The Supreme Court's Catholic Majority: Doctrine, Discretion, and Judicial Decision-Making

René Reyes
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INTRODUCTION

Since the confirmation of Justice Samuel Alito in 2006, the Supreme Court has had a Roman Catholic majority for the first time in its history. With the appointment of Justice Sonia Sotomayor in 2009, Catholics now constitute two-thirds of the High Court's bench. While the emergence of this Catholic majority may be of uncertain significance, it has undoubtedly generated an abundance of interest and commentary. Some of this commentary has explored such diverse topics as the history of Catholic judges, the politics of judicial appointments, or the appropriateness of using religion as a criterion for nomination.

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1 Lynette Clemetson, Alito Could Be 5th Catholic on Current Supreme Court, N.Y. TIMES, Nov. 1, 2005, at A23; see also Sheldon Goldman, The Politics of Appointing Catholics to the Federal Courts, 4 U. ST. THOMAS L.J. 193, 193 (2006) (noting that "the Court has a majority consisting of Roman Catholic justices for the first time in American history").


4 See, e.g., Goldman, supra note 1 (arguing that while role of religion in appointment of Catholic justices has varied throughout American history, at present
But most of the scholarly analysis has focused on one issue in particular: the role of Catholic religious faith in judicial decision-making.\(^5\)

More specifically, the academic literature has tended to focus on the potential for conflict between a Catholic judge's religious beliefs and her legal duties.\(^6\) It is well known that Catholic doctrine is at variance with American law on a range of subjects—divorce, capital punishment, and abortion are but a few examples.\(^7\) What happens when a Catholic judge is called upon to act in the context of these subjects? Do religious faith and legal duty necessarily conflict when a family court judge is faced with a petition for divorce, or when an appellate judge is called upon to review a death sentence in a criminal case? What about when a Supreme Court Justice is presented with an opportunity to overrule *Roe v. Wade*?\(^8\) And if there is a conflict between religious faith and legal duty, how is the Catholic judge to resolve it?

A number of legal scholars and judges have addressed these questions recently.\(^9\) By and large, those who have written on the subject have emphasized the limited scope of what Catholic doctrine requires of judges and the ways in which judges can justify their apparent deviations from Catholic moral norms.\(^10\) One of the main conclusions that follows from this line of argument is that cases of true conflict between religious faith and legal duty are relatively rare. For one, the number of cases

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\(^6\) See, e.g., Kalscheur, *supra* note 5, at 212.

\(^7\) Id. at 234–35, 238.

\(^8\) 410 U.S. 113 (1973).

\(^9\) See *supra* note 5 and accompanying text.

that present active conflicts between Catholic doctrine and settled American law is said to be rather small.\footnote{See Hartnett, supra note 5, at 236; see also Kalscheur, supra note 5, at 214–15.} For another, the Catholic doctrine of cooperation is said to allow judges room to participate in the administration of unjust laws without necessarily implicating themselves in sin.\footnote{See Hartnett, supra note 5, at 230–36; see also Kalscheur, supra note 5, at 232–35.} Further, the role and obligation of judges in shaping public policy is said to be more limited under Catholic doctrine than the role of other public actors.\footnote{See Idleman, supra note 5, at 315–16; see also Kalscheur, supra note 5, at 221.} Finally, in those few instances where there is a genuine conflict between religious faith and legal duty, the Catholic judge can simply recuse herself from the case.\footnote{See Kalscheur, supra note 5, at 214; see also Hartnett, supra note 5, at 257–64; Pryor, supra note 5, at 361.}

This body of literature thus seeks to defend the right of Catholics to serve on the bench while also reassuring non-believers that there is nothing to fear from the Catholic judiciary.\footnote{See generally JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM (2003); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002). Fortunately, the country appears to have moved beyond such fear and prejudice—at least to the point where six Catholics can sit on the Supreme Court and where the church’s teaching on law, religion, and public life can be critically analyzed without fanning the flames of bigotry.} But in making this apologia, much of the existing literature fails to adequately explore the role that Catholic doctrine implies for itself in important areas of constitutional jurisprudence. For while it may be true that Catholic doctrine does not—or need not—compel a judge to deviate from established legal principals in settled areas of the law, what does Catholic doctrine say a judge should do when she is operating in unsettled legal territory? In such cases, the issue is not how a judge is to resolve a conflict between Catholic doctrine and settled law—for by definition, there is no settled law to conflict with. Rather, the issue is how a judge will use Catholic doctrine in settling the law in the first place.

1 Fear of and prejudice against Catholics has played a prominent and ugly role in certain chapters of American political history. See MARTHA C. NUSSEBAUM, LIBERTY OF CONSCIENCE 214–21, 273–82 (2008); see also Sanford Levinson, The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices, 39 DePaul L. Rev. 1047, 1056 (1990) [hereinafter Levinson, Catholics Becoming Justices] (“Even a cursory look at the historical record involving Catholic Justices certainly reveals the presence of overt anti-Catholicism.”). See generally JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM (2003); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002). Fortunately, the country appears to have moved beyond such fear and prejudice—at least to the point where six Catholics can sit on the Supreme Court and where the church’s teaching on law, religion, and public life can be critically analyzed without fanning the flames of bigotry.
This Article undertakes an analysis of Catholic doctrine in this context of unsettled law and judicial discretion. The analysis focuses on the cases and on the court in which there is the widest room for judicial interpretation—namely, on the constitutional cases that come before the Supreme Court. The aim is to examine whether and to what extent Catholic doctrine offers a theory of constitutional interpretation that purports to guide the Catholic Justice in the exercise of her judicial duties. The analysis aspires to be descriptive rather than normative: It engages with church teaching in an objective and critical manner, but neither endorses nor impugns the Church’s position. To be sure, this analysis necessarily partakes of discernment and interpretation—for there is no explicit church teaching on how the Constitution is to be understood and applied. But regardless of the challenges that the process of doctrinal interpretation may present, they are undoubtedly no more unmanageable or parlous than the challenges presented by constitutional interpretation itself.

The Article is organized as follows. Part I discusses the doctrinal writings of the Catholic Church as they relate to the moral obligations of public actors. As will be seen, these writings lend themselves to an interpretation that suggests a strong role for Catholic moral teaching in all aspects of public life. Part II examines the circumstances in which these writings may be applicable to the decision-making processes of the Supreme Court. Cases involving fundamental rights and liberties are given particular attention in this Section—for these are cases about which Catholic doctrine often has the most to say, and in which the potential for judicial lawmaking is often made most clear. This Section demonstrates that an activist theory of constitutional interpretation can find ample support in Catholic teaching. Part III considers the implications of the activist Catholic theory for judicial nominations, with the goal of emphasizing the potential relevance of religious doctrine in the confirmation process. The Article concludes with some observations about the potential limits of Catholic self-identification as a predictor of judicial behavior and the need for further empirical research to measure the actual impact of Catholic teaching on the judiciary.

16 See Kalscheur, supra note 5, at 229.
I. CATHOLIC TEACHING ON LAW, MORALITY, AND PUBLIC LIFE

Before commencing the analysis of Catholic teaching on the role of religion in constitutional interpretation, it should be acknowledged that the Church's position on this precise subject has not been explicitly or unambiguously articulated. As Gregory Kalscheur has argued, "[t]here is no official Church teaching that defines what the U.S. Constitution means. Indeed, such a question is beyond the competence of the Church's teaching office." Scott Idleman has echoed this view, noting that "there are few if any authoritative church documents that speak directly to, or clearly about, a judge's specific obligations." But this does not mean that there is a shortage of sources that speak to the question at hand. To the contrary: The Catholic tradition contains an abundance of writings that analyze the relationship between the civil law and the moral law and that address the obligations of public actors who must confront questions of law and morality.

We begin with a brief discussion of the writings of Thomas Aquinas. Aquinas's writings provide useful background for the instant analysis, both because of their extensive treatment of various categories of law and because of their lasting influence on Catholic doctrine. With respect to legal taxonomy, Aquinas organizes law into four kinds: eternal law, natural law, human law, and divine law. Eternal law is defined as the governance of all things according to "Divine Reason"—that is, as God's eternal ordering of the universe. Natural law is a set of

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17 Id.
18 Idleman, supra note 5, at 315.
19 See, e.g., O'Scannlain, supra note 5, at 158–59.
22 1 SUMMA THEOLOGICA, supra note 21, pt. I-II, Q. 91, art. 1, at 996.
principles of action that are derived from the eternal law through the use of human reason.\textsuperscript{23} It is these principles of natural law that provide guidelines for moral living:

Hence this is the first precept of law, that \textit{good is to be done and pursued, and evil is to be avoided}. All other precepts of the natural law are based upon this: so that whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided.\textsuperscript{24}

Human law is in turn derived from natural law and consists of the particular rules necessary for the ordering of civil society.\textsuperscript{25} Divine law—the revealed law of the Bible—addresses interior acts, which are untouched by human law, and serves to assist humans in achieving their ultimate end of eternal union with God.\textsuperscript{26}

This Article is primarily concerned with Aquinas's discussion of the relationship between natural law and human law and its implications for judicial decision-making. On the one hand, certain passages in Aquinas's writings could be read to support the claim that the role of religion and morality in judicial decision-making should be rather narrow.\textsuperscript{27} For example, Aquinas cites Augustine for the proposition that, with respect to "earthly laws, though men judge about them when they are making them, when once they are established and passed, the judges may judge no longer of them, but according to them."\textsuperscript{28} Aquinas also maintains that a judge does not necessarily commit sin in sentencing to death a man he knows to be innocent—"for it is not he that puts the innocent man to death, but they who stated him to be guilty."\textsuperscript{29} Taken in isolation, these passages

\textsuperscript{23} Id. at pt. I-II, Q. 94, art. 2, at 1009.
\textsuperscript{24} Id.
\textsuperscript{25} Id. at pt. I-II, Q. 91, art. 3, at 997.
\textsuperscript{26} Id. at pt. I-II, Q. 91, art. 4, at 998-99.
\textsuperscript{27} See O'Scannlain, supra note 5, at 159.
\textsuperscript{29} 2 \textit{Summa Theologica}, supra note 28, pt. II-II, Q. 64, art. 6, at 1470. In order to escape sin, the judge must first carefully examine any false witnesses in order to find a basis for acquitting the defendant and must also attempt to refer the case to a higher tribunal for judgment. Id. For further analysis of the role of the Catholic judge in capital cases, see generally John H. Garvey & Amy V. Coney, \textit{Catholic
arguably suggest that the Catholic judge is obliged neither to question the morality of legislation nor to refuse to apply it, even if the injustice of its effects is manifest.

But on the other hand, these passages appear in a context in which Aquinas repeatedly emphasizes that an unjust law is not to be credited with binding legal status. Indeed, Aquinas insists that “[h]uman law has the nature of law in so far as it partakes of right reason . . . [b]ut in so far as it deviates from reason, it is called an unjust law, and has the nature, not of law but of violence.” Elsewhere, he approvingly quotes Augustine’s dictum that “that which is not just seems to be no law at all” and holds that “every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.” Finally, with respect to judging in particular, Aquinas states that “if the written law contains anything contrary to the natural right, it is unjust and has no binding force. . . . [A]nd consequently judgment should not be delivered according to them.”

Thus, for Aquinas, the task of judging is not simply one of applying the law as it appears on the books. The judge must instead look to the character of the law at issue and evaluate its conformity with natural right and justice; if the law is found wanting in this regard, it is not to be applied. To be sure, there may be limits to a judge’s obligations to correct or prevent injustice. Nevertheless, the clear implication of Thomistic thought is that those who shape and apply the human law must be guided by the higher moral principles of the natural law. And as discussed below, this implication has been explicitly adopted and endorsed in subsequent authoritative Church teaching.
While most ecclesiastical pronouncements do not speak to the duties of judges specifically, a number of Church documents do address the relationship between the civil law and the moral law and the obligations of public officials generally.\textsuperscript{35} The 1987 Instruction \textit{Donum Vitae} provides an illustrative example.\textsuperscript{36} With respect to the moral law and the civil law, the Instruction states that "[t]he task of the civil law is to ensure the common good of people through the recognition of and the defence of fundamental rights and through the promotion of peace and of public morality."\textsuperscript{37} The text concedes that "[i]n no sphere of life can the civil law take the place of conscience or dictate norms concerning things which are outside its competence.\ldots However, the inalienable rights of the person must be recognized and respected by civil society and the political authority."\textsuperscript{38} The Instruction goes on to specify the content of some of these fundamental and inalienable rights:

a) every human being’s right to life and physical integrity from the moment of conception until [natural] death; b) the rights of

\begin{itemize}
\item in its written form or in the form of Tradition, has been entrusted to the living teaching office of the Church alone. Its authority in this matter is exercised in the name of Jesus Christ. This means that the task of interpretation has been entrusted to the bishops in communion with the successor of Peter, the Bishop of Rome [namely, the Pope]." \textit{Catechism of the Catholic Church} \textit{ ¶ 85} (2d ed. 1997) [hereinafter \textit{Catechism}] (quoting \textit{Paul VI, Apostolic Constitution Dei Verbum} \textit{ ¶ 10} (1965)). In addition to matters concerning divine revelation, "[t]he authority of the Magisterium extends also to the specific precepts of the natural law, because their observance, demanded by the Creator, is necessary for salvation." \textit{Id.} at \textit{¶ 2036}. None of the magisterial teachings reviewed in this article purport to be "infallible"—that is, they were neither issued by the Pope speaking \textit{ex cathedra} nor by the College of Bishops speaking "in agreement on one position as definitively to be held." \textit{See Paul VI, Apostolic Constitution Lumen Gentium} \textit{ ¶ 25} (1964), available at \url{http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html}. Nevertheless, as with all magisterial teachings on matters of faith and morals, the church obliges individual Catholics "to accept [these] teaching[s] and adhere to [them] with a religious assent." \textit{Id.} The term "religious assent" has been interpreted to mean that Catholics are obliged to make a sincere effort to reach intellectual agreement with these teachings and to convince themselves of their truth. \textit{See The Harper-Collins Encyclopedia of Catholicism} 806 (Richard P. McBrien ed., 1995); \textit{Richard M. Gula, Reason Informed by Faith} 155–61 (1989).
\textsuperscript{35} \textit{See} \textit{Catechism}, supra note 34, \textit{¶ 2238–43}.
\textsuperscript{37} \textit{Id.} at ch. III.
\textsuperscript{38} \textit{Id.}
the family and of marriage as an institution and, in this area, the child’s right to be conceived, brought into the world and brought up by his parents.39

Donum Vitae thus seeks to authoritatively identify both the purpose and proper content of the civil law and to do so in a manner that challenges legal and political standards that do not conform to the Church’s understanding of the moral order. The Instruction also seeks to clarify the duties of public officials in promoting conformity between the civil law and the moral law:

The political authority is bound to guarantee to the institution of the family, upon which society is based, the juridical protection to which it has a right. . . . It is part of the duty of the public authority to ensure that the civil law is regulated according to the fundamental norms of the moral law in matters concerning human rights, human life and the institution of the family. Politicians must commit themselves, through their interventions upon public opinion, to securing in society the widest possible consensus on such essential points and to consolidating this consensus wherever it risks being weakened or is in danger of collapse. . . .

. . . All men of good will must commit themselves, particularly within their professional field and in the exercise of their civil rights, to ensuring the reform of morally unacceptable civil laws and the correction of illicit practices.40

Notably, this language is not phrased in aspirational or hortatory terms; it does not merely state what public officials should ideally do to shape the civil law. Rather, the text speaks with the voice of obligation: “[t]he political authority is bound to guarantee,” “politicians must commit themselves,” and so forth.41 Through this emphatic language—complemented by emphatic typeface—the Church makes clear that public officials are obliged to follow the dictates of moral teaching when exercising their public duties—not simply when informing their private consciences.

The Encyclical Evangelium Vitae further emphasizes the primacy of the moral law over the civil law. Indeed, the moral law is said to be “the obligatory point of reference for civil law

39 Id.
40 Id.
41 Id. (emphasis added in first quotation and omitted in part in second quotation).
The civil law must, therefore, be brought into conformity with the moral law—for the "real purpose of civil law is to guarantee an ordered social coexistence in true justice, so that all may 'lead a quiet and peaceable life, godly and respectful in every way.'" Invoking previous papal pronouncements and the teachings of Thomas Aquinas, the Encyclical reminds readers that "laws and decrees enacted in contravention of the moral order, and hence of the divine will, can have no binding force in conscience...; indeed, the passing of such laws undermines the very nature of authority and results in shameful abuse." Thus, laws such as those legalizing abortion or euthanasia are not simply ill-advised or unjust; they are corruptions of law and have no morally biding force.

Evangelium Vitae insists that the fact that a society is democratic and pluralistic does not relieve it of its obligations to follow the moral law. "Democracy cannot be idolized to the point of making it a substitute for morality or a panacea for immorality." Nor can respect for the consciences of others justify support for or acceptance of immoral law. To the contrary, the Encyclical strongly condemns the view that:

[I]n the exercise of public and professional duties, respect for other people's freedom of choice requires that each one should set aside his or her own convictions in order to satisfy every demand of the citizens which is recognized and guaranteed by law; [and that] in carrying out one's duties the only moral criterion should be what is laid down by the law itself.

Public officials are thus obliged not to rigidly separate the realm of private conscience from public conduct. Rather, they "are called upon under grave obligation of conscience not to cooperate formally in practices which, even if permitted by civil legislation, are contrary to God's law." Indeed, from the moral standpoint, it is never licit to cooperate formally in evil...

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42 Evangelium Vitae, supra note 20, ¶ 70.
43 Id. at § 71 (quoting 1 Timothy 2:2 (Revised Standard)).
44 Id. at § 72 (alteration in original) (quoting John XXIII, Encyclical Letter Pacem in Terris ¶ 51 (1963)).
45 Id.
46 See id. at § 70.
47 Id.
48 See id.
49 Id. at § 69.
50 Id. at § 74.
[And] cooperation can never be justified either by invoking respect for the freedom of others or by appealing to the fact that civil law permits it or requires it."

Much attention has been paid to the question of what constitutes "formal cooperation in evil." The Encyclical itself lists political advocacy or voting in favor of a morally invalid law as examples of such cooperation. Legal scholars have considered other possible examples and have reached varying conclusions. John Garvey and Amy Coney Barrett have argued that a judge's decision to sentence a defendant to death constitutes formal cooperation, but his participation in the guilt phase of a capital trial or his refusal to disturb a death sentence on appeal might not. Edward Hartnett has suggested that even imposition of a death sentence may not constitute formal cooperation, provided that the judge does not actually intend that the sentence be carried out. On the subject of judicial bypass hearings in abortion cases, Professor Kalscheur has concluded that some decisions to authorize an abortion may constitute formal cooperation while others may not. But for purposes of the present analysis, it is not necessary to enter into this discussion about whether certain activities or decisions constitute cooperation. For Evangelium Vitae invokes the doctrine of cooperation only to define what Catholics engaged in public life cannot do—namely, they cannot formally cooperate with evil. The concern of this Article, however, is with what Catholics engaged in public life should do. And on this point, the Encyclical is clear: Catholics—and indeed "all people of good

51 Id.
52 See id. at § 73.
53 Id.
54 See Garvey & Coney, supra note 29, at 305-06.
55 See Hartnett, supra note 5, at 244-45.
56 Specifically, Professor Kalscheur argues that a bypass decision issued on the grounds that an abortion is in the best interest of the minor "almost certainly" amounts to formal cooperation. Kalscheur, supra note 5, at 247. A decision issued on the grounds that the minor is sufficiently mature to make the decision on her own, however, may only amount to "material" cooperation: "[t]he judge might intend only to apply the law faithfully; he or she does not necessarily issue the order with the intent that the minor obtain the abortion." Id.; see also Hartnett, supra note 5, at 248-51.
57 EVANGELIUM VITAE, supra note 20, ¶ 74.
will—should affirmatively seek to bring the civil law into conformity with the moral law when fundamental human rights are at issue.

The importance of this moral duty has been reiterated by more recent pronouncements of the Church. In a 2002 Doctrinal Note, the Congregation for the Doctrine of the Faith counsels Catholics “that those who are directly involved in lawmaking bodies have a grave and clear obligation to oppose any law that attacks human life. For them, as for every Catholic, it is impossible to promote such laws or to vote for them.” Moving beyond the context of laws attacking human life, the Note states more broadly “that a well-formed Christian conscience does not permit one to vote for a political program or an individual law which contradicts the fundamental contents of faith and morals.” The Note explicitly connects a Catholic’s moral obligations to the exercise of her official public functions:

Nor can Catholics in public life:

appeal to the principle of pluralism or to the autonomy of lay involvement in political life to support policies affecting the common good which compromise or undermine fundamental ethical requirements. This is not a question of “confessional values” per se, because such ethical precepts are rooted in human nature itself and belong to the natural moral law.

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58 Id. The salutation of the encyclical is addressed “To the Bishops Priests and Deacons Men and Women religious lay Faithful and all People of Good Will . . . .” EVANGELIUM VITAE, supra note 20.


60 Id.

61 Id. at ¶ 6 (internal quotation marks omitted).

62 Id. at ¶ 5.
The United States Conference of Catholic Bishops has also weighed in on the obligations of Catholics in public life, albeit with less authority and in less detail than the Pope or the Congregation for the Doctrine of the Faith. Exercising their duties "as teachers of the Catholic faith and of the moral law," the Conference reminded voters prior to the 2004 elections that "[i]n the United States of America, abortion on demand has been made a constitutional right by a decision of the Supreme Court." The bishops further reminded their audience that "[t]o make such intrinsically evil actions legal is itself wrong." Consequently, "[t]hose who formulate law . . . have an obligation in conscience to work toward correcting morally defective laws, lest they be guilty of cooperating in evil and in sinning against the common good." It is the duty of all Catholics "to act in support of these principles and policies in public life. It is the particular vocation of the laity to transform the world."

Thus, the Catholic Church has consistently taught that the validity of the civil law is to be measured with reference to the moral law. The Church has also repeatedly declared it to be an

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64 Id.
65 Id.
66 Id.
67 Id.
68 This does not mean that every moral wrong must be made into a legal wrong—for Catholic theologians and scholars have long argued that the aims of the civil law are generally more limited in scope than the aims of the moral law. John Courtney Murray has explained the distinction as follows: "The moral law governs the entire order of human conduct, personal and social; it extends even to motivations and interior acts. [Civil] Law, on the other hand, looks only to the public order of human society; it touches only external acts, and regards only values that are formally social." John Courtney Murray, We Hold These Truths: Catholic Reflections on the American Proposition 166 (1960). Professor Kalscheur has made a similar distinction, noting that to "distinguish public morality (which is a proper concern of the state) from private morality (whose supervision is beyond the limited power of the state) is to recognize that not every sin should be a crime; the state's limited subsidiary purpose is not to 'make' people wholly virtuous through legal coercion." Gregory Kalscheur, Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom, 16 S. Cal. Interdisc. L.J. 1, 30 (2006); see also Paul VI, Declaration on Religious Freedom Dignitatis Humanae ¶ 7 (1965) (hereinafter Dignitatis Humanae) (setting forth "the right of the person and of communities to social and civil freedom in matters religious," and holding that "the freedom of man is to be respected as far as possible and is not to be curtailed except when and insofar as
obligation of all Catholics to use their political power—whether as voters or as public officials—to bring the civil law into conformity with the moral law in matters touching upon fundamental human rights. The Section below considers the extent to which these teachings apply to the exercise of judicial power in general and to the exercise of the constitutional decision-making power of the Supreme Court in particular.

II. CATHOLIC MORAL TEACHING AND JUDICIAL DECISION-MAKING

As noted previously, the writings surveyed above rarely mention courts or judges specifically. Instead, they direct their teaching more broadly: toward the "public authority," "political leaders," "those ... involved in lawmaking bodies," or "[t] hose who formulate law." This has led some commentators to conclude that "most of the authoritative church statements that address civic duties in regard to law or public policy appear largely focused on legislators, other elected politicians, and voters." More to the point, these commentators have suggested that such statements may not be directed at judges at all. As


Indeed, Pope Benedict XVI has recently reiterated that the protection of fundamental rights and values—including "respect for human life, its [defense] from conception to natural death, the family built upon marriage between a man and a woman, the freedom to educate one's children and the promotion of the common good in all its forms"—is "not negotiable." BENEDICT XVI, POST-SYNODAL AP OSTOLIC EXHORTATION SACRAMENTUM CARITATIS ¶ 83 2007), available at http://www.vatican.va/holy_father/benedict_xvi/apost_exhortations/documents/hf_ben-xvi_exh_20070222_sacramentum-caritatis_en.html. But when fundamental rights and values are not at stake, public actors must exercise prudence to determine whether a particular moral evil should be legally prohibited. The prudential inquiry focuses not only on the nature of the moral evil itself, but also on the likely effectiveness and potential consequences of a proposed ban. See MURRAY, supra note 68, at 166–67. Prudential considerations may dictate that certain practices be tolerated under the law even if they are condemned under Catholic morality; the use of contraceptives by married couples is one commonly cited example. See Kalscheur, supra note 68, at 27; John M. Finnis, Law, Morality, and "Sexual Orientation," 69 NOTRE DAME L. REV. 1049, 1076 (1994).

70 See text accompanying note 35.
71 DONUM VITA E, supra note 36.
72 EVANGELIUM VITAE, supra note 20, ¶ 90.
73 PARTICIPATION OF CATHOLICS IN POLITICAL LIFE, supra note 59.
74 Catholics in Political Life, supra note 63.
75 Idleman, supra note 5, at 316.
Professor Idleman has argued, "judges really do not 'vote for,' 'promote,' or have the ability to 'repeal' laws, nor are they ordinarily considered 'law-making bodies.'"\textsuperscript{76} Professor Kalscheur has also noted that "the different roles held by legislators and judges mean that legislators and judges are usually making very different sorts of decisions."\textsuperscript{77} Unlike the role of a legislator:

The role of the judge in our constitutional system is not primarily or directly to make public policy. Instead, the primary role of the judge is to use the tools of legal analysis to interpret the Constitution and laws, and to apply those laws as they exist in the context of deciding individual cases.\textsuperscript{78}

The understanding of the judicial role expressed by Idleman and Kalscheur is largely consistent with the view endorsed by Chief Justice John Roberts in his confirmation hearings: "Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them."\textsuperscript{79} Yet in highlighting the distinction between the role of judges and that of other public officials, the Chief Justice may be overstating the differences and under examining the similarities. The claim that judges do not make law may hold true in some circumstances, but it is hardly accurate as an overall description of judicial functioning. Indeed, the idea that judges only apply, rather than create, the law "is a nice slogan, but any first year law student knows that judges make law constantly."\textsuperscript{80} As for the comparison between a Supreme Court Justice and an umpire:

No serious person thinks that the rules that judges in our system apply, particularly appellate judges and most particularly the Justices of the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires. The rules are created by the judges themselves. They are created

\textsuperscript{76} Id.
\textsuperscript{77} Kalscheur, supra note 5, at 221.
\textsuperscript{78} Id. at 226–27 (emphasis omitted).
out of materials that include constitutional and statutory language and previous cases, but these conventional materials of judicial decision making quickly run out when an interesting case arises; in those cases the conventional materials may influence, but they do not determine, the outcome.  

To appreciate the lawmaking discretion of federal judges in general and Supreme Court Justices in particular, one need only consider a sampling of what Judge Posner refers to as "interesting cases" or Ronald Dworkin—more famously—calls "hard cases"—that is, "the ones in which the conventional materials of judicial decision making just won't do the trick." These can include cases in which Catholic doctrine does not have obvious applicability, such as those involving the reasonableness of a particular search and seizure under the Fourth Amendment or the permissibility of an election recount under the Equal Protection Clause. But these can also include cases that fall within the heartland of Catholic moral teaching. Examples include cases involving abortion, gay rights, and capital punishment. In all of these categories of cases, the Supreme Court has been in a position to make law at the highest level by granting or denying recognition of constitutional freedoms.

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It is impossible for a Justice actually to satisfy the demands of the analogy because there is no near-determinate rulebook to consult. That is, Justices cannot "just" decide constitutional cases according to "the rules" because they cannot agree on what the rules are. And they cannot agree on what the rules are because they cannot agree on the social vision that the rules are fashioned to realize. It is precisely because there is no remotely determinate rulebook that Justices can approach controversial cases with strong predispositions and can garner the power and prestige associated with a seat on the Court. It is for good reason that informed people care deeply about who in particular serves on the Supreme Court of the United States. Put differently, if the umpire analogy were persuasive, being a Supreme Court Justice would be nothing to write home about.


82 Posner, supra note 81, at 1053.


84 Posner, supra note 81, at 1053.

85 See Chemerinsky, supra note 80, at 1070.

86 See infra notes 87–90 and accompanying text.
And in none of these cases has the Court merely applied pre-existing rules to reach its decisions. In its abortion opinions, the Court has invoked the un-enumerated “right of privacy” and the un-delimited right of “liberty” in support of its decisions to recognize a woman’s right to terminate her pregnancy. The Court has appealed to similarly open-textured concepts, along with “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,” in recognizing a right to engage in consensual homosexual conduct. When evaluating challenges to the death penalty under the Eighth Amendment, the Court has referred to “the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual.” In all of these cases, the Supreme Court has clearly functioned as a lawmaking body that has set national policy on questions of fundamental rights—and it has done so without being guided by text and precedent alone.

90 If there were any doubt about the Court’s lawmaking role in these cases, it should be dispelled by reference to the dissenting opinions. See, e.g., id. at 608 (Scalia, J., dissenting) (“The Court thus proclaims itself sole arbiter of our Nation’s moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.”); Lawrence, 539 U.S. at 602–603 (Scalia, J., dissenting) (“Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.... What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new ‘constitutional right’ by a Court that is impatient of democratic change.”); Casey, 505 U.S. at 996 (Scalia, J., dissenting) (“The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges—leading a Volk who will be ‘tested by following,’ and whose very ‘belief in themselves’ is mystically bound up in their ‘understanding’ of a Court that ‘speak[s] before all others for their constitutional ideals’—with the somewhat more modest role envisioned for these lawyers by the Founders.”) (alteration in original).

The Supreme Court does not, of course, exercise its lawmaking role only in ideologically liberal directions. For example, in a series of cases the Court’s more
Stated simply, life-tenured federal judges in the American constitutional system do perform a legislative role in a very important class of cases. And they do not necessarily step into this role only as a last resort after more judicially restrained avenues have been exhausted. In Posner's view, many judges actually reverse the sequence: "They start by making the 'legislative' judgment as to what decision would have good consequences—would be, in other words, good policy—and then see whether that judgment is blocked by the orthodox materials." To be sure, even Supreme Court Justices engaged in the process of deciding constitutional cases face constraints on their lawmaking discretion; these include constitutional text, precedent, and political limits on the enforceability of their decisions. But it remains the case that "appellate judges when deciding cases in the open area are political actors—legislators operating under certain constraints that do not bind the official legislators, but also, depending on tenure and other factors, enjoying certain leeways that official legislators don't." Supreme Court Justices enjoy the greatest measure of leeway: They "are like legislators in a system in which there is no judicial power to invalidate statutes and [in which] legislators once elected cannot be removed."

Thus, regardless of whether the Church pronouncements discussed in the previous Section directly target judges, it is clear that the teachings logically include them. It therefore follows that Catholic judges in general and Catholic Supreme Court Justices in particular "have a grave and clear obligation to oppose conservative Justices have invoked the concept of "sovereign immunity" to significantly limit the ability of citizens to sue their own states without the state's consent. See, e.g., Alden v. Maine, 527 U.S. 706, 712–13 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996). As described by one commentator, these are decisions that "cannot be justified based on the text of the Constitution or the intent of the Framers. There is no provision concerning whether states can be sued in their own state courts, and it is something that was never discussed by the Framers." Chemerinsky, supra note 80, at 1079. For further analysis of this line of cases, see generally Daniel J. Meltzer, State Sovereign Immunity: Five Authors in Search of a Theory, 75 NOTRE DAME L. REV. 1011 (2000); Daniel J. Meltzer, The Seminole Decision and State Sovereign Immunity, 1996 SUP. CT. REV. 1.

91 Posner, supra note 81, at 1055.
92 See id. at 1053–54.
93 Id. at 1054.
94 Id.
any law that attacks human life,"95 "to work toward correcting morally defective law[,]"96 and "to ensure that the civil law is regulated according to the fundamental norms of the moral law."97 As has just been seen, the nature of constitutional adjudication is such that Supreme Court Justices have ample opportunities to carry out these obligations. For the Supreme Court often gets the last word on constitutional questions relating to the beginning and end of life, definitions of marriage and family, and other fundamental rights that are of major concern to the Catholic Church.98 In many of these cases, the state of the law is sufficiently unsettled as to allow for the exercise of judicial discretion without running afool of unambiguous text or established precedent. The exercise of this discretion can be guided by a number of interpretive goals, such as respecting originalism for Justice Scalia or fostering "active liberty" for Justice Breyer.99 Catholic teaching suggests its own interpretive goal to guide the exercise of judicial discretion: namely, the goal of promoting conformity between the civil law and the moral law.100

This appears to be the approach to constitutional interpretation recommended by the current head of the Vatican’s Congregation for the Doctrine of the Faith, William Levada. In his former capacity as Archbishop of San Francisco, Levada issued a statement in which he argued that “[t]he Supreme Court’s judgment about the application of the Constitution should...be guided by the principles of the moral law.”101

95 PARTICIPATION OF CATHOLICS IN POLITICAL LIFE, supra note 59 (internal quotation marks omitted).
96 Catholics in Political Life, supra note 63.
97 DONUM VITAE, supra note 36 (emphasis omitted).
98 See supra notes 87–90 and accompanying text.
100 See John M. Breen, Neutrality in Liberal Legal Theory and Catholic Social Thought, 32 HARV. J.L. & PUB. POLY 513, 591–93 (2009) (suggesting that under Catholic social thought, “a conscientious judge could invalidate an inherently unjust law if he or she found that it violated ‘the objective moral order’ by inflicting a gross evil,” and noting that “[t]he open-textured nature of many constitutional provisions ... invites judicial reasoning that is more overtly normative in character, especially where other modes of argumentation fail”) (quoting DIGNITATIS HUMANÆ, supra note 68).
101 Archbishop William J. Levada, Reflections on Catholics in Political Life and the Reception of Holy Communion, UNITED STATES CONFERENCE OF CATHOLIC
Professor Kalscheur suggests that "[i]t is not clear what Cardinal Levada means here," and cautions that "we need not conclude that he is arguing that the Supreme Court has the power to make decisions that comply with the principles of the moral law even when there is no basis in proper constitutional analysis for so concluding." But Professor Kalscheur's interpretation of the Cardinal's statement is debatable on at least two grounds. First, we have seen that the kind of morality-based jurisprudence that Cardinal Levada appears to be endorsing is well supported by the authoritative teachings of the Church. Second, we have also seen that the Supreme Court already has the power to make decisions that comply with the principles of various ideological viewpoints, and that it frequently exercises this power in constitutional cases. The real question thus becomes whether the Church's vision of morality is one of the ideological viewpoints that can properly guide the Court in the exercise of its discretionary powers.

The Catholic Church itself appears to have answered this question in the affirmative. Nor has the Church been alone in making the case for the inclusion of religiously-based moral reasoning in public decision-making, at least under certain circumstances. Michael Perry, for one, has argued that "citizens and even legislators and other public officials [may present, in public political debate,] religious arguments about the morality of ...

BISHOPS (June 13, 2004), http://www.catechism.org/bishops/reflections.shtml. Pope Benedict XVI is also reported to have included Catholic judges among those who are bound by "the requirements of the natural moral law and the Church's consistent teaching on the dignity of human life" during a 2009 meeting with former House Speaker Nancy Pelosi, when he spoke of the obligation of "all Catholics, and especially legislators, jurists and those responsible for the common good of society, to work in cooperation with all men and women of good will in creating a just system of laws capable of protecting human life at all stages of its development." Statement of Pope Benedict XVI, HOLY SEE PRESS OFFICE (Feb. 18, 2009), http://press.catholic.va/news_services/bulletin/news/23430.php?index=23430&po_date=18.02.2009&lang=en. The statement was issued by the Vatican's press office, and does not constitute authoritative teaching of the Church. Nevertheless, Douglas Kmiec was prompted to call Benedict's reported statement "quite radical—perhaps unintentionally so" and to argue that it represented a "sharp ... break" with past church practice by failing to distinguish between the duties of judges and other public officials. Douglas W. Kmiec, Catholic Judges and Abortion: Did the Pope Set New Rules?, TIME.COM (Feb. 20, 2009), http://www.time.com/time/nation/article/0,8599,1880977,00.html.

102 Kalscheur, supra note 5, at 229 n.48.
103 See supra notes 36–69 and accompanying text.
104 See supra notes 80–90 and accompanying text.
human conduct." He has also made a stronger claim: that
government may actively disfavor or punish certain conduct on
the basis of a religiously-grounded belief that such conduct is
immoral. Religion can thus serve as a basis both for the
persuasive power of argument and for the coercive power of law.
Notably, Perry has defended the legal and moral legitimacy of
religiously-inspired laws even in the absence of an independent
secular basis for the law in question.

Perry's defense of religiously-grounded lawmaking invokes a
number of related arguments. On the practical side, Perry
argues that a requirement that laws have an independent
secular basis would either be enforced so loosely as to render it
meaningless—for some plausible secular ground could always be
thought up for purposes of a court challenge—or so strictly as to
demand that judges act as "supreme arbiters of controversial
moral beliefs." In addition, "[b]ecause of the role that
religiously based moral arguments inevitably play in the political
process . . . it is important that such arguments, no less than
secular moral arguments, be presented in, so that they can be
tested in, public political debate." On the moral side, Perry
expresses concerns about "maintaining impartiality between
religious grounds and secular grounds for moral belief" and of
respecting "the equal citizenship of religious believers." In
Perry's words:

[T]o forbid legislators to disfavor conduct on the basis of a moral
belief that has a religious ground unless the belief also has a
plausible, independent secular ground . . . would be to import

105 MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL
PERSPECTIVES 44 (1997) [hereinafter PERRY, RELIGION IN POLITICS].
106 MICHAEL J. PERRY, UNDER GOD?: RELIGIOUS FAITH AND LIBERAL
DEMOCRACY 24 (2003) [hereinafter PERRY, UNDER GOD].
107 Id. at 26–28. Perry acknowledges that this position represents a departure
from his earlier writings. Id. at 152 n.28 (citing PERRY, RELIGION IN POLITICS, supra
note 105, at 30–38). In a more recent book, Perry clarifies this position further, and
argues that government may legislate on the basis of religious premises in the
absence of an independent secular justification only so long as government does not
privilege membership in, or the practices and beliefs of, any particular church. Thus,
for example, government may base laws and policies on "the premise that every
human being has a God-given dignity and inviolability," but not on "the premise that
Jesus is Lord." MICHAEL J. PERRY, CONSTITUTIONAL RIGHTS, MORAL
108 PERRY, UNDER GOD, supra note 106, at 28.
109 PERRY, RELIGION IN POLITICS, supra note 106, at 45.
110 PERRY, UNDER GOD, supra note 106, at 28.
into the Constitution a controversial conception of the proper relation between morality and religion, according to which morality—at least, morality “in the public square”—can and should stand independent of religion. . . . [It] would also unfairly deprivilege religious faith, relative to secular belief, as a ground of moral judgment—and unfairly deprivilege too, therefore, those moral judgments that . . . cannot stand independent of religious faith.111

Put differently, Perry concludes that to limit the role of religion in public decision-making, or to require that all laws be supported by plausible secular bases, is to “discriminate” against religion and religious believers.

To a greater extent than the writings of the Catholic Church, Perry applies these general arguments about religion in public life to the specific context of judicial decision-making. In an appendix to one of his principal works on religion and government, Perry poses the question directly: Are judges a special case? 112 In other words, are judges unique among public officials in being unable to rely on religious values and arguments in exercising their public duties? Perry answers this question in the negative. 113 He notes that “judges are sometimes policymakers” who must decide “the direction in which the law should move.” 114 In making such decisions, there is no reason why judges should not be as free as other public officials to explicitly invoke religious premises, at least where a plausible secular premise also supports the decision. 115

Stephen Carter shares Perry’s concern for the argument for equal treatment of religion in constitutional decision-making. 116 As understood by Professor Carter, an attempt to exclude religious reasoning from the judicial process “carries an implicit trivialization of religious faith, and a denigration of religion as against other ways of knowing.” 117 Objections to religious

111 Id. at 30.
112 PERRY, RELIGION IN POLITICS, supra note 105, at 102–04.
113 Id. at 103.
114 Id. at 102.
115 Id. at 103.
117 Id. at 933.
reasoning are particularly problematic to Carter given the widespread acceptance of the fact that judges do engage in moral reasoning in cases involving fundamental rights:

It is a bit late in the day to argue that when judges decide cases involving such issues as reproductive freedom or reapportionment, they are searching for rights that are already there, just waiting to be discovered. On the contrary, whether the judge claims to be enforcing the community’s moral norms or updating the moral vision of the Founders, it is quite evident that the judge cannot make such decisions without relying, at least in part, on her own moral knowledge.

... The question, then, is whether one can make sense of a rule prohibiting judges from relying on their moral knowledge if it happens to have an explicitly religious basis.\(^{118}\)

The claim that religious reasoning should be a prohibited form of moral reasoning strikes Carter as resting on two dubious assumptions: that an individual can cast aside her religious convictions when deciding moral questions\(^{119}\) and “that religion is a distorting force in the public dialogue on which liberal theory depends.”\(^{120}\) Carter rejects these assumptions, and concludes that religious reasoning should be acceptable in any case in which other forms of moral reasoning are also acceptable.\(^{121}\)

Unlike Perry, however, Carter does not believe that religious argument should have a role in formal judicial opinions: Judges “might make decisions on the basis of moral conviction, but they must justify them in terms of the received norms of judging.”\(^{122}\)

There are, of course, many compelling arguments that can be—and have been—raised against the use of religiously-based moral reasoning in judicial decision-making.\(^{123}\) However, it is not

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\(^{118}\) Id. at 935.

\(^{119}\) Id. at 940.

\(^{120}\) Id. at 938.

\(^{121}\) Id. at 943.

\(^{122}\) Id.

\(^{123}\) Perhaps most prominently, John Rawls has argued that, when deciding questions of constitutional essentials and basic justice, all participants in the political process should justify their positions in terms of “public reason”—principles which all participants in the political process can reasonably be expected to endorse—rather than private “comprehensive doctrines”—visions of the whole truth of life upon which individuals cannot be expected to reach agreement, such as religious doctrines. See John Rawls, The Idea of Public Reason Revisited, 64 U. CHI. L. REV. 765, 765-66 (1997); see also JOHN RAWLS, POLITICAL LIBERALISM (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]. The ideal of reliance on public reasons “applies also in a special way to the judiciary and above all to a supreme court in a
the point of this Article to assess the merits of these arguments or to take a position in the larger debate of which they are a part. Rather, the point is to determine whether the Catholic Church itself has taken a position on the role of religious morality in the process of constitutional interpretation.

In order to make this determination, the first Section of this Article reviewed the doctrinal writings of the Church; we saw that Church teaching emphasizes the obligations of all Catholics to use their political power to bring the civil law into conformity with the moral law whenever fundamental human rights are at stake. The present Section has considered the applicability of this teaching to the judiciary. We have seen that in the American system, federal judges in general and Supreme Court Justices in particular frequently function as lawmakers and exercise significant interpretive discretion in cases involving fundamental rights and liberties. The logical implication is that the Church's teachings on the role of religious morality in public life include Supreme Court Justices and other federal judges. Judges and justices are therefore obliged to use their judicial power to conform the civil law to the moral law, at least in those cases where fundamental rights are at issue and the exercise of judicial discretion necessarily comes into play. We constitutional democracy with judicial review." RAWLS, POLITICAL LIBERALISM, supra, at 216. For additional discussion, see generally 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 497–524 (2008); KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995); Mark C. Modak-Truran, Reenchanting the Law: The Religious Dimension of Judicial Decision Making, 53 CATH. U. L. REV. 709 (2004).

124 See supra Part I.
125 See supra notes 36–69 and accompanying text.
126 See supra Part II.
127 See supra notes 79–86 and accompanying text.
128 The questions of which rights are truly “fundamental” and how the law should best protect them are complex. For present purposes, we can note that the rights “to life and physical integrity from the moment of conception until death,” along with “the rights of the family and of marriage as an institution and... the child’s right to be conceived, brought into the world and brought up by his parents” have clearly been recognized as fundamental. See DONUM VITAE, supra note 36. Other rights have also been emphasized in church documents, including a number of rights relating to social and economic justice—though their “fundamental” status may be less clear. See Breen, supra note 100, at 529–36 (reviewing and analyzing various rights discussed in magisterial teaching). Even with respect to the protection of the most clearly established fundamental rights, the obligations of a judge may be quite limited under the theory of interpretation set forth in this article—for the status of those rights may be well-settled, and the issues left open to judicial
have also seen that this interpretation of Catholic teaching does not represent such an extreme vision of the role of religion in constitutional decision-making as to render it implausible. Quite to the contrary, this understanding of the Catholic theory finds support in the writings of several legal and political scholars. In the Part below, we will consider what implications this interpretation of Catholic teaching may have for the judicial nomination and confirmation process.

III. CATHOLIC MORAL TEACHING AND JUDICIAL NOMINATIONS

Thus far, the analysis in this Article has focused on the theoretical import of Catholic moral teaching; it has not addressed the practical impact of that teaching. But the foregoing discussion does suggest several practical questions that are worth considering. For example, how have Catholic judges themselves understood and responded to Catholic teaching on law, religion, and public life? Are a nominee's views on these subjects relevant to the nomination and confirmation process? If so, how closely should her views be scrutinized? While a comprehensive analysis of these questions is beyond the scope of this Article, some preliminary observations are offered below.

Whereas the Church's teaching implies an active role for religious reasoning in constitutional adjudication, many recent Catholic nominees to the federal bench have been apt to endorse a much narrower role for religion in judicial decision-making.

 discretion may be narrow. For example, a woman's right to terminate a pregnancy before viability is settled law, and even a judge who believes abortion to be a moral evil could conclude that his discretion is constrained by text or by principles of stare decisis. See Kalscheur, supra note 5, at 241 ("A judge could . . . sincerely (even if erroneously) conclude[ ] that the Constitution . . . does provide protection for the right to make the abortion decision. Alternatively, a judge could . . . sincerely (even if erroneously) conclude[ ] that respect for the rule of law prevents him from voting to overrule the precedent established in Roe.").

129 See supra notes 105–22 and accompanying text.

130 As is the case with many other subjects on which the Church has spoken, there is sure to be considerable diversity of opinion among the Catholic faithful on the subject of law, religion, and public life. This Article therefore does not assume that Catholic judges—or any other Catholics for that matter—necessarily agree with or follow the Church's teaching on these issues. For further discussion of this point and of the need for empirical research on the influence of Church teaching on judicial behavior, see infra Conclusion.

131 See Roberts Hearing, supra note 79; Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 566
Consider the testimony of John Roberts and Samuel Alito during their respective confirmation hearings. Chief Justice Roberts summed up his understanding of the role of religion in judicial decision-making as follows: “[M]y faith and my religious beliefs do not play a role in judging. When it comes to judging, I look to the law books and always have. I don’t look to the Bible or any other religious source.” Justice Alito articulated a similar position: “[M]y obligation as a judge is to interpret and apply the Constitution and the laws of the United States, and not my personal religious beliefs or any personal moral beliefs that I have, and there is nothing about my religious beliefs that interferes with my doing that.”

Other Catholic judges have echoed these views. Judge Diarmuid O'Scannlain has suggested that the Catholic tradition requires a judge to separate “his knowledge of the law from his knowledge of morality.” In a like vein, Judge William Pryor has argued that “the exercise of [his] authority as a federal judge is governed by the law alone.” This is not to say that religion cannot play any role in judicial decision-making; Pryor identifies several ways in which religious faith properly informs the exercise of his public duties: “[I]n [his] understanding of [his] oath of office, in [his] moral duties to obey lawful authority, and in [his] responsibility to work both diligently and honestly.” None of these ways, however, “involve[] using religious doctrine

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See Roberts Hearing, supra note 79; Alito Hearing, supra note 131.

Roberts Hearing, supra note 79, at 227; see also Kalscheur, supra note 5, at 219.

Alito Hearing, supra note 131, at 566–67; see also Kalscheur, supra note 5, at 219. Unlike Roberts and Alito, Justice Sotomayor did not directly address the role of religion in judicial decision-making during her confirmation hearings. Nor was she asked to do so: While members of the Senate Judiciary Committee did ask Sotomayor about extra-legal influences on her judicial decisions, they did not specifically identify religion as one these potential influences. Instead, Senators questioned Sotomayor about the influence of race, ethnicity, and gender in judicial decision-making, focusing on a speech she gave in 2001 in which she suggested that a “wise Latina” might reach better judicial decisions than a white male. Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 66 (2009) (Statement of Chairman Leahy).

O'Scannlain, supra note 5, at 160.

Pryor, supra note 5, at 355.

Id. at 349.
to decide a case in conflict with the law." Indeed, even in hard cases, "[t]he duty to administer justice requires the exercise of judgment, but not the employment of religious doctrine as a source of authority to supplant or evade the law when judging becomes difficult or its outcome undesirable." In sum, Pryor argues, "[t]he Church makes no claim that judges must be moral philosophers who are empowered to change the law, as they see fit, in resolving cases."

These statements indicate that many Catholic judges would deny that their faith compels them to bring the civil law into conformity with the moral law. It should be borne in mind, however, that many of these judges also maintain that they interpret the Constitution according to its text and original meaning, and reject the idea that moral reasoning of any kind plays a role in constitutional adjudication. We have already seen that Chief Justice Roberts has characterized judges as umpires who follow rules instead of making them. For his part, Judge Pryor has argued that an objective model of judging—one that does not allow for moral reasoning or judicial lawmaking—is "more than alive and well; it is the only legitimate model for a federal judge." Yet we have also seen that the notion that judges do not make law is at least debatable, if not demonstrably false. If we reject the premises of the objective model of judging, should we also reject the claim that religion plays no role in judicial decision-making?

Justice Scalia has suggested that the answer to this question may be "yes." For Scalia has acknowledged that his moral views would be relevant to how he voted as a Justice if he "subscribed to the conventional fallacy that the Constitution is a 'living document'"—that is, if he accepted that the Supreme Court's role was to give evolving meaning to constitutional

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138 Id.
139 Id. at 358.
140 Id.
141 See supra Part II.
142 See supra text accompanying note 79.
143 Pryor, supra note 5, at 357.
144 See supra Part II. See generally RICHARD A. POSNER, HOW JUDGES THINK (2008).
provisions. Scalia has further acknowledged that his moral views are informed by the teachings of the Catholic Church, at least with respect to some moral questions. With respect to the morality of capital punishment, for example, Scalia has explained: “As a Roman Catholic—and being unable to jump out of my skin—I cannot discuss that issue without reference to Christian tradition and the Church’s Magisterium.” This suggests that if moral reasoning were to enter into the judicial decision-making process, then religious teaching might inform that process in at least some cases. Judge Pryor has made a similar observation: While Pryor denies that judges necessarily engage in moral reasoning when deciding constitutional cases, he acknowledges that if they did, “then [he] would find it difficult to argue... that a judge should not be permitted to rely on his religion as a source of authority in reaching decisions.”

Thus, some prominent Catholic judges seem to agree that religious teaching could play a role in constitutional interpretation—at least in those cases where, properly or not, judges engage in moral reasoning to give meaning to constitutional text. It follows that a nominee’s religious views

146 Id. at 17 (noting that his views on the morality of capital punishment “have nothing to do with how [he] vote[s] in capital cases that come before the Supreme Court,” but that this would not be true if he believed that the Constitution “means from age to age whatever the society (or perhaps the Court) thinks it ought to mean.”).
147 See id. at 18.
148 Id. This is not to say that Scalia’s moral views are determined by the Church’s teaching. Again with respect to the morality of capital punishment, Scalia notes that while he has given the Church’s current teaching—which he understands to be non-binding—“thoughtful and careful consideration,” he nevertheless disagrees with the Church’s present position on the subject. Id at 21.
149 Pryor, supra note 5, at 356.
150 Though not a member of the federal judiciary, former Texas Supreme Court Justice Raul Gonzalez has written that his “relationship with God impacted the way [he] considered and wrote about the issues presented” in several cases. Raul A. Gonzalez, Essay, Climbing the Ladder of Success—My Spiritual Journey, 27 TEX. TECH. L. REV. 1139, 1157 (1996). In contrast to those “who believe that religious beliefs should be private and have no bearing on their work,” Gonzalez professes to believe that:

we are called to live our faith full time, not just on weekends, and that all our thoughts, words, and deeds should be impacted by our religious convictions. To me, it is an inescapable fact that our perspective on any issue is influenced by where we place ourselves on the religious spectrum. To deny this fact is to be dishonest.

Id. at 1147. For further discussion of Justice Gonzalez’ views on religion and judicial decision-making, see Sanford Levinson, Is It Possible To Have a Serious Discussion
could be relevant to her judicial philosophy and should be open to some degree of examination in the confirmation process. This is not to suggest that all of a nominee’s religious beliefs should be subject to scrutiny. Most questions relating to a nominee’s beliefs about God, worship practices, and the like would be wholly irrelevant to an assessment of her fitness for judicial office and should have no part in the confirmation process. But questions relating to a nominee’s beliefs about the role of moral and religious reasoning in judicial decision-making are a different story. Such questions are directed at an understanding of a nominee’s theory of constitutional interpretation, and are therefore an appropriate line of inquiry.

The Religious Test Clause\textsuperscript{151} of the Constitution should not be read to prohibit such inquiry. While some commentators have urged that the clause be broadly construed to preclude any questions concerning religious beliefs, others have convincingly argued that this expansive reading would be inconsistent with constitutional history and common sense.\textsuperscript{152} As Professor Paul Horwitz has written, “[i]t is one thing to say that a nominee may not be forced to adopt or disclaim particular religious views under oath. It is quite another to say that no one else is entitled even to consider that nominee’s views.”\textsuperscript{153} Moreover, an open consideration of a nominee’s religiously-informed beliefs “honors the view that there is nothing about religious beliefs that presumptively disqualifies them from inclusion in any aspect of public discussion.”\textsuperscript{154}

\textsuperscript{151} The Religious Test Clause provides that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” U.S. CONST. art. VI, cl. 3.


\textsuperscript{153}Horwitz, supra note 152, at 120.

\textsuperscript{154}Id. at 121–22. For alternative interpretations of the Religious Test Clause, see J. Gregory Sidak, supra note 152; Note, An Originalist Analysis of the No Religious Test Clause, 120 HARV. L. REV. 1649 (2007).
It may be that Catholic judicial nominees have been and will continue to be asked about their religious views more often than non-Catholics. But this scrutiny need not be taken as evidence of anti-Catholic bias on the part of the Senate or the public. Rather, the examination of a Catholic nominee's views may simply reflect acknowledgment that the Roman Catholic tradition has spoken more vocally and comprehensively about the role of religion in public life than many other faith traditions. Nor does inquiry into the role of religion in constitutional adjudication necessarily imply doubt about a Catholic nominee's loyalty to the Constitution. For as we have seen elsewhere in this Article, it is widely acknowledged that the process of constitutional interpretation occasionally requires judges to engage in moral reasoning—and it is not self-evident that religious reasoning is any less "loyal" than other forms of moral reasoning. It therefore implies no disrespect or bias to ask a Catholic nominee what significance she attaches to her church's moral teaching as it applies to judicial decision-making. To the contrary, to ask such questions is to honor all of a nominee's views with equal respect and consideration: "To the extent that a secular person can be examined on the implication of her beliefs for the performance of a public role ... the same should be true for someone whose beliefs are presented as religiously based. This, I believe, is required by our commitment to equality."

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155 As noted above, however, Sonya Sotomayor—the most recent Catholic nominee to the Supreme Court—was not asked about the role of religion in her approach to judicial decision-making. See supra note 134.

156 See Levinson, Catholics Becoming Justices, supra note 15, at 1071 (noting that "[o]ne might be more likely to ask Roman Catholic nominees such questions [about the relationship between natural law and positive law] than, say, Lutherans, because the Catholic Church has historically insisted on the reality of natural law in a way that the Lutheran community has not.").

157 Professor Levinson has remarked on "the lamentable anti-Catholicism that has pervaded much of the American past," and has noted that a common theme in the confirmation hearings of some Catholic nominees to the Supreme Court has been "the felt need for reassurance, to put it bluntly, that their primary loyalties were to the Constitution (and the United States) rather than to the Vatican and the Roman Catholic Church." Levinson, Religious Commitment and Judicial Responsibilities, supra note 150, at 282. In response to questions about their loyalties, "Justices identified with Catholicism have been forced to proclaim the practical meaninglessness of that identification." Levinson, Catholics Becoming Justices, supra note 15, at 1049.

158 Levinson, Religious Commitment and Judicial Responsibilities, supra note 150, at 281–82.
CONCLUSION

The primary purpose of this Article has been to discern a theory of constitutional interpretation based upon a fair and reasonable reading of Catholic moral teaching. In reviewing the doctrinal writings of the Church and considering their applicability to the federal judiciary, we have seen that Catholic moral teaching asserts a strong role for itself in the process of judicial decision-making. From the time of Thomas Aquinas to the present, the Church has consistently held that public actors have an obligation to bring the civil law into conformity with the moral law when fundamental human rights and liberties are at stake. Supreme Court Justices and other federal judges frequently perform a lawmaking role in the American system, and therefore face the same moral obligations as other political figures under Church teaching.

We have also seen that while some Catholic judges deny that religion influences judicial decision-making, others seem to suggest that religious reasoning might play a role in those cases in which other forms of moral reasoning are involved. The idea that religiously-informed beliefs should be given the same respect as non-religious beliefs also has significant support among legal scholars. But equal respect should also bring equal scrutiny. Thus, a judicial nominee’s religious views should be open to exploration in the confirmation process to the extent that they bear on her larger judicial philosophy.

Yet however appropriate inquiry into a nominee’s views on law and religion may be, the ultimate utility of such inquiry may prove to be limited. Many nominees—Catholic and non-Catholic alike—may continue to respond that religion plays no role in their judicial decision-making or simply decline to answer questions about their religious views. And in the absence of

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159 See, e.g., DONUM VITAE, supra note 36.
160 See id.; SUMMA THEOLOGICA, supra note 21, at pt. I-II, Q. 91, art. 5, at 999–1000.
161 See supra Part II.
162 See supra Part II.
163 Levinson, Religious Commitment and Judicial Responsibilities, supra note 150, at 282.
164 The reluctance of nominees to answer questions about the relationship—if any—between their religious views and their judicial views should perhaps not be surprising, given that nominees tend to avoid answering most questions that would yield insight into their judicial philosophies. This pattern of reticence among recent
information from the nominees themselves, the mere fact of Catholic self-identification will not necessarily reveal much about the nominees' judicial philosophies. For Catholic moral teaching is a complex body of thought that cannot always be neatly classified as liberal or conservative. On the one hand, the Church opposes abortion rights and gay marriage, and supports public funding for faith-based programs and for religious education. On the other hand, the Church also opposes the death penalty and preventive warfare, and supports organized labor and public health care. The jurisprudential approaches taken by Catholics on the bench reflect this diversity, with some judges being more conservative and others more liberal. Today, when people think of a Catholic Justice they may think of a conservative icon like Antonin Scalia. However, it should be recalled that the liberal hero William Brennan was himself a Catholic. Judge John Noonan has reviewed the decisions of both Justices, and has not found the opinions of either to be regularly explainable by reference to religion. Indeed, Noonan has concluded that “[r]eligion . . . does not regularly predict how a judge will vote on a constitutional question. It does not furnish an explanation of how the judge voted. It does not regularly distinguish the judge from colleagues who do not share his religious beliefs.” Further research—drawing on a larger

166 Id.
167 See supra Part III.
168 See Horwitz, supra note 152, at 80–81.
170 Id. at 768. Noonan does allow that conscience can influence a judge’s behavior.
sample of Catholic judges and relying on more rigorous empirical analysis of their decisions—will help to test the validity of Noonan’s conclusion and to shed light on the question of whether Catholic teaching has succeeded in influencing American constitutional law in the manner in which it has aspired to do.

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[I]t is this conviction at one’s inner core, uniting principles and experience and empathy, that counts most in judging. It is here that the religion of the judge—not just this or that particular precept but the whole thrust of the judge’s commitment to God—can make a difference. To measure that difference, however, belongs not to any human but to God.

*Id.* at 770.