SUBSCRIPTIONS

Touchstone A Journal of Mere Christianity

Feature

July/August 2006 Vol 19 No 6

The Catholic Court Appeal

Why So Many Catholic Justices on the Supreme Court? Why Now?

by ***Robert F. Cochran, Jr.***

The Supreme Court has been dominated since the founding of our country by mainline Protestants, but with Samuel Alito joining Antonin Scalia, Anthony Kennedy, Clarence Thomas, and John Roberts, five of the nine justices are now Catholics. All five have been appointed in the last 20 years. In the previous 200 years, only seven Catholics have served on the Court.

There may be political explanations for the attractiveness of Catholic justices, but I think three Catholic doctrines—natural law, subsidiarity, and religious freedom—help to explain why a majority of the justices are now Catholic. My argument is not that citizens who support, presidents who appoint, and senators who confirm these justices consciously do so because they want Catholic religious beliefs on the Court, but that these doctrines yield habits of thinking that make Catholics attractive candidates to the broad range of the American people.

I write as an Evangelical, but one who has come to share a commitment to the Catholic doctrines that I will mention.

Written on Our Hearts

Natural law teaches that humans were created with a nature and that through reason we can discern moral values as well as laws that conform to that nature and enable us to live the fullest lives.

As the Catholic moral philosopher Robert P. George has defined it, natural-law theory holds that the world offers us

ends or purposes that, as basic aspects of human well-being and fulfillment, are intrinsically valuable. These goods can, in principle, be grasped by any rational person whose judgment is not deflected by ideology or prejudice, or compromised by carelessness, inattentiveness, or any of the other intellectual failings that can defeat sound understanding in any field of inquiry.

With the virtue of practical reason, legislators and judges can serve the common good by devising systems of law that promote these basic aspects of human flourishing.

Paul referred to the natural law in Romans 2:15, when he wrote that the Gentiles "show that what the law requires is written in their hearts." Natural law's most dominant proponent through the ages has been Thomas Aquinas. Pre-Christian proponents included Aristotle and Cicero. Influential proponents today include the Catholic philosophers John Finnis, Robert George, and Russell Hittinger.

In contrast to many Protestant views of law, which see law merely as a necessary evil required by our fallen nature, natural law sees the law as a positive good, enabling us to achieve good things we could not achieve otherwise. Natural-law proponents draw insights from Scripture, but reason enables all to see the requirements of the natural law. Natural law, therefore, can create a common legal agenda for people of all faiths and of no faith.

A Shared Language

Why are judicial candidates who believe in natural law attractive to the American people? Let me suggest two reasons: the compatibility of such thinking with the two other major approaches to legal thought, and its consistency with our national traditions.

First, natural-law thinking is acceptable to many of those who speak the other two primary legal languages in the United States: secularism and scripturalism. Whereas serious Catholics are generally united in acceptance of natural law, both Protestants and Jews in America are split; members of these faiths tend to gravitate toward either a secularist or a scripturalist view of law.

The group that legal scholar Noah Feldman calls "legal secularists" favors a government that is untouched by religion or religiously based values. The more extreme legal secularists seek to use government to advance secularism in the culture. They reject any recognition of the religious foundations of American law—even the tiniest cross on a city seal—and believe that citizens ought to swear allegiance to a nation that is not "under God." They insist that (as once proposed by secularist Justice John Paul Stevens) religiously grounded morality in a law makes it unconstitutional.

Those favoring a secularist state make up an unusual coalition. Some are pure secularists—not many in absolute numbers, though they dominate law faculties and the legal profession. But many are religious. Reform and Conservative Jews, mainline Protestants, and moderate Baptists tend to be legal secularists.

Many are what theologian H. Richard Niebuhr called "dualists": those who are religious in their private lives, but support a secularized state. Some argue, for example, that a secularized state will generate less political conflict, that religious faith has nothing to say to government problems, that a secularized state is the best protection of religious freedom, and that involvement with state affairs is likely to corrupt religious institutions.

Legal scripturalists advocate that we base law on Scripture. Historically, they were Calvinists, but as many Calvinists have moved in a secularist direction, other Evangelicals have picked up the legal scripturalist flag. A very small number believe that biblical law should be implemented.

Most scripturalists, however, believe merely that the broad teaching of Scripture conveys principles that should serve as the moral foundation of law. They differ from some proponents of natural law in their skepticism about reason. Though reason might shed some light—it is one of God's gifts, a part of what Calvin referred to as "common grace"—it, like every other aspect of creation, is fallen and an unreliable guide in itself.

Scripturalists share the view of William Blackstone, the nineteenth-century natural-law commentator, who said: "Undoubtedly the revealed law is (humanly speaking) of infinitely more authority than what we generally call the natural law. Because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law." (As Blackstone's comment indicates, many natural lawyers are willing to draw insight from Scripture.)

Today, natural-law proponents are in a strong position politically because natural law is more acceptable to each of the other groups than the alternative. Natural lawyers are more acceptable to scripturalists than secularists are, because natural lawyers generally come to the same positions as scripturalists and the Scriptures themselves recognize the existence of natural law. (If we had God's insight, natural lawyers and scripturalists would always reach the same conclusions, but we do not.) Natural lawyers are more acceptable to secularists than scripturalists are, because natural lawyers justify law by reason, a language they both share.

Traditional Law

A second reason why those who think in natural-law terms are attractive as Supreme Court justices is that such thinking is consistent with our national traditions. The United States was founded on natural law. The tensions between secularist and scripturalist thinking were present at the founding, at that time manifested in conflicts between Enlightenment deists and New England Calvinists, but at that time both groups thought within the framework of natural law.

To borrow Catholic moral philosopher Michael Novak's helpful image (which he borrowed from John Paul II), America was carried on two wings, reason and faith. These, of course, are the bases of natural law. The documents the founders drafted leave no doubt about the foundation of their thinking: They acted based on "the laws of nature and of nature's God" and on the "self-evident" truth that humans "are endowed by their Creator with certain unalienable rights."

Not only were the country's founding documents rooted in natural law, but the everyday work of everyday lawyers was also rooted in natural law. The "bible" for early American lawyers (when it wasn't *the* Bible) was Blackstone's *Commentaries,* volumes explicitly based on Scripture and natural law. During the nineteenth century, natural law was the primary mode of thinking of American lawyers. Abraham Lincoln, trained as a lawyer in the back of a law office by reading Blackstone, led the nation to abolish slavery with speeches full of natural law.

Of course, there were very few Catholics present at the founding of the United States. It is therefore ironic that in the twentieth century, Catholics became the guardians of the theory of law on which the

United States was created, while it grew into disfavor among Protestants and the increasingly secular legal intellectuals.

Oliver Wendell Holmes, a Supreme Court justice and the most influential legal thinker of the twentieth century, called natural law "that brooding omnipresence in the sky." His views—that moral preferences are arbitrary, law is merely power, and "truth" is the position of the nation that can lick any other—became increasingly influential during the twentieth century.

The leading legal theories of the last third of the twentieth century had no place for natural law. Critical legal studies, feminism, and critical race theory taught that law is merely the power play of judges and their economic classes. However, they offered no basis for reconstructing law on a firm and just footing, for if law is only power, there is no basis on which the weak can challenge the powerful. These theories provided only a counsel of despair, a means of deconstruction with no basis for reconstruction.

The leading conservative theory, called law and economics, also looked to Holmes. It taught that the best ground for law is efficiency and thus provided no conception of justice. In a system based solely on efficiency, the inefficient have no standing.

By the end of the twentieth century, modern legal theories had run their course. Words like "justice" and "rights," which are rooted in natural-law jurisprudence, mean little in a legal world that understands law as only power or efficiency.

Legal Habits of the Heart

Nevertheless, natural law never really disappeared from the American legal scene. It is too much a part of our human nature, even if we do not recognize it. Despite the rejection by most twentieth-century legal intellectuals of natural-law theory, the great civil rights advocates based their arguments—arguments against the Holocaust, against racial discrimination, against prisoner abuse—on natural law. Though natural law has been used over the centuries to justify the status quo, including great evils that are a part of the status quo, it provides the most powerful basis for challenging that status quo.

I suspect that a Catholic sense of natural law was at the root of Catholic Justice Pierce Butler's dissenting vote—the sole dissenting vote—against the infamous Supreme Court decision in *Buck v. Bell,* approving Virginia's decision to forcibly sterilize Carrie Buck, who allegedly suffered from a genetically transferred mental disability. Justice Holmes, writing for the eight-man majority, declared that "three generations of imbeciles are enough."

Butler's successor in the "Catholic" seat on the Court, Frank Murphy, was one of only three dissenters—against the great "civil libertarians" Hugo Black, Felix Frankfurter, and William O. Douglas—in the equally notorious case of *Korematsu v. United States.* In his dissenting opinion, Murphy warned that in upholding the forced relocation of Japanese-Americans, the Court was letting the country fall into "the ugly abyss of racism."

But Catholics, I should note, should not be too smug about their brothers' contribution. Chief Justice Taney, one of the few nineteenth-century Catholic justices, wrote the *Dred Scott* decision—tied with

Roe as the worst Supreme Court decision—which did for slavery what *Roe* did for abortion: gave it the benefit of constitutional protection.

Not all twentieth-century use of natural law was Catholic. The opening and closing arguments of Episcopalian Justice Robert Jackson, who took a leave from the Court to be the chief American prosecutor at Nuremberg, were natural-law arguments: The Nazis had committed crimes against humanity, crimes against a law that is higher than positive law. Martin Luther King, Jr., a Baptist, in his *Letter from a Birmingham Jail,* quoted both Scripture and Thomas Aquinas to support his argument that an unjust law is no law.

Natural law received little respect within legal intellectual circles during most of the twentieth century until the publication of Oxford legal philosopher John Finnis's *Natural Law and Natural Rights* in 1980. Since then, to the surprise of proponents of the dominant legal theories, natural law has re-emerged as a leading legal theory, and Catholics, who had never given up on natural-law theory, have taken the lead in that movement.

Thus the effect of the doctrine of natural law. The two other Catholic doctrines that make Catholics attractive candidates for the Supreme Court, subsidiarity and religious freedom, are not independent from natural law. They are developments of natural-law thinking that provide opportunity for the expression and development of our social and religious natures.

Important Intermediaries

A second doctrine that makes Catholics attractive candidates for the Supreme Court is subsidiarity. It recognizes that humans are social beings who need a broad range of intermediate associations. Though Pope Leo XIII did not use the term "subsidiarity," the concept is clearly articulated in his critique of individualism and collectivism in his 1891 encyclical *Rerum Novarum* ("Of New Things").

Subsidiarity recognizes the importance of the individual, but holds that *because* the individual is important, the intermediate associations that are essential to human functioning—family, religious congregations, labor unions, businesses, private benevolent foundations, and local communities—must be protected.

In the encyclical *Quadragesimo Anno* (1931), Pius XI wrote that

just as it is wrong to withdraw from the individual and commit to a group what private initiative and effort can accomplish, so too it is an injustice . . . for a larger and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower associations. This is a fundamental principle of social philosophy.

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

The principle of subsidiarity must be respected: a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society,

always with a view to the common good. Needs are best understood and satisfied by people who are closest to them, and who act as neighbors to those in need.

Note that this doctrine sees an important role for central authority, but it seeks to keep individuals and intermediate communities strong and independent, not to make them dependent on the state. If an intermediate institution is at risk, a larger institution should step in and aid it, but only with the objective of making it independent again. As the Lutheran scholar Jean Bethke Elshtain has written, "Communities must enable and encourage individuals to exercise their self-responsibility and larger communities must do the same for smaller ones."

Subsidiarity's Use

Subsidiarity makes those with Catholic habits of thought attractive as potential Supreme Court justices for three reasons.

First, subsidiarity is based on a fuller understanding of the nature of humanity than either individualism or collectivism. It recognizes the need for a balance between personal freedom and social responsibility if individuals and communities are to flourish.

Individualism posits that choice, self-determination, and self-fulfillment are the highest goals of human life, but this has left many people feeling isolated and alone. Many have found that, in the words of Kris Kristofferson, "Freedom's just another word for nothing left to lose." The breakdown of the family and of voluntary associations has left many Americans longing for community.

Yet, the breakdown of collectivist regimes around the world in the last 25 years demonstrates that the broader social community, by itself, is not an adequate source of human fulfillment either. The broader social community is important, but collectivist regimes that sought to do away with intermediate communities undercut the very institutions that train citizens to relate to and care for one another in the broader community.

Second, subsidiarity, like natural law, provides a middle course between two extremes. It "triangulates" its alternatives, individualism and collectivism. It is more attractive to proponents of each alternative than the other option. Individualists prefer subsidiarity over collectivism, and collectivists prefer subsidiarity over individualism.

Third, subsidiarity is, like natural law, consistent with our national traditions. Whereas our first great national document, the Declaration of Independence, was explicitly grounded on natural law, our second great national document, the United States Constitution, can be seen as a political manifestation of the doctrine of subsidiarity. It established independent institutions of various sizes, each with separate responsibilities to the individual and each other.

Justices raised in a tradition that values subsidiarity are likely to have a good sense of the balance of powers within our federal system. It is probably not a coincidence that Catholic justices have been among the Court's leaders in the rebirth of federalism as an important constitutional doctrine in the last decade.

A New Freedom

Whereas the first two Catholic doctrines have been Catholic doctrines for a long time—natural law since the thirteenth century (at least in its Thomist form) and subsidiarity since the late nineteenth century—the third, religious freedom, is relatively new. Vatican II endorsed religious freedom in its *Declaration on Religious Freedom, Dignitatis Humanae* in 1965.

In *Dignitatis Humanae,* to a large extent based on the arguments of the American Catholic theologian John Courtney Murray, the council adopted as strong a statement of religious freedom as has ever been crafted. It found the source of religious freedom in the natural law and Scripture. The council declared the desire for religious freedom "to be greatly in accord with truth and justice."

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

The council recognized that freedom is important because it enables the individual to appropriate the truth. In the words of Robert George, citing the council,

[F]reedom—freedom to inquire, freedom to assent or withhold assent as one's best judgment dictates—is a condition of the personal appropriation of the truth by the human subject—the human person—for the sake of whom—for the flourishing of whom, for the liberation of whom—knowledge of truth is intrinsically valuable.

The council's words were not mere platitudes. Both Spain and Italy quickly granted religious freedom. Pope John Paul II embraced religious freedom as well, proclaiming that "the Church imposes nothing, she only proposes."

Whereas the first two doctrines make Catholics attractive Supreme Court justices because they are appealing alternatives to other positions, the Catholic embrace of religious freedom cleared a roadblock that might otherwise have limited that number of Catholics appointed to the Court.

I was raised in a Virginia Southern Baptist church in the 1950s and early 1960s. A common component of the missionary reports that we received regularly from the field was that Catholic governments in Italy and Spain were jailing our missionaries. We were reminded that prior to the adoption of religious freedom in this country, Anglicans similarly jailed Baptist pastors for preaching the gospel only a few miles away from us.

Many feared that if Catholics got into power in the United States, they would limit religious freedom. Official Catholic doctrine at that time was not comforting. Numerous Vatican documents stated that "error has no rights." When presidential candidate John F. Kennedy claimed, before a group of Texas Baptist ministers, that his Catholic faith would have nothing to do with how he would run the country, we had our doubts. We would have strongly opposed any move to appoint a substantial number of Catholics to the Court.

Other Protestants shared our suspicion. That suspicion may explain why senators to this day have asked Catholic appointees—and only Catholic appointees—to the Court whether their religious faith would affect the way they vote on the Court. (All have said no.)

The embrace of religious freedom by Catholics removed the fear of many Protestants that Catholics on the Court would cut back on religious freedom.

Unpredictable Catholics

These three Catholic doctrines help explain why the Supreme Court has the first Catholic majority in its history. But what do these doctrines tell us about the way these Catholic justices will vote?

People want to know how Catholic justices will rule on abortion, capital punishment, euthanasia, homosexuality, the nature of marriage, and a host of other issues on which Catholic teaching differs from the views held by a significant number of Americans—but the interplay of the doctrines discussed herein does not give us clear answers.

For example, the doctrine of natural law suggests that a Catholic would oppose abortion as the taking of innocent life, but the doctrine of subsidiarity might suggest that the question of whether to regulate abortion should be left to the states. Of course, the current *Roe v. Wade* regime, which prohibits states from protecting the unborn, runs counter to both natural law's affirmation of life and subsidiarity's rule of deference to smaller communities.

Catholic legal scholar Russell Hittinger notes, citing Thomas Aquinas, that the natural law requires that a judge have proper legal authority before imposing judgment. Thus, the Catholic justice must look to the positive law to determine whether he has authority to act in a particular case. The natural law itself limits the ability of Catholic justices to use the natural law to resolve cases.

A Catholic-led court is therefore unlikely to seize power and impose its will on the country, as the 1973 Supreme Court did when, without constitutional authority, it struck down abortion laws, basing its ruling on a right to privacy found by an earlier case in "penumbras, formed by emanations" from various constitutional amendments.

Justice Scalia, the Catholic justice who has provided the most extensive discussion of the role of religious faith in judging, argues that justices should decide cases according to the language of statute and constitution, even when the results conflict with Catholic teaching. He argues that the place for natural law is in the voting booth and the legislative and constitutional hall. Citizens and legislators should vote in light of natural law, but the judge's job is to apply the laws that they produce. Scalia argues that his views of matters have nothing to do with his legal decisions, that he resolves everything based on statutory and constitutional language and, if necessary, American traditions.

Under Scalia's vision of judicial restraint, judges should defer to the results of the democratic process unless there is a persuasive constitutional justification for doing otherwise. He would interpret the Constitution on the basis of the original understanding held by the framers, though he has conceded that he is a "faint-hearted" originalist, in the sense that as a justice he must follow entrenched precedent even if it is inconsistent with the original meaning.

I have a two-fold reaction. The first is to applaud the concept of judicial restraint. Judicial restraint, like subsidiarity, is based on the view that powerful institutions should limit their power and empower others; courts that exercise judicial restraint defer to other branches of government and to state and local governments. Power should be shared across many institutions within society, both because

power corrupts and because a division of responsibility enables different institutions to do what they do best.

But my second reaction is to note that judicial restraint does not answer every question a justice must answer. There is a limit to the restraint that justices can exercise. Many cases require them to look at more than language and tradition. Many constitutional provisions are stated in broad, general terms, including those pertaining to freedoms of religion, speech, and the press and the rights to due process and security in one's home.

Prudence & Wisdom

The implications of these freedoms and rights must be worked out in individual cases, many arising from technologies and circumstances that the founders could not have envisioned. For example, is a wiretap an "unreasonable search"? The framers of the Fourth Amendment could not have imagined electronic surveillance. For another example, the Constitution prohibits "cruel and unusual punishment." Would the framers have thought that the electric chair was cruel or unusual? Obviously, it was unusual in 1789. The best judges can do is to identify the basic value or principle underlying the terms of the Constitution and extrapolate that principle to apply it to the current problem.

Many, if not most, of the cases that come before the Court come that far because the correct outcome is *not* clear. That does not entitle justices to do whatever they want, but it requires them to exercise judgment, prudence, and practical wisdom. And their exercise of these is likely to be informed by their religious convictions. In fact, it may be that those justices who are raised in a natural-law tradition will be the best equipped to interpret the meaning of the Constitution and the Bill of Rights, documents that were grounded in natural law.

Of course, there is the possibility that a justice's religious tradition will have no effect on his jurisprudence, that a justice's votes will reflect some other set of foundational beliefs, probably the reigning secular individualist ideology of the legal profession in America. For example, though the current *Roe v. Wade* regime runs counter to both natural law and subsidiarity, and is founded on no legal authority, Catholic Justice Anthony Kennedy voted to affirm it in *Planned Parenthood v. Casey,* stating, "At the heart of liberty is the right to define one's own concept of existence, of the meaning of the universe, and of the mystery of human life." That standard would require the Court to strike down not just anti-abortion laws but almost any law.

Nevertheless, I am convinced that the decisions of Catholic justices will be influenced by their religious traditions. Though I am not a Catholic, I think it is good that convictions informed by Catholic ways of thinking will affect the decisions of the Supreme Court of the United States for a long time to come.

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