University of St. Thomas Law Journal

Volume 4 | Issue 2 Article 8

2006

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Recommended Citation

Cochran, Robert F. Jr. (2006) "Catholic and Evangelical Surpeme Court Justcies: A Theological Analysis," *University of St. Thomas Law Journal*: Vol. 4: Iss. 2, Article 8. Available at: http://ir.stthomas.edu/ustlj/vol4/iss2/8

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ARTICLE

CATHOLIC AND EVANGELICAL SUPREME COURT JUSTICES: A THEOLOGICAL ANALYSIS

ROBERT F. COCHRAN, JR.*

The last three decades have witnessed a substantial growth in Catholic and evangelical[1] influence on public life in the United States. Three of the last five presidents (Carter, Clinton, and G.W. Bush) were evangelicals and evangelicals were widely credited with having elected the other two (Reagan and G.H.W. Bush). Five of the nine Supreme Court justices (Scalia,

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1. Evangelicals are part of a large, very diverse family, which includes Dutch Calvinists, most African-Americans, Mennonites, South American Pentecostals, Catholic Charismatics, Southern Baptists, and those who attend American megachurches. There are evangelicals in almost every church, evangelical churches in almost every denomination, and fifty-two denominations in the National Association of Evangelicals. *See* http://www.nae.net/.

Evangelicals have two central beliefs in common. First is the importance of a new birth in Christ. Jesus told Nicodemus, a religious leader of his day, "You must be born again." *John* 3:7; *see John* 3:1–21 (all biblical quotations herein are from the New International Version). Evangelicals preach the good news that though we have all sinned, Christ died for our sins. Anyone can turn from his or her sins, accept God's forgiveness, and follow Christ. Following Christ gives one a personal relationship with God, a meaningful life today, and eternal life with God. Evangelicals are called to share this good news to others.

Second, evangelicals believe in the authority of scripture. The reliability of scripture is based on the reliability of its writers. The authors of the New Testament—the portion of the scripture that describes Jesus and the early church—were willing to die rather than recant what they wrote.

Evangelical ethics are a response to God's grace. The substance is captured by the bracelets that evangelical kids wear that say "WWJD"—"What would Jesus do?" The evangelical environmentalists' question, "Would Jesus drive an SUV?" is, or should be, a compelling question for evangelicals. The question for an evangelical member of the Supreme Court would be, "What would Jesus do if he were a Supreme Court justice?"

Kennedy, Thomas, Roberts, and Alito) are now Catholic.[2] All of the Catholics on the Court were appointed in the last twenty years and in the prior 200 years only seven Catholics were appointed to the Court.[3] Though it has been almost a century since an evangelical joined the Court,[4] it is likely that with the growing evangelical political and cultural influence, we will see evangelicals appointed to the Court in coming decades.

The growth in the number of Catholic justices is, in part, a result of the approach that Catholics have taken toward American culture, including law. In this essay, I will first consider the approaches that Catholics and evangelicals have taken toward culture. Whereas Catholics have consistently been engaged with the culture, during most of the twentieth century,

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2. The 112 Supreme Court justices have included forty-one Episcopalians, twenty Presbyterians, and five Methodists. There have also been eight Unitarian and seven Jewish justices. Of the others currently on the Court, Justices Ginsburg and Breyer are Jewish and Justices Stevens and Souter are Protestant. For a list of the Justices over the history of the Court and their religious faiths, see THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENT 239–50 (Lee Epstein et al. eds., 2d ed. 1996).

3. *See id.*

4. For explorations of the religious views of the justices, see Thomas C. Berg & William G. Ross, *Some Religiously Devout Justices: Historical Notes and Comments*, 81 MARQ. L. REV. 383 (1998) and JAMES HITCHCOCK, THE SUPREME COURT AND RELIGION IN AMERICAN LIFE, VOL. II, 77–108 (2004). Unlike Catholics and Jews, whose religious faith can generally be identified by their birth, membership in a religious congregation, or both, being an evangelical is a matter of sharing the religious beliefs and commitments mentioned *supra* at note 1. Whereas, it is generally clear whether someone is Jewish or Catholic, it is not always clear whether someone is an evangelical. Some denominations, e.g., Baptists, Dutch Calvinists, Mennonites, are predominantly evangelical, so membership within one of those denominations might establish a presumption that one is an evangelical. One's statements that contradict evangelical beliefs might rebut that presumption. But evangelicals can be found within a variety of Christian denominations. To determine whether one from outside of an evangelical denomination is an evangelical, we might look to that person's beliefs. That can be a difficult matter with some, who hold that religion is a private matter, but evangelicals believe that they are called on to share their faith. A person's statements may mark him or her as an evangelical.

The last evangelical on the Court was probably James C. McReynolds, who served on the Court from 1914–1941. He has been described as "a pious lifelong member of the Disciples of Christ (Campbellites)," HITCHCOCK, *supra* at 88, but he is an unfortunate representative of the evangelical faith. "Racist and anti-Semitic, he has been called the most bigoted person ever to sit on the Court [though] the two decisions concerning religion that he wrote—*Meyer* (1923) [upholding the right to teach German in schools] and *Pierce* (1925) [guaranteeing the freedom of private religious schools]—became liberal landmarks." *Id.* (citing JAMES E. BOND, I DISSENT: THE LEGACY OF JUSTICE JAMES CLARK MCREYNOLDS (1992)). More attractive evangelical justices David Brewer and (the first) John Marshall Harlan preceeded McReynolds, serving on the Court from 1889–1910 and 1877–1911, respectively. *See id.* at 85–86. Brewer, whose parents were American missionaries to Turkey, said that Harlan "goes to bed every night with one hand on the Constitution and the other hand on the Bible." *See* Berg & Ross, *supra* at 386, 389–90, 393–94. For a brief description of a few of their cases, see *infra* text accompanying note 35.

Justices Charles Evans Hughes and Hugo L. Black, are both listed in the SUPREME COURT COMPENDIUM, *supra* note 2 at 239–50, as Baptists (generally an indication of evangelical faith), but Hughes rejected orthodox Christianity while in college and Black, according to his son, had rejected many Baptist beliefs by the time he came to Washington and attended a Unitarian church toward the end of his life. *See* HITCHCOCK *supra* at 90 and 92 and sources cited therein.

evangelicals withdrew from it. It has only been in the last three decades that evangelicals have reengaged the culture.

Then I will consider three aspects of Catholic and evangelical theology that are likely to influence law. These doctrines address the nature of law, community, and religious freedom. The Catholic doctrine concerning law is natural law; the analogous evangelical doctrine is common grace. The Catholic doctrine concerning community is subsidiarity; the analogous evangelical doctrine is sphere sovereignty. Catholics and evangelicals now share a common commitment to the doctrine of religious freedom.

In my view, the Catholic doctrines help to explain the substantial growth in the number of Catholics appointed to the Court in recent decades.[5] My argument is not that presidents who nominate, citizens who support, and senators who confirm Catholic candidates to the Court are necessarily aware of the Catholic doctrines. The candidates themselves may not know the doctrines by name. My argument is that candidates formed in a Catholic culture that is shaped by these doctrines develop habits of thinking that make them attractive Supreme Court candidates.

Many legal scholars, both liberal and conservative, argue for very different reasons that religious faith has no place in legal decision making. At the end of this essay, I will consider that position and argue that while the range of cases in which religiously grounded insights affect judges' decisions should be narrow, religious influences in some cases are both unavoidable and valuable. Though this essay focuses on Catholic and evangelical understandings of law, other religious traditions have much to add to an understanding of law as well.[6]

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5. One political explanation for the appointment of so many Catholics to the Court in recent decades is that the political parties want to attract Catholic citizens, who are swing voters. Historically, Catholics were Democrats, but with the Democratic Party's embrace of abortion rights in the 1970s, many Catholics began to vote Republican. The bad news for Catholics is that they are without a political home; the good news is that each party would like to draw them into its home. Republican presidents, who want to attract Democratic voters (and want a pro-life Supreme Court) appoint Catholic justices. Democratic senators, who do not want to offend Catholic voters, vote to confirm Catholic appointees. Evangelicals, who also tend to be pro-life, are generally more individualistic on economic issues than Catholics, and therefore are more comfortable in the Republican Party. They have a political home in the Republican Party, but they tend to be taken for granted. Of course even this political explanation for the appointment of Catholic justices to the Court is related to Catholic theological beliefs. The Catholic pro-life position led Catholics from the Democratic Party and makes them attractive Supreme Court candidates for pro-life Republicans.

6. *See* FAITH AND LAW: HOW RELIGIOUS TRADITIONS FROM CALVINISM TO ISLAM VIEW AMERICAN LAW (ed. Robert F. Cochran, Jr.) (NYU Press, forthcoming) (authors from sixteen different religious traditions discuss how their traditions view law).

I. Catholics, Evangelicals, and Culture in America[7]

During the nineteenth century, a period of explosive growth of both Catholics (through immigration) and evangelicals (through conversion) in the United States, both groups were socially and politically active. Among Catholics, that activity has continued to the present. Social and political engagement is a deeply-rooted Catholic practice. Catholics are what H. Richard Niebuhr, in his classic *Christ and Culture*, called "synthesizers."[8] Under the influence of Thomas Aquinas, Catholics synthesize Christian faith and culture, drawing on the best aspects of both. Aquinas "combined without confusing philosophy and theology, state and church, civic and Christian virtues, natural and divine laws, Christ and culture."[9] A later section of this essay discusses the legal manifestation of this synthesis in natural law. Catholics were synthesizing Christian faith and culture before they came to the United States, and that synthesis has continued as they have moved into leadership positions in culture-forming institutions, including the legal profession, in the United States.

Whereas Catholics have had a growing involvement with culture, including law, from the nineteenth century to the present, the evangelical story is significantly different. Though they had a different style during the nineteenth century, evangelicals, like Catholics, were culturally engaged. Evangelicals at that time tended to be what Niebuhr called "conversionists."[10] They sought to convert the culture in many respects, advocating the abolition of slavery, the adoption of child labor laws, the emancipation of women, and the prohibition of alcohol sales. But early in the twentieth century, in what some historians have called "the great reversal,"[11] evangelicals withdrew from the culture into evangelical enclaves. They took a position toward culture that Niebuhr labeled "separatist." This did not put them in a position to influence the culture or to move into leadership roles within it.

It was not until the early 1970s that evangelicals in large numbers re-engaged the broader American culture.[12] Since that time, evangelicals have

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7. For evangelicals' and Catholics' cultural history in the United States, see Nathan Hatch, The Democratization of American Christianity (1989); Mark Noll, The Scandal of the Evangelical Mind (1994); and John T. McGreevy, Catholicism and American Freedom: a History (2003).

8. H. Richard Niebuhr, Christ and Culture 116–48 (1951).

9. *Id.* at 130.

10. *Id.*

11. *See, e.g.*, George M. Marsden, Understanding Fundamentalism and Evangelicalism 30 (1991).

12. Carl Henry was one of the early evangelical leaders to call for evangelical re-engagement in social and legal concerns. Carl F. H. Henry, The Uneasy Conscience of Modern Fundamentalism (Eerdmans 1947). He and other "neo-evangelicals" laid the groundwork for the evangelical re-engagement that was to emerge later in the century. In 1973, a broad range of evangelicals met and issued the Chicago Declaration of Evangelical Social Concern. They confessed the failure of evangelicals to be involved in important social issues, confessed their respon-

become increasingly active in public life,[13] but good Supreme Court candidates do not emerge overnight. The lack of involvement of evangelicals in the culture during most of the twentieth century helps to explain the dearth of evangelicals on the Court, but a generation of potential evangelical candidates is emerging.

II. LAW-RELATED ASPECTS OF CATHOLIC AND EVANGELICAL THEOLOGY

A. *Natural Law and Common Grace*

The first Catholic doctrine is natural law. Natural law's most dominant proponent through the ages has been Thomas Aquinas. Influential proponents today include Catholics John Finnis, Robert George, and Russell Hittinger.[14] Natural law teaches that we as humans were created with a nature and that, through reason, we can discern moral values as well as laws that will conform to that nature and enable us to live the fullest lives. There are "goods"—things that humans universally value such as life, knowledge, recreation, beauty, and friendship—and through reason voters, legislators, and judges can develop laws that will maximize those goods for individuals and the community.

Judicial candidates who think in a natural law framework are attractive to the American people because natural law thinking is consistent with our national traditions. The United States was founded on natural law, and the documents the Founders drafted are full of the language of natural law. The Founders declared independence based on "the laws of nature and of nature's God" and on the "self-evident" truth that humans "are endowed by their Creator with certain unalienable rights."[15] Not only were the country's founding documents rooted in natural law, so also was the everyday work of everyday lawyers. The "bible" for early American lawyers (when it wasn't the Bible) was Blackstone's *Commentaries*, volumes explicitly

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sibility for racism and sexism, and declared their opposition to poverty and materialism. Marjorie Hyer of *The Washington Post* wrote prophetically that their meeting "could well change the face of both religion and politics in America." (*quoted in* JOEL A. CARPENTER, *Compassionate Evangelicalism: How a Document Conceived 30 Years Ago Has Prompted Us to Care More About "the Least of These"*, http://www.christianitytoday.com/ct/2003/012/2.40.html).

13. In my view, evangelicals are now spread across Niebuhr's range of approaches to culture. Some remain separatists and some have become conversionists. Others are dualists (seeing little connection between the Christian faith and culture) or culturalists (seeing little distinction between the Christian faith and culture). For a summary of Niehbur's categories and their manifestation in law, see Robert F. Cochran, Jr., *Christian Traditions, Culture, and Law*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell, Robert F. Cochran Jr. & Angela C. Carmella eds., 2001).

14. *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); NATURAL LAW THEORY: CONTEMPORARY ESSAYS (Robert P. George ed., 1992); and RUSSELL HITTINGER, THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN THE POST-CHRISTIAN WORLD (2003).

15. THE DECLARATION OF INDEPENDENCE, paras 1-2 (U.S. 1776).

based on natural law.[16] Abraham Lincoln, trained as a lawyer in the back of a law office by reading Blackstone, led the nation to eliminate slavery with speeches that were full of natural law.

There were few Catholics present at the founding of the United States.[17] It is therefore ironic that in the twentieth century Catholics became the guardians of natural law in the United States. In the twentieth century, natural law grew into disfavor among the Protestant and increasingly secular legal intellectuals. Oliver Wendell Holmes, the most influential American legal thinker of the last century, indirectly scorned natural law as "a brooding omnipresence in the sky."[18] His views, that moral preferences are arbitrary, law is merely power, and "truth" is the position of the nation that can lick any other, became increasingly influential during the twentieth century on both the left and the right.[19] Critical legal studies, feminism, and critical race theory teach that law is merely the power play of judges and their economic classes. The law and economics theory teaches that the proper ground of law is efficiency.[20] Words like "justice" and "rights" that are rooted in natural law jurisprudence mean little in a legal world consisting only of power and efficiency.

Natural law never really disappeared from the American legal scene. Despite the loss of natural law language, most of the rights arguments of the twentieth century—for example, arguments against the Holocaust, racial discrimination, and prisoner abuse—were based on natural law. Justice Jackson's arguments at Nuremberg were natural law arguments—the Nazis had committed crimes against humanity.[21] Martin Luther King, Jr., in his *Letter from a Birmingham Jail*, quoted both scripture and Thomas Aquinas to support his argument that "[a]n unjust law is no law at all."[22]

Natural law received little attention within legal intellectual circles during most of the twentieth century until the publication of John Finnis's *Natural Law and Natural Rights* in 1979. Now, natural law has re-emerged as a leading legal theory, and Catholics, who had never given up on natural law theory, have taken the lead in that analysis.

Many evangelicals draw insights from a combination of sources that yield something very similar to natural law. For evangelicals, the primary

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16. *See* William Blackstone, Commentaries on the Laws of England, sec. 2 (1865), *available at* http://www.yale.edu/lawweb/avalon/blackstone/introa.htm#2.

17. WILL HERBERG, PROTESTANT, CATHOLIC, JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY 151 (New York: Doubleday 1955).

18. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

19. *See generally* ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES (2001).

20. *See generally* Chicago Lectures in Law and Economics (Eric A. Posner ed., 2000).

21. *See, e.g.*, European Navigators, Opening address by Robert H. Jackson (Nov. 21, 1945), http://www.ena.lu/europe/pioneering/opening-address-robert-jackson-nuremberg-1945.htm (opening address of Justice Jackson at Nuremberg).

22. Martin Luther King, Jr., *Letter from Birmingham City Jail* (1963), *in* AMERICAN LEGAL HISTORY: CASES AND MATERIALS 517 (Kermit L. Hall et al. eds., 2d ed., 1996).

source of authority is the Bible, which notes that those who do not have the scriptures have the law "written on their hearts."[23] Many American evangelicals have a positive view of reason and the human ability to discern right and wrong. This view has its roots in the Scottish Enlightenment's Common Sense philosophy,[24] but it is compatible with natural law's notion that humans have a natural capacity to know the good.

Even those evangelicals who have a Calvinist skepticism about reason and human nature believe that God gave a measure of "common grace" to all people. Common grace includes some human ability to discern right and wrong without scripture, though the term attributes such insights to God.[25]

One of the most thoughtful proponents of common grace was Abraham Kuyper (1837-1920). He was a philosopher, theologian, journalist, founder of the Free University of Amsterdam, and Prime Minister of Holland. Kuyper opposed the tendency, which he saw in the Calvinist churches of Holland, to withdraw from culture (a tendency which as we have seen was manifested among evangelicals in America during much of the twentieth century). He said, "[i]f God is sovereign, then his Lordship *must* remain over *all* life and cannot be closed up within church walls or Christian circles."[26] At the root of common grace is the doctrine of creation. "[T]he *Savior* of the world is also the *Creator* of the world."[27] Kuyper criticized Christians who separate nature and grace, as if nature is something separate from God's reign. "What we call *nature* is everything that has its origin and law in the original *creation*."[28] Kuyper saw common grace as the basis for the Christian calling to engage with culture.

Aspects of Kuyper's philosophy are clearly in tension with natural law. Kuyper anticipated postmodern philosophers in recognizing that there are great differences in the way that humans with different cultural backgrounds view the world. He attributed this to our fallen nature; according to Kuyper, we may seek to convey "universal human insight" but our insights are always colored by our own egos.[29] Kuyper saw great challenges for humans seeking to come to agreement about issues of peace and justice. As Nicholas Wolterstorff notes, Kuyper did not expect to find principles that "are such that we can fairly ask everybody to appeal to them when debating

23. *Romans* 2:15.

24. *See, e.g.*, George M. Marsden, Fundamentalism and American Culture: The Shaping of Twentieth-Century Evangelicalism: 1870–1925 16 (1980).

25. *See* J. Budziszewski, Evangelicals in the Public Square 35–37, 136–38 (2006) and sources cited therein.

26. Abraham Kuyper, *Common Grace*, *in* ABRAHAM KUYPER: A CENTENNIAL READER 166 (James D. Bratt ed., 1998) [hereinafter Kuyper Reader].

27. *Id.* at 173; Abraham Kuyper, *Selected Works* (Nicholas P. Wolterstorff ed.) *in* 2 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, & HUMAN NATURE 242 (John Witte, Jr. & Frank S. Alexander eds., 2006).

28. Kuyper Reader, *supra* note 26, at 175.

29. *See* Kuyper, *supra* note 27, at 301.

and deciding basic political issues."[30] Nevertheless, Kuyper's life and work illustrate his constant effort to determine how diverse groups of people might find peace and justice together. He favored what Wolterstorff has called an "[e]ngaged pluralism."[31] Through human interaction, Kupyer notes, many convictions that were once "entertained by individual thinkers" have become "the common property of the universal human consciousness."[32]

In my view, as an evangelical, natural law is a manifestation of common grace and evangelicals should join with Catholics in advocating and exploring natural law.[33] Within the natural law framework, there is plenty of room for evangelicals to argue for the limitations that we see in some views of natural law.

One great advantage of both natural law and common grace is that they provide a basis for law that can be shared among those of various religions and of no religious faith. I believe that judicial decisions should generally be expressed in natural law terms, rather than explicitly religious terms. As Kent Greenawalt and Stephen Carter have noted, a judicial opinion "is not an explanation of how a decision was reached, but rather a formalized justification for it."[34] Law expressed in natural law terms is more likely to generate public support than law expressed in religious terms.

What might decisions influenced by natural law (and common grace) look like? We may gain some insight from the decisions of Catholic and evangelical justices of the past. Catholics and evangelicals can point with pride to some decisions. Evangelical Justice John Marshall Harlan—the first Justice Harlan—dissented in *Plessy v. Ferguson* against the "separate but equal doctrine" and evangelical Justice David Brewer, the son of Turkish missionaries, was a firm voice against the xenophobic tendencies of the late nineteenth century.[35] Catholic Justice Pierce Butler cast the sole dissenting vote against forced sterilization in *Buck v. Bell*, where secularist Oliver Wendell Holmes, writing for the eight-man majority, declared that "three generations of imbeciles are enough."[36] Catholic Justice Frank Murphy cast one of the few dissents in *Korematsu*, the Japanese internment case.[37]

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30. Nicholas Wolterstorff, *Abraham Kuyper (1837–1920)*, *in* 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, & HUMAN NATURE 299 (John Witte, Jr. & Frank S. Alexander eds., 2006); *see also id.* at 298–309.

31. *Id.* at 304.

32. *Id.* at 305.

33. For additional evangelical arguments for natural law, see STEPHEN J. GRABILL, REDISCOVERING THE NATURAL LAW IN REFORMED THEOLOGICAL ETHICS (2006).

34. *See, e.g.*, Stephen L. Carter, *The Religiously Devout Judge*, 64 Notre Dame L. Rev. 932, 943 (1989) (citing KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 239 (1988)).

35. *See* Berg & Ross, *supra* note 4, at 389–90, 393–94 and cases cited therein.

36. Buck v. Bell, 274 U.S. 200, 207 (1927).

37. Korematsu v. United States, 323 U.S. 214 (1944).

I will add, however, that Catholics and evangelicals do not always get it right. Catholic Justice Roger Taney wrote the *Dred Scott* decision, which held that blacks were not "citizens" entitled to bring cases in federal courts under diversity jurisdiction and that they were not included in the Constitution's references to "We the People" or "persons."[38] Justice Taney's opinion in *Dred Scott* was in fact a very positivist, very un-Catholic opinion, for it ignored the natural law insight that "all men are created equal." Justice Joseph Bradley, who had an evangelical background,[39] wrote a concurring opinion in 1873 upholding Illinois' decision to reject Myra Bradwell's petition to practice law. He said, "[t]he constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."[40]

A belief in natural law can lead one in a variety of directions. Our human tendency is to assume that what we see around us is natural. There is a danger that practices that are common at a certain time and place, like slavery and gender roles, will get the unreflective stamp of natural law. The theory of natural law has been used over the centuries to justify great evils and it is often used to merely justify the existing order.[41] But natural law also provides one of the few bases for challenging the status quo—observe the witness of Martin Luther King. Natural law points to a higher law, one that can correct existing law. The remaining doctrines that I will discuss—subsidiarity, sphere sovereignty, and religious freedom—can all be seen as part of the natural law.

B. Subsidiarity and Sphere Sovereignty

The Catholic doctrine of subsidiarity and the evangelical Dutch Calvinist doctrine of sphere sovereignty (both developed in the late nineteenth century) hold that a broad range of intermediate communities between the individual and the state are essential for human flourishing.

Subsidiarity, which dates from Pope Leo XIII's encyclical *Rerum Novarum* (Of New Things) in 1891, recognizes that humans are social beings who need a broad range of relationships. Though he did not use the term, Leo presented subsidiarity as an alternative to the ideologies of radical individualism and Marxist collectivism. Subsidiarity recognizes the importance of the individual, but because the individual is important,

38. Dred Scott v. Sandford, 60 U.S. 393 (1856).

39. *See, e.g.*, HITCHCOCK *supra* note 4 at 83. Bradley's unorthodox beliefs and religious skepticism probably would place him outside of the evangelical fold. One could imagine, however, some evangelicals using Scripture to reinforce cultural stereotypes about the types of profession that are appropriate for women.

40. Bradwell v. Illinois, 83 U.S. 130 (1872).

41. *See, e.g.*, Ali Kahn, *The Dignity of Labor*, 32 COLUM. HUM. RTS. L. REV. 289, 338 n.205 (2001) (noting that "natural law has been invoked to entrench the status quo, old traditions, and prejudicial beliefs").

intermediate associations—families, religious congregations, labour unions, businesses, private benevolent foundations, and local communities—are important.

Pope John Paul II's *Centesimus Annus, The Economics of Human Freedom*, an encyclical commemorating *Rerum Novarum*'s 100th anniversary, says:

> *The principle of subsidiarity* must be respected: a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good. Needs are best understood and satisfied by people who are closest to them, and who act as neighbors to those in need.[42]

The doctrine of subsidiarity seeks to keep individuals and intermediate communities strong and independent, not to make them dependent on the state. If such institutions are at risk, a larger institution should step in and aid them with the objective of making them independent again. As Jean Bethke Elshtain has said, "[c]ommunities must enable and encourage individuals to exercise their self-responsibility and larger communities must do the same for smaller ones."[43]

The doctrine of sphere sovereignty was developed by Kuyper, who believed that God delegates authority to the state, but that he also delegates authority to other entities—including the church, families, universities, guilds, and other associations—each of which is sovereign within its sphere.[44] Kuyper recognized two special responsibilities for the state:

> [The State] must provide for sound mutual interaction among the various spheres, insofar as they are externally manifest, and keep them within just limits. Furthermore, since personal life can be suppressed by the group in which one lives, the state must protect the individual from the tyranny of his own circle.

Nevertheless, he warned, "[d]o not forget that every State power tends to look upon all liberty with a suspicious eye."[45] Obviously, subsidiarity and sphere sovereignty are quite similar, though, as the names imply, sub-

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42. John Paul II, *Centesimus Annus, The Economics of Human Freedom* (1991), *reprinted in* RICHARD JOHN NEUHAUS, DOING WELL AND DOING GOOD 285, 301 (1992); for a similar description of subsidiarity, see Pope Pius XI, *Quadragesimo Anno* (1931), *reprinted in* THE PAPAL ENCYCLICALS IN THEIR HISTORICAL CONTEXT 228, 230 (Ann Fremantle ed., 1956).

43. Jean Bethke Elshtain, *Catholic Social Thought, the City, and Liberal America, in* CATHOLICISM, LIBERALISM, AND COMMUNITARIANISM 97, 105 (Kenneth L. Grasso et al. eds., 1995) (citing Joseph A. Komonchak, *Subsidiarity in the Church: The State of the Question*, 48 THE JURIST 298, 301–02 (1988)).

44. Abraham Kuyper, *Sphere Sovereignty* (George Kamp trans., 1880) *in* Kuyper Reader, *supra* note 26, at 468.

45. *Id.* at 472.

sidiarity allows greater interaction between the levels of community, and sphere sovereignty gives greater autonomy to the various communities.

The doctrines of subsidiarity and sphere sovereignty create attractive habits of thought in potential Supreme Court justices for several reasons. First, they provide a reasonable middle course between the extremes of individualism and collectivism. Individualism posits that choice, self-determination, and self-fulfillment are the highest goals of human life. But an overemphasis on individualism has left many people feeling isolated and alone. The breakdown of the family and of voluntary associations (as documented in Robert Putnam's *Bowling Alone*[46]) has left many Americans longing for community. On the other hand, the collapse of collectivist regimes around the world in the last twenty-five years demonstrated that the large social community, by itself, is not an adequate source of human fulfillment either. Subsidiarity and sphere sovereignty recognize the need for a broad range of communities and for a balance between freedom and responsibility. They see important roles for the individual, intermediate communities, and the broader community.

Second, subsidiarity and sphere sovereignty are consistent with our nation's traditions. They call us back to one of America's great strengths. Tocqueville noted that one of the distinctive things about Americans was our tendency to create and join associations.[47] Intermediate associations help to insure a vibrant, reform-minded people, because those who learn to interact effectively within smaller groups develop a skill that enables them to interact effectively in the broader community.

Finally, the doctrines of subsidiarity and sphere sovereignty are likely to yield justices who have a good sense of the balance of powers within our federal system. Note the parallel between subsidiarity, sphere sovereignty, and our federal system: all are based in part on the recognition that humans tend to be selfish and to use power for their own benefit. Since humans tend to abuse power, it is best to spread it around. In fact, the federal system can be seen as a manifestation of subsidiarity and sphere sovereignty—independent institutions of various sizes, each with separate responsibilities to the individual and to each other. It should not be surprising that the renewal of attention to federalism in recent decades has come with the leadership of Catholic justices.

These doctrines suggest a pattern of judicial restraint. Judicial restraint, like subsidiarity and sphere sovereignty, is based on the view that powerful institutions should limit their power and empower others. At its root, judicial restraint is a matter of deferring to other branches of government and to state and local governments. Powerful institutions should limit their power

46. *See generally* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2001).

47. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, ch. 12 (1835).

and empower others. Courts that exercise judicial restraint defer to other branches of government and to state and local governments. Power should be shared across many institutions within society, both because power corrupts and because a division of responsibility enables different institutions to do what they do best.

C. *Religious Freedom*

On the final doctrine, religious freedom, evangelicals were far ahead of Catholics. Indeed, Catholic support for religious freedom was a historic reversal of the Catholic Church's traditional view that "error has no rights."[48] Prior to Vatican II, there was little religious freedom in Catholic countries. The Second Vatican Council adopted as strong a statement of religious freedom as has ever been crafted: *Dignitatis Humanae* declared the desire for freedom of religion "to be greatly in accord with truth and justice."[49]

> [T]he right to religious freedom has its foundation in the very dignity of the human person, as this dignity is known through the revealed Word of God and by reason itself. This right of the human person to religious freedom is to be recognized in the constitutional law whereby society is governed and thus it is to become a civil right.[50]

Pope John Paul II embraced religious freedom as well, proclaiming that "[t]he Church imposes nothing, she only proposes."[51] The embrace of religious freedom by Catholics removed the fear of many Protestants that Catholics on the Court would cut back on religious freedom. In my view, were it not for the Catholic embrace of religious freedom, Protestants would have greatly limited the number of Catholics on the Court.

Support for religious freedom among evangelicals came much earlier than among Catholics. In the early days of the Reformation, while Catholics, Calvinists, and Lutherans were fighting over who would run governments and establish the religions of European countries, Anabaptist evangelicals were arguing that the decision to follow Christ was by nature an individual decision.[52] Baptist evangelicals in early America shared the Anabaptist beliefs in salvation as an individual decision and baptism after

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48. *See, e.g.*, John T. Noonan, Jr., *Development in Moral Doctrine*, 54 THEOLOGICAL STUD. 662, 669 (1993).

49. Declaration On Religious Freedom, *Dignitatis Humanae, On The Right Of The Person And Of Communities To Social And Civil Freedom In Matters Religious* (Dec. 7, 1965), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html.

50. *Id.*

51. Pope John Paul II, *Redemptoris Missio* (Dec. 7, 1990), http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_07121990_redemptoris-missio_en.html.

52. *See, e.g.*, MaryAnn Schlegel Ruegger, *An Audience for the Amish: A Communication Based Approach to the Development of Law*, 66 IND. L.J. 801, 804–05 (1991) ("The Anabaptists originated as one of several factions within the Reform movement that desired additional changes to which neither Luther nor Zwingli would agree . . . . [T]he dissenting factions [Anabaptists]

conversion. Both came to support religious freedom, in part, no doubt, because they were subjected to religious persecution, but also because they believed that conversion, by its very nature, is a matter of free choice.[53]

In this area, as well as the other two areas I have discussed, Abraham Kuyper is one of the most articulate evangelical spokesmen. "[T]he church of Christ can never exert influence on civil society directly, only indirectly."[54] "By its influence on the state and civil society the church of Christ aims only at a *moral triumph*, not at the imposition of confessional bonds nor at the exercise of authoritarian control."[55]

Finally, let me note that there are obvious tensions between many of the doctrines described above. The existence of natural law might suggest that judges should discern and implement the best law—it might suggest activist judging. But the doctrines of subsidiarity and sphere sovereignty suggest that judges should exercise judicial restraint and defer to intermediate associations and individuals. As with so many things, the challenge is to find the right balance. The argument of this essay is that wise justices who draw from the resources of the Catholic and evangelical traditions are well-positioned to strike that balance.

III. Should Religion Affect How Judges Vote?

Many liberal and conservative legal theorists argue that a judge's religion should not affect judicial decisions. Liberal theorists want constitutional cases resolved based on secular moral values.[56] In contrast, conservative theorists argue that judges should exercise judicial restraint—they should resolve cases based solely on the language of statutes and the Constitution, the intent of the framers, and the traditions of the American people. Justice Scalia argues that Catholic justices should decide cases according to the language in the law—even when that language leads to decisions that conflict with natural law, reason, and Catholic teaching—and that the place for natural law is in the voting booth and legislative and constitutional halls.[57] Citizens and legislators should vote in light of natural law, but the judge's job is to implement the laws that those other entities produce. He argues that his own views have nothing to do with his legal decisions—he resolves everything based on statutory and constitutional language and, if necessary,

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believed that New Testament scripture required individuals to profess a Confession of Faith before they could be baptized.").

53. *See, e.g.*, Isaac Backus, *An Appeal to the Public for Religious Liberty* (1773), *reprinted in* Political Sermons of the American Founding Era 334–35 (Ellis Sandoz ed., 1991) and John Leland, *The Rights of Conscience Inalienable* (1791), *reprinted in* Political Sermons of the American Founding Era at 1079. *See also* William G. McLoughlin, Soul Liberty: The Baptists' Struggle in New England, 1630–1833 (1991).

54. Kuyper, *supra* note 26, at 197.

55. *Id.*

56. *See, e.g.*, John Rawls, A Theory of Justice (1971).

57. *See, e.g.*, Antonin Scalia, *God's Justice and Ours*, First Things (May 2002).

American traditions. According to Justice Scalia, this type of judicial restraint should characterize American jurisprudence.[58]

I have a two-fold reaction to this argument. The first is to applaud. In fact, the theory of judicial restraint is rooted in Catholic and evangelical ways of thinking. As I argued previously, judicial restraint is attractive to Catholic and evangelical legal thinkers because of its consistency with the doctrines of subsidiarity and sphere sovereignty.

But my second reaction is that there is a limit to the restraint that judges can exercise. Judges must decide cases, and many cases require judges to look beyond language and traditions. Many constitutional provisions are stated in broad general terms—freedom of religion, speech, and the press, the rights to due process and to be secure in one's home. The implications of these rights must be worked out in individual cases, many arising from technologies and situations that could not have been envisioned by the Founders and for which the traditions of the American people offer little guidance. Many statutes are written in vague terms because legislators could not come to agreement on their specifics. Many of the cases that come before the Supreme Court come that far because there is no clear outcome. That does not entitle justices to do whatever they want, but it requires justices to exercise judgment, prudence, and practical wisdom. And that judgment is likely to be affected by a judge's religious convictions, as well as every other aspect of his or her life.

In my view, there is no alternative to religious faith affecting the way that a judge decides cases. Some speak as if it is possible to be neutral. I have bad news for those of you who want to separate religion from law: like it or not, religious faith affects almost everything that we do. Most people have the experience of setting aside their views (including religious views) and dealing with an issue from another perspective. But when we try and put our religious faith aside, that probably does not mean we operate on neutral values; it is likely that we merely operate based on someone else's religious values. Some sort of faith will affect a judge's work; it is just a question of what faith it will be.

Even if it were possible for a judge to cordon off her religious views from her judicial decision-making, I believe that she should not. In the first place, this is a matter of fairness. Religiously-based moral values should not be secondary to other moral values. I share the views of Stephen Carter and Teresa Collett that in any situation where a judge appropriately relies on moral values to make a judgment, religious moral values should have equal standing with secular moral values.[59]

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58. *Id.*

59. *See generally* Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989); Teresa S. Collett, *"The King's Good Servant, but God's First"— The Role of Religion in Judicial Decisionmaking*, 41 S. TEX. L. REV. 1277 (2000).

Second, judges of faith should bring the insights of their religious faith to the task of judging, because that aspect of their character is probably one of the reasons they were chosen to be judges. Most judges are chosen because they have functioned in a legal community for some time—long enough for them to be perceived as persons with wisdom and moral insight. They are chosen because of the character traits and moral insights they have manifested and those character traits and moral insights are likely to be rooted in their religious faith. They are chosen so they will bring those character traits to the bench. Judges would fail to do the job they were called to do if they did not draw on those insights, including insights grounded in religious faith.

Third, Catholic and evangelical judges should bring their religious insights to the law because such insights generally are good for law. The doctrines described above are good for law and they are good for people. They are doctrines that correspond to the way that humans were made.

I will add a few caveats to my argument that religious faith should affect judicial decision-making. First, a judge bringing her religious faith to the process of decision making in a democracy does not mean that the Court will or should adopt religious doctrines as law. As noted above, the doctrines of subsidiarity and sphere sovereignty place significant limitations on law. Religious freedom is grounded in the dignity of the person, and that dignity must be respected by granting the right of conscience in a broad range of aspects of human life. There is great practical wisdom in leaving broad ranges of choices to individuals and intermediate communities.

In addition, as noted above, I do not believe that decisions should be framed in religious terms. To do so would alienate citizens who do not share that religious viewpoint. One of the beauties of natural law is that it provides a language that is shared broadly. Most decisions can be expressed in values that are broadly shared.

IV. CONCLUSION

In closing, I will quote Alexander Bickel's classic book on the Supreme Court, *The Least Dangerous Branch*:

> The function of the Justices [when faced with an issue not resolved by the ordinary sources of law] . . . is to immerse themselves in *the tradition of our society* and of kindred societies that have gone before, in history and in the sediment of history which is law, and, as Judge Hand once suggested, in *the thought and the vision of the philosophers and the poets*. The Justices will then be fit to *extract 'fundamental presuppositions' from their deepest selves*, but in fact from the evolving morality of our tradition.[60]

60. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 236 (1962) (emphasis added).

My argument is that the "tradition of [American] society" includes its religious traditions and that judges should consider not merely "the thought and vision of [its] philosophers and [its] poets," but the thought and vision of its theologians as well. When Catholic and evangelical justices extract "fundamental presuppositions" from their deepest selves, they are likely to draw on religious notions and those religious notions are an important part of "the evolving morality of [the American] tradition."