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The Divine Right of Judges: How Christian Thought Shaped the American Judiciary

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ESSAY

THE DIVINE RIGHT OF JUDGES: HOW CHRISTIAN THOUGHT SHAPED THE AMERICAN JUDICIARY

ELISE McLAREN VILLERS

“If, therefore, the earthly power can err, it shall be judged by the spiritual But if the supreme power err, it can only be judged by God, not by man”¹

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1. JAROSLAV PELIKAN, INTERPRETING THE BIBLE & THE CONSTITUTION 82 (2004) (quoting POPE BONIFACE VIII, UNAM SANCTAM (1302)).

ABSTRACT

This Essay continues a discussion on the authority of courts, executives, and legislators to govern nations where the law diverges from necessity or morality. In a previous Comment, P. Elise McLaren, Answering the Call: A History of the Emergency Power Doctrine in Texas and United States, 53 ST. MARY'S L.J. 287 (2022), I asked whether necessity or emergency ever supersedes the law, i.e., whether "emergency powers" exist. In this Essay, I ask whether the government is held accountable to a force other than the people themselves, namely, religious influence. As was done with respect to emergency powers, I ask whether a religious influence is beneficial, detrimental, or neutral, and secondarily whether it is necessary.

I. INTRODUCTION

At first blush, it seems uncomplicated that American judges derive their authority from their respective constitutions and use the same to exact justice and equity on litigants. But what remains where the constitution is silent or ambiguous, and litigants seek clarity, closure, and finality all the same? From whom or what do judges summon authority to resolve the harrowing impasse? Litigants and legislators incessantly ask judges to exercise discretion when adjudicating cases, increasingly turning to them for guidance when there is fear that failure to consider mitigating circumstances would result in rigid inequity. In exercising such discretion, are judges permitted to use religious concepts of morality and conscience to produce sensible results? In a nation founded by Christians, is secular government desirable? Possible?

Repudiating compatibility between God and government, and with respect to the Roman Empire, St. Paul wrote "[l]aw . . . cannot make a man worthy to God; only faith can bring life to the just man."² Others view the relationship as one of symbiosis. Anna Judge Veters Levy asserts that "history . . . shows that whenever man has wrested his rights and liberties from despots and tyrants, he has proceeded to try to secure these rights by setting up a government controlled by the rule of law as distinguished from the rule of men," a body politic naturally encompassing man's spirituality in addition

2. Kenneth Pennington, *The Christian Tradition: A History*, in ROUTLEDGE HANDBOOK OF RELIGIOUS LAWS 35, 36 (Rossella Bottoni & Silvio Ferrari eds., 1st ed. 2019) (commenting on *Romans* 7:1–12, 10:1–11). Rather than the modern view that government should reject religion, St. Paul argued religion repudiates government. *Id.* Nonetheless, to St. Paul, the two were distinct authorities.

to scientific observance and reason.³ Professor John Coughlin agrees. “Theology without law,” he wrote, “leaves the ecclesiastical community bereft of an ordered life. Law without theological meaning surrenders its moral persuasiveness and deteriorates into rigid legalism.”⁴ Providing more support for the compatibility between God and government, Jesus taught his disciples he was “master of the Law.”⁵ He prophesized, “Do not think that I have come to destroy the Law or the Prophets. I have not come to destroy, but to fulfill.”⁶ Ultimately, the modern Christian theory of government—the idea that sovereignty is derived from the authority of God—would permanently graft itself to American patriotism.⁷ The modern judiciary is the epitome of that relationship. “Mercy and forgiveness were religious concepts taught to the people through the church. They were attributes of ‘God the Judge’; if God was to act mercifully to man, then certainly man had to act mercifully to man.”⁸ Indeed, Christianity teaches individuals that God is the punisher of evil and the adjudicator of truth, rewarding those who spurn corruption and obey the Lord’s commandments.⁹ This analogy between “God the Judge” and the secular equivalency need not be spelled out; the result is obvious. In tasking judges with adjudicating terrestrial fate based on wrongdoing, we have bestowed them with discretion and authority to make wholistic moral assessments of those appearing before them.¹⁰

3. Anna Judge Veters Levy, *Law and Religion in the United States*, 7 LOY. L. REV. 138, 140 (1954) (“[W]hen we refer to the rule of law we mean the right relationship between man and man, and man and God, which was exemplified in the life of Christ and which finds its highest expression in the sermon on the Mount and the Lord’s Prayer.”); see C. G. Bateman, *The Hermeneutics of Sovereignty: The Written Word, State Sovereignty, and Freedom of Religion in the Late Antiquity Roman Empire*, 34 J. JURIS. 311, 322 (2017) (recounting Isidore of Seville’s *Etymologiae*, which considers Moses the original “law-giver”).

4. John J. Coughlin, *Canon Law and the Human Person*, 19 J. L. & RELIGION 1, 2–3 (2003–2004).

5. John J. Dougherty, *Religion and Law*, 17 JURIST 127, 131 (1957) (quoting *Matthew* 5:17).

6. *Id.* (quoting *Matthew* 5:17).

7. Levy, *supra* note 3, at 139–40 (“[L]eaders of the American Revolution . . . said over and over again . . . that the laws of God cannot be superseded by any power on earth; and that the only protection against the fallibility of omnipotent government lies in the infallibility of an [o]mniscient God.”); see Dougherty, *supra* note 5, at 129 (“[T]he formative days of American jurisprudence are reminiscent of the great days of the Magna Carta.” (internal quotation marks omitted) (quoting J. C. H. WU, FOUNTAIN OF JUSTICE: A STUDY IN THE NATURAL LAW 128 (1959))).

8. Paul J. Zwier, *God, Man, and Jury*, 1989 UTAH L. REV. 433, 445 & n.65 (1989) (using the words of the Lord’s Prayer—Forgive my trespasses, as I forgive those who trespass against me—to exemplify this concept).

9. See HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 166 (1993) (stating God grafts the law on the human heart; the law “command[s], prohibit[s], permit[s], or punish[es] conduct”).

10. Arguably, criminal judges are more easily analogized to “God the Judge,” given their literal roles in a criminal trial: determining guilt or innocence and exercising discretion in deciding

Naturally, the question becomes: What is an acceptable source for judges' moral standards?

The late Professor Harold Berman succinctly summarized a common reply to the foregoing question when he wrote: "Western legal science is a secular theology, which often makes no sense because its theological presuppositions are no longer accepted."¹¹ Although derived from Judeo-Christian principles, a legal relationship with the ethereal has been utterly rejected by the vast majority American courts despite its inevitable effect on the decisions those courts make.¹²

This Essay endeavors to explore the relationship between religion, philosophy, and the judiciary by looking through a Christian lens to modern American justice. It posits whether the questions we ask of judges in interpreting and applying legal principles require, allow, or exclude a consideration of Christian religion. In its answer, it finds the ideal relationship between God and law irrelevant; rather, an entanglement with religion is the only natural result of a government conceived by devout Protestant-Christians and influenced by centuries of Christian-led government. Further, it argues that a coexistence between theology and law is not the equivalency of a surrender of one to the other. Other than the foregoing, this Essay poses no response to the propriety of religion in government.

punishment. *See* U.S. SENT'G GUIDELINES MANUAL § 3E1.1 (U.S. SENT'G COMM'N 2021) (permitting adjustments to permissible prison sentences using factors such as "victim-related adjustments," "role in the offense," "obstruction and related adjustments," "multiple counts," and "acceptance of responsibility"). I would more broadly include civil judges, however, as regularly employing fairness and morality both in law and equity. *See, e.g.*, 1 *Kings* 3:16–28 (NIV) (serving as the origin story for split-the-baby negotiating) ("When all Israel heard the verdict . . . they saw that [the king] had wisdom from God to administer justice."); *see also* *Exodus* 21:28–29 (NIV):

If a bull gores a man or woman to death, the bull is to be stoned to death, and its meat must not be eaten. But the owner of the bull will not be held responsible. If, however, the bull has had the habit of goring and the owner has been warned but has not kept it penned up and it kills a man or woman, the bull is to be stoned and its owner also is to be put to death.

(punishing one for the foreseeable consequences of one's actions).

11. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 165 (1983).

12. Brian H. Bornstein & Monica K. Miller, *Does a Judge's Religion Influence Decision Making?*, 45 *CT. REV.: J. OF AM. JUDGES ASS'N* 112, 115 (2009) ("[T]he single most prominent, salient, and consistent influence on judicial decision making was religion—religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community." (internal quotation marks omitted) (quoting Gregory C. Sisk et al., *Searching for the Soul of Judicial Decision Making: An Empirical Study of Religious Freedom Decisions*, 65 *OHIO ST. L.J.* 491, 614 (2004))).

II. RELIGION, THE STATE, AND THEIR JUDGES

A. *Primitive Beginnings*

Recounting the history of religious and political integration necessarily begins in the Stone Age; even the earliest Paleolithic communities are hypothesized to have practiced ritualistic spiritual behaviors including the creation of art and burial of the dead.¹³ In fact, these micro-communities of hunter-gatherers are probably best understood through the art they left behind. It is very likely that the social norms of Paleolithic people did not operate to the exclusion of spiritual rituals but rather in tandem with them much as people do today.¹⁴ An example of the symbiotic relationship can be illustrated through paintings and engravings left in caves in Southern France.¹⁵ The displays could be interpreted as man's initial understanding of the relationship between a physical thing and its transcendent other.¹⁶ A paleolithic person might concentrate on the object of their hunt, manifest it by illustration and meditation, or "prayer," and success would naturally result.¹⁷

Anthropologists and archaeologists find evidence of truly "religious" art at the birth of the New Stone Age, or Neolithic Era.¹⁸ Unlike the primitive animal portraits, these spiritual practices encompassed an understanding of fertility, death, and possibly reincarnation, giving way to the now commonly-held belief that Neolithic societies practiced what can safely be regarded as religion.¹⁹ Professor George Barton describes religious

13. Ina Wunn, *Beginning of Religion*, 47 NUMEN 417, 419 (2000).

14. *Id.* at 431.

15. Emma Groeneveld, *Chauvet Cave*, WORLD HIST. ENCYC. (Feb. 12, 2017), https://www.worldhistory.org/Chauvet_Cave/ [https://perma.cc/PD6J-VXDN].

16. *See id.* ("Although this is a tricky topic, it is thought these Paleolithic people might have had some sort of shamanistic religion in which the art played a role, perhaps with a dose of hunting magic added to it (where the depicted animals were directly influenced by acting on their images).")

17. Although spirituality is used here to encompass both religion and supernatural belief, Barton distinguishes between the two and clarifies that archaeological knowledge of the earliest paleolithic religion is better understood as "magic[]" rather than religion. George A. Barton, *The Palaeolithic Beginnings of Religion—An Interpretation*, 82 PROC. OF AM. PHIL. SOC'Y 131, 134 (1940); *see* Groeneveld, *supra* note 15 (explaining the Paleolithic people's belief that cave engravings influenced the success of their hunt).

18. Barton, *supra* note 17, at 134.

19. *Id.* at 134–39; *see also* Christiana E. Köhler, *The Development of Social Complexity in Early Egypt. A View From the Perspective of the Settlements and Material Culture of the Nile Valley*, 27 EGYPT AND LEVANT 335, 342 (2017) (describing a sanctuary in Egypt where "ancestors or a male anthropomorphic deity may have been worshiped during the late 4th millennium BCE").

ceremonies during this time period as an “experience . . . giv[ing] man the consciousness of a power which lifted him above the ordinary levels of life”²⁰ Although the intricacies of the relationship between religion and sociopolitical norms governing these communities is altogether unknown, archaeological findings suggest that the two materialized in tandem with the development of community.²¹

B. *Ancient Civilizations*

As legal standards in ancient governments, such as Egypt and Rome, developed, so did the relationship between law and theology. The Greeks, for example, looked to goddesses Dike and Themis as personifications of justice, law, and good judgment.²² As adjudicator of the gods, Dike was associated with “custom and retaliation,” an interaction still echoed by politics today.²³ The Greeks used their polytheistic structure and mythology to explain “societal social norms and expectations,” “the unexplainable,” “why a culture did certain things,” such as rituals, and “claim[s] to [power].”²⁴ The Bible references the Greeks’ reverence for the religious:

When Paul went to Athens, he stood in the Athenian theater and observed that the citizens were very religious. When he saw that they had erected an altar “To The Unknown God,” he said to the Athenians, “[T]he One whom you worship without knowing, Him I proclaim to you: ‘God, who made the world and everything in it’”²⁵

20. Barton, *supra* note 17, at 137.

21. See Barbara J. King, *Were Neanderthals Religious?*, NPR (Dec. 7, 2016), <https://www.npr.org/sections/13.7/2016/12/07/504650215/were-neanderthals-religious> [<https://perma.cc/C5DJ-SEYB>] (quoting Professor John Hawks who posited “I don’t think it is at all improbable that the Neanderthals had a humanlike religious capacity”).

22. R. V. D. Magoffin, *Reviewed Work: Themis, Dike und Verwandtes. Ein Beitrag zur Geschichte der Rechtsidee bei den Griechen* by Rudolph Hirzel, 3 AM. POL. SCI. REV. 284, 284 (1909) (book review) (noting Themis was viewed more in the light of good counsel, rather than judgment, which was more closely associated with Dike).

23. *Id.* at 286.

24. Cara Leigh Sailors, *The Function of Mythology and Religion in Ancient Greek Society* 16–19 (Aug. 2007) (M.A. Thesis, East Tennessee State University) (on file with School of Graduate Studies for East Tennessee State University). Many myths centered on moral lessons including instructions to “keep you[r] word.” *Id.* at 17. Consequences for failure to adhere to such expectations included the potential for the gods to exact “extreme” revenge. *Id.*

25. Arthur H. Garrison, *The Rule of Law and the Rise of Control of Executive Power*, 18 TEX. REV. L. & POL. 303, 315 (2014) (quoting *Acts* 17:22–24).

Additionally, Germanic folklaw left a lasting impression on European legal thought “with its emphasis on honor, oaths, retribution, reconciliation, and group responsibility.”²⁶ Religion, then, was not only of paramount importance to the individuals who practiced it, but it was baked into the fundamental levels of society.

C. Rome and Christianity

In the late 50s BCE, Cicero inquired as to the source of the law and its nature in his writing, *De Legibus*.²⁷ He posited that the law indeed comes from man, but the principles in which the law resides are entrenched in man’s nature, which “commands what must be done and prohibits the contrary.”²⁸ If man’s nature was gifted by God, the resulting law was also, therefore, a product of heaven.²⁹ Thus, if the law created rights for individuals or government, it was ordered by God.

The notion that religion legitimized a claim to property or power in addition to providing a threat of punishment for wrongs quickly expanded.³⁰ Although it once banned Christianity and persecuted its followers, fourth-century Rome fortified legal institutions by its declaration that the law was of “heavenly origin and . . . [and] crime [was] a disturbance of the order of heaven.”³¹ The two realms of human existence, both the political and religious, coalesced in Roman psychology such that nearly everything could be understood either as “things of Caesar” or “things of God.”³²

Before the Roman Empire made Christianity its *raison d’être*, a relationship between Christianity and state never materialized. Formerly, Christians comprised a minority in government and rarely did their status as Christians

26. BERMAN, *supra* note 11, at 201.

27. MARCUS TULLIUS CICERO, *DE LEGIBUS – DE RE PUBLICA* (Jiahu Books 2014).

28. “[L]ex est ratio summa, insita in natura, quae iubet ea quae facienda sunt, prohibetque contraria.” Elizabeth Asmis, *Cicero on Natural Law and the Laws of the State*, 27 CLASSICAL ANTIQUITY 1, 6 & n.10 (2008) (quoting MARCUS TULLIUS CICERO, *DE LEGIBUS* 1.18–19).

29. See Garrison, *supra* note 25, at 314 (summarizing Cicero’s position that “the law is a result of reason given by God to man as a guide to live by”). Cicero’s book 2 of *De Legibus* openly equivocated law with a supreme being. Asmis, *supra* note 28, at 7–8.

30. Levy, *supra* note 3, at 138–39.

31. Dougherty, *supra* note 5, at 129.

32. David Knowles, *Church and State in Christian History*, 2 J. CONTEMP. HIST. 3, 4 (1967); see also Garrison, *supra* note 25, at 315 (“The idea that the rule of law is a higher moral and ethical principle that checks the power of the King has served as a guiding principle of governance and the foundation of Western democracy. It dates back to the heyday of Athens and the Roman Republic . . .”).

pose any relevance to the state.³³ Now, Christianity was not only relevant to political concerns, it was the very source of governmental power.³⁴ Professor Berman takes pause at this juncture to emphasize that authoritative Roman law was not absolute for Christians when it conflicted with God's commandments and moral lessons.³⁵ Instead, laws that contradicted Christian moral obligation were viewed as invalid; in fact, there may be a "positive duty" to rebel against the enactment.³⁶ Early-century Christians were expected to "internalize the Biblical law" and "believe in their hearts the truths it embodied," so they may "do good out of faith and hope and love rather than because of legal commands or sanctions."³⁷ The concept is reminiscent of John Locke's right of rebellion, understood today as civil disobedience and famously promulgated by writers such as Henry David Thoreau.³⁸ Professor Berman considers the Christian legal standard to be one of "activis[m]," rejecting the legitimacy of purely secular law and appointing the Judeo-Christian God as "judge" and "legislator."³⁹

Although the exact reason for Emperor Constantine's 312 CE conversion to Christianity is unknown, it is undisputed that the winter of 312 CE marked Constantine's embarkment on "restor[ing] and maintain[ing]" the

33. Knowles, *supra* note 32, at 5 (excepting instances where "[i]ndividual Christians might come into conflict with officers of the state by reason of their beliefs, or even their refusal to allow the state . . . the respect due God alone").

34. *Id.* at 6.

35. BERMAN, *supra* note 11, at 167.

36. *Id.*

37. *Id.*

38. *Id.* ("The principle of civil disobedience was in fact inherent in the experience of the early church, since Christian worship was itself illegal."). Thoreau famously wrote:

Law never made men a whit more just; and, by means of their respect for it, even the well-disposed are daily made the agents of injustice. A common and natural result of an undue respect for law is, that you may see a file of soldiers, colonel, captain, corporal, privates, powder-monkeys, and all, marching in admirable order over hill and dale to the wars, against their wills, ay, against their common sense and consciences, which makes it a very steep marching indeed, and produces a palpitation of the heart. They have no doubt that it is a damnable business in which they are concerned; they are all peaceably inclined. Now what are they? Men at all? [O]r small movable forts and magazines, at the service of some unscrupulous man in power?

HENRY DAVID THOREAU, CIVIL DISOBEDIENCE 2–3 (Open Road Integrated Media 2015) (1849).

39. BERMAN, *supra* note 11, at 167.

church.⁴⁰ In the following years, the church was fortified by the sovereign, and likewise, the sovereign was fortified by the church.⁴¹

D. *Canon Law*

Before the systemization and codification of canon law, authorities in Christian communities, traditionally bishops, enforced standards of morality in early society.⁴² As these first-through-third-century ecclesiastical judges applied moral principles to the subjects before them, a compilation of the ecclesiastical law became necessary to promote predictability. Indeed, the law was considered a “measuring stick,” or precedent.⁴³ Thus, the beginnings of canon law were born. As time passed, the legal became impossible to separate from the religious, as the two alchemized and became one.⁴⁴ Professors Harold Berman and Stephan Kuttner spoke of the legal consequences of theological development as a kind of “interlacing.” That is, ecclesiastical and secular law became so homogenous “it did not occur to anyone to separate out the legal aspects and to transform them into a system.”⁴⁵

Canon law took on an individualized role in Europe, a role Professor Stephan Kuttner attributes to “the unique nature of the Church: a society of divine origin by its institution, yet human in its bearers of authority, which is a stewardship of the divine authority of Christ Himself perpetuated.”⁴⁶ Because the church is given authority to enforce the will of God, yet is secular in the sense that the people govern its administration, “the Church is incommensurable with all other modes of social existence.”⁴⁷ It is difficult to deny Christianity captivated Europeans and their governments, as the two lived inseparable existences throughout the medieval period.

40. A.H.M. JONES, *CONSTANTINE AND THE CONVERSION OF EUROPE* 76 (Univ. of Toronto Press 1978) (1948).

41. *Id.* at 87–90 (describing how Constantine’s conversion to Christianity motivated him to extend privileges to the Church and how he, in turn, was strengthened by his belief in a “powerful divinity”).

42. BERMAN, *supra* note 11, at 199; see Ladislav M. Örsy, *Towards a Theological Conception of Canon Law*, 24 *JURIST* 383, 385 (1964) (“[A]t times a text of canon law is no more than an expression of a rule of faith; and that canon law depends on theology as its norm and its inspiration.”).

43. BERMAN, *supra* note 11, at 199. “Canon” was derived from the Greek word “kanon” meaning a measuring stick. *Id.*

44. *Id.* at 201–02.

45. *Id.*

46. Stephan Kuttner, *Natural Law and Canon Law*, 3 *NAT. L. INST. PROC.* 85, 87 (1950).

47. *Id.*

St. Thomas Aquinas, writing in the thirteenth century, acquiesced in the mutual inclusivity of man and God. First a philosopher and later a saint, his writings bridge any perceived gap between the theological, philosophical, and political.⁴⁸ In fact, Aquinas is commonly referred to as the “Great Synthesizer” by academics and ecclesiastics who study his work.⁴⁹

To Aquinas, the universe can be both justified and explained according to a combination of natural and religious laws. Because natural, secular law is a product of reason, and the ability to reason was gifted to man from God, the product of our reasoning is an exercise of God’s will and is, therefore, an integral part of the law.⁵⁰ In essence, God works through the people upon whom he bestowed with intellect to accomplish heavenly tasks.⁵¹ The individual thus becomes a product of both secular and ethereal influences or a “spirit-in-flesh.”⁵² Indeed, Aquinas’s view of the righteous judge must be proficient in both “moral [and] intellectual virtue.”⁵³ Otherwise the judge is apt to “issue improper and incoherent rulings.”⁵⁴

Aquinas’s view is based in part on Aristotle’s classification of natural law and particular law, or man-made governmental law.⁵⁵ Unlike Aristotle’s view, Aquinas more directly reconciles religion with law, looking to it for moral authority and giving Christianity a dominant position in the legal hierarchy; both particular law and natural law are held accountable to an

48. See John J. Fitzgerald, *Law’s Virtues: Fostering Autonomy and Solidarity in American Society*, 30 J.L. & RELIGION 339, 340 (2015) (“[F]or Aquinas and other Christians, both the cardinal and theological virtues are central to the moral life.”); see also Peter Koritansky, *Thomas Aquinas: Political Philosophy*, INTERNET ENCYC. OF PHIL., <https://iep.utm.edu/aqui-pol/> [<https://perma.cc/49VX-GVKF>] (“The political philosophy of Thomas Aquinas . . . stands at the crossroads between the Christian gospel and the Aristotelian political doctrine . . .”).

49. ANNE GORDON, *A BOOK OF SAINTS* 173 (1994). Gordon includes another common title for Aquinas: “Angel of the Schools,” noting Aquinas is also the patron saint of schools. *Id.*

50. Raymond Bradley, *The Relation Between Natural Law and Human Law in Thomas Aquinas*, 21 CATH. LAW. 42, 45 (1975); see also GEORGE C. CHRISTIE & PATRICK H. MARTIN, *JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW* 125 (2d ed. 1995) (citing St. Thomas Aquinas’s *Summa Theologiae* and commenting that Aquinas’s view of theology would obligate man to engage in rational thought).

51. Bradley, *supra* note 50, at 46.

52. Coughlin, *supra* note 4, at 4 (internal quotation marks omitted).

53. Charles P. Nemeth, *Judges and Judicial Process in the Jurisprudence of St. Thomas Aquinas*, 40 CATH. LAW. 401, 403 (2001).

54. *Id.*

55. Bradley, *supra* note 50, at 45.

omnipotent eternal law.⁵⁶ Although Aristotle recognized a king's role as judge in addition to his religious and military roles as a "heroic" kind of "kingship," he did not necessarily condone the occasional animus between a power-seeking autocrat and religion—which wields its own kind of power over individuals.⁵⁷ Aristotle instead treated that perspective as a "historical relic[]." ⁵⁸ To Aquinas, however, there need not be an outwardly religious role for government leaders because men are "creature[s] of God," and, therefore, exercise his will in their judgment.⁵⁹ The metaphor echoes the first book of the Old Testament: "Then God said, 'Let us make mankind in our image, in our likeness . . .'"⁶⁰

Aquinas's philosophy can also be viewed as revitalizing St. Augustine's perspective on the marriage between politics and philosophy. Before Aquinas, St. Augustine was unparalleled in his understanding of an individual's ability to derive reason as a well-worn path to godliness.⁶¹ Professor Christian Tornau summarizes the thinking behind Augustine's writings:

The first step toward perfection is to believe the words of Scripture; the second is to realize that the words are outward signs of an internal and intelligible reality and that they admonish us to turn to and to "consult" inner truth so as to reach true understanding and, accordingly, the good life.⁶²

A testament to the popularity and influence of St. Augustine and St. Thomas Aquinas's view, in 1998, Pope John Paul II described a nearly identical scene resulting from the proper relationship between faith and philosophy:

Faith and reason are like two wings on which the human spirit rises to the contemplation of truth; and God has placed in the human heart a desire to know the truth—in a word, to know himself—so that, by knowing and loving

56. *Id.*; see Garrison, *supra* note 25, at 314 ("[T]he power of positive law to rule over men 'comes from the Eternal law from which they are derived.'" (quoting THOMAS AQUINAS, *SUMMA THEOLOGICA* 324 (Fathers of the English Dominican Province trans., Benziger Bros. ed. 1947))).

57. David C. Mirhady, *Aristotle and the Law Courts*, 23 *POLIS* 302, 310 (2006).

58. *Id.*

59. Bradley, *supra* note 50, at 45.

60. *Genesis* 1:26 (NIV).

61. See Knowles, *supra* note 32, at 6 ("[T]heology, philosophy, Scripture and, in this case, world history, were enlisted to illuminate the path to salvation of the individual Christian . . .").

62. Christian Tornau, *Saint Augustine*, *STANFORD ENCYC. OF PHIL.* (Sept. 25, 2019), <https://plato.stanford.edu/entries/augustine/#FaitReas> [<https://perma.cc/59T6-WYZK>].

God, men and women may also come to the fullness of truth about themselves.⁶³

So, by seeking the truth in judicial decisions, a judge knows and loves God, since God endowed man with the ability to seek veracity in the law.

Like St. Augustine and St. Thomas Aquinas's proclamations on the importance of law and theological reason, the Apostle Paul distinguished lawfulness from godliness.⁶⁴ The law, Paul conveyed, does not create sin, and it does not create righteousness, but it does afford the opportunity to identify one from the other. Paul writes, "I would not have known what coveting really was if the law has not said, 'You shall not covet.' But sin, seizing the opportunity afforded by the commandment, produced in me every kind of coveting."⁶⁵ He continued, "For apart from the law, sin was dead."⁶⁶ So then, law is good and necessary because it allows people to identify sinfulness in themselves and expel it in accordance with the law. The law Paul refers to in *Romans* is not a governmental regime per se, but God's commandments given to Moses, laws rooted in morality.⁶⁷ His analogy, therefore, only rings true when the law reflects Christian concepts of sinfulness. As previously discussed, this relationship appears often.⁶⁸

Some consider Aquinas's ability to reconcile theology, philosophy, and law as uniquely Christian, due to the lack of political direction enshrined in the Christian Bible.⁶⁹ Christianity, therefore, can assimilate to any political structure so long as the moral principles of the laws governing it reflect those of scripture.⁷⁰ Aquinas saw both aspects as essential to a well-

63. Pope John Paul II, Encyclical Letter, *Fides et Ratio* (Sept. 14, 1998).

64. See *Romans* 7:7–10 (NIV) (finding it impossible to adhere to the law without divine intervention).

65. *Id.*

66. *Id.*; see *Romans* 7:6 (NIV) (preceding the verses above) ("[B]y dying to what once bound us, we have been released from the law so that we serve in the new way of the Spirit, and not in the old way of the written code."). The goal was not anarchy, but a law which comported with spirituality, morality, and government.

67. See William S. Brewbaker III, *The Bible as a Law Book?: Thomas Aquinas on the Juridical Uses of Scripture*, 12 RUTGERS J.L. & RELIGION 76, 77 (2010) (referring to the Old Testament as moral law).

68. See sources cited *supra* note 10.

69. See Koritansky, *supra* note 48 (distinguishing Christianity from Judaism and Islam in that Christianity does not require specific conduct to form a civil society).

70. *Id.*

functioning society, so it is no surprise that his work was lauded by the Papal States, a society governed exclusively by the church.⁷¹

A visual testament to the influence of the medieval period on the judiciary, American judges today are adorned by a variation of the robes worn by monastic scribes.⁷² When universities, where texts could be studied rather than merely copied, became the corollary of traditional monasteries, two professional schools developed: medicine and law.⁷³

E. *Ancien Régime*

The coexistence of law, politics, and the church was recognized by St. Paul, St. Augustine, and finally, St. Thomas Aquinas. The entwinement intensified even further in seventeenth-century Europe. Jacques-Benigne Bossuet, a Catholic bishop, justified European absolutist politics through a Catholic lens.⁷⁴ As a result, the church ruled Europe as the ultimate sovereign and bestowed European kings and queens with their political legitimacy. Aristotle, too, expressed confidence in the sovereignty of a king in so far as the king's laws did not conflict with those of the church.⁷⁵ Although Bossuet was not the first to think of the sovereign in terms of authority derived from God, his view brought new life and added force to the notion that monarchs were accountable exclusively to God.⁷⁶

Bossuet authored *Politics Drawn From the Very Words of Holy Scripture*,⁷⁷ a treatise arguing monarchs derived their authority from God, and thereby concluding that legal disobedience was also religious disobedience.⁷⁸ “[T]he

71. Thomas Aquinas was canonized by Pope John XXII in 1323. His work was lauded by the Church. See Robert Pasnau, *Thomas Aquinas*, STANFORD ENCYC. OF PHIL. (Dec. 7, 2022), <https://plato.stanford.edu/entries/aquinas/> [<https://perma.cc/JJ2J-B469>] (describing the impact Aquinas made during his life which included producing a vast number of influential manuscripts).

72. Stephen C. O’Neil, *Why Are Judges’ Robes Black?*, 7 MASS. LEGAL HIST. 119, 119–20 (2001).

73. *Id.* at 119.

74. See generally JACQUES-BENIGNE BOSSUET, *POLITICS DRAWN FROM THE VERY WORDS OF HOLY SCRIPTURE* (Patrick Riley ed., trans., 1990) (1709) (explaining politics and religion are not separate entities; rather, God influences politicians in the governance of their nations).

75. See generally Mirhady, *supra* note 57 (examining Aristotle’s philosophy on the relationship between the king, the courts, and religion).

76. See Knowles, *supra* note 32, at 8 (“[E]mperors, by edict and action, declared and exercised their God-given power of supreme government.”).

77. See generally BOSSUET, *supra* note 74.

78. See *id.* at 59–61 (explaining why monarchs should be revered and obeyed “in a kind of religious way” because of their divine characteristics).

effect of absolutist theory was to make the king sovereign in England.”⁷⁹ Bossuet’s “Top Down” approach was justified both through scripture and reason.⁸⁰ Conversely, later philosophers used the “Bottom Up” approach, which professed that government derived its power from the people.⁸¹

Several problems arose from the church’s association with secular life and politics. The people questioned whether monarchs would be subject to the law, or whether kings “were answerable only to God.”⁸² Substantial evidence suggests they were not subject to the law, including the modern doctrine of contempt, which “can be traced back to English common law” and originates from “the notion that the King could do no wrong.”⁸³ Because judges in those courts were enforcing the will of the throne, ordained by the king’s divine right to rule, they had the power to hold litigants before them in contempt.⁸⁴

Despite later upheaval in Europe, some argue the divine right of kings helped form the United States’ modern political concept of “sovereignty” regardless of whether that sovereignty comes from God, the people, or the government itself by virtue of a covenant with the people.⁸⁵

F. *Revolution and Enlightenment*

Uncertainty inspired revolution. The French Revolution was ignited, in part, by dissatisfaction with the crown’s corruption and the inequitable administration of law.⁸⁶ It gave birth to philosophies rejecting divine government and embracing “rationalism, individualism, and utilitarianism and [an] emphasis on equality of opportunity, natural rights, freedom of expressions,

79. Glenn Burgess, *The Divine Right of Kings Reconsidered*, 107 *ENG. HIST. REV.* 837, 840 (1992) (internal quotation marks omitted) (quoting J. P. SOMMERVILLE, *POLITICS AND IDEOLOGY IN ENGLAND, 1603–1640*, at 38 (London 1986)).

80. Tom Richey, *Divine Right of Kings*, *THE BLOG @ TOM RICHEY.NET* (Sept. 1, 2018), <https://www.tomrichey.net/blog/divine-right-of-kings-lecture-notes> [https://perma.cc/3RRN-USL7] (describing the philosophical doctrine where kings rule by divine right as “Top Down”).

81. *Id.*; see generally JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (theorizing government derived its authority from the people). After the Glorious Revolution and during the beginning of the Enlightenment, John Locke sharply diverged from the reasoning memorialized in Bossuet’s treatise. Both writers’ ideas are deeply rooted in biblical texts and theology.

82. Burgess, *supra* note 79, at 844.

83. CANDACE S. KOVACIC-FLEISCHER ET AL., *EQUITABLE REMEDIES, RESTITUTION AND DAMAGES* 182 (8th ed. 1994).

84. *Id.*

85. Burgess, *supra* note 79, at 837–38.

86. BERMAN, *supra* note 9, at 137.

and freedom of will.”⁸⁷ French *philosophes* deconstructed French legal principles, and in doing so began to deconstruct the church. At this time in France, the church was almost exclusively Catholic.⁸⁸ Some *philosophes* went so far as to denounce Christian influence on France entirely, writing:

Religion has ever filled the mind of man with darkness, and kept him in ignorance of his real duties and true interests. It is only by dispelling the clouds and phantoms of Religion, that we shall discover Truth, Reason, and Morality. Religion diverts us from the causes of evils, and from the remedies which nature prescribes⁸⁹

But despite efforts to distinguish revolutionary, Enlightenment principles from religious Catholic beliefs, which taught that wealth and power were tantamount to godliness, the Enlightenment ideas in revolutionary France were inescapably religious in origin.⁹⁰ Primarily concerned with man’s ability to find solutions to political and social problems through public opinion and reason, French revolutionaries, similarly to Aquinas, saw reason as emanating from God’s creation.⁹¹ Therefore, man was gifted the opportunity to pursue a greater good, including a more transparent government, under God.⁹² Christianity did not lose its hold on Europeans in the eighteenth century but was merely decanted by revolution, leaving behind the sediment of Christianity’s strict adherence to scripture, tradition, and the political prestige of religious officials and the church.⁹³

The Enlightenment philosophy that followed revolution, then, did not abandon God but rather the church.⁹⁴ Voltaire often used the phrase “*Écrasez l’infâme*” meaning “crush the infamous”—the “infamous” being the

87. *Id.*

88. See Alexa Weight, *God and Revolution: Religion and Power from Pre-Revolutionary France to the Napoleonic Empire* 6 (Spring 2017) (B.A. thesis, University of Western Oregon) (on file with the Department of History for University of Western Oregon) (noting Catholicism was “the official religion in France”).

89. PAUL HENRI THIRY & BARON D’HOLBACH, *GOOD SENSE* 206 (Project Gutenberg 2013) (1772) (ebook).

90. BERMAN, *supra* note 9, at 138.

91. *Id.* at 138–39.

92. *Id.*

93. *Id.* at 138; see William Bristow, *Enlightenment*, *STANFORD ENCYC. OF PHIL.* (Aug. 29, 2017), <https://plato.stanford.edu/entries/enlightenment/> [https://perma.cc/TZB2-VL4H] (“Though the Enlightenment is sometimes represented as the enemy of religion, it is more accurate to see it as critically directed against various . . . features of religion . . .”).

94. The Enlightenment movement was not restricted to France; its influence spanned the continent and European colonies. *Id.* Notwithstanding other enlightenments, I focus on French philosophes as the pinnacle of enlightenment thought.

church.⁹⁵ Because the church was in a position vulnerable to abuse, its authority could not go unchecked.⁹⁶ A government sponsored by the church was an unacceptable conglomerate of authority.

G. *The American Experiment*

Heavily influenced by Enlightenment principles, the framers of the United States Constitution sought to avoid consolidation of power in a monarchy or religious authority.⁹⁷ But when the framers decided against a *national* establishment of religion, they did so with the understanding the *states* would likely establish one.⁹⁸ Even so, it is unclear what was intended by the framers' disestablishment of national religion. Did they intend freedom of religion to mean the absence of religion in government or simply denominational freedom amongst the states, while the national government "presuppose[d] a Supreme Being"?⁹⁹ President Jefferson posited: "the liberties of a nation [cannot] be thought secure when we remove their only firm basis, a conviction in the minds of the people that their liberties are the gift of God."¹⁰⁰ It is important here to distinguish between what Jefferson believed personally and the ideas he held for the American practice of religion. While Jefferson was devout in his personal life,¹⁰¹ he worked to

95. *Id.*

96. *See id.* ("Enlightenment philosophy tends to stand in tension with established religion . . .").

97. *See* John Ragosta, *Divided We Stand, United We Fall*, THE JEFFERSON MONTICELLO (Jan. 16, 2019), <https://www.monticello.org/research-education/blog/divided-we-stand-united-we-fall/> [<https://perma.cc/N8YP-SMMP>] ("No progress could be made in politics or education if 'kings, priests, and nobles' continued to use government power to propagate religion, seeking to control citizens' minds.").

98. BERMAN, *supra* note 9, at 211. Thomas Jefferson believed that although there should be denominational freedom of religion, "there was a common core of religious belief that was essential to preserve peace and order in society." *Id.* at 210. At that time, the "freedom of religion" debate amongst states sparked widespread controversy as overwhelmingly Christian colonists fought for traditional Christian structures they were accustomed to in Europe. SIDNEY E. MEAD, *THE LIVELY EXPERIMENT* 41–42 (1963).

99. Michael S. Ariens, *Evidence of Religion and the Religion of Evidence*, 40 *BUFF. L. REV.* 65, 82 (1992) (quoting *Zorach v. Clauson*, 343 U.S. 306, 312–13 (1952)).

100. BERMAN, *supra* note 9, at 210 (alteration in original) (internal quotation marks omitted). One can imagine Aquinas making an identical statement.

101. Jefferson's ideology did not conform to traditional Christian ideals; he carefully rejected—as improbable or unlikely—many of Jesus's purported miracles. Jefferson even altered his personal Bible to conform with his intuition about the meaning of biblical lessons. Erin Blakemore, *Why Thomas Jefferson Renrote the Bible Without Jesus's Miracles and Resurrection*, *HISTORY* (Aug. 1, 2019), <https://www.history.com/news/thomas-jefferson-bible-religious-beliefs> [<https://perma.cc/287Y-DGYN>].

achieve religious neutrality in 1779 Virginia.¹⁰² Another framer, John Adams, noted in 1811, “I have been a church-going animal for seventy-six years, from the cradle.”¹⁰³ He sought to establish a state religion in Massachusetts but condoned the private practice of other religions.¹⁰⁴ Both framers worked to achieve some level of religious freedom.

More likely, the framers’ intention was to prevent consolidation of power in a single church-led government, such as those which historically erupted in revolution. “Although no divine right of kings justified the actions of the state, the American system nevertheless was premised on the belief that any human concentration of power would become corrupt if left unchecked.”¹⁰⁵ The concept of separation of power evidences this principle’s influence over the framers. Nonetheless, in Jefferson’s words, the American plan was a “novel experiment.”¹⁰⁶ Despite the framers’ vision for religious freedom, no one could have predicted whether the scheme would prove successful.

III. CONCLUSION: CONTEMPORARY JUDGING AND CHRISTIANITY

Had the framers felt compelled to sterilize politics from spiritual infection, their efforts would have been futile. This is because “[l]aw is religion’s child,” or so the Very Reverend Monsignor John J. Dougherty touts.¹⁰⁷ Professor Berman agrees. In his assessment, it is improper to explore the “legal foundations of religious freedom,” without also considering the “religious foundations of legal freedom.”¹⁰⁸ Indeed, the biblical law-givers, Greek philosophers, Romans, medieval ecclesiasts, Enlightenment *philosophes*, and the American founders agree: “the principle of the rule of law over[powers] the mere power of man.”¹⁰⁹

Although Americans pride themselves on governmental insulation from religious influence, a closer examination reveals such neutrality was neither

102. See John Witte Jr., “A Most Mild and Equitable Establishment of Religion”: John Adams and the Massachusetts Experiment, 41 J. CHURCH & STATE 213, 213 (1999) (discussing Thomas Jefferson’s support of Virginia’s religious freedom bill that promulgated equality across all religions).

103. CARL J. RICHARD, THE FOUNDERS AND THE BIBLE 25 (Rowman & Littlefield 2016) (internal quotation marks omitted).

104. Witte, *supra* note 102, at 216.

105. Zwieter, *supra* note 8, at 446.

106. Witte, *supra* note 102, at 213 (quoting Thomas Jefferson, *Letter of November 21, 1808*, in THE COMPLETE JEFFERSON, CONTAINING HIS MAJOR WRITINGS 538 (Saul K. Padover ed., 1943)).

107. Dougherty, *supra* note 5, at 129.

108. BERMAN, *supra* note 9, at 210.

109. Garrison, *supra* note 25, at 310–11.

the framers' intent nor their legacy.¹¹⁰ Nonetheless, the American public seemingly refuses to accept an ecclesiastical influence on the judiciary—despite the likelihood it was and is influenced by the Christian church. Justice Amy Coney Barrett's nomination to the Supreme Court of the United States is illustrative. While many argued Justice Barrett's commitment to Catholicism was an improper outside influence on her judicial discretion, others aptly recognized “th[at] absurd position runs against everything we know about human psychology and the role of religion.”¹¹¹ Professor Alan Levinowitz argues “it demeans religious belief to think there's no connection.”¹¹² Further, religion is a small piece of the much larger “comprehensive doctrine” comprising the framework for judicial considerations.¹¹³ After all, it is an inevitability of human nature that judges take more than just legal principles into account when exercising their discretion.¹¹⁴

Tocqueville wrote in his two-volume *Democracy in America*, “[T]here is no country in the whole world in which the Christian religion retains a greater influence over the souls of men than in America”¹¹⁵ He argues that Catholicism and its Protestant progeny exercise dominion over the United States—not through direct control of the federal or state government—but rather through social structures, “by regulating domestic life,” and “direct[ing] the manners of the community.”¹¹⁶ One hundred years later, this control was exemplified in widespread social change such as the Civil Rights Movement and the political “New Christian Right” in the seventies.¹¹⁷ Both movements were mobilized by their respective congregations, each gaining

110. BERMAN, *supra* note 9, at 211.

111. Alan Levinowitz, *Let's Be Honest About Religion and the Courts*, FOREIGN POL'Y (Oct. 28, 2020, 9:59 AM), <https://foreignpolicy.com/2020/10/28/barrett-court-catholicism-religion-judges-abortion/> [<https://perma.cc/LT2E-YQ9K>].

112. *Id.*

113. *Id.* (internal quotation marks omitted).

114. See RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 193 (Harvard Univ. Press rev. ed. 1990) (“I am describing the conditions of adjudication that make it unrealistic to believe that our judges can render objective decisions in difficult cases.”). Notably, Posner qualifies his statements of disbelief, by assuring he is “not engaged in criticism.” *Id.*; see BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921) (“The great tides and currents which engulf the rest of men do not turn aside their course and pass the judges by.”).

115. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 326 (Henry Reeve trans., D. Appleton and Co. 1899).

116. *Id.* at 327.

117. Rhys H. Williams, *Religion as Political Resource: Culture or Ideology?*, 35 J. FOR SCI. STUDY RELIGION 368, 369 (1996). Some argue the shift was due, in part, to retaliation against the Soviet Union. KEVIN M. KRUSE, ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA 49 (2015).

a sense of potency by virtue of their association with the church.¹¹⁸ Through these kinds of social movements, the churches have had an influence on the public as Tocqueville noted, but Tocqueville ignores the influence of Christianity in the government itself.

Still, some maintain religion has lost its prestige in the hearts and minds of twenty-first century Americans, and thus religious tradition has become a “private matter[] best retired from the realm of public discourse.”¹¹⁹

The late Professor H. L. Stewart admitted to but argued against the prevalence of this connotation:

[T]he evolution of law, not only in Europe but also in the newer countries across the ocean which Europeans settled, has been affected much more than is commonly supposed by ecclesiastical custom, even where the secularist spirit has been most loudly proclaimed, and [] there is much still to be learned in jurisprudence by study of the canonists.¹²⁰

Professor Stewart was right. As illustrated by *Church of the Holy Trinity v. United States*,¹²¹ in exempting the church from compliance with a federal law prohibiting contracts for employment with aliens, the Court took the opportunity to pay credence to religion’s influence on the American legal system.¹²² Justice Brewer wrote that the Legislature, which represented a “Christian nation,” would not have intended to inhibit the exercise of the same religion, even if the church’s employment contract was in technical violation of federal law.¹²³ Justice Brewer has been referred to as “one of the most unabashedly religious men to ever sit on the Court,” but he was not the only member of the Court, and the opinion was unanimous.¹²⁴ Perhaps Justice Brewer and the other Justices recognized the inevitable influence of Christianity on the law. In a “Christian nation,” originated from Christian legal principles, and condoned by God, to whom or what are our judges accountable? From where do they derive their morality and

118. See Williams, *supra* note 117, at 369 (“African American churches were the organizational infrastructure of the early civil rights movement.”).

119. Coughlin, *supra* note 4, at 2 n.7.

120. H. L. Stewart, *Canon Law*, 29 CAN. B. REV. 483, 483 (1951).

121. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

122. See *id.* at 471 (acknowledging the pervasive influence of Christian customs in American society and holding the Act does not extend to Christian employment).

123. *Id.* at 471.

124. J. Gordon Hylton, *David Josiah Brewer and the Christian Constitution*, 81 MARQ. L. REV. 417, 417 (1998).

conscience if not from the same laws inspired by the divine and effected by the religious? Accountability to Christian law is accountability to God; a divine right nonetheless.