement with them contribute to the Court's institutional legitimacy.[32] Similar attentions directed at the *amicus* briefs of religious organizations, however, pose greater challenges. On the one hand, they raise the specter of the Court's overstepping the limits of its own Establishment Clause jurisprudence. While religious *amici*, like all others, are thus at liberty and indeed encouraged to exercise their right to free speech,[33] the Justices' making reference to such briefs has appeared to some as a potentially unconstitutional form of endorsement.[34]

Indeed, historically speaking, the Court seems to have tacitly assented to the validity of these concerns. As Mansfield has argued, in spite of religious organizations' embrace of the *amicus* role, "a reader of the Supreme Court decisions might have no idea such a debate is occurring. Little, if any, explicit mention is made of the concerns of [religious organization] *amici* or their participation in the process in the Supreme Court's decisions."[35] Since the

Interest Groups, the Supreme Court, and Issues of Freedom of Expression and Speech," *Southeastern Political Review* 15, no. 1 (1987): 47–65; Donald R. Songer and Reginald S. Sheehan, "Interest Group Success in the Courts: Amicus Participation in the Supreme Court," *Political Research Quarterly* 46, no. 2 (1993): 339–54.

[29] See, for example, Kearney and Merrill, "Influence of Amicus Curiae Briefs on the Supreme Court"; Stephanie Tai, "Friendly Science: Medical, Scientific, and Technical Amici before the Supreme Court," *Washington University Law Quarterly* 78, no. 3 (2000): 789–838; Epstein, "Interest Group Litigation during the Rehnquist Court Era"; Susan Hedman, "Friends of the Earth and Friends of the Court: Assessing the Impact of Interest Group Amici Curiae in Environmental Cases Decided by the Supreme Court," *Virginia Environmental Law Journal* 10, no. 2 (1991): 187–212; Susan Behuniak-Long, "Friendly Fire: Amici Curiae and *Webster v. Reproductive Health Services*," *Judicature* 74, no. 5 (1991): 261–70; Fowler V. Harper and Edwin D. Etherington, "Lobbyists before the Court," *University of Pennsylvania Law Review*, no. 101 (1953): 1172–77.

[30] Paul M. Collins, Jr., Pamela C. Corley, and Jesse Hamner, "The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content," *Law & Society Review* 49, no. 4 (2015): 917–44.

[31] See, for example, Collins, Corley, and Hammer, "The Influence of Amicus Curiae Briefs," 938 ("The novel data we offer reveals important insights into this topic, demonstrating that the justices systematically incorporate language from amicus briefs into the Court's majority opinions based on their perceptions as to whether those briefs will enhance their ability to make effective law and policy."); similarly Kearney and Merrill, "Influence of Amicus Curiae Briefs on the Supreme Court," 830 ("Amicus briefs clearly do matter in many contexts, and this means that the Court is almost certainly influenced by additional information supplementing that provided by the parties to the case."); and, most recently, Richard L. Pacelle et al., "Assessing the Influence of *Amicus Curiae* Briefs on the Roberts Court," *Social Science Quarterly* 99, no. 4 (2018), 1253–66, at 1263 ("[O]ur results indicate that *amicus curiae* briefs do have a significant impact on the voting behavior of Supreme Court justices, although this impact clearly is weaker than that of the other variables we included in our models.").

[32] See, for example, Omari Scott Simmons, "Picking Friends from the Crowd: Amicus Participation as Political Symbolism," *Connecticut Law Review* 42, no. 1 (2009): 185–233.

[33] See, for example, Gregg Ivers, "Organized Religion and the Supreme Court," *Journal of Church and State* 32, no. 4 (1990): 775–93, at 776 ("[T]o deny organized religion the right to engage in political action not only subverts the integrity of the Free Exercise Clause, but risks carving out a constitutionally troublesome exception to another basic First Amendment right—to petition the government for a redress of grievances.").

[34] See Tiffany Marie Westfall Ferris, "Justices Hawking Jesus: Endorsement through Citation to Religious Amici in Supreme Court Opinions," *William and Mary Bill of Rights Journal* 21, no. 4 (2013): 1259–90.

[35] Mansfield, "Religious Arguments," 346.

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beginning of the twenty-first century, the Court seems to have relaxed this apparent policy somewhat, with occasional references to religious organizations' briefs occurring in both majority opinions and in individual Justices' concurrences or dissents.[36] Still, as recently as 2009, a survey of the Court's engagement with religious organizations' *amicus* briefs was able to suggest that "the Supreme Court is extremely careful not to be seen adopting those positions because of its own jurisprudence on the Establishment Clause."[37]

Anxieties about the Court's engagement with religious *amicus* briefs resonate with concerns about Justices' religious beliefs and their influence on judicial reasoning. Studies concerning the latter proliferate, while also differing widely in their conclusions. One 2004 study of district and appeals court judges, for example, found that "the religious background of judges proved to be the single most prominent feature";[38] similarly, a 2012 analysis of Roman Catholic justices' voting record concluded that "religion is a source of judicial policy preferences, independent of underlying differences in ideology and justice-specific fixed effects."[39] By contrast, a 2013 study reached more modest conclusions concerning the differences between Roman Catholic and mainline Protestant justices,[40] and a 2015 article called into question the methodological presuppositions informing earlier studies' accounts of Roman Catholics on the Court.[41]

As this sample of scholarship already attests, questions concerning justices' religious allegiances have been particularly pressing for the Court's Roman Catholic constituency. The latter have for some decades now constituted either a majority or a hefty minority of justices.[42] Both the scholarly community and the public media have raised questions about Roman Catholic Justices' potential responsiveness to their tradition's priorities; while results vary, the specter of undue influence remains.[43] And yet, Roman Catholic justices

[36] See, for example, Citizens United v. FEC, 130 S. Ct. 876, 916 (2010) (Kennedy, J., citing Brief for Alliance Defense Fund as Amicus Curiae in Support of Appellant, Citizens United v. FEC, 130 S. Ct. 876 (No. 08-205)); Christian Legal Society v. Martinez, 130 S. Ct. 2971, 3012 (2010) (Alito, J., dissenting and quoting Brief for American Islamic Congress et al. as Amici Curiae in Support of Petitioners, Christian Legal Society v. Martinez, 130 S. Ct. 2971 (No. 08-1371)); Pleasant Grove City v. Summum, 555 U.S. 460, 480 n.7 (2009) (Alito, J., citing Brief for American Catholic Lawyers Association as Amicus Curiae in Support of Petitioner, Pleasant Grove City v. Summum, 555 U.S. 460 (No. 07-665)); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2008) (Stevens, J., citing Brief for United States Catholic Conference et al. as Amici Curiae in Support of Petitioner, Atkins v. Virginia, 536 U.S. 304 (2002) (No. 00-8542)) (This and other amicus briefs filed in *Atkins* were originally filed in *McCarver v. North Carolina*, No. 00-8727, and refiled without alteration by joint agreement of the parties in *Atkins.* See Joint Motion of All Amici in McCarver v. North Carolina, No. 00-8727, to Have Their McCarver Amicus Briefs Considered in this Case in Support of Petitioner, Atkins v. Virginia 536 U.S. 304 (2002) (No. 00-8452)); FEC v. Wisconsin Right to Life, 551 U.S. 449, 481 n.10; (2007) (Roberts, C.J., citing Brief for Family Research Council et al. as Amici Curiae in Support of Appellee, FEC v. Wisconsin Right to Life, 551 U.S. 449 (Nos. 06-969, 06-970)).

[37] Mansfield, "Religious Arguments," 377.

[38] Gregory C. Sisk, Michael Heise, and Andrew P. Morriss, "Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions," *Ohio State Law Journal* 65, no. 3 (2004): 491–614, at 576.

[39] William Blake, "God Save This Honorable Court: Religion as a Source of Judicial Policy Preferences," *Political Research Quarterly* 65, no. 4 (2012): 814–26, at 823.

[40] Lewis M. Wasserman and James C. Hardy, "U.S. Supreme Court Justices' Religious and Party Affiliation, Case-Level Factors, Decisional Era and Voting in Establishment Clause Disputes Involving Public Education: 1947–2012," *British Journal of American Legal Studies* 2, no. 1 (2013): 111–62.

[41] Walsh, "Addressing Three Problems."

[42] For a discussion of the Catholic presence on the Court through 2016, see Kenneth D. Wald, "Religious Influences on Catholic and Jewish Supreme Court Justices: Converging History, Diverging Paths," in *The Wiley Blackwell Companion to Religion and Politics in the U.S.,* ed. Barbara A. McGraw (Chichester: Wiley Blackwell, 2016), 442–53. In the intervening years, the balance of religiously affiliated Justices has shifted further with the death of Ruth Bader Ginsburg and the addition of (Roman Catholic) Justice Amy Coney Barrett. At the time of this article's writing, seven of the Court's members accordingly self-identify as Roman Catholic.

[43] Blake, "God Save This Honorable Court," 816 ("In the Protestant tradition the doctrine of universal priesthood holds that all Christians have the potential to interpret scripture, not just priests … Thus, Protestant lay people may

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have shown no greater propensity towards citing Catholic *amicus* briefs than have their non-Catholic colleagues; indeed, some of the harshest critique of this practice and the alleged democratic impulse that propels it has come from one of the most stalwart Catholic justices of the past decades.[44]

This survey merely skims the surface of scholarship on *amicus curiae* participation in the United States. Notably absent from it are, however, studies of *amicus curiae* briefs as exercises in story-telling—and, by extension, as efforts to shape the story that is told by parties to a lawsuit and by the court itself. Yet if we acknowledge the importance of a narratival dimension to other processes of law—to legal argument, brief-construction, jury deliberation, and the formulation of judgment—it stands to reason that the Court's friends might not be excepted from the thrall of stories. Qualified support for this suggestion arises from a study concerning the most valuable—or at least: the most attended to—kinds of *amicus* briefs, as discussed by seventy former clerks to Supreme Court justices from the 1960s through the beginning of the 2000s.[45] Clerks' responses to the kind of briefs most useful to the justices largely focused on the Court's desire for facts rather than doctrine: "Clerks citing the serviceability of amicus briefs in technical, statutory, regulatory and medical cases alike frequently noted that it was largely the non-legal information presented in these briefs that made them useful."[46] This desire for facts extended even, albeit in more qualified ways, to "softer" data. A narrow majority of the clerks interviewed, for example, indicated that they would give more attention to *amicus* briefs containing social science data. As one clerk noted, "[a]ny data showing real world impact is important because it shows affects [sic] that go beyond the interests of the parties. This matters to some justices."[47]

The judicial quest for facts suggests that one of the roles *amici* play vis-à-vis the Court is that of providing raw material from which the justices create stories both for understanding the cases before them and for narrating them to the public. By contrast, the study of Supreme Court clerks provides no indication that the Court is in the market for pre-fab storylines to adopt and deploy. And yet, at times this seems to occur just the same, as suggested by a remarkably resonant footnote in J. Stevens's majority opinion in *Atkins v. Virginia.*[48] Stevens therein sought to craft a narrative of capital punishment's increasing marginalization in U.S. society: its declining popularity, increasing condemnation, and, in short, likely trajectory towards relic status in the American legal system.

Symptomatic of this development, Stevens argued, was states' increasing avoidance of executing "mentally retarded" convicts: "The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it."[49] To further support his narrative, the justice also called on support from a number of *amicus* briefs, including the American Psychological and Medical Associations. Breaking with tradition, Stevens also called on a brief submitted by the USCCB, writing on behalf of a number of religious groups. The latter, Stevens argued, were a set of "widely diverse religious communities in the United

be freer to come to their own theological conclusions, even if it means disagreeing with the position taken by their religious leader.").

[44] See especially Scalia's scathing response to Stevens' in *Atkins v. Virginia*, 536 U.S. 304, 347 n.6 (2002) (Scalia, J., dissenting).

[45] Kelly J. Lynch, "Best Friends? Supreme Court Clerks on Amicus Curiae Briefs," *Journal of Law and Politics* 20, no. 1 (2004): 33–75.

[46] Lynch, 42. Related to the perceived need for (niche) factual data rather than legal expertise, 14 percent of clerks "went out of their way to note that amicus briefs were *least* helpful in constitutional law cases, despite the fact that these cases attracted the *most* amicus briefs." Lynch, 42.

[47] Lynch, 67. Note, however, that some of the respondents denied giving more attention to briefs containing social science data, owing perhaps to perceptions of its "manipulable" nature. Lynch, 67.

[48] Atkins v. Virginia, 536 U.S. 304 (2002).

[49] *Atkins*, 536 U.S. at 316.

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States, reflecting Christian, Jewish, Muslim, and Buddhist traditions," who nevertheless "all 'share a conviction that the execution of persons with mental retardation cannot be morally justified.'"[50]

On the one hand, this is precisely the kind of data the clerks in Lynch's study indicated "matters to some justices": that the leadership of large swaths of the United States' religious populations—and, by extension, those populations themselves—treated as immoral the execution of individuals with an IQ below 70, provided potentially important insight into the "real world" ramifications of the Court's decisions. The fact moreover also fit perfectly with the story Stevens's opinion sought to construct: a mere pebble in the bulwark the justice was building against capital punishment, it was evidently selected as much for its fit in the opinion's broader narrative structure as the information it provided.

By the same token, however, the opinion's acknowledgement of and quotation from the USCCB's brief points to the success of their and their co-authors' own narrative strategy. Their brief, as Stevens acknowledges, had presented them as odd-couple collaborators, united, despite their differences on general and capital punishment-specific issues, to highlight a point of theological and political convergence. Their story succeeded, in other words, because it cohered with the story the Court's majority sought to tell.[51] Below, I turn to different stories, produced by the USCCB in *amicus* briefs for three recent Supreme Court cases. Unlike in *Atkins*, their provenance is still too recent to discern the ways in which they will echo in and beyond the Court's opinions. Their shared approach to and deployment of history nevertheless suggests the beginnings of a new historiographical—and emphatically narrative—turn.

Bishops and Friends: Examining the Briefs

The USCCB and its predecessor organizations have been a regular contributor of *amicus* briefs to the Supreme Court.[52] For most of the 2000s, the conference submitted at least one brief each year, and in the 2010s, the number rose further. The 2014 term, with eleven submitted briefs, has thus far been the most *amicus*-intensive for the USCCB; by contrast, in the 2019 term they submitted a mere seven.

A majority of these briefs reflect not only the views of the USCCB, but are co-authored, typically among a group of religious institutions that favor a shared policy outcome in a particular case. This at times makes for strange bedfellows: *McCullen v. Coakley*,[53] a 2014 case concerning a Massachusetts law fixing "buffer zones" around reproductive health care facilities, for example, precipitated a joint *amicus* brief from, inter alia, the USCCB, the International Society for Krishna Consciousness, and the Ethics and Religious Liberty Commission of the Southern Baptist Conference.[54] On other occasions, by contrast, the

[50] *Atkins*, 536 U.S. at 316 n. 21.

[51] The decades since *Atkins* suggest, however, that its impact resonated beyond the confines of the case, frequently drawing criticism for Stevens's opinion. See, for example, Kelly C. Elmore, "*Atkins v. Virginia*: Death Penalty for the Mentally Retarded—Cruel and Unusual—The Crime, Not the Punishment," *DePaul Law Review* 53, no. 3 (2004): 1285–1346; Ferris, "Justices Hawking Jesus," 1281.

[52] For a discussion of the history of the United States Conference of Catholic Bishops and its predecessor organizations, see Reese, *Flock of Shepherds.*

[53] 573 U.S. 464 (2014).

[54] Brief for the National Hispanic Christian Leadership Conference et al, as Amici Curiae in Support of the Petitioners, McCullen v. Coakley, 573 U.S. 464 (2014) (No. 12-1168). Such collaborations may make strategic sense by commanding greater attention from at least some Justices and their staff, a survey of former Supreme Court clerks suggests. Lynch, "Best Friends," 63–64.

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USCCB either partners only with Roman Catholic organizations[55] or authors briefs under its own auspices, at times in conjunction with the Roman Catholic diocese in which the case first arose.[56]

The decision whether to file singly or jointly—or, for that matter, as an interreligious or a purely Roman Catholic group—reflects a strategic choice on the part of the USCCB, and in turn shapes the briefs themselves. Where the USCCB thus joins with other, non-Catholic *amici*, the arguments deployed either draw on a shared basis of religious, moral, or ethical understanding,[57] or focus narrowly on considerations of law and legal interpretation.[58] The three briefs examined in this essay, by contrast, all reflect exclusively Roman Catholic authorship, having been composed either solely on behalf of the USCCB, or on behalf of a narrowly drawn coalition between the USCCB and a diocese or a selection of Roman Catholic charities implicated in the case. They thus approximate as closely as possible the USCCB's perspective.[59] Moreover, while the briefs at hand were authored by different primary counsels, and experienced different receptions by the Court, they nevertheless all demonstrate an argumentative trend towards historical embeddedness, deploying and indeed constructing sacred history to appeal to the Court.

Fulton v. City of Philadelphia

Fulton v. City of Philadelphia involves a challenge, brought by a group of foster parents and their licensing agency, the local archdiocese's Catholic Social Service, against the city of Philadelphia. The latter had determined in 2018 that Catholic Social Service refused to license or arrange home visits for same-sex couples, in the process violating the terms of the city's contract with the agency, which prohibited, inter alia, discrimination "on the basis of ... sex, sexual orientation, [and] gender identity."[60] The city in March 2018 refused to renew its contract with Catholic Social Service, which, along with previously licensed foster families, proceeded to file suit, citing the violation of its rights under the Free Exercise and Establishment clauses of the first amendment. Both the District Court and Court of

[55] In the brief filed in support of petitioner in *Advocate Health Network v. Stapleton*, 137 S. Ct. 1652 (2017), for example, the USCCB collaborated with Catholic Charities USA, Catholic Relief Services, the National Catholic Educational Association, and the Association of Catholic Colleges and Universities.

[56] In practical terms, moreover, not all of the USCCB's *amicus* briefs are drafted by the same persons, even in instances where the USCCB appears as the only author. The briefs discussed in this article, for example, were authored by a West Coast law firm specializing, inter alia, in litigation for religious institutions (*Fulton*); a partner specializing in complex civil litigation at a large international law firm (*Dailey*); and the USCCB's own general counsel (*Trump*).

[57] See, for example, Brief for the United States Conference of Catholic Bishops et al., as Amici Curiae in Support of the Defendants-Appellants, Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014) (Nos. 14-1167(L), 14-1169, 14-1173).

[58] See, for example, Brief for the United States Conference of Catholic Bishops et al. as Amici Curiae in Support of Respondent, June Medical Services v. Russo, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460).

[59] That is not to say, of course, that these briefs represent the only possible or even necessarily the official Roman Catholic perspective, even within the constraints of the *amicus curiae* genre. *Fulton v. Philadelphia*, discussed *infra*, is a case in point. In addition to the USCCB's brief, four other briefs present themselves as reflecting Roman Catholic views, with three of them—those on behalf of the Catholic Charities of the Diocese of Springfield in Illinois, and Catholic Charities of the Diocese of Joliet, Inc.; New Hope Family Services, Inc. and Catholic Charities West Michigan; and Archbishop Jerome E. Listecki and the Roman Catholic Archdiocese of Milwaukee—supporting respondents' cause. The fourth and perhaps most interesting one, filed on behalf of "27 [Roman Catholic] lay men and women," by contrast, expresses support for the City of Philadelphia and particularly for LGBTQIA foster parents, highlighting both the so-called big tent and the concomitant internal tensions of Roman Catholic discourses even within the legal realm.

[60] Philadelphia Fair Practices Ordinance § 9-1102 (Definitions) at 4, Chapter 9-1100 of the Philadelphia Code, quoted in Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 671 (E.D. Pa. 2018).

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Appeals for the Third Circuit found in favor of Philadelphia, relying in significant part on a 1990 Supreme Court ruling, *Employment Division v. Smith.*[61]

The latter's circumscription of free exercise where a religious activity violates otherwise valid state law—and the concomitant question whether a government's toleration of that practice raises the specter of an establishment challenge—sat at the heart of the Supreme Court's consideration of this case. The *amicus* brief submitted by the USCCB and the Pennsylvania Catholic Conference on behalf of the Catholic Social Service and its foster families, however, addresses itself to an apparently peripheral aspect of respondents' argument: the Catholic Church's historical role in caring for orphans.[62] Such an argument touches on two considerations that have proved significant in First-Amendment jurisprudence: the centrality of a practice to a religion's identity; and the long-standing toleration of its exercise under public auspices.[63] To more fully understand the uses of history, however, requires readers to appreciate, first, the kinds of history the brief adduces, and the strategies by which those histories are constructed.

History, in fact, stands at the center of arguments surrounding *Fulton*: the century-long collaboration between Catholic Social Service and the City of Philadelphia;[64] the role of faith-based organizations in foster-care throughout the nation's history more generally;[65] even the historical particularities of constitutional protections enjoyed by different groups.[66] The USCCB's *amicus* brief both feeds on and feeds into this pattern of treating history as the key to the case: "Petitioners' opening brief shows that the Catholic Church has been helping orphans and other vulnerable children in Philadelphia for more than 200 years.... [Moreover, t]he USCCB and PCC offer this brief to complement Petitioners' brief with additional historical background as to the central role that the Catholic Church has played in caring for orphans around the world and here in the United States."[67]

More history, the brief suggests, would facilitate *Fulton*'s fair and constitutionally fitting resolution; given the particularities of history, it would, moreover, establish the centrally religious—and thus arguably constitutionally protected—nature of petitioner's

[61] Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). The Court in *Smith* found no Free Exercise violation in the state's criminalizing the use of peyote even for religious purposes, and its denying unemployment benefits to individuals who had been discharged for aforementioned reasons.

[62] See, for example, *amici*'s explicit statement in the Summary of Argument: "The USCCB and PCC [Philadelphia Catholic Conference] offer this brief to complement Petitioners' brief with additional historical background as to the central role that the Catholic Church has played in caring for orphans around the world and here in the United States." Brief for USCCB in *Fulton*, 5.

[63] For the Court's reliance on tradition and longstanding practice in determining the constitutionality of religious monuments on state property in *Van Orden v. Perry*, see Greg Abbott, "Upholding the Unbroken Tradition: Constitutional Acknowledgement of the Ten Commandments in the Public Square," *William & Mary Bill of Rights Journal* 14, no. 1 (2005): 51–72.

[64] Petitioner's brief, in fact, leans heavily into its assertion that "[h]istory matters, too": the historical relationship between city and agency; the Court's history of interpretation of the Free Exercise clause; Philadelphia's position throughout the case; and the particular history of race discrimination vis-à-vis other forms of discrimination. Reply Brief for Petitioners, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123).

[65] See, for example, Brief for Nebraska, Arizona, and Ohio as Amici Curiae in Support of Petitioners, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123). Nebraska's solicitor general, James Campbell, further expressed the states' views in a contribution to a SCOTUSblog symposium: James Campbell, "Symposium: Philadelphia's Exclusion of Faith-Based Foster Agency Departs from History and Undermines Interests of Children," *SCOTUSblog*, October 29, 2020, https://www.scotusblog.com/2020/10/symposium-philadelphias-exclusion-of-faith-based-foster-agency-departs-from-history-and-undermines-interests-of-children/.

[66] For an analysis of different varieties of discrimination in the oral arguments surrounding the case, see Leslie C. Griffin, "Stigma and the Oral Argument in *Fulton v. City of Philadelphia*," *Verdict: Legal Analysis and Commentary from Justia,* November 5, 2020, https://verdict.justia.com/2020/11/05/stigma-and-the-oral-argument-in-fulton-v-city-of-philadelphia.

[67] Brief for USCCB in *Fulton*, 5.

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activities.[68] While the USCCB thus adduces biblical support for the importance of orphan care to its religious identity, their sampling of passages pales in comparison with the space allotted to the brief's discussion of Christian history.[69] Whereas the Bible, the brief suggests, is thus ahistorical, univocal, and self-interpreting, requiring neither dating nor contextualization, extra-canonical sources must be located in time and space.

Two periods of history feature in the USCCB's argument with particular prominence: the "Early Church," a term by which the brief designates the period from the second through the early third centuries (pp. 9–13); and the "Church in the United States" (pp. 13–15). Both sections demonstrate a preoccupation with origins, of the Jesus movement and of its manifestation in American Catholicism. Of these, the former takes pride of place, in light of the brief's argument that "[c]aring for the orphan and the marginalized has been part of the Catholic Church's fundamental makeup from the very beginning."[70] The documents the brief adduces are accordingly among the earliest noncanonical witnesses to Christian communal life: the *Apology* of Aristides, "presented … to the Roman emperor Hadrian in 125 A.D.";[71] Justin Martyr's apology, presented "about thirty years later" to Antoninus Pius;[72] the epistle of Ignatius to the Smyrnians, dated by the brief to "c. A.D. 106";[73] Polycarp's Epistle to the Philippians, "c. A.D. 110"; and the *Didascalia Apostolorum*, "written around 230 A.D.," and thus a relative late-comer for the brief.[74]

Strikingly, the brief seeks to locate these sources against the backdrop of the Roman Empire and its grisly treatment of both orphans and Christians: "The Church was born in the shadow of the Roman Empire, in which it was both common and legal for parents to abandon unwanted children through exposure. Some children were abandoned in public places, in hopes that others would take them up, but others were left on remote mountaintops, dung heaps, or garbage piles."[75] Such casual cruelty sets the scene for Christian distinction—they "became renowned for their care for these abandoned children"[76]—and, as in the case at hand nearly two millennia later, their self-justification before civic leaders.

While individual sources emerge as historically situated, with dates and settings in Roman history, the brief's selections of these texts appear largely indistinguishable from one another. The brief's quotation from the *Apology* of Aristides is a case in point: "[Christians] love one another; and from widows they do not turn away their esteem; and they deliver the orphan from him who treats him harshly."[77] In a similar vein, the excerpt from Polycarp's Epistle suggests that "presbyters, for their part, must be compassionate and merciful to all, bringing back those that wander, visiting all the sick, and not neglecting the widow, the orphan, or the poor, but always 'providing for that which is becoming in the sight of God and man'."[78]

[68] The question whether Catholic Social Service engaged in a "ministry"—and thus an activity particular and indeed central to its religious identity—or provided a "public service," stands, for obvious reasons, at the heart of the dispute. The USCCB accordingly consistently characterizes Catholic Social Service's activity as a ministry and an extension of long-standing Roman Catholic religious practice. See, for example, Brief for USCCB in *Fulton*, 6 ("The claim that Catholic Social Services' foster care ministry is just another "public service" is not only erroneous, it is also unsupported by the record.").

[69] Brief for USCCB in *Fulton*, 16–17 (Exodus 22:21–22; Deuteronomy 27:19; Isaiah 1:17; Zechariah 7:9–10; James 1:27).

[70] Brief for USCCB in *Fulton*, 9.

[71] Brief for USCCB in *Fulton*, 10.

[72] Brief for USCCB in *Fulton*, 10.

[73] Brief for USCCB in *Fulton*, 11.

[74] Brief for USCCB in *Fulton*, 11.

[75] Brief for USCCB in *Fulton*, 9–10.

[76] Brief for USCCB in *Fulton*, 10.

[77] Brief for USCCB in *Fulton*, 10.

[78] Brief for USCCB in *Fulton*, 11.

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In these selections, early Christian communities and their central figures appear as purveyors of social justice by virtue of their care for orphans and other similarly vulnerable figures. The brief's efforts to situate them notwithstanding, the sources' brevity and relative univocality strips them of their literary, social, and historical particularities: they blur into an undifferentiated mass of early Christian valorization of orphan care. That very sameness is, in fact, part of the message the brief seeks to convey, as its conclusion suggests: "[i]n the burgeoning Christian movement, the early church fathers *consistently and conspicuously* exhorted Christians to be faithful to Scripture's demand that Christians care for orphans. Virtually *every early writing on Christian conduct* stressed the importance of caring for children without parents."[79] Orphan care thus emerges as a catholic—that is to say, a universally shared—tenet of Christian religiosity.

From the perspective of the USCCB's brief, moreover, the value of these sources lies less in their content than in their historical pedigree. They, the brief suggests, have been selected and narratively curated for their ascription to the earliest stratum of Christian communities. By placing them alongside the USCCB's emphasis on religiously circumscribed orphan care as central to its own rights and duties, the brief thus creates a narrative of continuity traceable from the Jesus movement's second-century roots to the twenty-first century American courtroom. Origins, as both early Christian writers and nineteenth-century students of religion knew, determine identity: by connecting petitioner with the earliest availing Christian sources, and its services—however loosely—with the latter's account of communal activities, the brief establishes orphan-care as an essential, because original and contiguous, characteristic.

The brief performs a similar, if rather more concise feat in its second, subordinate origin story: that of "the Church in the United States."[80] In lieu of early Christian apologies, letters, and church orders, the reader encounters histories-in-miniature of some of the Roman Catholic tradition's most prominent American reformers: Elizabeth Ann Seton, Mother Joseph, Frances Cabrini, and Father Flanagan—all, as the brief informs the reader, among the Roman Catholic Church's "greatest saints and religious orders," and all "known for their devotion to caring for orphans and other children in need."[81] Again, dates matter: the earliest—and, at one full page of the brief, longest—account lists no fewer than four of them, beginning with the death of Seton's husband in 1803. Others are more sparing: a reference to Mother Joseph's travel to the frontier here, a mention of Mother Cabrini's departure from Italy there.[82] Between them, the stories span the nineteenth and early twentieth centuries, anchoring orphan care in American Catholicism from the nation's beginnings.

Here, narratives of historical figures take the place occupied by primary sources in the preceding section; the effect, however, is comparable. For all their distinctive elements, the stories blend, leaving the reader merely with the impression of the weight of history and a certain uniformity in valorization and practice. As the brief glosses these sections: "Across the centuries and up to today, across the world and in the United States, the Catholic Church has been at the forefront of caring for orphans by placing them in loving homes."[83]

The USCCB's brief in support of *Fulton* is, in other words, openly preoccupied with origins, refracting its narratives through the lens of legal engagement and molding them

[79] Brief for USCCB in *Fulton*, 17 (italics mine). This statement closely parallels in content and wording a passage from a Christian—but not Roman Catholic—exhortation to orphan care: David Z. Nowell, *Dirty Faith: Bringing the Love of Christ to the Least of These* (Bloomington: New Bethany House, 2014), 70. For a discussion of the literary relationship, see *infra* note 134.

[80] Brief for USCCB in *Fulton*, 12.

[81] Brief for USCCB in *Fulton*, 13.

[82] Brief for USCCB in *Fulton*, 14.

[83] Brief for USCCB in *Fulton*, 20.

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to the shape of a new genre—the *amicus* brief—and an old *telos*: the creation, albeit by proxy, of new, favorable law and legal interpretation. The brief at hand reflects concededly one of the most fulsome occasions for the deployment of history in this service; it is not, however, the only one, nor are its sacred histories the only ones adduced by the USCCB in the service of shaping the law of the United States. The following section on the USCCB's brief in *Trump v. Hawaii* illustrates another, equally potent narrative: that of the tradition's persecution and suffering.

Trump v. Hawaii

Argued before the Supreme Court in 2018, *Trump v. Hawaii* addresses the constitutionality of section 2 of presidential proclamation No. 9645 ("Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats").[84] The latter suspended entry into the United States for nationals of Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia —countries whose populations, for the most part, are primarily Muslim. This fact, combined with a series of statements by then-president Donald J. Trump calling for the "total and complete shutdown of Muslims entering the United States,"[85] precipitated respondents' claim that the proclamation violated, inter alia, the First Amendment of the US Constitution by establishing a particular religious tradition.[86] The case generated a great deal of *amicus curiae* involvement, drawing attention, inter alia, from religiously affiliated groups like the Muslim Justice League, the Anti-Defamation League, the Episcopal Bishops, Scholars of Mormon History and Law, and, of course, the USCCB.

Significant *amicus* participation in cases pertaining to immigration policy is far from a recent development. The 2000s and 2010s have nevertheless brought with them an emphasis on high-profile, highly contentious cases, including those related to religion and particularly the specter of Islamophobia.[87] As the Supreme Court's caseload scrutinizing laws and executive proclamations concerning immigration has increased, so has the interest of *amici curiae* in these cases. The perceived exigencies of international migration and domestic immigration policy have brought to the fore a sense of urgency on the part of religious organizations.[88] In the case of the USCCB and the Catholic Church in America more broadly, that urgency has taken the form of official publications, sermons, and appeals by highly placed dignitaries of the church to legislative and advisory bodies. It has also expressed itself

[84] Executive Order 13780, March 6, 2017, https://www.dhs.gov/sites/default/files/publications/Executive%20Order%2013780%20Section%2011%20Report%20-%20Final.pdf.

[85] See Jenna Johnson, "Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States,'" *Washington Post*, December 7, 2015, https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/.

[86] By contrast, the majority opinion, authored by Chief Justice Roberts, in *Trump*, focused overwhelmingly on plaintiffs' claim under federal law, specifically the Immigration and Nationality Act (INA) of 1965. See Trump v. Hawaii, 138 S. Ct. 2392, 2403–15 (2018).

[87] See, for example, Rhys H. Williams, "Religion and Immigration Post-1965: Race, Culture Wars, and National Identity," in *The Wiley Blackwell Companion to Religion and Politics in the U.S.*, ed. Barbara A. McGraw (Malden: Wiley Blackwell, 2016), 319–32. Evidence suggests that, the 2015–16 presidential campaign notwithstanding, immigrants' religion may matter less to Americans than their ethnicity, and that negative stereotypes of Middle Eastern immigrants pale in comparison with attitudes toward those from Latin America. See, for example, Jeffery M. Timberlake et al., "Who 'They' Are Matters: Immigrant Stereotypes and Assessments of the Impact of Immigration," *Sociological Quarterly* 56, no. 2 (2015): 267–99.

[88] Whether that urgency corresponds to similar enthusiasm on the part of religiously affiliated individuals is, however, far less clear. See, for example, Gregory A. Smith, "Attitudes toward Immigration: In the Pulpit and the Pew," Pew Research Center, April 25, 2006, https://www.pewresearch.org/2006/04/25/attitudes-toward-immigration-in-the-pulpit-and-the-pew.

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in the USCCB's assuming the role of *amicus curiae* six times since 2012, including two briefs in cases related to the aforementioned presidential proclamation.[89] Both briefs are authored jointly by the USCCB, Catholic Charities USA, and Catholic Legal Immigration Network, Inc. They express a distinctly Roman Catholic perspective, including an emphasis on the church's history as determining both its interest in the case and its position vis-à-vis the law.

Compared to history's dominant role in *Fulton*, however, the discussion of the Roman Catholic past in the brief for *Trump* strikes the reader as considerably more limited: circumscribed to one section of the document,[90] its arguments appears neither in the case summary nor in the brief's conclusion. Catholic history, and particularly the history of Roman Catholics in America, nevertheless, figures prominently in the USCCB's statement of interest in this case: "Much like the Muslim migrants and refugees that the Proclamation singles out for disfavor, Catholic immigrants seeking a better life in the United States were once the targets of widespread animus. Having experienced such harsh treatment themselves, and having been the victims of discriminatory legislation motivated by religious animus, Catholics cannot be silent when other religious groups are targeted for mistreatment."[91] History, in other words, both authorizes the USCCB's speech in this case, and lends credence to the brief's interpretation of the US Constitution.

Unlike *Fulton*, the Conference's brief in *Trump* evinces relatively little interest in origins. The founding of the United States—conducted, as it was, by great men—was a time of "noble ideals espoused by the founders and embodied in [the American] Constitution."[92] Subsequent centuries, however, attest to the new nation's fall from grace and away from the principle of religious freedom as an "essential condition of a free and democratic society."[93] As a result, "the American experience has not always been a happy one for Catholics, particularly in the context of immigration."[94] Afflicted by the "anti-Catholic bias" of the early settlers, discriminated against by colonial charters, smeared by the Supreme Court's first Chief Justice, "Catholic immigrants suffered pernicious discrimination as they sought a better life for themselves and their families."[95] As synecdoche for the theme of Catholics' general mistreatment stands their history in and of the American school system: "Some of the most severe hostility towards Catholics appeared in the realm of education."[96]

[89] Brief for the United States Conference of Catholic Bishops, Catholic Charities USA, and Catholic Legal Immigration Network, Inc., as Amici Curiae in Support of Respondents, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965) (hereafter Brief for the USCCB in *Trump*). See also, a virtually identical brief *amici curiae* submitted by the same parties on behalf of respondents in the Supreme Court appeal of *International Refugee Assistance Project v. Trump.* Brief for the United States Conference of Catholic Bishops, Catholic Charities USA, and Catholic Legal Immigration Network, Inc., as Amici Curiae in Support of Respondents, International Refugee Assistance Protect v. Trump, 857 F.3d 554 (4th Cir. 2017) (Nos. 16-1436, 16-1540). *International Refugee Assistance Project* was declared moot and the Fourth Circuit's judgment vacated by the Supreme Court following the expiration of the entry restrictions in the underlying executive order. International Refugee Assistance Project v. Trump, 138 S. Ct. 353 (2017). Prior to the Court vacating the Fourth Circuit judgment in *International Refugee Assistance Project*, President Trump issued presidential proclamation 9645, which was the subject of the decision in *Trump v. Hawaii.*

[90] "Catholic Immigrants to the United States Have Experienced Discrimination Firsthand," in Brief for the USCCB in *Trump*, 14–19.

[91] Brief for the USCCB in *Trump*, 3.

[92] Brief for the USCCB in *Trump*, 15. The brief here centers particularly on the contributions of George Washington, whom it credits with having "made clear that the need for religious liberty and diversity extended to welcoming refugees and migrants of all faiths." Brief for the USCCB in *Trump*, 15).

[93] Brief for the USCCB in *Trump*, 14.

[94] Brief for the USCCB in *Trump*, 15.

[95] Brief for the USCCB in *Trump*, 16.

[96] Brief for the USCCB in *Trump*, 17.

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The brief lingers on Catholic students' being forced to read from the King James Bible at the risk of beatings and expulsion and the violent response to Catholics' eventual recourse to founding their own schools, an approach that "drew significant ire from Protestant majorities, reaching a fever pitch in the 1870s 'with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions'."[97] The brief's lengthy digression into educational policy eventually yields the section's key argument: "Although the text of the Blaine Amendment did not expressly use the word 'Catholic,' its discriminatory intent and effect—much like the Proclamation here—were unmistakable given the 'pervasive hostility to the Catholic Church and to Catholics in general,' as well as the 'open secret that "sectarian" was code for "Catholic"'."[98] Having themselves experienced the threat of general laws targeting particular populations, the reader infers, the USCCB is uniquely positioned to both recognize and speak out against such subterfuge: "Having once felt the sting of religious persecution in the United States, American Catholics understand that the majority can do great violence to the constitutional rights of an insular religious minority."[99]

This is a different kind of sacred history than the ones explored in *Fulton.* Whereas the former showcases the church's triumphs before its unbelieving audience—its virtuous communities and great saints confronting the judgment of the Roman Empire or approbation of early US magistrates—the brief at hand focuses on the darker side of Roman Catholics' minoritized status in this country. Whereas in *Fulton* Catholics thus appear as champions of orphans, here they appear as victims in need of their own champion. Theirs has been, the brief suggests, a history of trauma and persecution, which their eventual, tacit acculturation has done little to erase. The history adduced in *Trump* is, moreover, a uniquely American one. The Jesus movement and its biblical antecedents appear, at best, at the margins of the USCCB's argument; in its stead stand the church's relationship with the ideals and institutions of the United States, and its role as bearer of memory and privileged guardian of the rights of other religious minorities.

In the process of constructing its argument, the brief takes a curiously self-effacing approach. As may have already become apparent, much of the section is a hodge-podge of quotations, and scarcely a sentence goes unattributed to an outside source, including a recent article in a British newspaper; an edition, published in 1965, of a textbook on American Catholicism; a smattering of law review articles from the final decade of the twentieth century; and, notably, Justice Breyer's dissenting opinion in *Zelman v. Simmons-Harris*—a school-voucher case in which the USCCB had supported the majority's side. While the resulting effect on the reader is less than pleasing from the literary vantage point, this bricolage nevertheless generates the curious impression that the history told here is one of objective, even disinterested facticity. The voice of the *amici* is effaced; in its place, the reader encounters a ragtag collection of voices pressed to tell a history—a formative, sacred history—in sentence fragments and parenthetical references. It is as if in its least "lawlike" part, the brief assumes the guise of the law most insistently, appropriating the trappings of objective historiography to narrate a profoundly partial myth.

We will return to these stories and the briefs' ways of telling them in the following section. Beforehand, however, we must attend to the question of how history figures or might be made to figure in cases for which history itself provides only limited warrant. The USCCB's brief in *Dailey v. Florida*, a case appealed to the Supreme Court in 2020 but denied certiorari, is a case in point.

[97] Brief for the USCCB in *Trump*, 18, citing Mitchell v. Helms, 530 U.S. 793, 828 (2000).
[98] Brief for the USCCB in *Trump*, 18–19.
[99] Brief for the USCCB in *Trump*, 19.

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Dailey v. State of Florida

Few topics have exercised both the Supreme Court and its "friends" as much as the questions concerning the constitutionality of the death penalty, and the circumscriptions, if any, of states' right to impose it.[100] Since the beginning of the 2000s, the Supreme Court has taken up questions related to capital punishment nearly two dozen times, and has on numerous other occasions declined the opportunity to do so.[101] *Dailey v. Florida* is, at the time of writing, only the most recent such instance. The case involves the conviction of James Dailey for the murder of a fourteen-year-old girl in 1985. Despite limited evidence, Dailey was sentenced to death in 1987, while his alleged accomplice was sentenced to life in prison. Dailey's appeal constituted his third motion for post-conviction relief, arguing for the unconstitutionality of his sentence in light of, inter alia, the arbitrariness of the penalty and the state's failure to disclose favorable evidence to the defendant.[102] While the Supreme Court denied certiorari—and appellant at the time of writing remains on Florida's death row—the specter of an innocent man's execution mobilized the USCCB's support at this relatively early stage.[103]

Dailey's is the third capital punishment case to have attracted an *amicus* brief from the USCCB since *Atkins v Virginia* in 2001.[104] Unlike its predecessors, however, the *Dailey* brief is the product of exclusively Roman Catholic institutions, the USCCB and the Florida Catholic Conference, rather than a collaboration with other religious groups.[105] As such, its

[100] For an overview of the Supreme Court's death penalty jurisprudence, see Scott Vollum et al., *The Death Penalty: Constitutional Issues, Commentaries, and Case Briefs*, 3rd ed. (London: Routledge, 2015).

[101] Central Supreme Court cases include particularly *Atkins v. Virginia*, 536 U.S. 304 (2002) (execution of individuals with "mental retardation" violates the Eight Amendment); *Wiggins v. Smith*, 539 U.S. 510 (2003) (Sixth Amendment requires defense counsel in capital cases to investigate mitigating factors); *Roper v. Simmons*, 543 U.S. 551 (2005) (execution of individuals under the age of eighteen at the time of commission of the offense declared unconstitutional); and *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (death penalty declared unconstitutional in cases of child rape that did not lead to the death of the victim). For a term-by-term list and discussion of cases related to capital punishment regardless of certiorari, see Death Penalty Information Center, "Case Updates by Supreme Court Term," accessed December 5, 2020, https://deathpenaltyinfo.org/facts-and-research/united-states-supreme-court/case-updates-by-supreme-court-term.

[102] For the facts of the case and its appeal history, see the Florida Supreme Court's opinion in *Dailey v. State*, 283 So. 3d 782 (Fla. 2019).

[103] *Amicus* briefs may reach the Court at different stages of a proceeding but are most commonly filed only after *certiorari* has been granted. *Dailey* reflects an exception to this general rule, albeit only a limited one: only three *amicus* briefs or, as in the case of the USCCB and the Florida Conference of Catholic Bishops, motions for leave to file an *amicus* brief were submitted at this stage. See "Dailey v. Florida," *SCOTUSblog*, accessed on December 5, 2020, https://www.scotusblog.com/case-files/cases/dailey-v-florida-2/. In addition to the USCCB's motion, Roman Catholics have sought to mobilize against Dailey's execution in other ways as well. See, for example, the Florida Conference of Catholic Bishops' appeal for a stay of execution to Florida governor Ron DeSantis. "Re: please stay execution of James Dailey—veteran with evidence of innocence," accessed December 5, 2020, https://d2y1pz2y630308.cloudfront.net/11291/documents/2019/10/191021DaileyExecutionLetter.pdf?eType=EmailBlastContent&eId=bfb39be3-40a2-46c1-96fa-131dfe07d092), and Catholic efforts at lay mobilization. See, for example, "Stop Execution of James Dailey," accessed December 5, 2020, https://d2y1pz2y630308.cloudfront.net/11291/documents/2019/10/191107StayDaileyPrayerVigils.pdf).

[104] The USCCB submitted functionally identical briefs in *McCarver v. North Carolina*, 533 U.S. 975 (2001), and *Atkins*, inasmuch as both cases addressed concerns about the execution of individuals with mental retardation. After receipt of a number of *amicus curiae* briefs, including that of the USCCB, the Supreme Court dismissed *McCarver* as moot, in light of the state of North Carolina's adopting a statute making illegal the execution of the mentally retarded. The Court instead granted *certiorari* to *Atkins* on this issue. The USCCB also filed an *amicus* brief on behalf of the defendant in *Roper v. Simmons*, 543 U.S. 551 (2005). The Court, in an opinion by Justice Kennedy, declared unconstitutional the imposition of capital punishment for crimes committed while the perpetrator was under the age of eighteen.

[105] Motion for Leave to File Brief and Brief for United States Conference of Catholic Bishops and Florida Conference of Catholic Bishops, Inc., in Support of Petitioner James Milton Dailey, Daily v. Florida, 141 S. Ct.

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arguments are refracted most obviously through the lens of Catholic theology and history. Already the brief's opening remarks, petitioning the Court for leave to file over respondent's objections, expound on the church's historical pedigree: "Few, if any, institutions can claim a greater tradition of working with and studying the conscience of the human person and related questions of guilt, blame and punishment than the religious community.... The Catholic Church in particular has developed a rich tradition of reflection and scholarship about justice, mercy, responsibility, and restoration. This study has informed and been informed by the experience of countless millions of people over centuries."[106]

The existence of such a tradition notwithstanding, the brief's deployment thereof in Dailey's defense comes as something of a surprise to students of Roman Catholic history. The latter, after all, has been largely univocal in its support of the state's sword. As E. Christian Brugger has argued, "[f]rom its earliest days, up to and including the first half of the twentieth century, [the Roman Catholic Church] has maintained a relatively confident, consistent, and coordinated defense of the right of the state to kill criminals."[107] Only since the 1970s—and, on the papal level, since John Paul II's encyclical *Evangelium Vitae* in 1995—have Roman Catholics been involved in concerted, faith-based opposition to states' use of capital punishment. History, in short, is at best an equivocal resource for these ends; that the *Dailey* brief nevertheless seeks to mobilize it is thus a striking indication of a "historical turn" in Roman Catholic efforts to shape American law.

Nor does the USCCB confine itself to opposing death sentences in cases of the falsely convicted; opposition on behalf of the latter, the brief suggests, rather constitutes a subset of the church's broader rejection of capital punishment: "The Bishops of the United States have long abhorred the practice of state-sanctioned executions of human beings."[108] At the heels of this assertion, however, the brief, in a statement by Pope Francis, turns to recognizing the relatively recent nature of this sentiment: "Recourse to the death penalty on the part of legitimate authority, following a fair trial, *was long considered* an appropriate response to the gravity of certain crimes and an acceptable, albeit extreme, means of safeguarding the common good. *Today, however*, there is an increasing awareness that the dignity of the person is not lost even after the commission of very serious crimes."[109]

Francis's statement juxtaposes Catholic doctrine, historically conceived, with the Church's recent emphases. The brief nevertheless promptly distances itself from this concession, reclaiming Catholic history at least in the United States on the grounds of "the Catholic Church's longstanding tradition of defending the rights of the human person."[110] Subsequent sections present the reader with variations of this theme. The brief thus goes on to quote John Paul II, Benedict XVI, and Francis—the three most recent popes and the tradition's only outspoken opponents of the death penalty in this office—before asserting that "[t]he Bishops of the United States have, in accordance with the teaching of these Popes, *long opposed* the death penalty."[111] In a similar vein, the subsequent section,

689 (No. 19-7309) (hereafter Brief for USCCB in *Dailey*). The USCCB has collaborated with other religious groups on prior *amicus* briefs. For example, in *Roper* the USCCB collaborated with, among others, the Unitarian Universalist Association, Central Conference of American Rabbis, Southern Christian Leadership Conference, Prison Dharma Network, Muslim Public Affairs Council, Foundation for the Preservation of the Mahayana Tradition, and the Alliance of Baptists.

[106] Brief for USCCB in *Dailey*, 2.

[107] E. Christian Brugger, *Capital Punishment and Roman Catholic Moral Tradition*, 2nd ed. (South Bend: University of Notre Dame Press, 2014), 2.

[108] Brief for USCCB in *Dailey*, 8–9.

[109] Brief for USCCB in *Dailey*, 9 (my emphasis).

[110] Brief for USCCB in *Dailey*, 10.

[111] Brief for USCCB in *Dailey*, 13 (my emphasis). To substantiate this point, the brief here cites the USCCB's 2005 pastoral epistle *A Culture of Life and the Penalty of Death* discussed in greater depth below.

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dedicated to reiterating the bishops' argument with special emphasis on the innocently convicted, notes "[t]he Bishops' *longstanding* and profound moral opposition to the death penalty."[112] Here, the brief, in fact, reaches into Catholic history beyond the later 20th century, enlisting no less an authority than Thomas Aquinas for its cause. The latter "teaches that 'it is in no way lawful to slay the innocent' (*nullo modo licet occidere innocentem*). The radical injustice of punishing an innocent man is particularly grievous in the case of a sentence of death, which is by its nature final and irreversible. As St. Thomas Aquinas put it, such a sentence is like the violence of robbers' (*tale iudicium simile est violentiae latronum*)."[113]

Aquinas is, of course, one of Roman Catholicism's most celebrated theological thinkers; to quote him calls upon the weight of a millennia-long tradition. The brief's invocation of Aquinas is nevertheless by necessity circumspect, given his staunch support of the death penalty.[114] It thus focuses on two sections of Aquinas's magnum opus, the *Summa Theologiae*, one addressing the question "whether it is lawful [for a private person] to kill the innocent?,"[115] and another contemplating "[w]hether a man who is condemned to death [by the government] may lawfully defend himself if he can?"[116] The answer to the former question is, unsurprisingly, "no," whether the killing occurs at the hands of a private party or as the result of a governmental conspiracy, just as the answer to the latter is a qualified "yes," assuming that the condemned person's case is just.[117]

The brief's application of Aquinas to the issue at hand is nevertheless poignantly selective. It ignores, for example, a scenario to which Aquinas dedicates a separate *quaestio*: the possibility of an individual or entity accidentally precipitating the death of an innocent person—as, for instance, in the case of a person's being sentenced to death on the strength of misleading evidence. Aquinas judges this scenario defensible under certain circumstances: "if a man pursue a lawful occupation and take due care, the result being that a person loses his life, he is not guilty of that person's death."[118] Due diligence and process of law, in other words, for Aquinas constitute a defense in the case of the death even of an innocent, raising serious questions concerning the USCCB's deployment of the *Summa* on Dailey's behalf.

Much as in *Fulton*, however, the content of Aquinas's treatise is secondary to the historical heft his name and words, invoked in the original Latin, lend to the brief. *Dailey* suggests that even in instances in which history does not avail—for which, in other words, the "tradition" has changed, recently and dramatically—history can be created and can be pressed into the service of the law and its interpretation. The brief's emphasis on establishing a historical pedigree for the USCCB's position points to the value, even the necessity, of history in the process of creating legally efficacious stories. The myth of a Catholic tradition—or at least the Catholic Church in America—battling capital punishment since time immemorial here feeds an interpretation of the Constitution as similarly committed to the protection of human dignity from its very origins. The Supreme Court's originalist impulse seems to have generated originalist readings of other entities' histories—even in instances where, as in *Dailey*, such history is largely absent. The following section accordingly turns to examining

[112] Brief for USCCB in *Dailey*, 14 (my emphasis).

[113] Brief for USCCB in *Dailey*, 14. The parenthetical Latin translations are original.

[114] For a discussion of Aquinas's stance on the death penalty, see Brian Calvert, "Aquinas on Punishment and the Death Penalty," *American Journal of Jurisprudence* 37, no. 1 (1992): 259–81

[115] Thomas Aquinas, *Summa Theologica* II-II, q. 64, art. 6 (in Saint Thomas Aquinas and the Fathers of the English Dominical Province, trans., *The Summa Theologica: Complete Edition* (New York: Benzinger Brothers, 1947), 1470–71.

[116] Thomas Aquinas, *Summa Theologica* II-II, q. 69, art. 4 (in Aquinas, *Summa Theologica,* 1492).

[117] Aquinas denies lawful self-defense in case of a just judgment; in case of an unjust judgment, the condemned may defend himself, "to resist wicked princes, except perhaps in order to avoid scandal, whence some grave disturbance might be feared to arise" (Thomas Aquinas, *Summa Theologica* II-II, q. 69, art. 4 [in Aquinas, *Summa Theologica*, 1492]).

[118] Thomas Aquinas, *Summa Theologica* II-II, q. 64, art. 6 (in Aquinas, *Summa Theologica,* 1470).

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the stories adduced in the briefs thus far, their uses, impetus, and, at long last, their value to law and religion.

Stories and Power, Stories of Power

The three cases discussed above differ in important ways from one another, as do the *amicus* briefs submitted for them. Each brief nevertheless relies in important ways on the narration of an aspect of Roman Catholic history: glimpses into a formative account of the past, deployed here for a legal audience, for parties to the case and their representative, and for Justices and their clerks, in the interest of shaping that audience's approach to the interpretation of American law. The histories themselves show little obvious overlap with one another; they nevertheless all coalesce around three central themes: stability, suffering, and, by extension, authority.

Stability, the first and in many ways most obvious theme, designates an emphasis on the origins of a group's thought and practice in the distant past, and on the seamless continuity of the group with that past throughout time, into the present. This emphasis is most readily apparent in the *Fulton* brief, whose argument centers largely on the USCCB's claim, illustrated through *historiolae* from the first centuries of both the Jesus movement and the Roman Catholic presence in America, that "from the Second Century A.D. to Pope Francis [in the twenty-first century], the Church's Leaders and Saints Have Stressed the Religious Duty to Care for Orphans."[119] The briefs presented in *Dailey* and *Trump* are less overt in their claims that "true understanding" of law emerges from an understanding of the church's history.[120] As in *Fulton*, both nevertheless deploy narratives of stability as central to their arguments. The *Trump* brief accordingly creates a narrative of Roman Catholic experience in North America from the colonial era through the twentieth century, treating as the fruit of this tradition the USCCB's privileged insight into the case at hand. *Dailey*, by contrast, invokes stability by its repeated emphasis on the historical roots of Roman Catholic expertise in matters of crime and punishment, as well as the "longstanding" objection of American bishops and popes alike to the death penalty.

Closely connected with this emphasis on stability is the second discursive thread that weaves itself through the histories constructed by the briefs, namely that of suffering. The latter is most obvious in *Trump*, where virtually the entire narrative is dedicated to accounts of the pervasive yet diverse ways in which American Catholics have suffered throughout their history: by vilification, "anti-Catholic bias," "pernicious discrimination," "severe hostility," leading to Roman Catholics' exclusion from both the land and its institutions, and, not least of all, by physical violence.[121] Notes of suffering appear more submerged in *Fulton* and *Dailey*, in part because they appear in these briefs primarily as the experiences of other groups, taken up into the Roman Catholic experience by biblical mandate and human compassion.[122] In *Dailey*, suffering thus inheres in the victims of capital punishment, stripped of human dignity; in *Fulton*, it emerges even more proximately from the specter of violence hovering over the early Church's encounter with Roman society. The suffering

[119] Brief for USCCB in *Fulton*, 17.

[120] Compare, generally, Brief for USCCB in *Dailey*; Brief for USCCB in *Trump*; with, Brief for USCCB in *Fulton*, 9 ("to truly understand the Catholic Church's commitment to caring for orphaned and neglected children, one must look back to the Church's earliest days.").

[121] Brief for USCCB in *Trump*, 15, 16, 17.

[122] See, for example, the *Dailey* brief's assertion that "[t]he Catholic Church's opposition to the death penalty has a basic grounding in human compassion." Brief for USCCB in *Dailey*, 12.

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narrated here is accordingly that of exposed, orphaned, or otherwise abandoned children, and that of Christians exposed and called to give an account of themselves before emperors.

Both discourses prominent in these briefs—that of stability and that of suffering—reflect strategies for establishing authority: to define the parameters of group identity; to function as truth tellers; and, in the last instance, to interpret the law. The briefs' focus on origins and the contemporary church's connection with the experiences and practices of those eras thus participates in a phenomenon Eric Hobsbawm has labeled "invented traditions."[123] The latter refers to practice, rituals, or dogma either consciously constructed or "emerging in a less traceable manner within a brief and dateable period" that assert their origins in and continuity with a group's or institution's past.[124] While this phenomenon exists throughout premodernity, the aftermath of the industrial revolution provides particularly plentiful examples. In short, rapid historical change generates both the need for institutional adaptation and the craving for invariant continuity. Invented traditions enable the former by generating the veneer of the latter; they "give any desired change (or resistance to innovation) the sanction of precedent, social continuity and natural law as expressed in history."[125]

The *amicus* briefs at hand, I suggest, are both products of already existing invented traditions, and contribute to the creation of such traditions in their own right. This is most readily apparent in the case of the *Dailey* brief and the issue of the Roman Catholic Church's stance vis-à-vis capital punishment. As already noted, Catholic opposition to the death penalty is of recent vintage, emerging with the semblance of clarity only in the last decade of the twentieth century, and achieving full integration into the Catechism only in 2018.[126] In recent decades, American bishops have sought to strike a tenuous balance between acknowledging innovation and asserting the historical roots of its stance. The USCCB's 2005 statement "calling for an end to the use of the death penalty" ("A Culture of Life and the Penalty of Death") provides an illustrative example. One of the document's introductory paragraphs thus asserts that

> [f]or a quarter-century, Catholics have worked with others in state legislatures, in the courts, and in Congress to restrain or end the use of the death penalty. New allies and arguments offer new opportunities to make a difference. Under the leadership of our beloved Pope John Paul II, Catholic teaching on the death penalty has been articulated and applied with greater clarity and strength. Many people, especially Catholics, appear to be reconsidering their past support for the death penalty.... We renew our

[123] Eric Hobsbawm, "Introduction: Inventing Traditions," in *The Invention of Tradition*, ed. Eric Hobsbawm and Terence Ranger (Cambridge: Cambridge University Press, 1983), 1–14. Hobsbawm's theoretical contribution has been taken up with a vengeance, not only in the modern and postmodern contexts discussed in his introduction, but in writings addressing other periods, and it has been taken up with particular vigor in biblical studies and religious studies more broadly. For the former, see, for example, the contributions in Jan Willem van Henten and Anton Houtepen, *Religious Identity and the Invention of Tradition: Papers Read at a Noster Conference in Soesterberg, January 4–6, 1999* (Assen: Royal Van Gorcum, 2001); for the latter, see the contributions in Stefania Palmisano and Nicola Pannofino, eds., *Invention of Tradition and Syncretism in Contemporary Religions: Sacred Creativity* (Cham: Palgrave MacMillan, 2017).

[124] Hobsbawm, "Introduction," 1.

[125] Hobsbawm, "Introduction," 2. Indeed Hobsbawm explicitly discusses the position of the Roman Catholic Church as one of the "[o]ld institutions" adapting by way of invented traditions when "faced with new political and ideological challenges and major changes in the composition of the faithful (Hobsbawm, "Introduction," 5).

[126] See, "New Revision of Number 2267 of the Catechism of the Catholic Church on the Death Penalty—Rescriptum 'ex Audentia SS.mi,' 02.08.2018," Holy See Press Office, https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2018/08/02/180802a.html.

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> common conviction that it is time for our nation to abandon the illusion that we can protect life by taking life.[127]

The USCCB both acknowledges the comparatively recent onset of its activism ("for a quarter-century") and the ongoing process of change, for both individuals and institutions, in reflecting on this topic ("new allies and arguments," "reconsidering … past support"). At the same time, the statement emphasizes, in more or less subtle fashion, the continuities of the bishops' stance with a nebulous past. John Paul II's statements thus allow for the articulation and application "with greater clarity and strength" of tenets that, the reader infers, have existed as part of the Catholic tradition since time immemorial.[128]

The *Dailey* brief, of course, makes use of a more constrained medium and directs itself at a different primary audience: the Court rather than the Roman Catholic faithful. As such, it is perhaps not surprising that the nuances of the 2005 statement give way to an unremitting emphasis on a "long" or "longstanding" opposition, rooted in the teachings of scripture and a thirteenth-century scholastic alongside those of the three most recent popes. As Hobsbawm suggests, the brief makes "use of ancient materials to construct invented traditions of a novel type for quite novel purposes."[129]

If *Dailey* provides a relatively clear example of the processes of inventing traditions in the judicial realm, the same is less apparent in *Fulton* and *Trump.* Both, after all, construct traditions with considerable historical support: late ancient Christian writers evince evident concern for the fate of orphans, and Roman Catholic immigrants to the United States and the American colonies really did encounter bias and persecution. Both accounts, like the one in *Dailey*, are nevertheless constructed from historical *spolia*—materials carefully selected, shaped into traditions, and deployed for a new purpose. To this end, *Fulton*, for example, from the scant evidence of the second century—texts whose dates and the identity of whose authors scholars treat with caution[130]—seeks to construct a history that is both catholic and Catholic, both attesting to a universal sweep of Christian identity and to its particular identification with the Church of Rome.[131] Such prooftexts construct an uncertain

[127] United States Conference of Catholic Bishops, *A Culture of Life and the Penalty of Death*, (Washington, DC: United States Conference of Catholic Bishops, 2005), 2, https://www.usccb.org/resources/culture-life-and-penalty-death.

[128] Interestingly, Brunner, perhaps the most prolific American writer on the subject of Roman Catholic attitudes to capital punishment, and other Roman Catholic academics similarly seek to soften the disjunction between the church's contemporary stance and its historical precedents, arguing, for example, for a period of pre-Constantinian—and thus, I suspect, "pure"—Christian origins whose writings embody the "radicalism of Jesus' teaching on nonviolence," which in turn was uncovered through the labors of the mid-twentieth-century Roman Catholic *ressourcement* movement. Stuart W. Swetland, "The Catechetical Tradition," in *Where Justice and Mercy Meet: Catholic Opposition to the Death Penalty*, ed. Vicki Schieber, Trudy D. Conway, and David Matzo McCarthy (Collegeville: Liturgical Press, 2013), 139–46, at 143; see also Brunner, "The Ancient, Medieval, and Early Modern Periods," in Schieber, Conway, and McCarthy, *Where Justice and Mercy Meet*, 115–24.

[129] Hobsbawm, "Introduction," 6.

[130] Note, for example, Markus Vinzent's assessment, offered in the context of the *Apology* of Aristides, but similarly applicable to the letters of Ignatius and other second-century sources: "The texts that we are dealing with … need to be understood against the background of different geographies and times within which they played key roles in different apologetic discourses, roles that transformed those texts, particularly in contested fields of doctrine, ritual practices and ethics." Markus Vinzent, *Writing the History of Early Christianity: From Reception to Retrospection* (Cambridge: Cambridge University Press, 2019), 258.

[131] Indeed, the brief appropriates for its own purposes a statement by authors outside the Roman Catholic tradition, claiming that history for Christianity more broadly. A striking example of this phenomenon involves the brief's reference to David Z. Nowell's exhortation to orphan care, *Dirty Faith.* The brief here flirts with plagiarism, so closely does it reproduce Nowell's statement. Compare Brief for USCCB in *Fulton*, 17 ("In the burgeoning Christian movement, the early church fathers consistently and conspicuously exhorted Christians to be faithful to Scripture's demand that Christians care for orphans. Virtually every early writing on Christian conduct stressed the

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fundament upon which to base a tradition's identity, still more so in light of the mismatch between the history of orphan-care depicted in the sources and the "ministry" at stake in *Fulton*: Philadelphia, after all, had not sought to prevent Roman Catholics from engaging in the activities *Fulton* depicts as central to their faith, namely the adoption of abandoned children or the provision of monastic institutions in which to otherwise extend care to them. By contrast, none of the historical spoils address the considerably more recent practice, extended by the Catholic Social Service, of brokering placements for children in suitable homes. The brief's efforts notwithstanding, in other words, the "ancient materials" resist the story they are made to tell.

These instances of history chafing against history alert the reader that none of the traditions presented in these briefs are inevitable monuments to historical fact. As already suggested, they, like other historical accounts, are created for a specific purpose: to establish a kind of authority for the *amici*, to instruct the Court, and to shape the law. It is to this end, too, that the briefs and the stories they create deploy the second discursive thread discussed above: the logic of suffering. The latter serves as a peculiarly potent pledge of authority in American society, where, as Elizabeth Castelli has argued, "truth and violence inexorably imply each other—and that, indeed, the first requires the second."[132] This logic is on full display in *Trump*, where Roman Catholics' experience of persecution becomes a guarantor of their ability and authority to function as truth-tellers for the Court: to unveil the executive order at stake as a means of violence akin to those by which suffering has been inflicted—or very nearly inflicted—on a community standing in direct, tradition-based communion with the *amici.* Elsewhere, the same *amici* appropriate for themselves the role of *parrhesiastes*—persons able to speak candidly, even to those holding comparatively greater power—partly by virtue of their association with other victims of violence: with orphans and the (unjustly) condemned. In each instance, however, the discourse of suffering carries with it self-authorizing claims to a privileged status vis-à-vis truth—and, by extension, vis-à-vis public authority.[133] In the Christian tradition as well as the American one, to have suffered—especially to have suffered for a cause, whether in the guise of fighting for one's country or affirming one's faith in the presence of persecution—represents a source of great power: the power to command a hearing for oneself and one's story.

By activating a set of discursive associations surrounding origins and suffering, these stories, in short, deploy history to organize relationships and to create present-day legal struggles in the image of their historical archetypes: the righteous community confronting the violence of the state; the persecuted minority at the mercy of prejudiced civic

importance of caring for children without parents. Eusebius, the Apostolic Constitutions, Lactantius, Ignatius of Antioch, Polycarp, Justin Martyr, and many others called the early church to this ministry."), with Nowell, *Dirty Faith*, 70 ("In the growing Christian movement, however, the Church fathers consistently and conspicuously called upon followers of Christ to be faithful to Scripture's demand that we care for the orphan. Virtually every early writing on Christian conduct stressed the importance of caring for children without parents. Eusebius, the Apostolic Constitutions, Lactantius, Ignatius, Polycarp, Justin Martyr ... the list goes on and on, but every one of them called on the early Church to care for orphans."). Notably, the brief nowhere else refers to Lactantius or Eusebius.

Despite the brief's virtually direct quotation of its source, however, the two texts deploy the passage to different ends: the one to construct a specifically Roman Catholic history of institutional ministry, connecting biblical exemplars to the work of the Philadelphia Catholic Conference; the other to proffer an exhortation to all Christians to rescue children, including from a "broken foster care system," by personal intervention, including adoption.

[132] Elizabeth A. Castelli, *Martyrdom and Memory: Early Christian Culture Making* (New York: Columbia University Press, 2004), 196.

[133] See also Castelli, *Martyrdom and Memory*, 198.

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leaders; the sage before the text, discerning interpretation. The peculiar authority that accrues to them in the process sets them apart from the plethora of other stories told in the courtroom, many of them existing in competition with one another to become part of the eventual authoritative story told by the Court in its opinion.

Conclusion: Friendly Stories and their Audiences

Throughout this article, I have sought to suggest that the relevance of sacred history to the creation and transmission of law did not cease with the onset of modernity, the rise of the nation state, nor the Jeffersonian "wall of separation" invoked in American legal discourse. American law, in fact, provides many potential starting points for this conversation, including, perhaps most prominently, the concept of civil religion first discussed by Robert Bellah in 1967, and infused with new life in recent years.[134]

My focus has been, by necessity, a narrow one, centering on three *amicus curiae* briefs presented by the governing body of the Roman Catholic Church in the United States to the US Supreme Court during the past half-decade. These briefs, like others of their genre, serve both to inform the Court and, more proximately, to shape the latter's reasoning and decisions in light of their authors' priorities. To this end, these briefs deploy narratives of sacred history as a central—at times: the central—argumentative strategy. They present the Court with accounts of the Catholic Church's origins in the Jesus movement and in American history; with narratives of Catholics' persecution and the tradition's relationship with Empire and state; and with expositions of the historical roots of doctrinal stances. All of these reflect, in different ways and to different degrees, invented traditions: stories created from the building blocks of historical data in light of recent exigencies to present audiences with the specter of unbroken continuity, from antiquity to present. History and tradition thus serve as a source of authority, even more so when they invoke narratives of violence and suffering. Within the American "regime of truth," they enable audiences to "distinguish true from false statements," thus authorizing both the briefs' claims and their relevance for judicial discourse.[135]

Throughout, I have assumed that the primary—or even, barring the occasional wayward academic, the only—audience for *amicus* briefs is the judiciary, and that the briefs' sole aim, in turn, is to shape law and policy in ways beneficial to their authors. These assumptions are not only widespread among students of *amicus curiae* as an institution, but they are also supported by internal evidence. The briefs examined here, for example, all adopt the form and idiom of legal discourse, profess to inform the Court in ways likely to precipitate particular, law-specific outcomes, and in more or less obvious ways aspire to the benefits the Court is able to confer.

Alongside the justices, their clerks, and the parties to the cases at hand, however, we must consider a potential secondary audience for the USCCB's and other religious organizations' *amicus curiae* briefs: their own constituencies, both actual and aspirational. Religious groups accordingly go to considerable length to alert members to their *amicus* engagement with

[134] Robert N. Bellah, "Civil Religion in America," *Dædalus* 96, no. 1 (1967): 1–21. For recent appropriations of civil religion to address developments in the United States since the beginning of the 21st century, see, for example, C. Travis Webb, "'Otherworldly' States: Reimagining the Study of (Civil) 'Religion'," *Journal of the American Academy of Religion* 86, no. 1 (2018): 62–93; Heidi A. Campbell et al., "The Dissonance of 'Civil' Religion in Religious-Political Memetic Discourse During the 2016 Presidential Elections," *Social Media + Society* 4, no. 2 (2018): 1–15; Aaron Quinn Weinstein, "Occupy Wall Street's Civil Religion of the Nones: A Theology of Consensus," *New Political Science* 42, no. 1 (2020): 70–86.

[135] The idea of "regimes of truth" derives from Michel Foucault, most prominently in Michel Foucault, "The Political Function of the Intellectual," trans. Colin Gordon, *Radical Philosophy*, no. 17 (1977): 12–14.

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press releases, including both apposite sound bites and links to the briefs themselves;[136] they disseminate these statements on social media;[137] and, perhaps most tellingly, they post the briefs on their official websites for decades to come. The sites for the Presbyterian Church (USA) and the Lutheran Church—Missouri Synod, for example, both provide an introduction to the role of *amici curiae*, the processes of filing such a brief, and a list of *amicus* briefs submitted by their respective denominations since 1994.[138] In a similar vein, the USCCB's website features a selection of *amicus* briefs from the 1980s onward, categorized by the issue at stake in the suit, and listed in descending order by date.[139]

The number of members who consult, to say nothing of study in depth, each brief listed on these sites is, no doubt, vanishingly small. And yet, compared to the ephemeral attention *amicus curiae* briefs enjoy in the justices' chambers,[140] the relative permanence of their records on these sites is striking. Inasmuch as these briefs tell stories, then, they must be stories recognizable for religious groups' own membership as much as for the Court to whom they address themselves. In the legal realm, these narratives provide a foundation for the USCCB's speaking authoritatively, without calling on the foundations of authority common in intra-ecclesial discourse: those of dogma, of scripture, or of papal or episcopal edict. These elements also feature in the briefs; there, however, they serve as building blocks for a foundation shared between church and Court: the veneration of the ancient, original, time-honored, and hard-won.

Beyond the judicial realm, the histories conveyed in these briefs and the spoils from which they are constructed do not cease to speak—indeed, to the uninitiated, these elements communicate more clearly than analyses of legal theory and constitutional doctrine. In the hands of Roman Catholic readers, they promise to affirm the community's self-construction

[136] See, for example, the USCCB's press release concerning *Fulton*: "Bishop Chairmen Urge the Supreme Court to Preserve the Right of Catholic Foster Care Agencies to Serve," United States Conference of Catholic Bishops (website), November 4, 2020, https://www.usccb.org/news/2020/bishop-chairmen-urge-supreme-court-preserve-right-catholic-foster-care-agencies-serve; a press release by the Archdiocese concerning the case: "Philly Foster Families Ask Court to Stop City from Shutting Down Critical Foster Care Services," Archdiocese of Philadelphia (website), May 17, 2018, http://archphila.org/philly-foster-families-ask-court-to-stop-city-from-shutting-down-critical-foster-care-services; and an opinion piece by the archbishop of Philadelphia published in a Philadelphia newspaper: Nelson J. Pérez, "Philly Archbishop: SCOTUS Should Uphold Catholic Church's First Amendment Rights," *Philadelphia Inquirer*, November 2, 2020, https://www.inquirer.com/opinion/commentary/fulton-catholic-social-services-philadelphia-supreme-court-same-sex-adoption-20201102.html.

[137] Given the @usccb Twitter account's considerable following—179,800, as of December 5, 2020—each tweet promises to reach a considerable audience. In the context of the USCCB's announcement of its submission in *Fulton* ("Archbishop @ThomasWenski, @ArchbishopOKC, and Bishop David A. Konderla urge #SCOTUS to preserve the right of Catholic Foster Care Agencies to serve," U.S. Conference of Catholic Bishops [@usccb], Twitter, November 4, 2020, 2:16 p.m., https://twitter.com/USCCB), the response nevertheless appears rather modest: the tweet received sixty "likes," and twenty-seven retweets, several of them from Roman Catholic dioceses' Twitter accounts. By contrast, only eight followers commented on the tweet, including, in several cases, to critique Catholic Social Service's stance vis-à-vis same-sex couples. Striking is also the unofficial @usccbfreedom's tweet from November 4, 2020, that both links to the amicus brief and superimposes a quotation from it over an image of a kneeling, veiled figure, holding a representation of the sacred heart of Jesus with the hashtag #FREEtoFOSTER. United States Conference of Catholic Bishops Office of Religious Liberty (@usccbfreedom), Twitter, November 4, 2020, 9:50 a.m., https://twitter.com/usccbfreedom/status/1324001069773574144.

[138] "Constitutional Interpretation: Amicus Curiae Briefs," Office of the General Assembly, Presbyterian Church (USA) (website), accessed December 5, 2020, https://oga.pcusa.org/section/mid-council-ministries/constitutional-services/amicus-curiae-briefs; "LCMS Amicus Brief Directory," Lutheran Church—Missouri Synod (website), accessed December 5, 2020, https://www.lcms.org/about/leadership/board-of-directors/amicus-briefs.

[139] "General Counsel: Amicus Briefs," United States Conference of Catholic Bishops, accessed December 5, 2020, https://www.usccb.org/offices/general-counsel/amicus-briefs.

[140] In Lynch's study, multiple former clerks thus reported spending no more than sixty seconds on most *amicus* briefs: Lynch, "Best Friends," 44, 55.

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as part of a consistent, historically grounded body, echoing narratives presented to Catholic audiences elsewhere, albeit here inflected through the lens of legal argument. In this way, they assume the aspect of Janus, showing different faces to different audiences, constructed to shape both interpretations of law and self-interpretations of constituencies—an intertwining of law, myth, and identity that reverberates, in different forms, throughout the centuries.

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