

Religion in the Writing: A Literary Analysis of Justice Kennedy on Abortion

Jonathan Cantarero

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/rrgc>



Part of the [Human Rights Law Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Jonathan Cantarero, *Religion in the Writing: A Literary Analysis of Justice Kennedy on Abortion*, 20 U. Md. L.J. Race Relig. Gender & Class 36 (2020).

Available at: <https://digitalcommons.law.umaryland.edu/rrgc/vol20/iss1/3>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in University of Maryland Law Journal of Race, Religion, Gender and Class by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

RELIGION IN THE WRITING: A LITERARY ANALYSIS OF JUSTICE KENNEDY ON ABORTION

BY JONATHAN CANTARERO*

INTRODUCTION

This article considers the link between religion and rhetoric in the writing style of Former Supreme Court Justice Anthony Kennedy. During his thirty years on the Supreme Court, Justice Kennedy, a life-long Catholic, earned a reputation as the pivotal “swing vote” on morally-charged cases, particularly those involving abortion.¹ Given that Justice Kennedy often wrote the majority or concurring opinion in these cases,² it is worth considering whether, and to what extent, his religious views shaped his legal analysis in authoring those landmark opinions.

To that end, Part I of this article lays out Justice Kennedy’s Catholic background leading up to his Supreme Court confirmation in 1987.³ Part II surveys three analytic theories set forth in Anthony Amsterdam’s and Jerome Burner’s influential work *Minding the Law*.⁴ Calling for a heightened consciousness about how judicial decisions are made, their book explores judicial texts through the lens of categories, narrative,

© 2020 Jonathan Cantarero

*JD, Assistant District Attorney, Manhattan District Attorney’s Office. The author would like to thank Professor Andrea McArdle for her invaluable support throughout the editing process. All views expressed herein are solely those of the author.

¹ As Justice Kennedy’s former colleague, Justice Elena Kagan has observed, “It is absolutely true that in some number of cases every year . . . we are going to split on pretty predictable lines. Four of us who think one thing and four of us who think the other thing and [then] we wait and see what Justice Kennedy does.” *Inside the Supreme Court* (C-SPAN broadcast Nov. 4, 2014) <https://www.c-span.org/video/?322869-1/discussion-supreme-court-justice-elena-kagan> (00:37:43). Examples of opinions authored by Justice Kennedy and decided by split decision include: *Romer v. Evans*, 517 U.S. 620 (1996) (Same-sex Discrimination); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Abortion Rights; co-authored with Justice Souter and Justice O’Connor); *Roper v. Simmons*, 543 U.S. 551 (2005) (Death Penalty); *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014) (Religion and the Establishment Clause), and *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (Same-sex Marriage); JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 327–29 (2007); BARBARA A. PERRY, *THE SUPREMES: AN INTRODUCTION TO THE U.S. SUPREME COURT JUSTICES* 70–71 (2nd ed. 2009).

² PERRY, *supra* note 1, at 68–71.

³ *See infra* Part I.

⁴ *See infra* Part II.

rhetoric, and culture.⁵ Parts III–V draw from these categories in reviewing three landmark opinions by Kennedy on abortion: *Akron*, *Casey*, and *Carhart*.⁶ The article ends with a few tentative conclusions on the degree to which Justice Kennedy’s religious views may have shaped his judicial writing style and, thus, the nation’s abortion jurisprudence.⁷

I. JUSTICE KENNEDY

Despite the well-known fact that Justice Kennedy identifies as Catholic,⁸ surprisingly little has been written about his particular religious beliefs.⁹ Even scholars who acknowledge this deficiency in the literature decline attempts at constructing Kennedy’s theology,¹⁰ preferring instead to assess his opinions against traditional Catholic doctrine.¹¹ Justice Kennedy himself has never openly espoused his specific religious views nor has he written an autobiography detailing them.¹² Notwithstanding these limitations, a basic framework is still possible using currently available sources.

Justice Kennedy was raised in a Roman Catholic household in Sacramento, California, and eventually served as an altar boy at a local church during his adolescent years.¹³ Nothing indicates that Kennedy abandoned, or even considered leaving, the Church at any point before

⁵ ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 1–16 (2000). Although *Minding the Law* considers four separate literary theories, this article focuses on the first three: Categories, narrative, and rhetoric.

⁶ See *infra* Part III–V.

⁷ See *infra* Conclusion.

⁸ See *Anthony M. Kennedy*, OYEZ, https://www.oyez.org/justices/anthony_m_kennedy (last visited Apr. 5, 2020).

⁹ Anne Jelliff, *Catholic Values, Human Dignity, and the Moral Law in the United States Supreme Court: Justice Anthony Kennedy’s Approach to the Constitution*, 76 ALB. L. REV. 335, 336 (2013) (“One aspect of Kennedy, which has been insufficiently discussed, is his Roman Catholic faith and the influence that the teachings of the Catholic Church have had on his jurisprudence”).

¹⁰ *Id.* at 336.

¹¹ See, e.g., FRANK J. COLUCCI, *JUSTICE KENNEDY’S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY* 31–35 (2009) (viewing Kennedy’s jurisprudence as being informed by post-Vatican-II documents such as *Dignitatis Humanae*, but limiting discussion as to Kennedy’s actual religious beliefs to a footnote).

¹² The uncertainty of Justice Kennedy’s personal views have likewise extended to his judicial philosophy. TOOBIN, *supra* note 1, at 327 (“Kennedy had come to have a usually predictable, if intellectually incoherent, collection of views. He believed what he believed, but it was hard to say why”).

¹³ PETER IRONS, *A PEOPLE’S HISTORY OF THE SUPREME COURT: THE MEN AND WOMEN WHOSE CASES AND DECISIONS HAVE SHAPED OUR CONSTITUTION* 413 (2006); PERRY, *supra* note 1, at 60.

he began his legal career.¹⁴ Indeed, as Supreme Court commentator Jeffrey Toobin has noted, Kennedy was, and remains, “a serious Catholic, of pre-Vatican II vintage” and one “who went to Mass every Sunday.”¹⁵

Kennedy’s Catholic upbringing quickly became the subject of public inquiry following his nomination to the Supreme Court in 1987, when scrutiny into his personal views heightened.¹⁶ At the time, President Ronald Reagan, who had nominated Kennedy to replace Justice Lewis Powell, sought to assure Republicans that Kennedy was “a true conservative” who would vote “right” (pun intended) on important moral issues.¹⁷ Others, however, observed that while Kennedy was an open member of the Roman Catholic Church, “his personal views on those issues could not be readily determined.”¹⁸ Thus, more often than not, Justice Kennedy was labeled a moderate conservative and a restrained pragmatist which, when coupled with this “courteous” and polite nature, led many to consider him a “conservative but not a right-wing ideologue.”¹⁹

Further efforts to relate Kennedy’s religious views to his moral character can be gleaned from the 1987 confirmation hearings.²⁰ Interestingly, the hearings only provide two references to Kennedy’s Catholicism and its potential impact on his judicial reasoning. Victor Fazio, then a representative from California, was the first to reference Kennedy’s Catholicism, portraying his parish involvement as an example of community engagement, and likewise, of good moral character.²¹ This remark, however, was limited to one sentence and was later undermined by a second reference provided by The National Abortion Rights Action League (NARAL).²² Writing for the organization, then-executive direc-

¹⁴ See e.g., TOOBIN, *supra* note 1, at 53 (describing Kennedy’s devout Catholic belief).

¹⁵ TOOBIN, *supra* note 1, at 53.

¹⁶ *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 90 (testimony of Anthony M. Kennedy), 1091 (testimony of The National Abortion Rights Action League) (1987) [hereinafter *Hearings*].

¹⁷ Jelliff, *supra* note 9, at 335.

¹⁸ Robert Reinhold, *Restrained Pragmatist—Anthony McLeod Kennedy*, N.Y. TIMES (Nov. 12, 1987), <http://www.nytimes.com/1987/11/12/us/man-in-the-news-restrained-pragmatist-anthony-m-kennedy.html>.

¹⁹ *Id.* (quoting Professor Robert A. Horn, Kennedy’s professor during his undergraduate years at Stanford).

²⁰ *Hearings*, *supra* note 16, at 90 (testimony of Anthony M. Kennedy), 1091 (testimony of The National Abortion Rights Action League).

²¹ *Id.* at 12 (testimony of Rep. Vic Fazio).

²² *Id.* at 1091 (testimony of The National Abortion Rights Action League); see *id.* at 12 (testimony of Rep. Vic Fazio).

tor Kate Michelman cautioned that Kennedy's religious ties could influence his decision-making in controversial cases—particularly those relating to woman's rights.²³ Although Michelman declined to question Kennedy's sincerity when he testified before Congress that he had “no set agenda” with respect to abortion rights, she warned “that there may nonetheless be significance in Kennedy's history of pro bono work for the Catholic Church.”²⁴

Ultimately, these concerns proved to be remarkably insignificant as Kennedy went on to be confirmed by a vote of 97-to-0, a consensus reached in only four out of the last twenty-five confirmation hearings since 1969.²⁵ Indeed, this rare bi-partisan harmony would end up foreshadowing Kennedy's future place on the Supreme Court as a consistent moderate. Here, President Reagan's expectation that Kennedy would remain a “true conservative” would certainly diminish over time as Kennedy slowly established himself as a “swing vote” in pivotal cases.²⁶

Given this background, and recognizing Kennedy's own reluctance to articulate his personal religious beliefs, this article assumes for purposes of the foregoing analysis that Kennedy's religious views have more or less remained in accordance with traditional Catholic doctrine.²⁷ The notion, for example, that Kennedy was and remains personally against abortion is strongly suggested not only through some of his earliest opinions on the Court,²⁸ but by various investigative reports as well.²⁹ Kennedy himself alluded to this immediately before *Ohio v. Akron Center* was decided, when, in a handwritten letter to Justice Blackman, he confessed that he was “still struggling with the whole abortion

²³ *Id.* at 1084, 1091 (testimony of The National Abortion Rights Action League).

²⁴ *Id.* at 1091 (testimony of The National Abortion Rights Action League).

²⁵ See *Supreme Court Nominations (Present-1789)*, UNITED STATES SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> (last visited Apr. 6, 2020); see also IRONS, *supra* note 13, at 553.

²⁶ See Jelliff, *supra* note 9, at 335; see *supra* note 1 and accompanying text.

²⁷ See COLUCCI, *supra* note 11, at 31–35.

²⁸ See generally *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) (Kennedy writing the majority).

²⁹ See, e.g., TOOBIN, *supra* note 1, at 53. As one book noted:

...[Kennedy] prayed in the old-fashioned manner, hands clasped before him. Abortion repelled him. He fully adopted his church's teachings on the subject. Once before he joined the Court, he had called *Roe* the “*Dred Scott* of our time,” a reference to the infamous 1857 ruling that sanctioned slavery and helped spark the Civil War.

issue.”³⁰ Indeed, as we shall see, Kennedy subtly suggested his adherence to a more conservative moral stance in cloaked sections of *Casey* and *Carhart* as well.³¹

II. ANALYTIC THEORIES

In order to properly analyze Justice Kennedy’s abortion jurisprudence, Part II of this article provides three analytic approaches to reading judicial opinions, as adopted from Amsterdam’s and Bruner’s *Minding the Law*.³² In particular, this section discusses the analysis of judicial opinions through the lens of category, narrative, and rhetoric.³³

Category: The first approach, judicial opinions as category, views such opinions as thematic products designed to persuade a particular audience.³⁴ In that sense, judges frame their cases to fit within an identifiable category or theme in order to tap into a reader’s cognitive assumptions and intuitions about those types of subject matter.³⁵ Thus, under this view, a reader’s willingness to adopt a judge’s position on a particular case hinges on the judge’s ability to engage the reader in a relatable narrative. Amsterdam and Bruner suggest that, within the context of judicial opinions, three types of categories are most prevalent: “natural theoretical,” “human narrative,” and “supernatural religious.”³⁶

An opinion which fits in the “natural theoretical” category is both fact-based and empirical.³⁷ It is “natural” because it is based on plain observations. It is “theoretical” because it requires a way of rationalizing those observations. The category is also “fact-based” because the “theory” or “narrative” used must be “verifiable or at least falsifiable.”³⁸ This empirical approach, while perhaps “dry” in its substance, is meant to create an account of the facts which, when analyzed under the applicable law, creates an irrefutable logic-based proof (i.e., if you have

³⁰ See COLUCCI, *supra* note 11, at 46 (quoting Blackmun Papers, Box 544, Folder 2 (letter dated June 21, 1990)) (on file with Manuscript Division, Library of Congress, Washington, D.C.).

³¹ See *infra* Part IV–V.

³² See *infra* note 23 and accompanying text.

³³ See AMSTERDAM & BRUNER, *supra* note 5, at 1–16. A fourth approach, judicial texts as *culture*, is also considered in chapters 8–9 but is not discussed here.

³⁴ Marie-Claire Belleau & Rebecca Johnson, *I Beg to Differ: Interdisciplinary Questions About Law, Language, and Dissent*, in LAW, MYSTERY & THE HUMANITIES: COLLECTED ESSAYS 145, 146–47 (Logan Atkinson & Diana Majury eds., 2008).

³⁵ See AMSTERDAM & BRUNER, *supra* note 5, at 31–32.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 29–30.

X then you can prove Y; facts A, B, and C clearly show X, therefore Y must have occurred).

The second category, “human narrative,” on the other hand, is based not on objective truth, but rather the *appearance* of truth.³⁹ Here, the judge writes an opinion by constructing a factual narrative that fits within one of society’s “stock stories” (i.e., the “the evil corporation” or the “innocent bystander”).⁴⁰ In that lens, the degree to which a judge can successfully mimic these “stock stories” correlates with the reader’s receptiveness of the case to his or her own experiences, biases, and conceptions of right and wrong. But while this fabricated familiarity may make it easier to accept the judge’s version of the case, the approach can easily turn into an *argumentum ad passiones*, or a mere “appeal to emotion.”⁴¹

Finally, where the category is “religious supernatural,” the judge seeks to construct a “normative-religious” account of the facts.⁴² Here, “normative” means ordinary everyday facts backed up by an assumed understanding of some higher order.⁴³ Thus, authority is not based on verification (i.e., “natural theoretical”) or verisimilitude (i.e., “human narrative”), but on the author’s capacity “to enlist belief as an act of faith.”⁴⁴ As Amsterdam and Bruner note, an opinion within this category typically sets the tone as one of “human origins, human destiny, human responsibilities, and human plight.”⁴⁵ Of course, these are the “big questions” that the reader is least likely to understand. Accordingly, the resulting expectation is that the reader will simply defer to the judge’s wisdom rather than rely on his or her own limited understanding of what may be essentially a metaphysical issue.⁴⁶

Notably, the potential to use the “religious supernatural” category seems particularly apparent in cases where religion is the issue or where the author is religiously observant. Because the foremost concern in this article is the interplay between personal religious views and legal reasoning, Kennedy’s opinions provide fertile ground to explore this type of category.

³⁹ See BELLEAU & JOHNSON, *supra* note 34, at 147.

⁴⁰ *Id.* at 153.

⁴¹ Michael C. Labossiere, *Fallacy: Appeal to Emotion*, THE NIZKOR PROJECT (1995), <http://www.nizkor.com/features/fallacies/>.

⁴² AMSTERDAM & BRUNER, *supra* note 5, at 32.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

Narrative: A second analytical approach views judicial texts purely as *narrative*. Amsterdam and Bruner provide the following definition:

A narrative can purport to be either a fiction or real account of events; it does not have to specify which. It needs a *cast of human-like characters*, being capable or *willing their own actions, forming intentions, holding beliefs, having feelings*. It also needs a *plot* with a beginning, a middle, and an end, in which particular characters are involved in particular events. The unfolding of the plot requires (implicitly or explicitly):

(1) an initial *steady state* grounded in the legitimate ordinariness of things

(2) that gets disrupted by a *Trouble* consisting of circumstances attributable to human agency or susceptible to change by human intervention,

(3) in turn evoking *efforts* at redress or transformation, which succeed or fail,

(4) so that the old steady state is *restored* or a new (*transformed*) steady state is created,

(5) and the story concludes by drawing the then-and-there of the tale that has been told into the here-and-now of the telling through some *coda*... [such as a moral of the story].⁴⁷

Unsurprisingly, then, although categories and narrative may cut across each other and even masquerade as one another at times, narrative generally functions as the larger scheme while utilizing categories to help paint the picture.⁴⁸ Narratives work best in cases where the litigants are real people (i.e., in a murder case) as opposed to large corporations (i.e., in an anti-trust case) because the facts more easily translate into a compelling “storyline.” Thus, a judge may write for the majority utilizing a particular narrative (i.e., religion holds a special status in our country so Mean Principle Mike should not prevent Happy Student Harold from forming an after school Jewish Club) by employing various categories (i.e., the ill-spirited atheist [human-narrative] or religion as sacred [religious-supernatural]).

The larger task of developing a narrative, likewise, requires a particularized articulation of the “facts of the case.” Consequently, a method that reads judicial opinions as narrative seeks to understand a judge’s recitation of the “relevant facts” as influenced, if not dictated,

⁴⁷ AMSTERDAM & BRUNER, *supra* note 5, at 113–14.

⁴⁸ *Id.* at 12.

by the particular narrative employed.⁴⁹ What the facts “really” are and how they are applied thereby hinge on the narrative an author seeks to develop.⁵⁰ This art of constructing a narrative brings us to our final approach to reading judicial text, rhetoric.

Rhetoric: Rhetoric, generally construed, “. . .denote[s] the various linguistic processes by which a speaker can create, address, avoid, or shape issues. . . .”⁵¹ Rhetorical discourse can likewise be interpreted “. . .as seeking to regulate an audience’s conception of a subject and its definition of the issues attending that subject.”⁵² In other words, it is the craft of persuasion. Engaging in rhetorical discourse requires a speaker to choose words to the exclusion of alternatives in order convey precisely that which they hope to communicate.⁵³ This reality resonates with Amsterdam and Bruner’s axiomatic statement that “. . . *what is said to be meant by what is said depends on what is perceived to be going on.*”⁵⁴ Put differently: context matters.

The founder of analytical jurisprudence, John Austin, distinguished three dimensions of linguistic expression that helps illustrate this point: the *locutionary* dimension, the *illocutionary* dimension, and the *perlocutionary* dimension.⁵⁵ As interpreted by Amsterdam and Bruner, “the locutionary dimension is the propositional content of [any] utterance consisting,” in its simplest form, “of a reference to some subject . . . and a predication about that subject.”⁵⁶ Thus, in the statement “He just applied for a job at McDonalds,” “He” functions as the subject while “just applied for job at McDonalds” serves as the predicate.

The illocutionary dimension, on the other hand, refers to what the speaker is *doing* with the utterance.⁵⁷ This can range from merely “stating,” “describing,” and “asserting” to “warning,” “questioning,” or

⁴⁹ *Id.* at 111; see also Jerome Bruner, *What Is A Narrative Fact?*, 560 ANNALS AM. ACAD. POL. & SOC. SCI. 17, 18 (1998).

⁵⁰ Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 387 (1989).

⁵¹ AMSTERDAM & BRUNER, *supra* note 5, at 165.

⁵² EDWIN BLACK, RHETORICAL QUESTIONS: STUDIES OF PUBLIC DISCOURSE 153 (1992).

⁵³ See generally RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY 29 (2003) (“observing that the rhetorical approach belongs to the tradition of the ancient sophists, who were ‘not interested in discovering truth’ but instead in ‘crafting persuasive appeals to the imperfect understanding, the opinions and even the prejudices, of particular audiences’”); Anthony T. Kronman, *Rhetoric*, 67 U. CIN. L. REV. 677 (1999) (“Rhetoric is the art of persuading people to believe things”); John W. Cooley, *A Classical Approach to Mediation-Part i: Classical Rhetoric and the Art of Persuasion in Mediation*, 19 U. DAYTON L. REV. 83 (1993).

⁵⁴ AMSTERDAM & BRUNER, *supra* note 5, at 167.

⁵⁵ *Id.*; J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 108–09 (1962).

⁵⁶ AMSTERDAM & BRUNER, *supra* note 5, at 167.

⁵⁷ *Id.*

“commanding.”⁵⁸ In the example above, the utterance appears to function as a mere “statement” but could easily change to a “question” (if someone had asked where Mark was) or a warning (if someone said they were referring Mark for a job at Wendy’s).

Finally, the perlocutionary dimension refers to the *effects* of the utterance on the intended audience and hinges both on context and the illocutionary dimension previously discussed.⁵⁹ Take, for example, the following exchange:

Listener: I just took the same Bar Exam as you and Mark, did you think it was tough?

Speaker: He just applied for a job at McDonalds.

Here, the speaker’s fundamental objective is to answer the listener’s question although not necessarily in the most direct manner. The illocutionary intention of the utterance is, apparently, to warn or scare the listener while the perlocutionary consequence is likely that the listener is now “concerned,” “intimidated,” or even “frightened” by the bar exam. The lesson here is that listeners and readers are often not given the most straightforward response to a question or comment. In other words, what the speaker “means” is not always readily ascertainable from a mere locutionary understanding of the utterance but requires some internal processing on the part of the listener or reader to “make sense” of the utterance. This, however, does not necessarily make such rhetorical utterances any more difficult to understand. On the contrary, such responses often function as psychologically appealing short-cuts for conveying information in a more vivid manner. Thus, with respect to the last example:

Utterance: “He just applied for a job at McDonalds”

Translation: “The test was so difficult that not only had Mark lost all hope of passing it and being admitted to the bar but his self-esteem was so low despite his educational background that he felt he was only qualified to work for minimum wage in a fast-food restaurant.”

Rhetoricians take advantage of our innate ability to process information through inferences and implications by employing various rhetorical devices disguised in ordinary language.⁶⁰ In a legal setting, and in particular in the context of judicial writing, this translates to a system in which the illocutionary dimension of legal discourse (what judges are *doing* when they write a particular passage in an opinion)

⁵⁸ *See id*

⁵⁹ *Id.* at 168.

⁶⁰ *See supra* text accompanying notes 51–59.

functions as a means for advancing their perlocutionary aim of *persuading* their audience to accept the written rationale for the outcome of any given case. In simpler terms, a judge's skill is "[knowing] how to say something without thereby taking the responsibility of having said it," in order to reap the full benefits of "the efficacy of speech and the innocence of silence."⁶¹ Given that countless rhetorical devices exist, we will focus on two classifications highlighted by Amsterdam and Bruner: *Ontological* construction techniques and *epistemological* construction techniques.⁶²

Ontology is "a branch of metaphysics concerned with the nature and relations of being."⁶³ Ontological construction techniques, thus, serve to alter or modify our conception of reality.⁶⁴ An example of this is the "framing" that takes place in the first few paragraphs of all judicial opinions. It is here where judges often set the tone that supports the reasoning that follows. Take, for instance, a criminal appeal in which the judge rules in favor of the defendant. No matter how gruesome or colorful the facts, if the judge frames the case in a procedural context, refers to the parties formally as "the people" and "the defendant," and recites facts in board strokes rather than in gory detail, readers will have a harder time sympathizing with the victims. Why? Because in writing the opinion this way the judge forces the reader to subconsciously depersonalize the parties and become increasingly emotionally detached. Here, subtle changes in language, such as adding "allegedly" before otherwise damning facts and using ultra-technical jargon, all serve to divert the reader from "reading in" a gruesome narrative that would convince any twelve-person jury of a defendant's guilt.

Related to, but distinct from, ontology is epistemology which focuses on "the nature and grounds of knowledge especially with reference to its limits and validity."⁶⁵ Unsurprisingly, then, epistemological construction techniques work to alter the certainty or scope of our knowledge of reality by "mak[ing] facts appear more or less certain and

⁶¹ *Id.* at 175, 382–83 n. 24 (citing OSWALD DUCROT, *DIRE ET NE PAS DIRE: PRINCIPES DE SEMANTIQUE LINQUISTIQUE* 12 (1972)).

⁶² *See id.* at 177. *Minding the Law* also includes a third ("story telling") and fourth ("catch-all") category. *See id.* We considered the "story telling technique" in discussing the second analytical approach, judicial texts as narrative, see, *supra* text accompanying notes 37-40, and will borrow from "catch-all" category during our analysis of Kennedy's opinions, see *infra* at Part III.

⁶³ *Ontology*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/ontology> (last visited Apr. 7, 2020).

⁶⁴ AMSTERDAM & BRUNER, *supra* note 5, at 177.

⁶⁵ *Epistemology*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/epistemology> (last visited Apr. 7, 2020) (emphasis added).

[opening or closing] the range of admissible interpretative possibilities.”⁶⁶

One example of this is to include *questioning* modifiers (“alleged,” “asserted,” “presumed” or “conceded”) before unfavorable facts to denote the possibility that the information presented in the case is in fact false. Other rhetorical devices work in the same way to either open up certain options or close others. *Mental verbs* (“I think,” “I imagine”), *hedges* (“generally,” “basically”), and *qualifying adverbs* (“seemingly,” “approximately,” “possibly”), for example, all serve to “qualify the force of our assertions and conclusions.”⁶⁷ *Auxiliary verbs* (“could have” and “should have”) function in a similar way to suggest an alternative or better course of action that ought to have taken place.⁶⁸ This allows judges to sneak in their own views as to the rightfulness or wrongfulness of a party’s actions without flat-out saying “this is what *I* would have done.” A variety of other expressions exist as well, each with the effect of detracting from certainty, or diluting the veracity of any given proposition.⁶⁹

Given these various techniques, it is important to note that while these analytic theories are somewhat distinct, they often overlap and work off of each other in very fluid and organic ways.⁷⁰ This is something to keep in mind as we begin exploring Justice Kennedy’s abortion jurisprudence, beginning with his first opinion on the subject in *Ohio v. Akron Center*.⁷¹

III. OHIO V. AKRON CENTER FOR REPRODUCTIVE RIGHTS

The Supreme Court’s decision in *Akron* represented Kennedy’s first opportunity to write a majority opinion on abortion as an Associate Justice.⁷² Although the case was decided when Kennedy had just under two years on the bench, Kennedy had already established a record of voting with conservatives on these types of cases.⁷³ The first example of this was *Webster v. Reproductive Health Services*, a 1989 case involving a Missouri law that required physicians to test for fetal age before performing an abortion if they had reason to believe the fetus was twenty

⁶⁶ AMSTERDAM & BRUNER, *supra* note 5, at 184.

⁶⁷ *Id.* at 184 (quoting STEPHEN E. TOULMIN, *THE USES OF ARGUMENT* 75 (1958)).

⁶⁸ *Id.*

⁶⁹ *See id.*

⁷⁰ *See Logic and Ontology*, STANFORD ENCYCLOPEDIA OF PHIL., <https://plato.stanford.edu/entries/logic-ontology/#AreOve> (last updated Oct. 11, 2017).

⁷¹ 497 U.S. 502, 506 (1990).

⁷² *See id.*

⁷³ *See Anthony M. Kennedy, supra* note 8.

weeks or older.⁷⁴ A bare majority, which included Justice Kennedy, upheld the requirement as being reasonable in light of “the State’s interest in protecting potential human life.”⁷⁵

The second case, decided the following year and on the same day as *Akron*, was *Hodgson v. Minnesota*.⁷⁶ This case involved a Minnesota statute requiring “two-parent notification” of abortion decisions of minors unless they obtained a judicial bypass.⁷⁷ Although agreeing with the judgment affirming the notification provision when accompanied by the judicial bypass mechanism,⁷⁸ Kennedy went further in a separate concurrence arguing that the statute was valid even in absence of any judicial bypass provision.⁷⁹

Having sided with conservatives in *Webster* and *Hodgson*, Kennedy was poised to follow suit in *Akron*. On appeal from the Sixth Circuit, the suit involved then-pregnant Rachael Roe who had been denied an abortion from the Akron Center for Reproductive Health Services (Akron Center) based on Ohio’s new one-parent notification law.⁸⁰ At the time of the suit, Rachael was a single minor dependent on her parents.⁸¹ Similar to the “two-parent” notification requirement in *Hodgson*, the statute in *Akron* required Rachael to notify at least one of her parents before obtaining an abortion; it also included a similar “judicial bypass” exception.⁸² In an effort to keep her decision private, however, Rachael declined to use either avenue.⁸³ Her attending doctor at Akron Center, Dr. Gaujean, was thus forced to turn her away or otherwise subject himself to criminal penalties.⁸⁴

⁷⁴ *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 513 (1989).

⁷⁵ *Id.* at 519–20.

⁷⁶ *Hodgson v. Minnesota*, 497 U.S. 417, 417 (1990).

⁷⁷ *Id.* at 420.

⁷⁸ *See id.* at 481 (Kennedy, J., concurring in part and dissenting in part).

⁷⁹ *Id.* at 481 (Kennedy, J., concurring in part and dissenting in part). Although brief, Kennedy’s concurrence previews language that appears in *Casey* and *Carhart*. *See* COLUCCI, *supra* note 11, at 43.

⁸⁰ *See* Stephanie R. Bryant, *Constitutional Law—Due Process: Minor’s Abortion Right—Ohio’s Parental Notification Statute—An Anti-Abortion Statute in Disguise? Ohio v. Akron Center for Reproductive Health*, 27 LAND & WATER L. REV. 605, 605 (1992).

⁸¹ *Id.*

⁸² *See id.* at 605–06, 621.

⁸³ *See Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 512 (1990).

⁸⁴ *See id.* at 509, 533 (“The physician risks civil damages, criminal penalties, including imprisonment, as well as revocation of his license for disobeying the statute’s commands.”); *see also* OHIO REV. CODE ANN. § 2151.85(B)(1) (West 2020); OHIO REV. CODE ANN. § 2919.12(D)-(E) (West 2020); OHIO REV. CODE ANN. § 4731.22(B)(23) (West 2020).

Chief Justice Rehnquist assigned the opinion to Justice Kennedy who spent little time deciding how to vote on the case and began circulating drafts of an opinion upholding the “one-parent notification” statute shortly after oral arguments.⁸⁵ On the verge of going 0-for-3 in these three cases, liberal Justice Blackmun circulated a colorful dissent criticizing Kennedy’s rhetoric in his preliminary draft of *Akron*: “[Kennedy’s] hyperbole...can have but one purpose: to further incite an American press, public and pulpit already inflamed by the pronouncement made by a plurality of this Court last Term in *Webster*.”⁸⁶

Kennedy quickly responded to the Justice’s concerns in a private handwritten letter dated June 21, 1990:

Dear Harry,

After much hesitation, I decided it best for our collegial relation and, I hope, mutual respect to tell you that I harbor deep resentment at your paragraph on page 17 in *Ohio v. Akron Center*. You say my hyperbole is to incite an inflamed public. To write with that purpose would be a violation of my judicial duty.

I am still struggling with the whole abortion issue and thought it proper to convey this in what I wrote.⁸⁷

The crux of this impassioned exchange centered on Part V of Kennedy’s initial draft.⁸⁸ Alluding to the potential impact on the religious community, for example, Blackmun was not amused by Kennedy’s “paternalistic” and “philosophic[al]” language in that section which broke dramatically in style and substance from the rest of the opinion.⁸⁹ With neither Blackmun nor Kennedy willing to budge, however, both ultimately left most of their respective homilies intact in the final opinion.⁹⁰ For Kennedy’s part, his insistence on including this

⁸⁵ COLUCCI, *supra* note 11, at 45-47.

⁸⁶ *Id.* at 47 (citing Blackmun Papers, Box 544, Folder 3 (draft, p. 17) (on file with Manuscript Division, Library of Congress, Washington, D.C.)).

⁸⁷ *Id.* at 45-47 (citing Blackmun Papers, Box 544, Folder 2 (letter dated June 21, 1990) (on file with Manuscript Division, Library of Congress, Washington, D.C.)).

⁸⁸ See *Akron Ctr. for Reprod. Health*, 497 U.S. at 541 (Blackmun, J., dissenting).

⁸⁹ See *Akron Ctr. for Reprod. Health*, 497 U.S. at 541 (Blackmun, J., dissenting) (“The plurality indulges in paternalistic comments about “profound philosophic choices”).

⁹⁰ For Justice Kennedy, see *id.* at 519–20 (Kennedy, J., opinion); HELEN J. KNOWLES, *THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY* 179 (2009) (“the language of Part V went unchanged from start to finish”). For Justice Blackmun, compare COLUCCI *supra* note 11, at 48 (citing Blackmun Papers, Box 544, Folder 2 (draft, p. 17) (letter of 21 June 1990),

more controversial language, which we examine in greater detail below, resulted in a two-tiered structure in which Parts I–IV of *Akron* remained remarkably unexceptional in style and content but Part V stood out for its probative and provocative language.⁹¹

Unfortunately for Justice Kennedy the sharp differences between Justice Blackmun and himself concerning Part V of the opinion were also reflected in the final outcome of the case.⁹² Five Justices eventually joined Parts I–IV of *Akron* to form a six-three majority upholding the “one-parent notification” requirement.⁹³ However, only three Justices joined Part V, constituting merely a plurality of the Court.⁹⁴ These divisive results beg the question as to why Kennedy felt the need to include Part V in the final opinion at all. At least two explanations exist.

From a purely jurisprudential point of view, Justice Kennedy’s inclusion and framing of Part V suggests that he was generally more concerned with its *future* impact rather than its immediate relevance to the litigants in *Akron*.⁹⁵ To begin, Part V obscured the applicable legal principle for future abortion cases by referencing both the “rational basis” test used in *Webster* and the “undue burden” test advocated by Justice O’Connor a few years earlier in *City of Akron v. Akron Center for Reproductive Health*.⁹⁶ Having appeared first in O’Connor’s 1983 dissent, and now in *Akron*’s plurality opinion, Kennedy moved the Court one step closer towards fully embracing the “undue burden” test in a majority opinion as it eventually did in *Casey*.⁹⁷ This ideological shift also represented Justice Kennedy’s earliest efforts to alter *Roe v. Wade*’s⁹⁸ constitutional foundation from “privacy” to “liberty” which

with *Akron Ctr. for Reprod. Health*, 497 U.S. at 541 (Blackmun, J., dissenting) (only changing the term “purpose” for “result”).

⁹¹ See KNOWLES, *supra* note 90, at 178, and compare *Akron Ctr. for Reprod. Health*, 497 U.S. at 507–19 (Part I–IV), with *Akron Ctr. for Reprod. Health*, 497 U.S. at 519–20 (Part V).

⁹² See *Akron Ctr. for Reprod. Health*, 497 U.S. at 519–20.

⁹³ *Id.* at 506, 520. Although the Court held the statute valid when coupled with the judicial bypass mechanism, it ultimately left open the question of whether the judicial bypass was “required.” *Id.* at 510.

⁹⁴ *Id.* at 506. Part V of *Akron* was joined only by Chief Justice Rehnquist, Justice White, and Justice Scalia. *Id.*

⁹⁵ See COLUCCI, *supra* note 11, at 44.

⁹⁶ See *Akron Ctr. for Reprod. Health*, 497 U.S. at 519–20. Justice O’Connor first articulated an early version of the undue burden test in *City of Akron v. Akron Center for Reproductive Health, Inc.*, as an alternative to *Roe*’s trimester framework. 462 U.S. 416, 459, 463–64 (1983) (O’Connor, J., dissenting).

⁹⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992).

⁹⁸ 410 U.S. 113 (1973) *holding modified by Casey*, 505 U.S. at 878–79

was much more consistent with his own jurisprudential philosophy concerning individual rights.⁹⁹

Aside from these jurisprudential considerations, a second explanation is gleaned from Justice Kennedy's exchange with Justice Blackmun.¹⁰⁰ It is in this correspondence that Kennedy reveals his own personal "struggle" to reconcile abortion rights with his personal views on the subject.¹⁰¹ What is truly fascinating, however, is not that Kennedy admits that this struggle exists but that he confesses his express intention to ". . . convey this in what [he] wrote."¹⁰² Given, Kennedy's Catholicism, the analysis that follows suggests that his rhetoric in *Akron* can also be understood as illustrating Kennedy's effort to reconcile his personal *religious* views—whether consciously or subconsciously—with his larger role as a Supreme Court Justice.

PART III-B: KENNEDY'S VOICE IN *AKRON*

Justice Kennedy begins Part I of *Akron* with a rather unexciting restatement of the Ohio "one-parent notification" statute, detailing all of its exceptions.¹⁰³ Consider the beginning of the first few paragraphs:

The Ohio Legislature, in November 1985, enacted Amended Substitute House Bill 319 (H.B. 319) [making] it a criminal offense, except in four specified circumstances, for a physician or other person to perform an abortion on an unmarried and unemancipated woman under 18 years of age. . . .

The first and second circumstances in which a physician may perform an abortion relate to parental notice and consent. . . .

The third and fourth circumstances depend on a judicial procedure that allows a minor to bypass the notice and consent. . . .

⁹⁹ See generally KNOWLES, *supra* note 90, at 19–51 (discussing Justice Kennedy's jurisprudence in light of libertarian views); COLUCCI, *supra* note 11, at 43–48. As Colucci notes, framing the standard as one which protects women against an undue burden imposed by the State implies a value on individual liberty and autonomy consistent with Justice Kennedy's own evolving libertarian jurisprudence. *Id.* at 44.

¹⁰⁰ See COLUCCI, *supra* note 11, at 45–48.

¹⁰¹ See *id.* at 47–48 (quoting Blackmun Papers, Box 544, Folder 2 (letter dated June 21, 1990)) (on file with Manuscript Division, Library of Congress, Washington, D.C.).

¹⁰² See COLUCCI, *supra* note 11, at 47–48 (quoting Blackmun Papers, Box 544, Folder 2 (letter dated June 21, 1990)) (on file with Manuscript Division, Library of Congress, Washington, D.C.).

¹⁰³ *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 506–10 (1990).

The juvenile court must hold a hearing at the earliest possible time, but not later than the fifth business day after the minor files the complaint....¹⁰⁴

Part II follows an analogous pattern, diving into a textbook application of the case law, while Parts III and IV address counter arguments.¹⁰⁵ Throughout his discussion in Parts I–IV, Justice Kennedy gives little mention to Rachael Roe’s specific factual situation, never examines the history of abortion-limiting laws, never references any social science data concerning abortions, and never cites to an amicus brief in his reasoning.¹⁰⁶ His opinion, at least up to Part IV, is thus, structured, formal, and somewhat boring.

Taking a page from Amsterdam and Bruner, it is easy to see how Kennedy’s dry and perhaps academic style in Parts I–IV of *Akron* fits within a larger “natural-theoretical” approach to judicial opinion writing. Kennedy’s language in Part I is “natural” because it is descriptive and straightforward while Parts II–IV are “theoretical” in that they essentially constitute one large IRAC.¹⁰⁷ This, in turn, enables readers to verify and corroborate Kennedy’s rationale before deciding whether to “agree” or “accept” his ultimate conclusion. But Justice Kennedy goes one step further and supplements this “natural-theoretical” framework with ontological construction techniques that “frame” or “center” the case as one focused on “procedure” rather than “persons.”

Take Justice Kennedy’s use of the litigants, for example. To begin, Kennedy refers to Rachael Roe and Dr. Gaujean by name only once in the entire opinion.¹⁰⁸ Second, this introduction comes only after an almost three-page discussion of Ohio law.¹⁰⁹ Both of these features force readers to focus on the mechanical aspects of the statute rather than on the individual stories of the litigants. Third, Kennedy continues to depersonalize these individuals by generically referring to the parties as “the State” and “Appellees” for the rest of the opinion.¹¹⁰ Even here, any mention of the actual parties is dominated by repeated references to

¹⁰⁴ *Id.* at 507–08.

¹⁰⁵ *See id.* at 510–19.

¹⁰⁶ *See id.* at 507–19.

¹⁰⁷ IRAC is an acronym for “issue, role (or relevant law), application (or analysis), and conclusion”: a method used in composing certain legal documents and reports. Richard Norquist, *IRAC Method of Legal Writing*, THOUGHTCO. (Aug. 12, 2019), <https://www.thoughtco.com/irac-legal-writing-1691083>.

¹⁰⁸ *Id.* at 509.

¹⁰⁹ *See Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 507–09 (1990).

¹¹⁰ *See id.* at 509–20.

“procedure[s]” (thirty times in Parts I–IV) and “require[ments]” (thirty-one times in Parts I–IV).¹¹¹

Notice how these rhetorical devices gear audiences away from reading in any “human-narrative” into the opinion. In this vein, Justice Kennedy’s omissions function in much the same manner. Kennedy, for example, excludes Rachael’s allegations of parental abuse;¹¹² does not address the prevalence and psychological impact of physical and sexual abuse by parents despite its inclusion in the Appellees’ brief;¹¹³ and fails to mention the harsh criminal penalties that would have attached to Dr. Gaujean had he induced the abortion without complying with the statute.¹¹⁴ Thus, just as the emphasis on “procedure” over “persons” leads readers to stoically assess the case so does the absence of any narrative cues hinder them from “sympathizing” with Rachael Roe and Dr. Gaujean on any personal level.

Whether this rhetoric actually convinces lay readers to side with the State is a question outside the scope of this article. What we do know, however, is that Justice Kennedy’s persuasive writing was sufficient to cobble together five additional votes with respect to Parts I–IV of the opinion.¹¹⁵ Indeed, it is possible that, given his short tenure on the Court at the time, Kennedy consciously adopted minimally controversial language in order to gain the support of his colleagues, including Justice O’Connor (a swing vote at the time) and Justice Stevens (arguably the most liberal Justice on the Rehnquist Court).

Yet the looming question of how exactly this relates to Justice Kennedy’s Catholicism remains. As Kennedy’s exchange with Blackmun suggests, Parts I–IV must be read together with Part V which only garnered three additional votes, and is therefore not part of the controlling rationale. Despite its relegated status, however, Part V is the only section in *Akron* mentioning a rule.¹¹⁶ Indeed, Kennedy’s ambiguity as to *which* rule is being applied (he mentions both *Webster’s* “ra-

¹¹¹ See *id.* at 507–19.

¹¹² See *Akron Ctr. for Reprod. Health v. Rosen*, 633 F. Supp. 1123, 1127 (N.D. Ohio 1986), amended by 110 FRD 576 (N.D. Ohio 1986) and *aff’d sub nom.* *Akron Ctr. for Reprod. Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988), *rev’d sub nom.* *Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990).

¹¹³ Brief for Appellee at 12–14, *Akron Ctr. for Reprod. Health*, 497 U.S. 502 (No. 88-805), 1989 WL 1127539, at *8–9.

¹¹⁴ See *Akron Ctr. for Reprod. Health*, 497 U.S. at 533 (Blackmun, J., dissenting); OHIO REV. CODE ANN. § 2151.85(B)(1) (West 2020); OHIO REV. CODE ANN. § 2919.12(D)-(E) (West 2020); OHIO REV. CODE ANN. § 4731.22(B)(23) (West 2020).

¹¹⁵ See *Akron Ctr. for Reprod. Health*, 497 U.S. at 505.

¹¹⁶ See *Akron Ctr. for Reprod. Health*, 497 U.S. at 519–20.

tionality” test and O’Connor’s “undue burden” test) may, in part, account for its plurality status.¹¹⁷ In addition, Part V also probes into the larger metaphysical questions surrounding abortion rights, the framing of which resonates with traditional Catholic doctrine.¹¹⁸ Thus, although not part of the holding, Part V’s rhetoric may provide greater support for viewing Kennedy’s, larger “struggl[e] with the whole abortion issue”¹¹⁹ as influenced by his religion. Consider the following passage:

A free and enlightened society may decide that each of its members should attain a clearer, more tolerant understanding of the *profound philosophic choices* confronted by a woman who is considering whether to seek an abortion. Her decision will embrace her own *destiny* and *personal dignity*, and the *origins of the other human life* that lie within the embryo.¹²⁰

In addition to sounding like a theology textbook, Justice Kennedy’s word choice here (“profound philosophical choices,” “destiny,” and “origins of other human life”) is miles apart from the dry, procedural language in the preceding twelve pages of the opinion. Consequently, Kennedy’s almost spiritual discourse breaks away from his “natural theoretical” approach to judicial writing and creeps into the “religious supernatural” realm. Recall that where the category is “religious supernatural,” judges seek to construct a “normative religious” account of the case where ordinary everyday facts are backed up by an assumed understanding of some higher order.¹²¹ Transitioning from the locutionary dimension to the illocutionary dimension, readers see the following take place:

Warning/Assertion: “[A] woman who is considering whether to seek an abortion [is confronted by] profound philosophic choices. . . . Her decision will embrace her own destiny and personal dignity, and the origins of the other human life that lie within the embryo.”¹²²

¹¹⁷ Particularly interesting here is the fact that Justice O’Connor did not sign on to Part V of the opinion despite its inclusion of “undue burden” language. *See id.* at 506, 519–20. Colucci suggests several factors may have influenced this decision including: (1) O’Connor’s tendency to write separately; (2) Part V’s equivocation of “rational basis” and “undue burden”; and (3) Part V’s paternalistic and patriarchal language concerning minors and women in general which O’Connor may have found offensive or at least unnecessary. *See COLUCCI, supra* note 11, at 45.

¹¹⁸ *See COLUCCI, supra* note 11, at 72 (stating “Much of [Kennedy’s] rhetoric about human dignity, liberty, and postabortion regret resonates with the language of papal statements issued after Vatican II . . .”).

¹¹⁹ *Id.* at 47–48 (quoting Blackmun Papers, Box 544, Folder 2 (letter dated June 21, 1990)) (on file with Manuscript Division, Library of Congress, Washington, D.C.).

¹²⁰ *Akron Ctr. for Reprod. Health*, 497 U.S. at 520 (emphasis added).

¹²¹ *AMSTERDAM & BRUNER, supra* note 5, at 32.

¹²² *Akron Ctr. for Reprod. Health*, 497 U.S. at 520.

Translation: Even if you disagree with everything I just said...in the end these choices are way too deep, important, and even – dare I say – spiritual, for us, (especially me) and these woman to fully understand.

Consider, next, how Justice Kennedy uses this “philosophical” language to set up his final point in the opinion:

Assertion: The State is entitled to assume that, for most of its people, the beginnings of that understanding will be within the family, *society’s most intimate association*. It is both rational and fair for the State to conclude that, in most instances, *the family will strive to give a lonely or even terrified minor advice* that is both *compassionate* and *mature*.... It would deny all *dignity* to the family to say that the State cannot take this reasonable step...to ensure that, in most cases, a young woman will receive *guidance* and *understanding* from a parent.¹²³

Translation: If these questions are too deep for me, they are certainly too deep and confusing for these girls, at least in most cases. It makes sense, then, that these girls receive the support, love, and guidance only a parent can give. I have faith that parents will provide just that kind of support, in most cases, if given the opportunity (i.e., if minors are forced to ask for it).

There are several important working pieces in these two short passages. To begin, in the first passage Kennedy presents the larger social issues attending abortion not as “medical,” or “psychological” in nature but as “moral” and “philosophical.” This approach feeds into a “religious supernatural” reading of Part V and betrays Kennedy’s own internal “struggle” to reconcile his personal views with his role as a Supreme Court justice – something Kennedy finds a real challenge based on his exchange with Justice Blackmun.¹²⁴

Second, Kennedy continues to limit any “human narrative” to one focused on the family rather than the actual minor facing the decision. Here, Kennedy litters his reasoning with paternalistic language (“the beginnings of . . . understanding will be within the family”...“lonely,” and “terrified minor[s],” need “compassionate and mature” “advice”) that ultimately betrays his own conceptions of normalcy within the home.¹²⁵ This conception, in turn, is likely influenced by his unremarkable upbringing in a traditional two-parent Catholic household.¹²⁶ Indeed, Blackmun calls Kennedy out on this in his dissent:

¹²³ *Id.* (emphasis added).

¹²⁴ See *supra* notes 77–79 and accompanying text.

¹²⁵ *Akron Ctr. for Reprod. Health*, 497 U.S. at 520.

¹²⁶ See *Anthony M. Kennedy*, *supra* note 8.

The plurality indulges in paternalistic comments about “profound philosophic choices”; the “[woman’s] own destiny and personal dignity”; the “origins of the other human life that lie within the embryo”; the family as “society’s most intimate association”... and the desired assumption that “in most cases” the woman will receive “guidance and understanding from a parent.”¹²⁷

Some of this may be so “in most cases” and, it is to be hoped, in judges’ own and other warm and protected, nurturing family environments. But those “most cases” need not rely on constitutional protections that are so vital for others. I have cautioned before that there is “another world ‘out there’” that the Court “either chooses to ignore or fears to recognize.”¹²⁸

Part V’s location within Kennedy’s overall opinion is also telling. By encompassing Parts I–IV within a “natural theoretical” framework, Kennedy sets up a judicial logic-based proof that readers can find security in and depend on (i.e., according to our case law, if you have A, B, and C, then you can prove law X is valid; D, E, and F clearly show A, B, and C; therefore law X is valid). What we get out of *Akron*, then, is traditional legal analysis (Parts I–IV) capped off with probative philosophical language on the “bigger questions” concerning abortion (Part V).

As one commentator suggests “. . . Kennedy’s struggle over abortion was not about whether to overturn *Roe*. It was about how to modify and narrow *Roe* . . .”¹²⁹ Given Kennedy’s Catholicism, however, it is hard to see this explicit “struggle” as merely philosophical in nature. The idea that Kennedy had trouble applying his liberty-based approach to judicial interpretation¹³⁰ due to some mere internal academic colloquy seems suspect. A more realistic picture of *Akron* then would be to read Part V’s rhetoric as pointing towards how Kennedy’s Catholicism influenced and shaped his personal views on the subject.

Several factors support this interplay between religion and rhetoric in *Akron*. First, we know Kennedy was “struggling with the whole abortion issue” at the time *Akron* was being decided, and that he intentionally sought to “convey that in what [he] wrote.”¹³¹ Second, based on Kennedy’s elaborate language in Part V, it seems fair to infer that his

¹²⁷ *Akron Ctr. for Reprod. Health*, 497 U.S. at 541 (Blackmun, J., dissenting) (citation omitted).

¹²⁸ *Id.* (Blackmun, J., dissenting) (citations omitted, and underlines added).

¹²⁹ COLUCCI, *supra* note 11, at 48.

¹³⁰ *See id.*; KNOWLES, *supra* note 90, at 178–79.

¹³¹ COLUCCI, *supra* note 11, at 47–48 (quoting Blackmun Papers, Box 544, Folder 2 (letter dated June 21, 1990)) (on file with Manuscript Division, Library of Congress, Washington, D.C.).

“struggle” with abortion was uniquely moral in nature, and, thus understandably influenced by his religious convictions. Third, given his Catholic upbringing, the Catholic Church’s position on abortion, and extrinsic evidence on Kennedy’s personal repudiation of abortion, it is equally fair to assume that his religious views informed his moral objection, which, in turn, influenced his judicial writing style. As the next section shows, this subtle connection becomes more explicit as Justice Kennedy continues his mission to narrow *Roe* in *Planned Parenthood v. Casey*.

IV. *PLANNED PARENTHOOD V. CASEY*

If there is one case which illustrates both Justice Kennedy’s importance as a “swing vote” and the import of his personal values in deciding cases, it is *Casey*.¹³² A 1992 abortion case out of Pennsylvania, *Casey* dealt with five provisions of the Pennsylvania Abortion Control Act which restricted a married woman’s ability to have an abortion.¹³³ Besides the obvious implications on woman’s rights, the case was particularly relevant for its treatment of *Roe v. Wade*, the landmark 1973 case which had previously affirmed a woman’s right to an abortion as constitutionally protected under the First Amendment.¹³⁴

Of the several provisions at issue in *Casey* one required that a woman seeking an abortion provide a signed statement that she has notified her husband of her intention to have the procedure.¹³⁵ Another specified that she be provided with certain information at least 24 hours before the abortion is performed.¹³⁶ The underlying purpose behind these provisions mimicked those of *Akron* – to make it as hard as possible for a woman to have an abortion.¹³⁷ While a general exception was made in cases of medical emergency, physicians nevertheless challenged the statutes as being at odds with the Court’s precedent in *Roe*.¹³⁸

Interestingly enough, at the time the Court heard the case it was more or less evenly split in terms of judicial ideology.¹³⁹ Liberal justices such as Blackmun, Stevens and Souter, would have no issue upholding

¹³² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

¹³³ *Id.* at 833, 844.

¹³⁴ *Roe v. Wade*, 410 U.S. 113, 152–53 (1973), *modified by Casey*, 505 U.S. 833.

¹³⁵ *Casey*, 505 U.S. at 844.

¹³⁶ *Id.*

¹³⁷ See generally Casey Quinlan, *Parental notification laws delay minors’ access to abortion care, study finds*, THINKPROGRESS (Dec. 13, 2017), <https://thinkprogress.org/parental-notification-laws-delay-access-abortion-care-857ac91248fa/>.

¹³⁸ *Id.* at 879–80.

¹³⁹ See JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 151 (2007).

Roe in its entirety, and O'Connor's voting record while on the Arizona legislature suggested she would follow suit.¹⁴⁰ Conversely, conservative Justices Scalia, Thomas, White and Chief Justice Rehnquist saw this as an opportunity to categorically overturn *Roe v. Wade*, which they viewed as an excessive use of judicial activism.¹⁴¹ As a result, there was clear and substantial pressure on Kennedy to alone – for all intents and purposes – decide what for many Americans was and remains a moral and religious question.

The Court laid down its ruling on June 29, 1992 affirming the “core” holding of *Roe*, that a woman has a fundamental right to have an abortion.¹⁴² As Constitutional law scholar Helen Knowles notes, the plurality shifted the abortion right's constitutional foundations from privacy to liberty just as Justice Kennedy desired.¹⁴³ In the process it rejected the rigid trimester framework of *Roe* and articulated an undue burden standard to allow for more state regulation of abortion.¹⁴⁴ Recall that in *Roe*, the Court created the trimester framework in an effort to balance the fundamental right to abortion with the government's two legitimate interests: protecting the mother's health and protecting the “potentiality of human life.”¹⁴⁵ In the first trimester, the Court left the decision solely to the woman and her physician.¹⁴⁶ From the end of the first trimester until fetal viability, the state's first interest in protecting the health of the mother would become “compelling” and the state could regulate the procedure if the regulation “reasonably relate[d] to the preservation and protection of maternal health.”¹⁴⁷ At viability, which the Court believed to be in the third trimester, the state's interest in “potential life” would become compelling and it could regulate abortion to protect “potential life” and even forbid abortion barring certain health/life exceptions.¹⁴⁸

¹⁴⁰ See *id.* at 150–54.

¹⁴¹ See TOOBIN, *supra* note 1, at 55 (referencing Scalia's pronounced intent to overturn *Roe*.)

¹⁴² *Casey*, 505 U.S. at 844–46 (“we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed”). The Court also continued Kennedy's trend of farming the right as a “liberty” right rather than a “privacy” right. See *id.* at 844 (showing that the first word in the opinion is, in fact, “liberty”).

¹⁴³ See KNOWLES, *supra* note 90, at 181; see also COLUCCI, *supra* note 11, at 52–53.

¹⁴⁴ See *Casey*, 505 U.S. at 878–79.

¹⁴⁵ See *Roe v. Wade*, 410 U.S. 113, 164–65 (1973).

¹⁴⁶ *Id.* at 163.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

To implement its holding in *Casey* the Court “rejected both *Roe*’s rigid trimester framework and the interpretation of *Roe* that considered all previability regulations of abortion unwarranted.”¹⁴⁹ Instead it held that:

Before viability, a State “may not prohibit any woman from making the ultimate decision to terminate her pregnancy.”

It also may not impose upon this right an undue burden, which exists if a regulation’s “purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”

On the other hand, “[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.”¹⁵⁰

But the decision was not without an unusual twist. The opinion was authored by three justices: O’Connor, Souter, and Kennedy.¹⁵¹ Although the Court has never openly divulged exactly how it appropriated the writing duties between these three justices, one need not read very far into the opinion to make that determination. Indeed, commentators routinely attribute certain sections to particular justices, often in conclusory fashion.¹⁵² As Jeffery Toobin explains in *The Nine*:

In their secret collaboration, Kennedy had agreed to write the opening section of the opinion, where they announced that they would preserve *Roe*. Souter would write next, about the importance of stare decisis, and O’Connor would write the final section, explaining why the spousal notification provision of the Pennsylvania law had to be struck down.¹⁵³

If we take Toobin’s widely accepted view, Parts I and II (pp. 844-53) are attributable to Justice Kennedy, Parts III and IV (pp. 853-879) to Justice Souter, and Part V (pp. 879-901) to Justice O’Connor.¹⁵⁴ Adopting this structure allows us to adequately narrow our focus on Justice Kennedy’s judicial writing style.

¹⁴⁹ *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (discussing *Casey*).

¹⁵⁰ *Id.* (discussing *Casey*’s “undue burden” test) (internal citations and quotation marks omitted).

¹⁵¹ *Casey*, 505 U.S. at 843.

¹⁵² See, e.g., Terry Eastland, *The Tempting of Justice Kennedy*, THE AM. SPECTATOR (Feb. 1993), <https://spectator.org/the-tempting-of-justice-kennedy/> (taking it as a given that Justice Kennedy wrote Part I of the opinion).

¹⁵³ TOOBIN, *supra* note 1, at 54.

¹⁵⁴ The page attribution is based on *Casey*, 505 U.S. at 844–901.

IV-B. KENNEDY'S VOICE IN *CASEY*

Justice Kennedy sets the tone of the opinion in the first line in classic grandiose fashion: “Liberty finds no refuge in a jurisprudence of doubt.”¹⁵⁵ Consistent with the “religion-supernatural” category, the pronouncement reads both powerfully and ominously, as if some divine command were to follow. In addition, Parts I and II of the opinion are sprinkled with additional suggestive language that build on his use of categories. After laying out the rule of the case, and reaffirming the essential hold of *Roe*, Kennedy adds:

[Passage I] At the heart of *liberty* is the right to define one’s own concept of *existence*, of *meaning*, of the *universe*, and of the *mystery of human life*. *Beliefs* about these matters could not define the attributes of personhood were they formed under compulsion of the State (...)

[Passage II] The *destiny* of the woman must be shaped to a large extent on her own conception of her *spiritual imperatives* and her place in society.¹⁵⁶

Unlike his approach in *Akron*, Kennedy wastes no time infusing *Casey* with an eerie and metaphysical tone that continues through Parts I and II of the opinion.¹⁵⁷ In what would on other occasions be mere dicta, then, Kennedy’s prose throughout the opinion provides fertile ground for exploring intersection of his personal beliefs and his role as a judge.¹⁵⁸ A final passage from Part I further buttresses this perspective:

[Passage III] Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound *moral* and *spiritual* implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic *principles of morality*, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own *moral code*.¹⁵⁹

¹⁵⁵ *Casey*, 505 U.S. at 844.

¹⁵⁶ *Id.* at 851–52 (emphasis added).

¹⁵⁷ *See id.* at 844–53.

¹⁵⁸ In terms of precedential value, Justice Kennedy’s use of language here can be understood as dicta in the strict sense. Dicta typically refer to “statements in a judicial opinion that are not necessary to support the decision reached by the court.” *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000 (1994). Similar to his use of the plurality section of *Akron*, Kennedy nevertheless utilizes powerful language in *Casey* in order to engage the reader, who, based on the topic at issue, is likely to be religious. Kennedy, himself a Catholic, aims to win over a religious audience by inducing it to accepting his logic as narrated within, what for many religious groups, is a familiar “religion supernatural” category.

¹⁵⁹ *Casey*, 505 U.S. at 850 (emphasis added).

Taking these passages together, four observations are immediately clear. First, Justice Kennedy clearly did not see resolution of the issue as a mere academic exercise¹⁶⁰ but appreciated the real-world impact both political and socially that his decisive vote would have. Second, we see traces of Kennedy's own struggle to reconcile his personal views and his role as a judge with an obligation to uphold the rule of law. Here, *Casey*'s language is even more revealing than that of *Akron*. Whereas Kennedy's limits his word choice to "profound philosophical choices" in Part V of *Akron*, for example, his use of the terms such as "spiritual" and "moral code" in *Casey* resonates more directly with a traditional Catholic mindset. Finally, Kennedy also exposes the reader to his particular hermeneutical approach to applying that law.

Beginning with the first observation, Justice Kennedy paternalistic prose evidences a conscious effort to publicly acknowledge the importance of an opinion affirming *Roe v. Wade*.¹⁶¹ His appreciation of this "great moral issue," is expressed both in terms of breadth and magnitude. With respect to breadth, Justice Kennedy acknowledges the broad-reaching implications of the decision. In Passage III, for example, his remark that "[m]en and women of good conscience can disagree, and we suppose some always shall disagree" recognizes that more than the litigant's claims are at stake.¹⁶² Indeed, like Parts I–IV of *Akron*, Parts I and II of *Casey* are almost entirely void of any individualizing language specific to the petitioner or respondent in the case.¹⁶³

Passage I, likewise, deals with the latter issue of magnitude or how *deeply* the decision will impact those affected.¹⁶⁴ Here Kennedy adds that "At the heart of *liberty* is the right to define one's own concept of *existence*, of *meaning*, of the *universe*, and of the *mystery of human life*."¹⁶⁵ He frames the category of inquiry as one of life's "big questions," which, in turn, has two effects. First, as mentioned, it appreciates the scale of the decision and the depth of its impact on the minds and hearts of all citizenry. Second, it frames the case as dealing with a "state

¹⁶⁰ Recall that we also rejected this view as to Part V of *Akron*. See *supra* text accompanying note 129–30.

¹⁶¹ This paternalistic language, moreover, is consistent with Kennedy's earlier opinions opposing *Roe*. See, e.g., *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 541 (1990) (Blackmun, J., dissenting) ("The plurality indulges in paternalistic comments about 'profound philosophic choices' [and] the [woman's] own destiny and personal dignity") (internal citations omitted).

¹⁶² *Casey*, 505 U.S. at 850.

¹⁶³ See *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 507–19 (1990); *Casey*, 505 U.S. at 844–53.

¹⁶⁴ *Akron*, 497 U.S. at 5507-19; *Casey*, 505 U.S. at 844-53.

¹⁶⁵ *Casey*, 505 U.S. at 851.

interest in morality,” whose boundaries must be set via judicial intervention.¹⁶⁶

This latter point engrains the audience with Kennedy’s “supernatural religious” narrative, requiring the reader to enlist “belief as an act of faith.”¹⁶⁷ These great “mysteries” of “existence” are “beliefs” which may be right or wrong. Kennedy’s argument then is that the state should not assert what is “right” or “wrong” but rather defer to the Court’s judgment in erring on the side of extending human liberty rather than retracting it.¹⁶⁸ He asks us to “trust” him that these “big questions” should be largely solved by each woman seeking an abortion.¹⁶⁹

Our second observation, that Justice Kennedy illustrates his own struggle to compromise on abortion, shifts the focus from a universal view to one centered on an individual character – Kennedy.¹⁷⁰ Here, Kennedy continually supplements the “religious-supernatural” motif with additional ontological construction techniques.¹⁷¹ Kennedy, for example, uses the terms “moral,” and “spiritual” no less than four times in Passages II and III alone.¹⁷² But these terms are also reinforced with operative language; the phrases “principles of,” “imperatives,” and “code[s],” for example, all amplify the consequences of those “moral,” and “spiritual” beliefs.¹⁷³ Justice Kennedy views the issue not as just one of law, but of religion which affects him personally.¹⁷⁴

Kennedy places himself at the center of the narrative when he writes that “Some of *us* as individuals find abortion offensive to our most basic principles of morality.”¹⁷⁵ The use of the “us” pronoun is a clear break from the “men and woman... may disagree” language previously used. As the Blackmun papers show, Kennedy had a genuinely difficult time reaching his decision on abortion rights.¹⁷⁶ This was especially true given that Kennedy had generally sided with conservatives in abortion cases such as *Webster*, *Hodgson*, and *Akron* in the years

¹⁶⁶ See COLUCCI, *supra* note 11, at 48.

¹⁶⁷ See AMSTERDAM & BRUNER, *supra* note 5, at 32.

¹⁶⁸ See COLUCCI, *supra* note 11, at 48.

¹⁶⁹ *See id.*

¹⁷⁰ *See Casey*, 505 U.S. at 846–69.

¹⁷¹ *See id.*

¹⁷² *See id.* at 846–69.

¹⁷³ *See id.*

¹⁷⁴ *See id.*

¹⁷⁵ *Id.* at 850.

¹⁷⁶ *See generally* COLUCCI, *supra* note 11, at 38–58 (discussing the Blackmun paper in the context of several abortion cases).

leading up to *Casey*.¹⁷⁷ Notwithstanding this record, however, Kennedy still “struggled” with the issue on a personal level. As one commentator notes, for example, Kennedy had originally voted at to uphold the Pennsylvania requirements in conference, and only changed his mind after much internal reflection.¹⁷⁸ What exactly brought him to that position is found in our third observation.

One’s hermeneutic is fundamentally ones method of interpretation.¹⁷⁹ Understood expansively, it is the way one chooses to approach a problem. Kennedy’s hermeneutical approach to moral issues in his judicial reasoning is cached in an often cited passage from *Casey*: “Some of us as individuals find abortion offensive to our most basic principles of morality, *but that cannot control our decision*. Our obligation is to define the liberty of all, not to mandate our own moral code.”¹⁸⁰

As the Blackmun papers suggest, this was perhaps one of the most difficult passages for Kennedy to write.¹⁸¹ Kennedy’s vote in *Casey* was a systematic shift from his jurisprudential stance on abortion in virtually all the prior cases.¹⁸² This “shift” is one that moved from an internal “struggle” in *Akron* (to reconcile his personal views with his judicial duty) to a clearer position in *Casey* which recognized that his subjective views on abortion had no business in deciding a Supreme Court case.¹⁸³ Consequently, Justice Kennedy first builds up the importance of moral issues within a “religious supernatural” framework.¹⁸⁴ He then amplifies that importance by putting his own struggle up for display. As a final act of judicial integrity he attests that despite “our” moral views, those views alone “cannot control our decision;” that regardless of my, yours, or anyone’s “moral code,” the Court’s obligation is to define liberty for all, not just for Catholics, atheists or any other individual group that seeks to infiltrate the Courts decision-making process by tapping into personal sympathies.¹⁸⁵ Although *Casey* ultimately

¹⁷⁷ *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (Kennedy, J. concurring in the judgment in part and dissenting in part); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) (Kennedy writing the majority).

¹⁷⁸ See COLUCCI, *supra* note 11, at 49.

¹⁷⁹ *Hermeneutic*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/hermeneutic> (last visited Apr. 9, 2020).

¹⁸⁰ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992) (emphasis added).

¹⁸¹ See COLUCCI, *supra* note 11, at 47 (quoting Blackmun Papers, Box 544, Folder 2 (letter dated June 21, 1990)) (on file with Manuscript Division, Library of Congress, Washington, D.C.).

¹⁸² See *id.*; *Casey*, 505 U.S. at 833–39.

¹⁸³ Compare *supra* text accompanying notes 101–04, with *supra* text accompanying notes 171–79.

¹⁸⁴ See AMSTERDAM & BRUNER, *supra* note 5, at 32.

¹⁸⁵ See *Casey*, 505 U.S. at 850–51.

did cut back on *Roe*, Kennedy's internal transformation reflected, for him, a revival of a fundamental judicial principle – impartiality.

Considering that *Casey* includes more religious-like language (“moral codes” and “spiritual imperatives”) than *Akron* (“philosophical choices”) we have all the more reason to view Kennedy's rhetoric as being, at the very least, influenced by his Catholicism.¹⁸⁶ Justice Kennedy writes about “spiritual imperatives” and “moral codes” because these are the issues that came to his mind.¹⁸⁷ Why they came into mind, this article suggests, is because Kennedy himself was dealing with them on a very real and personal level.¹⁸⁸ He thus utilized the “supernatural religious” category to expand upon that “struggle” and, given his conclusion, perhaps end the debate for himself as to whether his personal “religious” view have any place in his opinion writing process.¹⁸⁹

Once again the question of whether readers buy into Kennedy's “religious supernatural” narrative is open for debate. Justice Kennedy attempted not only to convey his own internal struggle in the opinion – a practice consistent with his prior opinions on abortion¹⁹⁰ – but also his appreciation for each reader's own potential ethical dilemma in accepting his verdict. Key, however, is the fact that while this *sympathy* narrative set aside pro-life views in the end, it did not *totally* abandon them. This is so because, despite Kennedy's affirmation of the “fundamental” principle of *Roe*, the opinion in *Casey* changed *Roe*'s rigid trimester framework to the more relaxed undue burden standard espoused by Justice O'Connor.¹⁹¹ While the fundamental holding of *Roe* was retained, there is no doubt that the undue burden standard provided states with greater opportunities to restrict abortion in certain contexts.¹⁹² Thus while the lay reader may have bought into Kennedy's narrative, a critical scholar would quickly understand this as just another compromise between a liberty-based approach to judicial interpretation and Kennedy's personal [religious] views. Here, Colucci's remarks ring true that

¹⁸⁶ See *id.* (writing that religious and moral codes cannot dictate the holding in this case).

¹⁸⁷ See Jelliff, *supra* note 9, at 119–20.

¹⁸⁸ See COLUCCI, *supra* note 11, at 46–47.

¹⁸⁹ See AMSTERDAM & BRUNER, *supra* note 5, at 32.

¹⁹⁰ COLUCCI, *supra* note 11, at 46–47, n. 41 (Justice Kennedy writes in a handwritten note to Justice Blackmun “. . . I am still struggling with the whole abortion issue and thought it proper to convey this in what I wrote.”).

¹⁹¹ See TOOBIN, *supra* note 1, at 57–59.

¹⁹² See Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUMBIA L. REV. 2025, 2025–26 (1994).

“Kennedy’s struggle...was about how to modify and narrow *Roe* to allow for more democratic regulation of abortion while retaining it as a judicial enforceable liberty.”¹⁹³

V. *GONZALES V. CARHART*

Having voted in favor of “parental-notification” laws in *Hodgson* and *Akron*, and after axing the “trimester framework” in *Casey*, Justice Kennedy’s next challenge came in the form of the controversial “partial-birth abortion” statutes.¹⁹⁴ Whereas prior statutes generally focused on mandating or proscribing the actions of *women*, the “partial-birth abortion” laws centered on preventing *physicians* from utilizing certain procedures in performing second-trimester abortions.¹⁹⁵ The first of these cases was *Stenberg v. Carhart*, a 5-4 decision which struck down Nebraska’s criminal ban on a second-trimester procedure as an undue burden on a woman’s right to have an abortion.¹⁹⁶ Specifically, the Court considered Nebraska’s ban on Dilation and Evacuation (D & E).¹⁹⁷ This procedure entailed extracting a fetus from the womb through the cervix.¹⁹⁸ In some cases the fetus could be removed more or less intact but often was removed piecemeal by having the physician make several “passes” through the cervix.¹⁹⁹

Consistent with his voting record in *Akron* and *Casey*, Justice Kennedy issued a dissenting opinion arguing that the *Stenberg* majority “repudiate[d]” the “central premise” of *Casey* that the “the States retain a critical and legitimate role in legislating on the subject of abortion.”²⁰⁰ In the process, he exposed his own moral repulsion to the procedure by describing it in vivid detail.²⁰¹ Here, for example, Kennedy adopted language from the anti-abortion movement referring to the doctors as “abortionist[s]” thirteen times in his dissent and describing D & E’s as involving the “dismemberment,” “tearing,” and “dragging” of fetuses until they “[bleed] to death.”²⁰² He emphasized this language within his

¹⁹³ COLUCCI, *supra* note 11, at 48.

¹⁹⁴ See *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000).

¹⁹⁵ See *id.* at 921–22.

¹⁹⁶ *Id.*

¹⁹⁷ See *id.* at 914–15.

¹⁹⁸ See *id.* at 921–22.

¹⁹⁹ See *Stenberg v. Carhart*, 530 U.S. 914, 927 (2000).

²⁰⁰ *Id.* at 956–57 (Kennedy, J., dissenting) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 883 (1992)).

²⁰¹ *Id.* at 958–60 (Kennedy, J., dissenting).

²⁰² *Id.* at 958–59.

larger moral framework of securing the State's interest in preserving and promoting fetal life.²⁰³

Justice Kennedy continued this graphic tone several years later in *Gonzales v. Carhart* when the Court reviewed a federal version of the Nebraska statute.²⁰⁴ Passed largely in response to the Court's decision in *Stenberg*, the Partial-Birth Abortion Ban Act of 2003 ("2003 Act") differed from the Nebraska Act in two important ways. First, although both statutes applied to physicians and not women seeking the procedure, only the 2003 Act included a scienter requirement on the part of the physician.²⁰⁵ Second, the 2003 Act was narrower in that it covered only a variation of the D & E procedure at issue in *Stenberg*, namely, "intact D & E's."²⁰⁶ As the Court elaborated "[t]he main difference between the two procedures is that in intact D & E a doctor extracts the fetus intact or largely intact with only a few passes"²⁰⁷ whereas the traditional D&E generally call for removing the fetus in pieces. The logic here was that "intact D & E's" were closer to infanticide in that they often involved killing the fetus after a majority of its body was already outside the womb.²⁰⁸

Once again assigned to write the opinion, Kennedy hoped to secure a majority upholding the 2003 Act in his larger effort to continually narrow *Roe's* imprint. With Justice O' Connor (who held the decisive fifth vote in *Stenberg*) now replaced by a much more conservative Justice Alito, Kennedy again acted as a "swing vote" in yet another monumental abortion case.²⁰⁹ As a result, and in a total shift from the 5-4 decision in *Stenberg*, the Court in *Gonzales v. Carhart* ultimately upheld the federal ban on "intact D&E's" in a bitter 5-4 split decision.²¹⁰ Aside from its clear precedential value, the case adds to the conversation on Kennedy's religion and judicial writing style not because of its particular structure (as with *Akron's* two-tiered approach) or its pinning of

²⁰³ *Id.* at 979 (stating "The decision nullifies a law expressing the will of the people of Nebraska that medical procedures must be governed by moral principles having their foundation in the intrinsic value of human life, including the life of the unborn").

²⁰⁴ *Gonzales v. Carhart*, 550 U.S. 124 (2007).

²⁰⁵ *Id.* at 148.

²⁰⁶ *Id.* at 136-39, 150-53.

²⁰⁷ *Id.* at 137.

²⁰⁸ *See, e.g., id.* at 139 ("Some doctors performing an intact D & E attempt to remove the fetus without collapsing the skull. Yet one doctor would not allow delivery of a live fetus younger than 24 weeks because 'the objective of [his] procedure is to perform an abortion,' not a birth.") (internal citations omitted).

²⁰⁹ *See* Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1, 3 (2008).

²¹⁰ *See Gonzales*, 550 U.S. at 155-56.

women's rights against society's moral condemnation (as in *Casey*).²¹¹ Rather, Justice Kennedy's opinion again betrays his personal views on the issue with its vivid description of the procedure and heightened paternalistic language. Applying the same logic we used in assessing *Akron* and *Casey*, we can also see how this rhetoric reflects the deeper Catholic dogma that likely influences his personal leanings on the issue.

The decision itself broke down into five sections. Part I starts with the Act, the policy behind it, and the procedural history leading up to the instant case.²¹² Part II sets up the applicable standard in a two-page summary of *Roe* and *Casey*.²¹³ Part III & IV apply the standard to the 2003 Act with Part III addressing the Act's "operation and effect"²¹⁴ and Part IV assessing whether it constitutes a "substantial obstacle to the woman's effective right to elect the procedure."²¹⁵ Part V concludes by upholding the 2003 Act in its entirety.²¹⁶

Before discussing Kennedy's vivid descriptions of the procedure, it is worth noting that this overall structure of the opinion has a marked resemblance to that of *Akron*. Recall that in *Akron* Kennedy also began with a detail explanation of the statute followed by one giant IRAC with all the expected pieces: precedent, application, counterarguments, and conclusion. However, it is Kennedy's unique rhetoric that distinguishes the two cases in terms of style and substance, beginning which his description of various medical operations.

First, unlike the dull, formal, and bureaucrat administrative actions at issue in *Akron*, or *Casey* for that matter, the 2003 Act focuses on much more intense, detailed, and visually-graphic medical procedures, "intact D & E's." Kennedy capitalizes on this distinction to paint the surgery in the most negative light possible. Here, Kennedy starts not by copying and pasting the statute's language into his opinion but by describing how the medical procedure it discusses is actually performed. Consider Kennedy's discussion of the traditional and intact D & E's at the beginning of his opinion:

²¹¹ The language of the Act at issue in *Gonzales v. Carhart* focused on the actions of the *physicians* who perform abortions not the *women* who seek them. As a result, Kennedy's language in *Carhart* differs slightly from that of *Casey* where the statute at issue was specifically mandating or proscribing the action of women. See generally *Gonzales v. Carhart*, 550 U.S. 124 (2007).

²¹² *Id.* at 133–45.

²¹³ *Id.* at 145–46.

²¹⁴ *Id.* at 146–56.

²¹⁵ *Gonzales*, 550 U.S. at 156–67.

²¹⁶ *Id.* at 167–68. Writing for the majority, Justice Kennedy also asserts that the facial challenges brought by the physicians were improper in the instant case and should never have been considered. He adds that in such cases an as-applied challenge would have been more appropriate. *Id.*

[*Traditional D & E:*] After sufficient dilation...[t]he doctor, often guided by ultrasound...grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety . . .²¹⁷

[*Intact D & E:*] In the usual intact D & E the fetus' head lodges in the cervix, and dilation is insufficient to allow it to pass...

At this point, the right-handed surgeon slides the fingers of the left [hand] along the back of the fetus and "hooks" the shoulders of the fetus...

While maintaining this tension...the surgeon takes a pair of blunt curved Metzenbaum scissors [and] carefully advances the tip, curved down, along the spine...[until it] contacts the base of the skull...

Having safely entered the skull, he spreads the scissors to enlarge the opening. The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.²¹⁸

Justice Kennedy dedicates six-full pages to describing both procedures in explicit detail.²¹⁹ With respect to the second description, however, he clarifies the language as merely "an abortion doctor's clinical description."²²⁰ In order to get a clearer and more emotionally provoking view of the process he adds a second description from a nurse who witnessed the same method performed on a 26 ½-week old fetus:

Dr. Haskell went in with forceps and *grabbed* the baby's legs and *pulled* them down into the birth canal. Then he delivered the baby's body and the arms—everything but the head....

The baby's *little fingers* were clasping and unclasping, and his *little feet were kicking*. Then the doctor stuck the scissors in the back of his head, and the baby's arms *jerked* out, like a startle reaction, like a flinch, like a baby does when he *thinks* he is going to fall. The doctor

²¹⁷ *Id.* at 135–36.

²¹⁸ *Id.* at 138 (citing H.R.Rep. No. 108-58, p. 3 (2003) (internal quotation omitted)). Here, Justice Kennedy cites to Dr. Martin Haskell's testimony before Congress regarding his method for performing the procedure. *Id.*

²¹⁹ See *Gonzales*, 550 U.S. at 134–40 (Part I-A).

²²⁰ *Id.* at 138.

opened up the scissors, stuck a high-powered suction tube into the opening, and *sucked the baby's brains out*.

Now the baby went completely limp....He *threw the baby* in a pan, along with the placenta and the instruments he had just used.²²¹

This last description differs strikingly from the prior two, with each more unsettling than the last. This imagery, moreover, fits within Kennedy's "human narrative" of victimizing the fetuses and criticizing physicians. Tapping to society's conception of the "indifferent" or "mad scientist" (perhaps a particular TV show or medical movie thriller comes to mind) Kennedy forces reader to choose between "innocence" and "impersonal;" between the "the poor defenseless infant" and the "stoic medical professional."

One similar thread between *Akron*, *Casey*, and *Carhart* is the use of rhetorical devices to amplify a particular category of thought. In Part I of *Carhart*, Kennedy adds to his "human narrative" by shifting his audiences' ontological understanding of the case; in other words "centering" the facts to narrow the readers' focus towards "fetuses as human beings" rather than "pregnant women as citizens with rights."²²² Consider the nurse's description. Here, Kennedy presents the startling image of an innocent "baby" with "little fingers" and "little feet" who "thinks" and "jerks" before having his [or her] "brains sucked out."²²³ Juxtaposed to this image is the antagonistic physician who indifferently throws the "baby in a pan" after delivery – even alongside the very instruments just used to kill the unborn fetus.²²⁴ Thus, an "Act proscrib[ing] a method of abortion in which a fetus is killed just inches before completion of the birth process"²²⁵ becomes not only permissible but desirable.

In addition to ontology, Kennedy touches on epistemology by pointing to the variety and uncertainty involved in "intact D & E's."²²⁶ Epistemology concerns our scope of knowledge about what is "possible."²²⁷ In one sense, Justice Kennedy utilizes this realm of inquiry as a way of building upon the readers' fears as to what happens to the unborn in these cases. Sprinkled throughout Part I, for instance, are examples of what "some doctors" do; what "others" chose to do and what "may" occur as a result.²²⁸ This epistemological construction technique creates

²²¹ *Id.* at 138–39 (emphasis added).

²²² *See id.* at 134–45.

²²³ *See id.* at 138–39.

²²⁴ *See Gonzales*, 550 U.S. at 138–39.

²²⁵ *Id.* at 156–57.

²²⁶ *See id.* at 136–40.

²²⁷ *Epistemology*, *supra* note 65.

²²⁸ *See Gonzales*, 550 U.S. at 134–45 (Part I).

fear, both in the terms of increasing distrust of physicians given the variety of medical uncertainty involved in the procedure and with respect to how the fetuses are treated (some may be “torn apart” others “killed a few days **before**” to make the process easier, and still others have their “brains sucked out”).²²⁹ In the second sense, Justice Kennedy uses epistemology to discuss all the alternative procedures that fall outside the scope of the 2003 Act.²³⁰ Unlike the first sense, the purpose here is not fear but *reassurance*. By discussing how many other procedures are available to women, readers are more likely to except this single prohibition as an appropriate measure. In other words, he is saying “look, this act really won’t have as big effect as you all think, and given how horrendous it is, we should ban it anyway.”

For many readers trying to reconcile their personal views with the rights of women to access these services, this shocking presentation, viewed in light of the infinite variables at play, make physicians’ arguments harder to digest and accept. Yet this may very well be exactly what Kennedy had in mind. In other words, by “humanizing” the fetus, Kennedy fully expects readers (or, more importantly, his colleagues) to have a harder time sympathizing with physicians on any “moral,” philosophical, or even “spiritual level.” He thus implicitly frames the issue in *Carhart* as a struggle between *humanized* fetuses facing gruesome deaths at the hands of *inhumane* physicians.²³¹

Justice Kennedy compliments the above referenced rhetoric with his familiar paternalistic approach in Part IV of his opinion. After laying out Act’s language in full detail and articulating the applicable standard, Kennedy hones in on these pragmatic concerns. He does so, however, not at the “undue burden” stage but in his discussion of the “government’s interest” in banned “intact D & E’s.” Here, he begins with the pertinent State interests:

There can be no doubt the government “has an interest in protecting the integrity and ethics of the medical profession,” and “[an] interest in promoting respect for human life at all stages in the pregnancy.”²³²

Kennedy next dives unashamedly into homily on the deep and dark nature of decisions concerning abortion and how the 2003 Act

²²⁹ *Id.* Another example is the variety of drugs which may be used depending on the stage of the pregnancy, the level of dilation achieved and various other factors. *Id.*

²³⁰ Justice Kennedy utilizes this approach throughout Part I, for example, by mentioning the traditional D & E procedure in the beginning and other second-trimester procedures towards the end. *See generally id.*

²³¹ One can further distinguish this narrative with Justice Breyer’s approach in the *Stenberg* majority opinion. *See Stenberg v. Carhart*, 530 U.S. 914 (2000).

²³² *Gonzales*, 550 U.S. at 157, 163.

serves to “protect” both women and, perhaps more important to Kennedy, the fetuses:

No one would dispute that, for many, D & E is a procedure itself laden with the power to *devalue human life*.²³³

[I]t seems unexceptionable to conclude some women come to *regret* their choice to abort the infant life they once created and sustained.²³⁴

It is self-evident that a mother who comes to *regret* her choice to abort must *struggle* with *grief* more *anguished* and *sorrow* more *profound* when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.²³⁵

Kennedy employs two parallel rhetorical devices all three phrases. First, he sets up the epistemic framework by affirming the veracity of each proposition at the beginning of the statement (underlined above).²³⁶ These self-serving phrases (“No one would dispute” and “It is self-evident”) lure readers into accepting the proposition before it has even been presented.²³⁷ He then hooks the reader in with emotionally sobering language (in italics) that mixes his “human narrative” with a more concerning “religious supernatural” tone (“devalue[ing] human life,” leads to a “struggle with grief” and “anguish and sorrow”).²³⁸ No longer does the struggle relate to Kennedy’s personal battle between liberty and personal belief (he clearly opposes this specific type of abortion regardless of women’s rights) but rather frames it as woman’s internal conflict in dealing with the consequences of her decision (“some come to regret their decision”). Kennedy beats the reader over the head with this rhetoric eventually tying it into the overall legal basis for upholding The Act:

[Because]...Respect for human life finds an ultimate expression in the *bond of love* the mother has for her child.

[Because]...Whether to have an abortion requires a *difficult* and *painful moral decision*.

[Because]...In a decision so *fraught with emotional consequence* some doctors may prefer not to disclose precise details of the means that will be used[.]

²³³ *Id.* at 158 (emphasis added).

²³⁴ *Id.* at 159 (emphasis added).

²³⁵ *Id.* at 159–60.

²³⁶ See *supra* notes 162–64 and accompanying text.

²³⁷ See *supra* notes 162, 164 and accompanying text.

²³⁸ See *supra* notes 162, 164 and accompanying text.

[Then it follows that]...The State has an interest in ensuring so *grave a choice* is well informed.²³⁹

These passages relate to Kennedy's Catholicism in several ways. First, given our reading of *Akron* and *Casey*, it is safe to say that Kennedy's language reveals his own moral leanings on the issue of abortion, and in particular to this specific form of abortion.²⁴⁰ This type of vivid explanation, for example, is totally absent from Breyer's majority opinion in *Stenberg* where the Court struck down the "partial-birth abortion" statute.²⁴¹ Although Kennedy exposed the reality of these procedures in his dissent in *Stenberg*, he made them the center of attention in *Carhart v. Gonzales*.²⁴² In addition, the level of rhetoric devoted to painting the case as a moral issue with such "grave" and "profound" implications suggests that this moral aversion to the procedure has deeper roots in Kennedy's Catholicism. Just in prior cases, one can read Kennedy's language as revealing his own moral agenda, which, in turn, is influenced by his religious beliefs. In this sense, Kennedy has increasingly emphasized the moral [and religious] dimensions of abortion cases to vote more and more in line with the Court's conservative block and chip away at *Roe* in the process.

CONCLUSION

During his thirty-year tenure on the Supreme Court, Justice Kennedy developed a unique moral flavor to writing judicial opinions; an approach which compliments his larger liberty-based approach to deciding cases.²⁴³ As this article has attempted to demonstrate, this progression is evinced by Kennedy's more publicized opinion concerning abortion: *Akron*, *Casey*, and *Carhart*.²⁴⁴ In addition, however, this article argues that Kennedy's religious views influenced his opinion writing process in those landmark cases.²⁴⁵ With Blackmun papers as the starting point, we know that Kennedy intentionally wrote to convey his own moral "struggles" on this sensitive issue.²⁴⁶ In addition, the three cases

²³⁹ See *Gonzales*, 550 U.S. at 159 (emphasis added).

²⁴⁰ See *supra* Parts III-IV.

²⁴¹ See *Stenberg v. Carhart*, 530 U.S. 914 (2000).

²⁴² 550 U.S. 124 (2007).

²⁴³ Andrew Nolan et al., *Justice Kennedy: His Jurisprudence and the Future of the Court*, CONG. RES. SERV. (July 11, 2018), <https://fas.org/sgp/crs/misc/R45256.pdf>.

²⁴⁴ See *supra* Part III-V.

²⁴⁵ See *supra* Part I.

²⁴⁶ See *supra* Part IV-B.

discussed show how Kennedy grew more confident in exposing his personal leanings with each divisive opinion.²⁴⁷ Finally, based on what we gleaned regarding Kennedy's religious beliefs and his personal views on abortion, we can safely infer that these "moral" pronouncements are to some degree influenced by his Catholic background.²⁴⁸ To be sure, we may never know conclusively whether Justice Kennedy's Catholicism "made the difference" in any of these cases. However, there is little doubt that it influenced his judicial writing process.

²⁴⁷ See *supra* Part III-V.

²⁴⁸ See *supra* Part I.