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SOME RELIGIOUSLY DEVOUT JUSTICES: HISTORICAL NOTES AND COMMENTS

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For the last couple of years, we have been researching the religious beliefs and activities of justices of the U.S. Supreme Court and how those may have related to their judicial decision-making. The voluminous literature on the Court contains almost nothing on this topic; and we were intrigued by Judge Noonan's comment, in his casebook, that "[t]he religious views of the Justices are a taboo subject in legal analysis."[1] In an article criticizing the Court's free exercise rulings, Douglas Laycock wrote that "the personal religiosity of the justices [is] none of my business. They are protected by both the Free Exercise Clause and the Test Oath Clause."[2] The warning appears to be that the justices' religious beliefs are private matters, not relevant or appropriate for scholarly discussion.[3] In the face of such statements, writing on this topic makes us feel a little like reporters for the *National Enquirer.* Headline: "Flash—Justice O'Connor Spotted Attending Church Last Sunday! What does this mean for her off-again, on-again relationship with the *Lemon* test?"

There are some good reasons why the justices' religious beliefs have not been the object of study. Unless a decision of the Court makes specific use of religious arguments, which does not happen often, it can be very speculative to draw a connection between the decision and the re-

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1. JOHN T. NOONAN, JR., THE BELIEVER AND THE POWERS THAT ARE 238 (1987). *See also* William G. Ross, *The Religion of the U.S. Supreme Court Justices*, in THE ENCYCLOPEDIA OF LAW AND RELIGION (Paul Finkelman ed.) (forthcoming 1999).

2. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 23.

3. That appears to be Judge Noonan's warning too, although he tried to break the taboo. *See* NOONAN, *supra* note 1, at 239. In his casebook, many of the excerpted opinions are prefaced with information about the religious beliefs of the justices who decided the cases.

ligious views of the justices. Even if the legal realists were right that decisions usually rest on factors other than legal doctrines, the justices' religious beliefs may be less important than are considerations of political opinion, social class, or geographical background. Or religion may be intertwined with these factors in ways that are difficult to sort out. Moreover, the justices' religious views are often difficult to ascertain. Denominational affiliations alone explain very little, and not only among Protestants: just try to find jurisprudential similarities among the Roman Catholic justices Brennan, Scalia, and Kennedy. One must look to the specific views of individual justices—if they have left any record of such views, and many have not.

Nevertheless, we think this topic is worth exploring not so much because it gives clear explanations for many decisions, but because it sheds light on some important subjects such as the historical development of American religions and their relationship to American politics and law. It also is relevant to a question of legal philosophy on which several speakers at this conference are experts: to what extent may a judge bring religious precepts to bear in deciding cases?[4] Many Supreme Court justices have in fact had a lively interest in religious matters, and some have been quite prominent in their respective faiths. Interest in the justices' religious beliefs flared up again recently because the Court now for the first time has a majority of non-Protestants—because of Justice Thomas's recent, publicized conversion to Roman Catholicism—and because some justices, especially Scalia and Thomas, have been unusually outspoken about their devotion.[5]

There are many entry points into this topic. In this article, we seek to give an overview of the issues by discussing some religiously devout justices who have sat on the Court at various periods of the Court's history: the Gilded Age of the late nineteenth century, the New Deal and the mid-twentieth century, and finally the current Court. We examine how the devout justices' beliefs have related to their judicial approach and decisions, and how such relationships have varied at different times in history.

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4. *See* KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 141-50 (1995); Scott C. Idleman, Note, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433 (1993); *see also* Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989).

5. *See, e.g.*, Richard Carelli, *Justices' Faith Could Play Role in Two Pivotal Decisions*, CHI. SUN-TIMES, Jan. 26, 1997, at 32. On Thomas' conversion, see Larry Witham, *Thomas' Journey Leads Back to Rome*, WASH. TIMES, June 8, 1996, at A11; Tony Mauro, *After 28 Years, Thomas Reclaims Catholic Faith*, U.S.A. TODAY, June 18, 1996, at 4A.

We use the term "devout" in a limited and perhaps controversial way, to refer to justices who have been active in religious matters or who have left a written record of being significantly influenced by religious ideas. (We do not, of course, mean to pass judgments on the justices' spiritual lives.) Such active or recorded involvement is not the only way a person can be devout; and a justice could also be influenced by her religious background without being devout in a conventional sense (this seems particularly the case with the Jewish justices, on whom there has already been some scholarly work[6]). But active involvement is at least probative of a justice's religious commitment, especially of the justice's belief that religious life is not simply limited to attendance at a weekly worship service. Just as important, a justice's active, recorded involvement in religious matters gives us some material with which to make scholarly judgments.

I. THE GILDED AGE JUSTICES

Although the vast majority of the 108 justices who have sat on the Court have been affiliated with some religion, for a great many it appears the affiliation has been nominal. It is not that these justices have been anti-religious. They have not had very strong views on religion one way or the other, and they have mostly valued it for the extent to which it promotes ethical behavior and social order.

However, during the nineteenth century, a number of the most prominent justices were quite active and outspoken in religious matters; and this involvement reached its height during the Gilded Age, the period from Reconstruction until the first decade of this century. While sitting on the Court in the 1870s, the otherwise obscure Justice William Strong served as president of an organization that sought to amend the Constitution to include an acknowledgment of God and of Jesus Christ "as the ruler of all nations, and his revealed will as the supreme law of the land."[7] The much more prominent Joseph Bradley wrote many articles on the Bible and comparative religion and was hailed at his death, with some exaggeration, as "one of the most accomplished Biblical scholars in the country."[8] The first Justice Harlan served several times

6. *See generally* THE JEWISH JUSTICES OF THE SUPREME COURT REVISITED: BRANDEIS TO FORTAS (Jennifer M. Lowe ed., 1994); ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND (1988).

7. DANIEL G. STRONG, SUPREME COURT JUSTICE WILLIAM STRONG, 1808-1895: JURISPRUDENCE, CHRISTIANITY AND REFORM 293-338 (Ph.D. dissertation, Kent State University, 1985) (discussing Strong's leadership of the National Reform Association).

8. Frank W. Hackett, *Mr. Justice Bradley*, *in* THE GREEN BAG, April 1892, 145,

as vice-moderator of the northern Presbyterian denomination;[9] his colleague, Justice David Brewer, remarked only half-jokingly that Harlan "goes to bed every night with one hand on the Constitution and the other hand on the Bible."[10] And Brewer himself, who was born the son of Congregationalist missionaries in Turkey, wrote in the *Holy Trinity Church* decision in 1892 that "this is a Christian nation,"[11] and expanded on and defended that claim a decade later in a series of lectures published nationally.[12]

This heavy involvement in religious ideas and affairs is hardly surprising, for these were the climactic decades of the "*de facto* Protestant establishment" in America, in which Christian language and references pervaded both the culture and the law.[13] And one finds explicitly religious arguments in some of the Court's decisions from this period—mostly, it should be noted, in opinions by the above-mentioned justices. Some such arguments, as one would expect, are in cases directly involving the relations between religion and government. Brewer made his "Christian nation" assertion in the course of holding that a statute prohibiting the importation of foreign workers was not meant to bar a church from calling a man from England to be its rector. And in an opinion by Bradley, the Court upheld federal confiscation of the Mormon Church's property on the ground that the Mormon practice of polygamy was a threat "to the spirit of Christianity and of the civilization which Christianity has produced in the western world."[14] But outside the church-state field, Bradley provided another famous example of explicitly religious argument when he concurred in rejecting Myra Bradwell's petition to practice law on the same terms as men, on the ground that "the law of the Creator" required that women not be diverted from

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9. *See* Loren P. Beth, *John Marshall Harlan*, *in* THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES 1798-1995 216, 218-19 (Clare Cushman ed., 2d ed. 1995).

10. *Quoted in* TINSLEY E. YARBROUGH, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN viii (1995).

11. Church of Holy Trinity v. United States, 143 U.S. 457, 471 (1892).

12. *See generally* DAVID J. BREWER, THE UNITED STATES A CHRISTIAN NATION (1905).

13. On the *de facto* establishment, see MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 11-12, 31, 98, 154 (1965); FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL STUDY OF RELIGION CLAUSE JURISPRUDENCE (1995).

14. Late Corp. of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890). Similar references to Christian civilization appear in the earlier Mormon cases. *See* Davis v. Beason, 133 U.S. 333, 341, 344 (1890); Murphy v. Ramsey, 114 U.S. 15, 45 (1885); and Reynolds v. United States, 98 U.S. 145, 166 (1879).

fulfilling "the noble and benign offices of wife and mother."[15]

How should we evaluate these explicit religious arguments, looking back from the vantage point of a century later? To some extent, the principles that contemporary scholars have developed for the "appropriate" use of religion by decision-makers are anachronistic when applied to the Gilded Age Court. Kent Greenawalt has suggested that the optimal principles would allow more use of explicit religious arguments in a religiously homogeneous society than in today's pluralistic one;[16] religious arguments in a religiously homogeneous society could command a sort of moral consensus that they could not in a pluralistic one. And though America was changing rapidly in the late 1800s, its population and culture were still much more pervasively and self-consciously Christian than is the case today. Thus, in the Mormon cases the Court unanimously viewed polygamy as a basic threat to American civilization because it was a threat to Christian principles of family structure. The Gilded Age justices saw the American legal and constitutional order as very much in harmony with Christianity, and they were willing to make explicit arguments to that effect.

Note, however, the limits on the importance of religious arguments. First, such arguments do not appear as often as one might expect in an age of pervasive Christianity: one can basically count them on two hands. Second, in many cases the religious arguments produce relatively restrained results. For example, Brewer's "Christian nation" claim, although it was certainly triumphalist, was not as benighted as confidently pronounce it today.[17] To a large extent, Brewer was stating a sociological fact: that most Americans were Christians and that morals and customs and therefore laws were based, at least in a general sense, on Christian teachings. Moreover, the *Holy Trinity* opinion used the argument as a means of determining congressional intent: given the public respect for Christianity, Congress would not have meant to make it a crime for a church to contract for the services of a foreign clergyman.[18] Once one interprets a statute according to underlying purpose rather than express language, then it seems appropriate to investigate the moral beliefs of the enacting body, including religious beliefs, if those are relevant to the particular question of interpretation posed.

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15. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring, joined by Swayne and Field, JJ.).

16. GREENAWALT, *supra* note 4, at 6.

17. *See* Lynch v. Donnelly, 465 U.S. 668, 717-18 (1984) (Brennan, J., dissenting) (calling Brewer's declaration "arrogant[ ]").

18. *Church of Holy Trinity*, 143 U.S. at 472.

Even Professor Greenawalt, who is skeptical about the explicit use of religious views in opinions, says they can serve as evidence of community morality.[19]

What is troubling today about the opinion is the exclusive reference to Christianity as the religion of the nation, which raises the implication that only Christian congregations would have their freedom respected. But the opinion explicitly says that Congress would not have meant to bar the calling of a rabbi either.[20] Today *Holy Trinity* looks like a free exercise case, and the result, protecting the church but also congregations of all faiths, seems plainly right under the "compelling interest" test that arguably should govern free exercise issues.

Likewise, one could defend at least some of Justice Bradley's use of religious arguments in *Bradwell* even under the principles set forth by modern commentators such as Professor Greenawalt. (Not, of course, that Bradley interpreted the tenets of Christianity correctly, just that it was legitimate for him to look to them.) If we accept the proposition that open-ended guarantees of substantive rights—like the Privilege or Immunities Clause, which was at issue in *Bradwell*—should be interpreted by reference to societal traditions, then once again, one important indicator of such traditions is the teaching of major religions. Bradley grounded his conception of women's role partly in legal traditions, though also partly in a divine law apparently independent of tradition: "[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of men and women."[21] The two merge, in fact, because "the founders of the common law" adopted the natural law principles about women's role.[22] Thus, the use of tradition as a source of constitutional interpretation could lead to considerable reliance on religious arguments, as exemplars of tradition. That tradition, of course, would be different today, and would not countenance the legal exclusion of women from professions (nor would most religious arguments today). Tradition is not a static thing. But when tradition is relevant, religious arguments are

19. GREENAWALT, *supra* note 4, at 147. Professors Carter and Idleman go further and say that if the justices ever go beyond text, history, or tradition and engage in independent moral reasoning, religious morality is a legitimate independent source of arguments—not just evidence of community morality. *See* Carter, *supra* note 4; Idleman, *supra* note 4.

20. *See Holy Trinity*, 143 U.S. at 472.

21. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring, joined by Swayne and Field, JJ.).

22. *Id.*

relevant as parts of the tradition.[23]

Some of the nineteenth century uses of religious arguments, therefore, could be defended even in modern terms. On the other hand, a critic might counter that Justices Brewer and Bradley were not restrained in their use of religion; their opinions could have appealed to tradition for support without going further and making such aggressive assertions of religious truth.

Brewer made a more attractive, though less well known, appeal to religious conscience in *Fong Yue Ting v. United States*,[24] one of the "Chinese Exclusion Cases." Today Brewer is mostly ignored or else vilified as a laissez-faire dinosaur,[25] but he wrote a long series of powerful dissents from decisions allowing Congress to deport resident Chinese aliens, or deny them reentry, with only minimal procedural protections.[26] In the leading case, *Fong Yue Ting*, the Court permitted the deportation of a Chinese laborer who had lived in America for fourteen years because he did not have a certificate required by statute and because the only independent testimony of his residence came from another Chinese alien, not from a "white witness" as the statute required. Brewer set forth his argument that the statute violated due process rights and then concluded by asking: "In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius fairly ask, 'Why do they send

23. Perhaps the real problem with Justice Bradley's argument was that he read the question of whether to classify women distinctively as a question under the Privileges and Immunities Clause. It seems much more appropriate to treat the question as one of equal protection. And the Equal Protection Clause is probably a less appropriate provision on which to use tradition-based arguments; unlike the clauses that seem to refer to an accepted set of privileges or processes, it seems by its logic to override tradition in the name of the value of equality. *See, e.g.*, Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988).

24. 149 U.S. 698 (1893).

25. However, a revisionist school, more hospitable to him and to the Fuller Court in general, has developed. *See generally* MICHAEL J. BRODHEAD, DAVID BREWER: THE LIFE OF A SUPREME COURT JUSTICE (1994); JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910 (1995); OWEN J. FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910 (1993); James A. Thomson, *Swimming in the Air: Melville W. Fuller and the Supreme Court 1888-1910* (Review Essay), 27 CUMB. L. REV. 139, 151-56 (1996) (citing sources).

26. *See* United States v. Ju Toy, 198 U.S. 253 (1905); United States v. Sing Tuck, 194 U.S. 161 (1904); Lem Moon Sing v. United States, 158 U.S. 538 (1895); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Nishimura Ekiu v. United States, 142 U.S. 651 (1892); Quock Ting v. United States, 140 U.S. 417 (1891).

missionaries here?'"[27]

This is, as Owen Fiss has observed, a "truly memorable" summary of the moral issues posed by the decision.[28] But what would we think of such an appeal today? Setting aside the "Christian nation" tag, the basic argument implicit in the question might still have some relevance today: American churches and agencies still send thousands of missionaries overseas, and the credibility of their message of goodwill still would be undercut if the American government mistreated foreigners. But it is hard to imagine a justice today making Brewer's argument; it would lack resonance and practical force. It rests on an assumption that America's mission to the world includes the spread not only of democracy and freedom, but also of Christianity. Today, only the first two would figure in the official understanding of our mission, if we still think in terms of mission at all.

However these explicitly religious arguments might be evaluated, why were there not more of them in an age in which Christianity pervaded public culture? Several reasons seem plausible. First, in those days the Court did not deal with many cases involving the "intimate" cultural matters of family, education, and sexual conduct—the areas with which American religions have tended to be most concerned. (A review of state court judges may provide more case material, but few of those judges have left accessible records of their own beliefs.)

Second, the convention of avoiding explicit religious arguments in opinions, to which Professor Greenawalt has called attention,[29] may have operated among legal elites in the Gilded Age too, although obviously not in a strict way. Bradley's peroration on divine law in *Bradwell*, "according to one contemporary newspaper, 'seemed to cause no little amusement upon the Bench and on the Bar.'"[30] There had been similar reactions thirty years earlier when the Court heard arguments concerning the will of philanthropist Stephen Girard, who had left a bequest to establish a school for orphan boys but had insisted, in order to avoid sectarian divisiveness, that clergy could not serve as instructors or even visit the school.[31] Daniel Webster, representing the challengers to the will, drew huge crowds by portraying the bequest as an assault on Christianity. Again, hardened court observers wrote that "Mr.

27. *Fong Yue Ting*, 149 U.S. at 744 (Brewer, J., dissenting).

28. FISS, *supra* note 25, at 312.

29. GREENAWALT, *supra* note 4, at 150.

30. *Quoted in* Jonathan Lurie, *Mr. Justice Bradley, in* ILLUSTRATED BIOGRAPHIES, *supra* note 9, at 201, 204.

31. *See* Vidal v. Girard's Executioners, 43 U.S. (2 How.) 127 (1844).

Webster's sermon has created no small amusement among the members of the Bar"; and Justice Story, who was himself a defender of public Christianity but who wrote the opinion upholding the will, confided in letters that the theological arguments had amused him and that Webster's argument "seemed to me, altogether, an address to the prejudices of the clergy."[32]

Another factor is that Christian morality (or a widely accepted version of it) may have so pervaded legal doctrines in a general way that, paradoxically, explicit references were seldom needed. For one thing, the mainstream Protestantism of this period was highly non-doctrinal, instrumental, and general—even among the vocal defenders of the faith on the Supreme Court. For example, in his articles on religion, Joseph Bradley expressed little interest in theological doctrines, even the divinity of Christ; he found wisdom in all the great religions; and as his opinion in the Mormon case suggested, he valued Christianity primarily as "an instrument of moral elevation, civilization and refinement."[33] Indeed, the chief reason Bradley offered for retaining traditional dogmas was not so much that they were true, but that the "the masses are too little developed in moral perception and principle to make it safe to abandon the artificial methods and sanctions by which order is maintained."[34] David Brewer, in his "Christian nation" lecture series, commended Christianity almost exclusively on the ground that it had enriched the nation's moral life; indeed, like Bradley, he virtually defined Christianity as moral elevation.[35]

More specifically, the dominant religious ideals overlapped considerably with those of the constitutional culture. An example is the relation between mainline Protestant thought and the constitutional doctrines of property and contract rights that came into full bloom on the Gilded Age Court. As historians such as Sidney Fine and Henry May have shown, the clergy of the middle-class Protestant churches preached ideals of individualism and self-reliance that paralleled and reinforced

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32. *Quoted in* 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 130, 132-33 (1928).

33. Joseph P. Bradley, *The Bible (1875)*, *in* MISCELLANEOUS WRITINGS OF JOSEPH P. BRADLEY 370, 370 (C. Bradley ed., 1901).

34. *The Danger of Abrogating Religious Forms* (undated), *in* BRADLEY, *supra* note 33, at 405. Justice Bradley's remarks were echoed years later by the less conventionally devout Hugo Black, who told his son that while some people "do good for the sake of it," others had "to be scared into doing the right thing" by organized religion: by being "given blind hope [that] you['re] gonna find it better somewhere else by doing right on this earth." HUGO BLACK, JR., MY FATHER: A REMEMBRANCE 175 (1975).

35. *See* BREWER, *supra* note 12, at 82-83.

the legal theories of economic liberty.[36] The clergy also called for humanitarian treatment of workers and for some reforms of business practices—but voluntarily, they said, in the spirit of Jesus, not through government coercion. These were not the only religious views on the question of economic regulation, but they were the views overwhelmingly held by middle- and upper-middle-class Protestants, which included the justices. And even the Social Gospel movement, which challenged the individualistic focus of Protestantism, did not at first go beyond suggesting voluntary reforms through education and moral exhortation.[37]

Paralleling the religious endorsement of reform within a general laissez-faire structure, the Supreme Court struggled to permit regulation of the growing power of industry in some limited spheres but also marked out a broad area in which government could not interfere with economic liberty (that is, with liberty in the negative sense, understood as individual freedom from government action). For example, David Brewer was the Court's most outspoken proponent of economic liberty, and he said, in one of his many off-the-bench speeches, that intrusions on property rights violated the Decalogue's commandments against stealing and coveting.[38] He also echoed the clergy in arguing that the way of Jesus in matters of social reform was "not to fill the statutes with prohibitions, but to reach the individual and strengthen his character."[39] At the same time, Brewer wrote the decision in *Muller v. Oregon*[40] upholding a maximum-hours law for women workers and allowing regulation in the defined sphere of women's working conditions. And Harlan, though he accepted the framework of economic liberties doctrine, was willing to accept regulation for health reasons in cases like *Lochner v. New York*.[41]

Although these pronouncements paralleled and invoked the religious concepts of mainline Protestantism, for the most part the justices had no need to appeal to such concepts directly. The religious endorsement of both individualism and public morality was utterly consis-

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36. *See, e.g.*, SIDNEY FINE, LAISSEZ-FAIRE AND THE GENERAL WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT, 1865-1901, 117-25 (1956); HENRY F. MAY, PROTESTANT CHURCHES AND INDUSTRIAL AMERICA (1949).

37. *See* FINE, *supra* note 36, at 179-80.

38. *See* David J. Brewer, *The Movement of Coercion*, Speech to New York State Bar (1893), *cited in* BRODHEAD, *supra* note 25, at 118.

39. David J. Brewer, *The Twentieth Century from Another Viewpoint (1899)*, *quoted in* BRODHEAD, *supra* note 25, at 130.

40. 208 U.S. 412 (1908).

41. 198 U.S. 45, 65-74 (1905) (Harlan, J., dissenting).

tent with the structure of the law: indeed, the mainstream religious views had been both embedded in legal doctrine and in turn influenced by it.[42]

Even within the general Protestant consensus, however, there were some cases in which specific religious beliefs and experiences of the devout justices appear to have contributed to their taking distinctive positions. For example, Brewer, who was born in Turkey to American missionaries, consistently voted to hold America to constitutional standards of decency in its treatment of foreigners—not only of Chinese resident aliens, as in the *Fong Yue Ting* dissent, but also of people in the overseas territories that America acquired in its imperialist period.[43] In Brewer's religious vision, America had a calling to bring both peace and the Christian gospel to the developing world.[44] Here we have an especially strong case for drawing a connection between religion and decisionmaking: not only an explicit religious reference in an opinion (the reference to missionary work in the *Fong Yue Ting* dissent), but a host of off-the-bench speeches in which Brewer emphasized "the evils of imperialism, ... the duty of Christians to work for peace, [and] the Golden Rule as the guiding principle in diplomacy."[45]

Some of Justice Harlan's strong moral stances also were probably influenced by Christian principle, although the connection here is less plain. Harlan led the wing of the Court, which Brewer joined, that believed that constitutional guarantees should extend to the people of the overseas territories. He repeatedly argued that to leave Congress unconstrained in the territories would "engraft upon our republican institutions a colonial system such as exists under monarchical governments."[46] That Harlan may have been influenced by religious concerns is suggested by a speech on world missions that he made to the 1905 Presbyterian General Assembly, in which he reiterated that democracy

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42. Whether religious ideas helped give rise to the laissez-faire theories of the late 1800s, or whether they simplified ratified positions congenial to the middle class, is a complex question. For a discussion of the relation between religious movements and property rights, *see* William W. Fisher III, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860*, 39 EMORY L.J. 65, 108-21 (1990).

43. *See* BRODHEAD, *supra* note 25, at 160-61.

44. *See* BREWER, *supra* note 12, at 91 (stating "the more universal the rule of Christianity in the hearts of our people, the more certainly will [we] ever be the welcome leader in movements for peace among the nations"); BRODHEAD, *supra* note 25, at 107 (tying Brewer's position to "his lifelong support" for Christian overseas missions; "decent treatment of the Chinese in America would promote the missionary movement, both here and in the Orient").

45. BRODHEAD, *supra* note 25, at 173.

46. Downes v. Bidwell, 182 U.S. 244, 380 (1901) (Harlan, J., dissenting).

and colonialism were incompatible and asserted that Americans should instead "use our riches and our strength to spread the church of Christ all over the world."[47]

Harlan's most famous stand, on the unconstitutionality of racial segregation, is harder to attribute to religious beliefs in particular. Harlan was a former slaveholder (though also a Unionist) who switched to the Republican Party about 1867 and thereafter embraced the Reconstruction amendments with all the passion of a religious convert. As far as we know, he did not express his position on race in explicitly religious terms. However, Harlan's biographers do suggest, with unanimity, that his commitment to Reconstruction was sealed by his work as a lawyer representing the national Presbyterian Church against Kentucky congregations that broke away because of the denomination's position on slavery and secession and tried to take the church property with them.[48] (One of these cases, which Harlan litigated up to the Supreme Court and won, produced the landmark church-state decision of *Watson v. Jones*.[49]) We might simply observe that for a deeply religious judge, religious beliefs and experiences are likely to be thoroughly intertwined with legal, political, and social influences.

Overall, in the Gilded Age the devout justices tended to see a virtual identity between the ideals of the legal and constitutional order on one hand and of Christianity on the other. What Owen Fiss has said of Justice Brewer applies more generally: they "did not draw sharp lines between the Constitution, the Declaration of Independence, Holy Scripture, and *The Wealth of Nations*."[50] So the justices did not seem to regard it as illegitimate to use explicit religious arguments, but for various reasons they did so only infrequently.

II. THE NEW DEAL COURT

For the next prominent justice who gives indication of having been significantly influenced by religious ideas, we turn to the New Deal Court of the 1940s. Frank Murphy was a Roman Catholic, though in many ways an unconventional one; Judge Noonan calls him "somewhat

47. *Quoted in* YARBROUGH, *supra* note 10, at 209.

48. *See* LOREN P. BETH, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE 86 (1992); YARBROUGH, *supra* note 10, at 72-75; Alan F. Westin, *Mr. Justice Harlan*, *in* MR. JUSTICE: BIOGRAPHICAL STUDIES OF TWELVE SUPREME COURT JUSTICES 93, 103 (A. Dunham & P. Kurland eds., 1964).

49. 80 U.S. (13 Wall.) 679 (1871).

50. Owen M. Fiss, *David J. Brewer: The Judge as Missionary*, *in* THE FIELDS AND THE LAW 53, 63 (P. Bergan et. al. Eds., 1986).

anticlerical."[51] During the Depression, as mayor of Detroit and then governor of Michigan, Murphy pushed through New Deal-style relief programs, strongly defended the rights of unions, and intervened aggressively to stop violence and bring a peaceful resolution at the famous 1937 sit-down strike at General Motors.[52] Among the major influences on his actions was the tradition of Catholic social thought stemming from Pope Leo XIII's 1891 encyclical "Rerum Novarum," which criticized free-market capitalism and endorsed trade unions and minimum-wage laws. Murphy said he "always based my labor views on that Encyclical in large degree."[53] He repeatedly defended New Deal-style regulation as the means of taking Christian principles of charity and concern for the downtrodden and applying them to the new social and industrial order.

There can be little doubt that on the Court, Murphy sought to translate these same moral and religious precepts into law. The leading biography of the justice describes how after a tentative first couple of terms, marked by a desire to return to politics, Murphy resolved to define his role on the Court as an evangelist for broad principles of freedom and equality: "What a supreme joy it is," he wrote in 1943, "to have no other mission in life than to lift one's pen in defense of freedom of conscience and security and equal justice to the inarticulate!"[54]

In pursuit of such goals, Murphy wrote a series of majority opinions interpreting the guarantees of the federal minimum-wage statute broadly, explicitly "discarding formalities" because "we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion."[55] And in the opinions for which he has received the most credit, he refused to join the other FDR liberals in upholding the internment of Japanese-Americans during World War II[56] and the summary military trials of Japanese commanders after the war.[57]

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51. NOONAN, *supra* note 1, at 239.

52. *See* J. WOODFORD HOWARD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 118-79 (1968).

53. Letter to Arthur Cuddihy, Feb. 13, 1947, Murphy Papers, Beckley Library, University of Michigan, Box 45, Folder 45-32.

54. *Quoted in* HOWARD, *supra* note 52, at 299.

55. Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123, 321 U.S. 590, 592 (1944); *see also* Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946); Jewell Ridge Coal Corp. v. Local No. 6167 United Mine Workers, 325 U.S. 161 (1945).

56. *See* Korematsu v. United States, 323 U.S. 214 (1944).

57. *See* In re Yamashita, 327 U.S. 1 (1946); In re Homma, 327 U.S. 759 (1946). Judge Noonan celebrates the *Korematsu* dissent in his elegant essay, *The Catholic Justices of the United States Supreme Court*, 67 CATH. HIST. REV. 369, 383-85 (1981) ("The message of

In cases directly about religious life, Murphy defended individual conscience to the hilt. In every Jehovah's Witness case from 1942 until his death in 1949, he voted to uphold their right to preach and proselytize—leading to the quip that if Murphy "were ever to be canonized, it would be by the Jehovah's Witnesses."[58] He was proud that he defended the freedom of Witnesses to attack his own church vituperatively.

Murphy's defense of religious freedom owed little to official Roman Catholic doctrine and much to his distinctive religious sensibility. Before dissenting from the holding that child-labor laws could be used to bar Witness children from passing out tracts with their parents,[59] Murphy wrote his law clerk that he wanted "to save all that can be saved for the parent as against the state in the right to teach the religion to the child"; then, apparently thinking about the ongoing controversies over aid to Catholic schools, he added that the foregoing "might sound a little Catholic but I assure you I have nothing in mind but liberty of religion in a country that was conceived as a sanctuary for oppressed people."[60] And in the first Establishment Clause cases, *Everson* and *McCollum*, Murphy joined Black's opinions endorsing a "wall of separation between church and state." The decisions allowed a limited, but only a limited, form of aid to parochial-school parents and struck down efforts to release public school students from classes in order to attend religious instruction in the school building.[61] The latter decision was vehemently criticized by the Catholic hierarchy, which both worried and angered Murphy enough that he discreetly asked friends to write some replies in his defense, and at least once wrote such a letter himself.[62]

Murphy's Religion Clause votes reflected an outlook on religion that was shared by the even less conventionally devout Justices Black and Douglas. In one of the few articles discussing the justices' religious beliefs, Michael Smith made a convincing argument that these justices' decisions in church-state cases are best explained by their personal attitude toward religion: sympathetic to individual conscience but suspi-

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Paul to the Galatians that there was no discrimination in the Lord found here a constitutional counterpart in an American Catholic heart.").

58. John P. Roche, *Mr. Justice Murphy, in* MR. JUSITCE, *supra* note 48, at 281, 292.

59. *See* Prince v. Massachusetts, 321 U.S. 158, 176 (1944) (Murphy, J., dissenting).

60. *Quoted in* HOWARD, *supra* note 52, at 346-47.

61. *See* Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (permitting reimbursement for bus transportation to and from school); McCollum v. Board of Educ., 333 U.S. 203, 211 (1948) (invalidating release time).

62. HOWARD, *supra* note 52, at 452-53.

cious of the social power of communal or organized religion.[63] Without going into Smith's argument in detail, we note that it provides a good model for how to connect justices' beliefs with their decisions. He traces the results these justices reached: strong protection of individual conscience combined with strong limits on religion in the public schools and on state aid to parochial schools. Then he correlates the results with the justices' expressed personal views on religious matters: Black distrusted the Roman Catholic Church and labeled proponents of parochial aid as "powerful sectarian religious propagandists [seeking] domination and supremacy,"[64] and Douglas was an even more intense religious individualist who grew up resenting the establishment clergy and who once described churches as "feeding at the public trough."[65]

One further example of how Murphy's personal religious sensibility affected his decisions was his dogged, mostly unsuccessful campaign to limit prosecutions under the Mann Act to the white-slavery context and

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63. Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 105-10.

64. *See* BLACK, JR., *supra* note 34, at 104 (discussing the justice's attitude to Catholicism); Board of Educ. v. Allen, 392 U.S. 236, 251 (1968) (Black, J., dissenting) (attacking proponents of parochial aid).

65. *See* Wisconsin v. Yoder, 406 U.S. 205, 248-49 (1972) (Douglas, J., dissenting) (arguing that constitutional test of what is a religious belief should be broadened, but also that Amish parents had no right to keep their teenagers out of school to preserve communal religious traditions); WILLIAM O. DOUGLAS, GO EAST YOUNG MAN: THE EARLY YEARS 14-16, 109-11, 203-04 (1975) (discussing the establishment clergy); Walz v. Tax Comm'n of New York, 397 U.S. 664, 714 (1970) (Douglas, J., dissenting) (making the "public trough" statement and arguing that tax exemptions for charities cannot constitutionally extend to churches).

Michael Smith also discusses how Justice Frankfurter's views of religion influenced his decisions, and here another sort of evidence of influence appears. *See* Smith, *supra* note 63, at 110-12. Frankfurter was unsympathetic not only to actions by corporate religion (especially in the area of education), but also to individual claims of conscience (as, for example, in the flag-salute cases). *See, e.g.*, McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring) (arguing that religious influences must be kept "strictly apart" from public schools); West Virginia Board of Educ. v. Barnette, 319 U.S. 624, 653 (1943) (Frankfurter, J., dissenting) (arguing that allowing Jehovah's Witness children to refuse to salute flag would give "freedom from conformity to law because of religious dogma").

Frankfurter's overall attitude, if not precisely one of hostility to religious beliefs, was one of great concern about their divisive effects on the secular unity of society. That conclusion follows clearly from Frankfurter's opinions and letters, but it is also indicated by another piece of evidence: his opinions applying the Establishment Clause in almost absolute fashion cannot be squared with his general philosophy of judicial restraint. *Compare McCollum*, 333 U.S. at 255-56 (assuming without argument that the Establishment Clause applies to states, and interpreting it strictly), *with* Adamson v. California, 332 U.S. 46, 59-68 (1947) (Frankfurter, J., concurring) (expressing reluctance to incorporate Bill of Rights to bind states). When a justice's particular votes are inconsistent with his overall philosophy, one looks for non-legal explanations, including the justice's views about religion.

prevent the Act from being used more broadly to enforce conventional standards of morality.[66] Murphy's biographer notes that "[t]his effort ... led to endless jokes about his priestly sympathies for a sinful flock, which the Justice himself enjoyed."[67] As our colleague David Langum has explained in his study of the Mann Act, Murphy

> had a viewpoint more in accord with our contemporary understandings about the limitations of law to deal with issues of morality. Sexuality, or "sin" from Murphy's strong Roman Catholic perspective, was as inevitable as life itself. Therefore, repression could not be successful. As he once wrote in a private letter, "Someone must speak for sinners and reality. The law is for all."[68]

It is worth emphasizing again, however, that Murphy's personal view here conflicted with the official position of the Church. In the church-state cases as well as other contexts, then, Murphy had little problem seeing the Constitution as embodying what he viewed as the most attractive general principles of political morality. It is, of course, beyond our topic to discuss whether this Dworkin-like way of reading the Constitution[69] is the best method of interpretation. But Murphy's approach did cause him to be criticized, more than any of the New Deal justices, for rejecting the disciplining influence of legal reasoning and for writing his preferred moral beliefs into law. The wisecrack in Washington was that "[t]he Supreme Court tempers justice with Murphy," and one writer put the criticism vividly: Murphy assertedly "looked upon hallowed juridical traditions as a drunk views a lamppost—as a means of support rather than a source of light."[70]

Murphy's example, however, does not show that there is a strong correlation between religious passion and a morality-based approach to the Constitution. As we will discuss in the next section, the most self-consciously devout justices on the current Court say emphatically that

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66. *See, e.g.*, Cleveland v. United States, 329 U.S. 14, 24-29 (1946) (Murphy, J., dissenting) (arguing that the Act should not apply to consensual polygamy); United States v. Beach, 324 U.S. 193 (1945) (Murphy, J., dissenting); Mortensen v. United States, 322 U.S. 369 (1944).

67. HOWARD, *supra* note 52, at 341.

68. DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 210 (1994). The Murphy quote is from a letter to John R. Watkins, March 1, 1945, *quoted in* HOWARD, *supra* note 52, at 341.

69. *See generally* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1995).

70. Sidney Fine, *Frank Murphy, in* ILLUSTRATED BIOGRAPHIES, *supra* note 9, at 396, 398; Roche, *supra* note 58, at 281.

moral reasoning is not a legitimate factor in interpretation.[71]

Moreover, despite the influence of moralizing on his decisions, Murphy does not appear to have made explicitly Roman Catholic or Christian arguments in any of his opinions, except in church-state cases where he (like everyone else) had to discuss religious positions and currents. There may be two reasons for the lack of explicit religious references. By the 1940s, the convention may have been that such arguments were improper—perhaps because of an increasing religious diversity in America, perhaps because by then a large part of Murphy's audience of professional and intellectual elites had come to think that religious arguments lacked any credibility. Certainly, the New Deal Court's principle that government must remain wholly separate from religion, set forth in 1947 in *Everson v. Board of Education*,[72] at least implies that legal and political decisions should not be based on religious arguments. (Indeed, we have found only one non-church-state case where the mid-twentieth century Court relied on an explicit religious argument, and there the Court simply quoted and followed Bradley's Mormon Church opinion in holding that polygamy was an immoral practice within the scope of the Mann Act.[73])

However, another likely reason for the lack of explicit religious arguments is that for Murphy, as for the Gilded Age justices of the Protestant establishment, Christian values were not just consistent with, but virtually identical to, constitutional ideals of democracy and equality; and so again there was no real need to invoke the religious values explicitly. In speeches as governor, Murphy stated that "[i]n the scheme of democracy, as in the code of Christianity, all men are on a common

71. Moreover, although Sanford Levinson's taxonomy of "Protestant" and "Catholic" approaches to constitutional interpretation and judicial power is quite suggestive, we have not found any strong correlation between justices' actual religious faith and their method of constitutional interpretation. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 27-53 (1988). Hugo Black is perhaps the best example of Levinson's categories, as Levinson himself notes; Black, who grew up Southern Baptist in Alabama, championed a literalist approach to constitutional interpretation analogous to the Baptists' literalist approach to Scripture. *Id.* at 31-32. Black was not himself a Biblical literalist (or even a practicing Baptist in his years on the Court); he may have transferred his allegiance from the Bible to the Constitution as a source of inerrant authority, and probably the best explanation is that the rural Southern populism that held that the common man could understand the plain meaning of the Bible also meant he could understand the Constitution. But other justices do not fit the categories; for example, Justice Scalia is a devout Catholic but is rather "Protestant," in Levinson's terms, in his emphasis on the authority of text.

72. 330 U.S. 1 (1947).

73. *See* Cleveland v. United States, 329 U.S. 14, 19 (1946) (quoting Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890)).

level of dignity and importance";[74] and he referred to Jesus as

> that humble Carpenter of Nazareth who was the most perfect friend of democracy the world has ever known because His principles are the very heart and soul of the democratic way of life... the most ardent advocate of the brotherhood of man, the most compassionate friend of the lowly, the most perfect lover of justice and freedom.[75]

These opinions of Murphy's were not simply for public display; he expressed similar views in his private correspondence.

Thus, although his substantive positions differed from those of David Brewer and the Gilded Age justices, Murphy followed their example in equating his understandings of Christianity, of morality, and of constitutional law—except that by the 1940s a justice did not express the Christian ideals explicitly in opinions.

III. CURRENT JUSTICES AND THE CULTURE WARS

We have entered another period in which the religious makeup of the Court is noteworthy.[76] It is not only that the Court now has a majority of non-Protestants; as already mentioned, denominational affilia-

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74. Frank Murphy, Democracy and Religious Freedom, Address at Yeshiva College (Dec. 11, 1937) in Murphy Papers, Box 76, Item 77-32, at 69, 73-74.

75. Frank Murphy, Address to Jeffersonian Club (April 13, 1938) *in* Murphy Papers, Box 76, Item 77-32, at 83.

76. Between the New Deal and the current Court, perhaps the most religiously active justice was Thurgood Marshall. During his tenure on the Second Circuit in the 1960s, Marshall turned down most other engagements offered him but devoted a fair amount of time to speaking at Episcopal meetings, sitting on denominational committees, and finally serving as a delegate to the 1964 national convention in St. Louis. That meeting made headlines when a proposal to endorse peaceful civil disobedience against unjust laws was voted down by the lay delegates, led by Southerners, and Marshall thereupon left the convention, apparently in protest. The bishops of the church hastily adopted the proposal as a "position paper" and notified Marshall of this. *See, e.g.*, Margaret Frakes, *Episcopal Dichotomy (Editorial Correspondence)*, 81 THE CHRISTIAN CENTURY 1391-92 (Nov. 11, 1964). Marshall responded with some satisfaction and, in a private letter to one bishop, expressed "the need for much work in the several diocese toward more liberal deputies appearing at our next convention." Thurgood Marshall to Rev. George L. Cadigan, Nov. 12, 1964, Marshall Papers (Library of Congress), Box 23, Folder 5. For further discussion, *see* MARK TUSHNET, MAKING CONSTITUTIONAL LAW 180 (1997). Marshall's church activity after that seems to have tapered off, probably because of his increased workload as Solicitor General and then Supreme Court justice, but Professor Tushnet reports being told that Marshall continued to attend services regularly while on the Court.

One hardly needs to look to religious values to explain Marshall's passion for civil rights; but his involvement in the culturally prominent Episcopal Church may have strengthened (as well as reflected) his belief that significant progress toward justice could be made through the system.

tion in itself is not much of an indicator. More important is the presence of two justices, Antonin Scalia and Clarence Thomas, who have been relatively outspoken in proclaiming their faith and in discussing its relation to other aspects of culture. In recent speeches, Justice Scalia has defended traditional Christian doctrines (such as the belief in miracles) against the scorn of the "worldly wise," has expressed his own personal support for pro-life policies on abortion, and has urged Roman Catholic colleges to continue to uphold "a moral and virtuous lifestyle that is increasingly different from the surrounding society."[77] Justice Thomas's devotion to a conservative charismatic form of Christianity, and how that faith sustained him in the face of Anita Hill's allegations, is a central theme of the "inside" account of the Thomas confirmation battle written by his sponsor Senator Danforth.[78]

The single most prominent conflict involving religion, politics, and law in America at present is the so-called culture war between "traditionalist" views and "progressive" views in areas such as education, the family, and sexuality.[79] Although we make the following sort of statement with some trepidation, it does appear from their public statements that the religious views of Justices Scalia and Thomas land on the traditionalist side of this divide. And today's Court, unlike that of the Gilded Age, is constantly enmeshed in the moral issues that are the subject of the culture war: abortion, gay rights, euthanasia, religion in education and public life, and so forth. Justice Scalia, indeed, is sufficiently attuned to the idea of a culture war that he employed it to lead off his angry dissent in the 1996 gay rights case, *Romer v. Evans*.[80]

One distinctive feature of today's situation, though, is that even as religio-political issues divide the Court more than ever, these two most publicly devout justices are the strongest in forswearing reliance on religious or other personal moral beliefs in making decisions. Both Scalia

77. Joan Biskupic, *Scalia Makes the Case for Christianity: Justice Proclaims Belief in Miracles*, WASH. POST, April 10, 1996, at A1 (reporting a speech Scalia made at Christian Legal Society prayer breakfast in Mississippi); Jeffrey Gold, *Catholic Universities Neglect Their Mission*, Assoc. Press. Pol. Serv., March 6, 1997, 1997 WL 2506558 (speech at Seton Hall University in New Jersey). Scalia's speeches have provoked widespread reaction over whether a sitting justice should speak his mind about his religious faith; this reaction is itself critiqued in Michael Stokes Paulsen and Steffen N. Johnson, *Scalia's Sermonette*, 72 NOTRE DAME L. REV. 863 (1997).

78. *See generally* JOHN C. DANFORTH, RESURRECTION: THE CONFIRMATION OF CLARENCE THOMAS (1994).

79. *See generally* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991).

80. 116 S. Ct. 1620, 1629 (1996) (Scalia, J., dissenting).

and Thomas profess a strong commitment to what Professor Greenawalt has called the "limited sources" approach to constitutional and statutory interpretation: reliance only on the text, on original intent, or on specific, clearly-established legal traditions.[81] Both were questioned at their confirmation hearings on their commitment to set aside personal moral values in judging. The subtext, of course, was abortion; Scalia had expressed reservations about *Roe v. Wade*, and Thomas had given speeches suggesting that a religiously oriented form of "natural law" should be a standard for judicial decisionmaking, in a way that implied he too would overrule *Roe*. In response to questioning, Scalia affirmed "that one of the primary qualifications for a judge is to set aside personal views," and that even if he thought certain laws were "immoral in the results they produce ... [i]n no way would I let that influence my determination of how they apply."[82] Thomas also pledged that he would stick to the text and history, saying that natural law was merely "the background to our Constitution," not "a method of interpreting or a method of adjudicating in the constitutional law area."[83]

These answers were more than just confirmation conversions. Both Scalia and Thomas have reembraced and reemphasized these restraints in numerous opinions.[84] Unlike the devout justices of the Gilded Age, and Murphy during the New Deal, Scalia and Thomas profess no great harmony—indeed they profess a sharp distinction—between principles of morality and of constitutional interpretation.

To be sure, the "limited sources" approach restricts the use of other moral views in judicial decisionmaking just as much as it does religious views. Under this approach, all moral arguments are illegitimate if they are not tied to the specific history of the provision in question, or to societal traditions concerning the specific issue before the Court. And Justices Scalia and Thomas frequently criticize the other members of the Court, perhaps rightly so, for reading their own moral views into the Constitution. As Professor Carter has pointed out, a devout religious believer will certainly find it more acceptable to prohibit all free-floating moral arguments than just to prohibit religious ones.[85]

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81. GREENAWALT, *supra* note 4, at 141.

82. *Quoted in* Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1064 (1990).

83. Witham, *supra* note 5, at A11.

84. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting, joined by Thomas, J.); Romer v. Evans, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting, joined by Thomas, J.).

85. Carter, *supra* note 4, at 933. Thus, in focusing on Justices Scalia and Thomas,

Nevertheless, the "limited sources" approach is indeed a limit that may raise problems for a devout justice. Does the commitment to set aside religious precepts in rendering decisions (even if other personal moral views are set aside as well) require a devout justice to shirk his duties to God, to deny the all-encompassing nature of the religious claim on his identity? Does it mean, at least in some cases, that the justice will be morally responsible for condoning or enforcing immoral laws? Even if the ideal of following only limited sources were possible to achieve, is it sufficiently attractive morally to serve as a grounding for judges' behavior? These are very good questions that have been explored by Sanford Levinson and others.[86]

Justice Scalia said at his confirmation hearings that if he faced an irreconcilable conflict between his religious duties and his constitutional duties, he would recuse himself or perhaps even resign.[87] When Justice Brennan was asked the same question, he essentially answered: "My religious beliefs have to give way."[88] Scalia's answer seems more theologically appropriate for a devout believer to give, as Thomas Shaffer has pointed out.[89] But though Justice Scalia is not blithely ready to choose his job over his faith, as Justice Brennan apparently would, nevertheless we can probably assume that the prospect of recusal in an important case (to say nothing of resignation) would cause any justice considerable distress.

To date, however, these questions do not appear to have had serious practical import for Justices Scalia or Thomas. In most of the issues that have come before them involving religion-related conflicts, Scalia and Thomas have reached constitutional results that, so far as we can tell, are consistent with the views of traditionalist Christianity. They reject abortion rights, homosexual rights, and the right to euthanasia and favor permitting a greater role for majoritarian religion in public

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we do not mean to imply that it is not worth investigating how other justices' personal beliefs relate to their decisions. Nor do we mean to imply that some other views expressed in justices' opinions might be seen as "religious" in some broad sense. A crucial paragraph from the joint opinion in *Planned Parenthood v. Casey*, for example, might be seen as expressing a view that is functionally religious: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." 505 U.S. 833, 851 (1992).

86. *See, e.g.*, Levinson, *supra* note 82; Thomas L. Shaffer, *On Checking the Artifacts of Canaan: A Comment on Levinson's "Confrontation,"* 39 DEPAUL L. REV. 1133 (1990); Howard J. Vogel, *The Judicial Oath and the American Creed*, 39 DEPAUL L. REV. 1107 (1990).

87. *See* Levinson, *supra* note 82, at 1064.

88. *Id.* at 1063.

89. *Id.* at 1066 n.64.

activities.[90] If state laws legalizing abortion or euthanasia were challenged in court, Scalia and Thomas might face conflicts between their moral views and the results of their constitutional method; but no such challenges have reached the Supreme Court.[91] The only major cultural and moral question on which these justices' constitutional results have differed from the official moral teaching of the Roman Catholic Church is the death penalty, which they vote to uphold and the Church in most cases condemns. We will return to these latter cases shortly.

Let us set aside the simplistic accusation that these justices (or indeed any others) are hypocrites who use legal reasoning as a cover to follow their moral views.[92] Why have the expressed religious views of Scalia and Thomas largely harmonized with the results they have reached as a matter of constitutional interpretation?

One reason is that under any theory of constitutional interpretation—no matter how "objective" it purports to be—one's application of an accepted standard to particular facts will sometimes turn on how one views the world personally, including religiously. In other words, the finding of "constitutional facts" will sometimes turn on religious issues. Again, *Romer v. Evans* provides an example.[93] The majority struck down Colorado's anti-gay-rights initiative, Amendment 2, on the

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90. *See* Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (majority opinion joined by Scalia and Thomas, JJ.); Romer v. Evans, 116 S. Ct. 1620, 1629 (1996) (Scalia, J., dissenting, joined by Thomas, J.); Planned Parenthood v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting, joined by Thomas, J.); Lee v. Weisman, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting, joined by Thomas, J.).

91. The Court's decree of a constitutional right to abortion obviously does away with the need for state laws protecting abortion rights. On the question of euthanasia, a federal district court did hold that the legalization of physician-assisted suicide violates the equal protection rights of terminally ill persons, but the ruling was vacated on justiciability grounds. *See* Lee v. Oregon, 891 F. Supp. 1429 (D. Or. 1995), *vacated*, 107 F.3d 1382 (9th Cir. 1997).

92. Like any other justices, Scalia and Thomas do show apparent inconsistencies; it could be argued that at least at times, they vote their moral views like everyone else when text or history point the other way. This explanation might find some support in their opinions in the affirmative action cases, where they use rather free-floating language about the immorality and counter-productivity of race-conscious programs. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring); Adarand Constructors Inc. v. Pena, 515 U.S. 200, 239, (1995) (Thomas, J., concurring). However, it would require extensive discussion about the original meaning of the Fourteenth Amendment as applied to affirmative action programs in order to make the charge of inconsistency stick. *But see* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985) (arguing the Amendment's framers approved some kinds of affirmative action programs).

93. We thank David Smolin for suggesting the aspect of "constitutional fact"-finding in *Romer*, 116 S. Ct. 1620 (1996).

ground that it failed rational-basis review: "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but sheer animus toward" homosexuals.[94] Justice Scalia and Thomas agreed that laws should not be motivated by hatred of any class; but what the majority read as animus toward gay people, Scalia and Thomas read as a measured expression of disapproval of homosexual conduct.[95] There are arguments to be made for either reading. But the point here is that a justice's interpretation of key social facts, such as whether Amendment 2 reflected hatred of gays or not, is bound to be affected by her religious views—and for less devout justices, by the views that they have *about* religion. Remember again the effect that the views of Justices Black, Douglas, and Murphy on religion had on early modern church-state law.

More importantly, religious arguments play a role even in Scalia and Thomas's "limited sources" approach because of their reliance on tradition as a key to constitutional interpretation, reflected both in substantive due process cases[96] and in other areas such as the First Amendment.[97] As we already discussed in part I, to the extent that tradition is an important source of constitutional norms, resort to major religious views in the culture is appropriate to determine the tradition. In so doing, goes the argument, a justice is not looking to his personal religious views, but to those of society as a whole. Thus, if tradition is the right standard for delineating the extent of the substantive due process right of privacy, it was appropriate for Chief Justice Burger in *Bowers v. Hardwick*[98] to look to traditional religious arguments in passing on the asserted privacy right to engage in homosexual sodomy. When Burger argued that "[c]ondemnation of [such] practices is firmly rooted in Judaeo-Christian moral and ethical standards,"[99] he may or may not have construed these religious traditions accurately;[100] but if societal traditions matter, he was justified in looking to the religious teachings.

To be sure, a justice's using religious arguments as exemplars or evi-

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94. *Romer*, 116 S. Ct. at 1627.

95. *Id.* at 1633 (Scalia, J., dissenting).

96. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989) (opinion of Scalia, J.).

97. *See, e.g.*, O'Hare Truck Serv. Inc. v. City of Northlake, 116 S. Ct. 2353, 2357-61 (Scalia, J., dissenting) (free speech); Lee v. Weisman, 505 U.S. 577, 631 (Scalia, J., dissenting) (non-establishment).

98. 478 U.S. 186 (1986).

99. *Id.* at 196 (Burger, J., concurring).

100. Idleman, *supra* note 4, at 480-81.

dence of societal traditions is not the same thing as the justice's using his own personal religious beliefs. Moreover, in his own substantive due process opinions, Justice Scalia has not explicitly relied on religious arguments; for example, in concurring in *Cruzan v. Director, Missouri Department. of Health*, he discussed the common law tradition that prohibited suicide, without mentioning any traditional religious pronouncements on the question.[101] But even without the explicit references to religion, a tradition-based analysis of what is constitutional will, obviously, produce results consistent with traditionalist moral and religious views. That may simply push the charges of hypocrisy back to another level. Do Justices Scalia and Thomas follow a tradition-based analysis because their personal views are largely consistent with traditionalist moral values? But again, such a charge would be unfair without a great deal of further discussion, for there are legitimate reasons for regarding tradition as a central factor in constitutional interpretation.[102]

But the most important component of Scalia's and Thomas's jurisprudence that can head off conflicts between religious duties and constitutional duties is their emphasis on the limited role of federal judges: that they pass simply on the constitutionality of legislation, not on its morality, and that it is the legislature and not the courts that bears moral responsibility for the enactment of unjust legislation.

Justice Scalia has relied on this distinction in order to assume a position of neutrality in the culture wars, even on issues on which traditionalist religious believers have very strong feelings. For example, in his dissent from the reaffirmation of abortion rights in *Planned Parenthood v. Casey*,[103] Scalia strongly indicated that he would vote to uphold a pro-choice law adopted by a state just as much as pro-life law, even though some anti-abortion lawyers have argued that liberal abortion laws unconstitutionally deny equal protection to unborn children. For Scalia, the point is that the Constitution "says absolutely nothing about" abor-

101. 497 U.S. 261, 294-98 (Scalia, J., concurring).

102. The use of tradition in constitutional interpretation, it may colorably be asserted, allows the Constitution to adapt organically to the changing nature of the country, without giving judges free reign to make that adaptation solely on their subjective judgment. For Justice Scalia's defense of his particular method of using tradition, *see, e.g.*, *Northlake*, 116 S. Ct. at 2357-61 (Scalia, J., dissenting); *Michael H.*, 491 U.S. at 127 (Scalia, J., concurring). *Cf.* Michael A. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551, 565 (1985) (offering another, though rather different, use of tradition). *But see* LAURENCE TRIBE & MICHAEL DORF, ON READING THE CONSTITUTION (1991) (critiquing Justice Scalia's approach).

103. 505 U.S. 833, 979 (1992) (Scalia, J. dissenting in part).

tion.[104] Likewise, in *Romer*, after excoriating the majority for reading notions of sexual relativism and autonomy into the Constitution in striking down the anti-gay-rights amendment, Scalia added: "I would not myself indulge in [ ] official praise for heterosexual monogamy, because I think it no business of the courts (as opposed to the political branches) to take sides in this culture war."[105]

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104. *Id.* at 980.

105. Romer v. Evans, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting). Justice Scalia expounded further on the impermissibility of judges relying on moral arguments—even traditionalist ones—when he responded to some questions after a speech he gave at the Gregorian University in Rome in May 1996. See *Justice Scalia/Rome Address—Of Democracy, Morality, and the Majority*, Origins (Catholic News Service Documentary Service), June 27, 1996, at 81 (copy on file with authors and with *Marquette Law Review*). The gist of his speech was that Christians should regard any political or economic system—democracy, socialism, or capitalism—not as theologically mandated or as the means for achieving ultimate goals, but as a more limited vehicle "for protecting life and property and assuring the conditions for physical prosperity." *Id.* at 83-85. In answering questions about the relationship between Christianity, democracy, and natural law, Justice Scalia reiterated his positivistic conception of minority and constitutional rights:

> The whole theory of democracy . . . is that the majority rules; that is the whole theory of it. You protect minorities only because the majority determines that there are certain minorities or certain minority positions that deserve protection . . . The minority loses, except to the extent that the majority, in its document of governance, has agreed to accord the minority rights. Otherwise you do not want a democracy, you want a king to decide what is right.

Id. at 88. This positivistic approach underlay his comment, echoing his opinions in *Casey* and *Romer*, that "[i]f the people, for example, want abortion, the state should permit abortion in a democracy. If the people do not want it, the state should be able to prohibit it as well." *Id.* at 87. The role of Christian moral arguments, he suggested, was "to convert the democratic society, which will then have its effect upon the government. But I don't know how you can argue on the basis of democratic theory that the government has a moral obligation to do something that is opposed by the people." *Id.*

Finally, Justice Scalia connected these thoughts to the role of the judge interpreting the Constitution:

> Maybe my very stingy view, my very parsimonious view, of the role of natural law and Christianity in the governance of the state comes from the fact that I am a judge, and it is my duty to apply the law. And I do not feel empowered to revoke those laws that I do not consider good laws. If they are stupid laws, I apply them anyway, unless they go so contrary to my conscience that I must resign . . . But I would certainly not have the power to invalidate them because they are contrary to the natural law. I have been appointed to apply the Constitution and positive law. God applies the natural law . . . . I'm a worldly judge. I just do what the Constitution tells me to do.

Id. at 89-90.

Justice Scalia's comments provoked critical reaction from the Rome audience and from commentators sympathetic to natural-law arguments. One line of criticism is that set forth by Christopher Wolfe: that Justice Scalia needs "to distinguish more carefully what might be called his 'judicial positivism' from a broader legal [or moral] positivism"—that the fact that judges should confine themselves to positive law adopted by the majority does not entail the

A somewhat less incendiary example of this position comes in the Free Exercise Clause decision of *Employment Division v. Smith*,[106] where Scalia used his jurisprudential approach in the majority opinion to produce a result—the elimination of most constitutional protection for religious conduct from generally applicable laws—that is bound in some cases to conflict with his expressed views off the bench on the relation of religion to society. He has voiced concern for the increasing pressure of secular society on a distinctive religious life; but the withdrawal of any constitutional requirement for religious accommodations is likely to help increase the secularizing pressures on religious bodies. Specifically, Scalia has praised Roman Catholic colleges that march to a different tune than society's, and he suggested that the student-funded gay rights group at Georgetown had been "imposed upon [the university] by a questionable court decree."[107] However, *Smith* wiped out or at least greatly weakened most of the arguments that Catholic colleges could raise to question such impositions.[108] In today's culture wars, and today's conditions of wide-ranging government, traditionalist values will not always succeed in the political process, and they may be threatened with suppression by law.

Justice Scalia's answer in *Smith* is that legislatures are free to protect religious freedom by exempting religious conduct from generally applicable laws.[109] A corollary of that position, it would seem, is the assertion that judges who simply defer to the government do not bear moral responsibility when religious freedom is suppressed by general laws. As

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broader proposition "that what the majority does is right because the majority does it." Christopher Wolfe, *Some Religiously Devout Justices, Civil Religion, and the Culture War*, 81 MARQ. L. REV. 427, 439 (1998).

A second line of criticism was that Justice Scalia had failed to take into account the natural-law origins of the American polity, reflected most clearly in the Declaration of Independence. *See, e.g.*, Robert A. Connor, *Justice Scalia and Yogi Berra: A Matter of Interpretation*, 41 AM. J. JURIS. 165 (1996); *The Public Square*, FIRST THINGS, January 1998, at 66 (summarizing Connor's article as arguing that "Justice Scalia may be right about a democracy, . . . but not about this democracy").

We thank Richard Myers and Charles Haynes for assisting us in securing a copy of the news-service transcription of Justice Scalia's remarks.

106. 494 U.S. 872 (1990).

107. Gold, *supra* note 77, at 4.

108. It is interesting that Scalia described the Georgetown ruling as "questionable," since the gay-rights ordinance that Georgetown was forced to abide by was "generally applicable" and did not single out religion and therefore would arguably be constitutional under his opinion in *Smith*. Perhaps the university could assert rights to religiously motivated speech or association, which arguably survive *Smith*. *See* Smith, 494 U.S. at 881-82.

109. *Id.* at 890.

Scalia put it in reaffirming the *Smith* rule just this past term: "The issue ... is, quite simply, whether the people, through their elected representatives, or rather this Court, shall" determine when religious freedom has been unreasonably burdened. *Smith* determines that "[i]t shall be the people."[110]

Surely the distinction between acting as a legislator and as a constitutional interpreter is basic to our system; it is what makes the practice of judicial review in a democratic republic theoretically defensible. In particular, the justice who allows an immoral law to pass federal constitutional review cannot be placed in the same category of moral responsibility as the legislator who votes for the law. The justice indeed occupies a more limited role than the legislator. Moreover, in functional terms, a court acts with less consequence when it permits other branches to enact an immoral law than when it strikes down a morally necessary law passed by the other branches. It is easier to correct the former action, since it can be done by ordinary legislation, whereas correcting a constitutional decision usually requires an Article V amendment or some large shift in the Court's makeup.

Not surprisingly, then, the two greatest moral conflicts that federal judges have faced in American history both involved situations where judges struck down laws and gave constitutional protection to behavior that at least some of the judges (and at any rate large parts of society) believed was deeply wrong. One was slavery, where as Robert Cover discussed, anti-slavery judges struck down state laws that would have made it harder for slaveholders to recapture escaped slaves.[111] The other case is abortion, in which Catholic justices, Brennan and Kennedy, have voted to adopt rules that prevent states from prohibiting what the Church regards as murder.

For reasons such as those given above, John Garvey and Amy Coney, in their interesting and careful contribution to this conference, conclude that a Catholic judge who affirms death sentences on appellate review or in habeas corpus proceedings does not commit an intrinsically wrong act under principles of Catholic social teaching, notwithstanding the Church's official view that the death penalty is immoral in most circumstances.[112] The judge's role on appeal or habeas—the only situa-

110. City of Boerne v. Flores, 117 S. Ct. 2157, 2176 (1997) (Scalia, J., concurring in part).

111. *See generally* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

112. John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 316, 318-19 (1998).

tions in which a Supreme Court justice will confront the death penalty—is limited to correcting legal errors, perhaps only constitutional errors if the judge sits in habeas review of state sentences. The judge is not, in terms of Catholic social teaching, committing the evil act himself. Nor is he "formally cooperating" with evil by intending to bring about the result of death; the judge's intent is to apply the Constitution, and executions are simply an unintended consequence.

But as Garvey and Coney also point out, even a judge who does not directly commit an evil act or intend to bring it about can be guilty of "material cooperation" with the wrongdoer. Citing various sources, they describe Catholic social teaching on this matter as follows: "Material cooperation is only sometimes immoral. We judge this by a kind of moral balancing test—weigh the importance of doing the act against the gravity of the evil, its proximity, the certainty that one's act will contribute to it, the danger of scandal to others, etc."[113] The "judicial restraint" position of Justices Scalia and Thomas raises the question: could federal judges ever be guilty of material cooperation with evil by allowing an immoral law to go forward on the ground that it is constitutional?

A judge will always have a very strong reason to stay on the case even if adjudicating it under constitutional standards will mean affirming an immoral law. Society needs conscientious judges to serve; the best women and men should not be prevented from handling our most vexing legal problems. Even more clearly, there is probably never (or perhaps almost never) any justification for a federal judge to remain on a case and decide it contrary to proper legal or constitutional standards in order to reach a result the judge believes is just. Preserving the rule of law, and the limited role of unelected judges in a democracy, are very important goals that, weighed in the balance, would almost always justify upholding a law that is constitutional although immoral.

Nevertheless, there are two ways in which a Supreme Court justice might sometimes be seen as materially cooperating with evil in upholding an immoral law under constitutional standards. The first is if a justice acts publicly in a way that suggests the immoral law is not only constitutional but also morally justified. A justice doing this would be giving unnecessary support to the law, perhaps "causing scandal to others" by persuading them of the law's goodness. Charles Black argued that upholding a law always has the effect of giving it added moral le-

113. *Id.* at 319.

gitimacy.[114] Such an argument is not really responsive to Scalia's and Thomas's position, however, seems too broad, because it rests on the premise that morality and constitutionality are closely related. If one makes clear, as Justices Scalia and Thomas often do, that morality and constitutionality are very different things, the inference that a law is good because it passed judicial review should be undercut. Nevertheless, a judge could make statements in the course of upholding a law that give the impression that the law is moral when it is not.

A second kind of argument might be that moral factors can and should play a role in constitutional interpretation when the "limited sources" of text and tradition cannot give definitive answers in particular cases. For example, as we noted above, the standard of "rationality" under the Equal Protection Clause was agreed upon by all of the justices in *Romer v. Evans*, but different moral visions led to different judgments about whether Amendment 2 was rational or spiteful. Similarly, the question of whether a proceeding was "fundamentally fair," which all justices appear to agree is a requirement of the Due Process Clause, often involves a moral judgment that cannot be wholly determined by tradition.

We mentioned above that in various situations, Justice Scalia and Thomas have upheld, or probably would uphold, laws that traditionalist values, or the teachings of the Church, would call deeply immoral: for examples, laws that permit abortion or euthanasia. And they repeatedly have voted to let the imposition of death sentences go forward, even though recent statements by the Pope (as well as by the recent Catechism and by the American bishops) teach rather strongly that executing offenders is inconsistent with the Church's position of respect for human life unless such executions are limited to "case[s] of absolute necessity ... when it would not be possible otherwise to defend society," which the Pope describes as "very rare, if not practically nonexistent."[115] The wrongness of the death penalty is not as bedrock a teaching as is the wrongness of abortion or euthanasia;[116] but one would

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114. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIPS IN CONSTITUTIONAL LAW (3d ed. 1985).

115. JOHN PAUL II, THE GOSPEL OF LIFE (EVANGELIUM VITAE): THE ENCYCLICAL LETTER ON ABORTION, EUTHANASIA, AND THE DEATH PENALTY IN TODAY'S WORLD 100 (1995). For similar statements in the 1994 Catechism of the Catholic Church and in a 1980 statement by the American Catholic bishops, see Garvey & Coney, *supra* note 112, at 308-15.

116. The Pope's condemnations of the death penalty are not made with the kind of force found elsewhere in his encyclical in the condemnations of abortion and euthanasia. *See* JOHN PAUL II, *supra* note 115, at 112, 119. The Pope's condemnations of abortion and

still assume that devout Catholics must give very serious consideration to the statements of the Pope and bishops taken together.[117]

Would upholding any of these laws mean a justice was materially cooperating in a wrong? The claim that laws permitting abortion violate the equal protection rights of the unborn is very untested, as is the claim that laws permitting physician-assisted suicide violate the equal protection rights of the terminally ill. One would assume that the "limited sources" approach of Justices Scalia and Thomas would find that these rights, however morally sound, had not been constitutionalized in the Equal Protection Clause. Although abortion and euthanasia are very great wrongs under Catholic teaching, a justice who permitted laws protecting these practices can convincingly say that he is bound by history or tradition to interpret the Constitution that way, so that any aid this gives to the practices is justified and is not material cooperation with evil. If these justices were to face such a case and uphold the pro-abortion or pro-euthanasia law, they could and probably would make clear in their opinions that they were in no way stating that the law was moral.

Similarly, it seems clear, under a "limited sources" approach, that the death penalty is not per se unconstitutional; reference to the government taking life is found in both the Fifth and Fourteenth Amendments, and capital punishment has historically been permitted on a widespread basis. On that broad question, the sources of text and tradition are perhaps clear enough that moral arguments should not enter, and a justice who rejects per se challenges to the death penalty is not materially cooperating with evil.

However, we wonder if Justice Scalia has not gone beyond merely holding the death penalty constitutional—if he has not given it more active support in both of the ways identified above. Two cases from the

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euthanasia use language "approaching that of infallible definitions." Avery Dulles, S.J., *The Gospel of Life: A Symposium*, 56 FIRST THINGS 32 (Oct. 1995). Moreover, the condemnation of the death penalty represents a doctrinal shift, for major Catholic teachers historically gave it fairly broad endorsement. *See* Garvey & Coney, *supra* note 112, at 315-16. Thus questions remain: What precisely are the exceptions to the almost but not quite absolute rule against the death penalty? And is this one of the situations in which the statement is of such a status that a faithful Catholic, including a public servant, is flatly prohibited from disagreeing or from acting to the contrary?

117. We also doubt that the current practice of capital punishment in America comports with any reasonable reading of the papal statements. For further discussion, see Garvey & Coney, *supra* note 112, at 311-17. It is worth noting the recent instances in which the Pope has protested particular death sentences in America and appealed for clemency. *See, e.g.*, Richard Carelli, *Court Hears Death Case that Drew Pop's Protest*, Associated Press, Mar. 18, 1997, *available in* 1997 WL 4858033.

1993-94 term illustrate the point.

First, we wonder if Justice Scalia has not sometimes rejected claims by capital defendants in situations where moral arguments against the death penalty could permissibly enter into constitutional interpretation. Although the death penalty is not per se unconstitutional, a capital defendant is obviously entitled in his individual case to due process, a concept that includes certain irreducible elements of "fairness." In *Simmons v. South Carolina*,[118] Scalia and Thomas dissented from the Court's ruling that when the prosecution suggests in the capital sentencing phase that a defendant may pose a future threat to society, the jury must be told of the alternative of imposing a life sentence without parole. Neither the text nor the practices of the states clearly settles the question, which simply seems to boil down to whether it is fair to let the prosecution suggest future dangerousness without making sure the jury is aware of an alternative to death that still would prevent such dangerousness. Justice Scalia appeared to bend over backward to read the record in a way that made the state's actions look fair.[119] He also dismissed out of hand the idea that due process might require a heightened concern for fairness to the defendant when the state is seeking to impose death.[120] In balancing the various considerations, we think that Justice Scalia offered rather slim reasons in *Simmons* for excluding from consideration moral factors such as the irrevocability of the death penalty and the value of even a murderer's life.

We also wonder if Justice Scalia has not sometimes left the distinct impression that the death penalty is morally justified, and not merely within the people's power to enact. In *Callins v. Collins*,[121] for example, Justice Blackmun, dissenting from the denial of a certiorari petition, argued that the death penalty was always cruel and unusual punishment "as currently administered," and in the course of his opinion described in detail what an execution by lethal injection is like.[122] Justice Scalia responded with textual and historical arguments, but added that death by lethal injection would be an "enviable" fate compared to what many

118. 512 U.S. 154 (1994).

119. Justice Scalia argued that the jury probably relied on the heinousness of the crime rather than future dangerousness in imposing death. *Id.* at 181 (Scalia, J., dissenting). However, the jury had imposed death only twenty-five minutes after asking the judge whether parole was a possibility and receiving an ambiguous answer from the judge. *Id.* at 160.

120. *Id.* at 185 (Scalia, J., dissenting) (criticizing what he called the Court's "'death-is-different' jurisprudence").

121. 510 U.S. 1141 (1994).

122. *Id.* at 1159.

convicted murderers have done—citing "the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat."[123] If the people "merely conclude that justice requires such brutal deaths to be avenged by capital punishment," he said, the Court should not stop them.[124] Such appeals arguably go beyond defending the death penalty's constitutionality and rather seek to make an affirmative case for it—indeed, a case based on considerations of vengeance that are entirely at odds with the approach of official Roman Catholic teaching.[125]

IV. CONCLUSION

There are many areas to explore within the broad subject of the justices' religious beliefs: religion in the appointment process, the distinctive positions of justices from religious minorities (Catholics and Jews), a more exhaustive look at the effect of the justices' religious views on church-state rulings. In this paper, we have sought to offer a taste of the subject, and of its historical nature, by looking at "devout" justices from three periods in the Court's history in which religious identities were important. The relationship of religious ideals and judicial decisions has varied in each of those periods. In the late nineteenth century, a pervasive Protestant identity equated religious and constitutional ideals; this meant that widely shared religious views would generally affect decisions, sometimes but not often with explicit recognition of religious arguments. The New Deal's Justice Murphy also equated constitutional ideals with his distinctive version of Roman Catholic ideals, but he did not mention religion in his opinions, perhaps because conventions had by then turned against such references. On the current Court, the distinctive situation is that the most publicly "devout" justices, Scalia and Thomas, most strongly reject independent moral (and hence religious) reasoning in interpreting the law—although their methods of interpretation do allow for substantial reference to traditional religious views and produce results largely in harmony with them. Our overarching les-

123. *Id.* at 1143 (Scalia, J., concurring in denial of certiorari petition) (citing McCollum v. North Carolina, *cert. denied*, 512 U.S. 1254 (1994)).

124. *Id.*

125. One might defend Justice Scalia, on the other hand, by pointing out that even if a law is not within the specific prohibitions of the Constitution, it must pass a minimal due process or equal protection review for rationality, which requires at least some minimal defense of the law on its merits.

son is that this topic must be approached historically, with all the complexities of history: religion and law have interacted in different ways in the work of justices of different eras.