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## The Justice Who Wouldn't Be Lutheran: Toward Borrowing the Wisdom of Faith Traditions

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THE JUSTICE WHO WOULDN'T BE LUTHERAN: TOWARD  
BORROWING THE WISDOM OF FAITH TRADITIONS

MARIE A. FAILINGER<sup>1</sup>

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I. INTRODUCTION

Much ink has been shed over the propriety of the use of religious language in law-making.<sup>2</sup> Some commentators have argued that lawmakers can properly be motivated by religious concerns<sup>3</sup> or even that they are inescapable; but that a

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<sup>1</sup>Professor of Law, Hamline University School of Law, and Co-editor, JOURNAL OF LAW AND RELIGION. Howard Lesnick and Howard Vogel have made this a much better article than it was going to be, and Pat Keifert and my colleagues on ELCA Church in Society's Task Forces, brought together by John Stumme, are responsible for getting me thinking about this topic. Michael Perry's work was a significant influence, among others, and I must also thank Susan DeVos, who did the scut-work well without complaint, aided by Jonathan Miller.

<sup>2</sup>See, e.g., Stephen Carter, THE CULTURE OF DISBELIEF 18-101 (1993); Mark Tushnet, Religion in Politics, 89 COLUM. L. REV. 1131 (1989)(book review); Michael J. Perry, MORALITY, POLITICS AND LAW 77-104 (1988); Kent Greenawalt, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988); Franklin I. Gamwell, Religion and Reason in American Politics, 2 J. LAW & RELIG. 325 (1984); Daniel O Conkle, Differing Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law, 10 J.LAW & RELIG. 1, 11-30 (1993-94).

<sup>3</sup>Justice Rehnquist, for example, views "individual moral judgments" as an appropriate "springboard" for political action, but they do not in themselves justify a decision; only when their followers have become "sufficiently numerous" to pass a law will such moral

lawmaker may not rely on religious reasons in making a decision.<sup>4</sup> John Rawls considers religious reasons a paradigmatic example of “nonpublic reasons,”<sup>5</sup> while Richard Rorty would want to make it ““seem bad taste”” to bring religion into public discussion.<sup>6</sup> Both Michael Perry and Ronald Thiemann have criticized Rawls for insisting that religious arguments cannot be fully shared by all members of the polity, and therefore are precluded.<sup>7</sup> Thiemann also criticizes Thomas Nagel’s position that religious arguments cannot be used because religious people are not prepared to make arguments available so that others can make the same judgment as they do.<sup>8</sup> Others have countered that refusing entry to religious arguments deprivileges them compared to secular arguments, in violation of both speech and free exercise norms,<sup>9</sup> or that religious discourse is so important to public life that it is incumbent for elected officials not to conceal their religious convictions.<sup>10</sup>

In its broad sense, this debate over religious argument in public life arises from what David Hollenbach calls “the fact of pluralism.” As an organic response to “the diversity of conceptions of the meaning and purpose of life,” pluralism, in Hollenbach’s view, is likely to be a permanent reality in modern democratic cultures.<sup>11</sup> If he is right, not to acknowledge such a reality, not to give it moral weight in political decision-making, seems not simply foolish, but also wrong.

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justifications carry any legal weight. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 705 (1976).

<sup>4</sup>For examples of arguments that lead to this or a more radical separatist conclusion see MICHAEL PERRY, *LOVE AND POWER* 9-28(1991) (discussing Kent Greenawalt, Bruce Ackerman, Thomas Nagel, and John Rawls). Some who are most outspoken against religious language in public life fear a specific antagonist: a conservative Christian, often labeled “fundamentalist,” who believes that divine revelation hands down a specific set of mandates about how all people should live. Some of them have expressed concern that lobbyists and lawmakers—labeled “stealth candidates” in local political races—will hide their religious motives and plans until they are elected. See, e.g., K. L. Billingsley, *ACLU Sues California School Board, Charges It Muzzles Public Criticism*, WASH. TIMES, May 19, 1997, at A4 (describing religious conservative candidates for school board); *Symposium*, INSIGHT MAG., May 5, 1997, at 25 (describing Christian Coalition candidates); William Safire, *Gambling Panel’s Foxes*, PORTLAND OREGONIAN, May 20, 1997, at B08 (describing gambling commission candidate who served on the Family Research Council).

<sup>5</sup>MICHAEL J. PERRY, *RELIGION IN POLITICS* 54-58 (1997),

<sup>6</sup>*Id.* at 45, quoting Richard Rorty, *Religion as a Conversation Stopper*, 3 COMMON KNOWLEDGE 1, 2 (1994).

<sup>7</sup>*Id.* at 54-61; RONALD E. THIEMANN, *RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY* 124-26 (1996).

<sup>8</sup>*Id.* at 127-30.

<sup>9</sup>RELIGION IN POLITICS, *supra* note 5, at 32-33.

<sup>10</sup>See, e.g., Kent Greenawalt, *PRIVATE CONSCIENCES AND PUBLIC REASONS* 166 (1995); RELIGION IN POLITICS, *supra* note 5, at 78 (noting that the Williamsburg Charter drafters called for public accessibility of private convictions to engage those who do not share such convictions).

<sup>11</sup>David Hollenbach, *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 SAN DIEGO L. REV. 877, 879 (1993) (citing and quoting John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 4 (1987)).

Yet, only a few legal scholars have gone past the propriety debate to work out what jurisprudence might look like if lawmakers and judges took their religious world-views seriously—and explicitly—in their work, in a way respectful of “the fact of pluralism.”<sup>12</sup> My task is to imagine the concrete case: what a judge’s jurisprudence might look like if a judge considered the wisdom of his own religious tradition in constitutional cases. This article explores broad jurisprudential themes and specific First Amendment and social welfare opinions of Justice William Rehnquist, who for some years has been a member of a Lutheran congregation, my own denomination. While Justice Rehnquist’s views have moderated over the years, and he has become known, partly through the impeachment inquiry, for a judicious temperament, I will make a modest case that *in his jurisprudence*, Justice Rehnquist does not take seriously central Lutheran understandings. (I should be very clear that, other than his membership, I know nothing about Justice Rehnquist’s theological beliefs or religious practice, and I do not consider them.<sup>13</sup> I only suggest how a person who accepts Lutheran doctrine, or one “take” on it, would reason about legal issues.)<sup>14</sup>

Justice Rehnquist is somewhat of a foil here, for he is a good example—but far from the only one—of how a judge from a particular faith-tradition may find himself not reflecting elements of that tradition in his jurisprudence. For instance, Sanford Levinson has shown how the American polity has somewhat successfully demanded that Catholic justices explicitly renounce any notion that their faith will have

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<sup>12</sup>Most recently, Perry has made the more expansive argument that no reasons that lobbyists or lawmakers might give as arguments, motivations, or pivotal influences in their decisions are out of bounds; but that a religious lawmaker may rely on his religious belief as a ground for decision only if he is convinced that there is a plausible secular reason for his action as well. RELIGION IN POLITICS, *supra* note 5, at 43-44. In his previous work, Perry had made an appeal for politics that were publicly intelligible and accessible, i.e., “comprehensible to those who speak a different religious or moral language—to the point of translating one’s position, to the extent possible, into a shared (‘mediating’) language.” “The virtue of public accessibility is the habit of trying to defend one’s position in a manner neither sectarian nor authoritarian.” LOVE AND POWER, *supra* note 4, at 106. Perry refers to similar arguments from J. Bryan Hehir and Richard John Neuhaus. RELIGION IN POLITICS, *supra* note 5, at 78.

<sup>13</sup>Nor is the article focussed on Justice Rehnquist’s personal moral character or the way in which he interacts with others in his professional life. In some biographical sketches, Rehnquist is described as a warm and compassionate person, intellectually sharp and courageous, see PETER IRONS, BRENNAN V. REHNQUIST: THE BATTLE FOR THE CONSTITUTION 18 (1994); DAVID SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 32 (1992); DEREK DAVIS, ORIGINAL INTENT: CHIEF JUSTICE REHNQUIST AND THE COURSE OF AMERICAN CHURCH/STATE RELATIONS 4-5 (1991). In fact, the contrast between reports about his personal character and the tone of his judicial opinions was precisely a factor which intrigued me enough to begin this inquiry.

<sup>14</sup>I happily invite more theologically educated Lutherans to correct mistakes, though I believe that the themes I take up are true to and central in the Lutheran understanding. Justice Rehnquist’s jurisprudence may well reflect some Christian “story,” if not a Lutheran one. For instance, Sanford Levinson suggests that the remnants of the American Protestant tradition held by founding communities can be found in the Supreme Court’s jurisprudence. Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1050, 1054 (1990).

anything to do with their judicial office, particularly their interpretive task.<sup>15</sup> And they are surely not alone.

However, I think that Justice Rehnquist might be a better Justice if he were a better Lutheran justice. That is, his failure to deploy traditional Lutheran ethics to understand and speak to the American constitutional situation impoverishes the center of his own jurisprudence. Even if he reached many of the same decisional outcomes, his willingness to take Lutheran theological insights about the relationship between God and humans seriously as he works could lead to a more complex and accurate jurisprudence. In particular, some of his rhetorical moves would be better informed by analogical adaptation from Lutheran views of the relationship between church, state, society, and the individual.

The Lutheran position, which many Lutherans distance from Protestantism,<sup>16</sup> is to be sure often difficult, because it is paradoxical. However, it is precisely those paradoxes which make this position a powerful tool for gaining insights into the seemingly contradictory and complex demands of post-modern society, and the human condition itself.

I realize that such a project is loaded with landmines for both theology and law—ranging from the central question theistic believers must ask, “is it possible to take God out of the picture, even analogically?” to the question people with other beliefs about religion might ask, namely, “what hidden theological assumptions might we

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<sup>15</sup>Levinson, *supra* note 14 at 1062-65. Justice Brennan was required to answer the question, “[W]ould you be able to follow the requirements of your oath [to follow the laws and precedents of this Nation] or would you be bound by your religious obligations?” *Id.* at 1062 (quoting *Nomination of William Joseph Brennan: Hearings Before the Committee on the Judiciary, United States Senate, 85th Cong., 1st Sess., 32 (1957)* [hereinafter *Brennan Hearings*]). He responded, “I say not that I recognize that there is any obligation superior to that [oath], rather that there isn’t any obligation of our faith superior to that.” *Id.* at 1063 (quoting *Brennan Hearings*, 34). Justice Scalia was required to answer what he might do about a deeply held “personal moral conviction, which may be pertinent to a matter before the Court,” and he responded that he had a moral obligation “to be bound by the determinations of that democratic society” and “[i]f [the judge] feels that he cannot be, then he should not be sitting as a judge.” *Id.* at 1064 (quoting *Nomination of Judge Antonin Scalia: Hearings Before the Committee on the Judiciary, United States Senate, 99th Cong., 2d Sess., 43 (1986)* [hereinafter *Scalia Hearings*]). Even faced with clearly immoral laws, Judge Scalia responded, “[i]n no way would I let that influence my determination of how they apply.” *Id.* (quoting *Scalia Hearings*, 43). Justice Anthony Kennedy, responding to a question about an admiring remark he had made as “a practicing Catholic” to Sen. Jesse Helms’ views on abortion, stated, “Now it would be highly improper for a judge to allow his or her own personal or religious views to enter into a decision respecting a constitutional matter.” *Id.* at 1064-65 (quoting *The Questions Begin: “Who is Anthony Kennedy,”* N.Y. TIMES, Dec. 15, 1987, at B16).

<sup>16</sup>Historian Sydney Ahlstrom recognizes four “traditional” headings for American churches which arose out of the Reformation: Lutheran, Anglican, Reformed, and Radical. SYDNEY AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 72 (1972). Some moments in American Lutheranism have emphasized Lutheranism as conserving the best of the Catholic tradition against radical and Reformed movements, while others have attempted to marry Lutheranism with other Protestant traditions into an “American Lutheranism.” *Id.* at 518-26.

mistakenly import as we are trying to adapt a theological idea to a secular setting?"<sup>17</sup> While Michael Perry and others have taken questions of this nature quite seriously, particularly the need for respectful process,<sup>18</sup> I will first suggest two moves that might respond to legitimate concerns about religious influence in the judicial process.

## II. WHEN MIGHT A RELIGIOUS ARGUMENT HELP?

Taking as true Perry's position that some plausible secular argument must be advanced to justify every political decision, we might ask why a judge's ability to borrow from his religion might make a difference in his opinions. First, a judge's religious understandings may usefully inform the rhetorical elements of his opinion, even if it is more problematic to permit such understandings to ground the decisional elements of the case. Second, joining Perry<sup>19</sup> and Ron Thiemann<sup>20</sup> in viewing religious traditions as in part preserving a storehouse of wisdom on the human experience, I argue that we can borrow analogically even in a state committed to a secularly justified result.

### A. Rhetorical Elements of Judicial Decision-Making

Even if Perry is right that a court must justify its decision using secular arguments, a judge's religious views may usefully inform the way in which she constructs the rhetorical cast,<sup>21</sup> and particularly the forensic and epideictic elements<sup>22</sup> of her opinion. To be adequate to its authority, the Supreme Court must move beyond decisional compromise<sup>23</sup> in individual opinions, and even beyond a laudable concern for justificatory consistency<sup>24</sup> over time. To be publicly persuasive in

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<sup>17</sup>See, e.g., Stephen D. Smith, *Idolatry in Constitutional Interpretation*, 79 VA. L. REV. 583, 604 (1993) (taking up the question whether moral arguments in law make sense without a transcendent source or "superlative," without God).

<sup>18</sup>See, e.g., RELIGION IN POLITICS, *supra* note 5 at 99-101, 105-11, 125-26 (1991).

<sup>19</sup>LOVE AND POWER, *supra* note 4, at 70-75.

<sup>20</sup>THIEMANN, *supra* note 7, at 132.

<sup>21</sup>Aristotle defined rhetoric as the "faculty which apprehends the possible means of persuasion in any given case" or subject. ARISTOTLE, SELECTED WORKS 611, section 1356a (Hippocrates G. Apostle and Lloyd P. Gerson, eds., Peripatetic Press, 2d ed. 1986)(hereinafter cited as Aristotle, at page and section.)

<sup>22</sup>See notes 25 and 26 and accompanying text (further explicating the forensic and epideictic elements of rhetoric.)

<sup>23</sup>Any number of opinions display the results of rhetorical compromise; they speak in a multiplicity of rhetorical tongues, reflecting the arguments of each of the Justices whose vote was needed to reach the decision. One oft-cited example of rhetorical compromise is Justice Brennan's opinion in *Plyler v. Doe*, which borrows from illegitimacy, alienage, and education jurisprudence to justify invalidation of a state education exclusion for illegal alien children. 457 U.S. 202 (1982).

<sup>24</sup>Some justices do seem to take pains to display some (if not perfect) theoretical consistency over time on issues such as the relationship of the federal and state governments, judicial review, the presumption of constitutionality, and similar issues. Yet, these patterns often assert themselves in concurring or dissenting opinions, rather than the opinion of the

history, the Court will need to take more care for both the forensic function of its opinions, that layer of argument aimed at convincing the reader that a litigant (or lower court) has acted wrongfully or correctly under the law,<sup>25</sup> and the epideictic, which is the rhetorical “piece” of an argument that praises or blames one of the parties for what has happened. If it does not carefully construct these elements of its argument, the Court can be sure that the public will imply or supply a forensic and epideictic text, even if not the one intended by the Justices.<sup>26</sup>

Viewing cases over time, it is not clear that the Supreme Court consciously attends to the forensic or epideictic functions that the Court’s opinions serve, perhaps because the court is still mired in a 19th century conception of law as science.<sup>27</sup> In the scientific model, the speaker is simply a detached observer, not persuading the hearer of the moral strength of his position, but instead finding a cold, hard legal truth out in nature, much like isolating an insect in an entomological expedition. In the scientific model, the hearer becomes unimportant, almost unnoticed; and the speaker cannot “see” the facts through a particular character or lens, lest he destroy the objectivity of the search for truth. A judge committed to the scientific model of law would not want to acknowledge that he has personal views, much less religious views, for that might skew the “reality” of the legal investigation. Moreover, to acknowledge that he is writing for, say, a public in turmoil over slavery or abortion would be to suggest that his rhetoric was aimed at appeasement rather than the pure truth.

A rhetorical jurisprudential model, by contrast, understands both the reluctant authority and the invitational force of the constitutional opinion. Such a model recognizes that the Court *must* decide even those critical matters on which people are sharply divided, matters which could easily go one way or another under the

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Court, which would presumably have the greatest opportunity for rhetorical influence since it is strengthened by the judgment itself.

<sup>25</sup>Aristotle distinguished between deliberative and forensic rhetoric. Deliberative speech urges people either to do or not do something; lawyers use deliberative speech in this sense, while judges rarely do, except when speaking from the bench. Forensic speech attacks or defends actions done in the past. Forensic rhetoric, chiefly employed by litigants, aims to prove some action just or unjust. ARISTOTLE, *supra* note 21 at 616, § 1358b. In a judicial opinion, forensic rhetoric is used to justify the decision to the reader, but it often waxes far beyond justification of the decision.

<sup>26</sup>Consider two examples:

—the popular interpretation of *Roe v. Wade*, 410 U.S. 113 (1973), as a case which decides the abortion question on the basis of whether a fetus is a human life;

—in the affirmative action arena, the public focus on “third-party innocence”, i.e., whether an affirmative action program will harm innocent non-minority employees/applicants, as a test of its moral worth derived from cases such as *Regents of California v. Bakke*, 438 U.S. 265 (1978) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

In each such case, the public is in some senses correct that this “kernel” of the abortion and affirmative action cases is necessary to the moral resolution of the case; but it is the public that has selected that kernel of the Court’s opinion to focus in on the moral debate, with the other kernels of the argument receiving much less attention in public discussion.

<sup>27</sup>Christopher Columbus Langdell, the first Harvard Law School dean, is credited with the development of the “law as science” theory. See Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

Constitution, because someone must decide. On the other hand, in the rhetorical model, the Court decides not as a tyrant, foreclosing all possibilities for action on an issue such as abortion, but as a conversation partner, precluding some choices because of overriding constitutional values but opening up many more.

The Court's moral authority to exercise leadership in a national conversation about distinctive aspects and limitations of American legal justice is blunted in absence of deliberate rhetorical design.<sup>28</sup> If any evidence is needed, one has only to look at the popular view that the Supreme Court's opinion in *Roe v. Wade*<sup>29</sup> was a "conversation-stopper" instead of a conversation-starter.<sup>30</sup> A more thoughtful, nuanced rhetorical strategy in *Roe* and subsequent abortion cases might, for instance, fruitfully have refocused public attention on harms and hardships rather than autonomy and rights. Reframed to the public as tragic situations, these cases might possibly have engendered compassionate public responses for both mothers and fetuses, rather than the expenditure of vast energies in the battle to challenge or defend autonomy rights.

Especially because Supreme Court opinions have become more accessible to the general public through increased press coverage and Internet access, the Court's inattention to the rhetorical aspect of its role is a lost opportunity to create consensus, not just around outcomes but also around principles of justice. A different imagination about the Court's speech—one that acknowledges the particular character and role of both speaker and its many audiences—not only opens the possibility of dialectical encounter among legally trained advocates of diverse world-views. It also bespeaks hope for the possibility that the average person can participate positively in critical national debates, not simply respond either in passivity or resistance to a loss in the Court.

Moreover, to ignore the most critical rhetorical fact—that the Court's audience is (at least primarily) the American public—is to invite a grave misstep; for it is the peculiarly American construction of notions like freedom, equality and limited government that gives a Court opinion its full force. To be sure, a rhetorical imagination often makes things theoretically messier: for instance, the Court could have ignored its Free Exercise and Establishment Clause audience, both non-religious and religiously diverse in a historically specific way, and achieved a less tortured First Amendment jurisprudence. But that trail of opinions would also be less authentic, for words like "coercion" and "wall of separation" take on their real meaning only in the context of a people formed in part from religious persecution and dedicated to a certain equality of religious belief.

The Supreme Court particularly neglects the epideictic function of its work, the way in which it implicitly makes judgments about the moral virtue or vice of those

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<sup>28</sup>Of course, Justice Rehnquist's more cynical view that rhetorical arguments may be used to "play to the crowd" as political messages might also explain his failure to use them. See SAVAGE, *supra* note 13, at 297 (describing Rehnquist's view of Blackmun's concurring/dissenting opinion in *Webster v. Reproductive Health Services*, 492 U.S. 490, 537 (1989)).

<sup>29</sup>410 U.S. 113 (1973).

<sup>30</sup>*Cf.*, Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 476 (1996) ("Because God's commands need not be rational, logical, or consistent, the response that abortion is contrary to God's will is essentially a conversation stopper.").



who are before it.<sup>31</sup> While one can find the rare exception—e.g., implied disgust at a hateful speaker<sup>32</sup>—more often the Court neglects to blame—or indeed to praise. These epideictic signals may be especially important when a constitutional result may seem distasteful, for instance, when the Court’s epideictic rhetoric would send a clear message of support to those harmed by protected speech. For example, the Court fails to take advantage of an opinion’s epideictic power in *Brandenburg v. Ohio*,<sup>33</sup> offering the modern test for identifying inciting speech. As the opinions describe the Klan rally without any significant expression of disgust at Klan members for their slurs against black people and Jews, the Court almost bloodlessly sends only one message—that this speech must be protected—instead of taking the opportunity to speak also to those harmed by the Klan’s deplorable message.

If the Court avoids these opportunities to influence popular opinion about the morality of a practice beyond the confines of a particular case, the Court deludes itself about its own power. More importantly, the Court’s silence on the morally problematical behavior of a litigant, whether it is a state or an individual, may over time leave an impression on the public about how they should view litigants in a particular class of cases. The affirmative action cases afford a good example: if the Court implicitly paints white challengers as maligned good guys out to get their due,<sup>34</sup> and by implication, affirmative action recipients as unworthy and selfish recipients of a legal windfall,<sup>35</sup> the Court influences many more social relationships than the decision itself affects.

A thoughtful observer of judicial review might, however, argue that Justices should not wax profound on either the epideictic or the forensic in their opinions, and certainly should not allow religious beliefs to influence these aspects of their opinions. Such an observer might claim that a judge exercises a narrow function in the scheme of justice, and any such comments are gratuitous and unnecessary to decide the case.<sup>36</sup> Of course, most justificatory arguments would also be superfluous under this rationale, since only one justificatory argument is necessary for each decision, yet judges often attempt to tie up as many justificatory loose ends as they can. Moreover, this concern seems more appropriately directed against a trial judge

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<sup>31</sup>Epideictic or oratorical speech “praises or blames” people or “the existing state of affairs,” “aiming at what is noble or disgraceful.” ARISTOTLE, *supra* note 21, at 616, § 1358b. Aristotle’s example of epideictic speech is those speeches praising Achilles for helping Patroclus even though he faced death, while saving his life would have been more expedient. *Id.* at 615-16.

<sup>32</sup>*See, e.g.,* R.A.V. v. City of St. Paul, MN, 505 U.S. 377, 396 (1990)(stating that crossburning in someone’s front yard is “reprehensible”).

<sup>33</sup>395 U.S. 444 (1969).

<sup>34</sup>*See, e.g.,* Regents of California v. Bakke, 438 U.S. 265, 295 n.34, 298 (1978).

<sup>35</sup>*See, e.g.,* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 489, 495-96, 499 (1978); Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of the Civil Rights Struggle*, 74 CORNELL L. REV. 993, 1022 (1994).

<sup>36</sup>Howard Lesnick would also have us ask whether any Justice, or anyone else, actually lives by the religious argument he makes, or whether religious-type arguments are usually prompted by other gratuitous comments with which the objector disagrees. Letter and notes from Howard Lesnick, May 1997 (on file with author).

whose role is to decide particular cases, not against the Supreme Court which exercises a national governance role. For even if one can contest whether the Supreme Court was truly meant to be a governance institution, in modern times it has functioned as an equal partner in democratic governance. For the Court to exercise its existing role blind to its own actual power would not seem justified.

A more important argument, also raised against religious debate in politics, is that religion can exercise a corrosive influence on the judicial process, from divisiveness to disrespect for minority religions. However, the same responses to the challenges against religion in politics also apply to the use of religious sources in judicial opinions: (a) although religion is sectarian and divisive, it is not peculiarly so, for many so-called "secular" arguments are also sectarian and divisive; (b) although some religious people cannot achieve critical distance on their beliefs necessary for a pluralistic, "ecumenical" conversation, many can, and conversely many secularists cannot; and (c) although religious arguments can be "subjective," they are no more so, and often less so (since they rely on a historical tradition) than many secular arguments.<sup>37</sup> Indeed, there have been strong challenges even to the assumption that the use of religious language necessarily implies disrespect for minority religions.<sup>38</sup>

In fact, while there is reason to be more concerned about these issues in judicial than political choice, precisely because we imagine the courts to be the reserve of impartial, "objective" judgment, there is also reason to think that judges will exercise more self-restraint in using religious arguments. First, as the Catholic judges' experiences point out, judges come with a built-in bias about letting their personal views cloud their judgment. Second, constitutional judges themselves define the parameters of the inappropriate use of religion by government—they are the ones who have determined it inappropriate for government to impede religious practices based on views of the value of a religion, its truthfulness, efficaciousness or its American "authenticity."<sup>39</sup> If the judges have developed these standards, we may expect enough investment in their validity to assume that judges will apply them to each other (i.e., on appeal and in concurring/dissenting opinions), if not to themselves. Third, unlike legislators, judges work in an atmosphere where thorough testing of biases and ideas by litigants and other judges is part of the norm, not the exception. Though these constraints do not make the problem of applying religious insights worry free, neither do they counsel for full exclusion of those insights in the judge's work in deciding a case.

A different argument, lodged against a complex rhetorical approach itself, is one of competence: judges are not qualified to exercise leadership on forensic or even epideictic questions such as who is morally blameworthy for the particular mess before the courts. In this respect, critics are sometimes, perhaps even often, on solid

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<sup>37</sup>See RELIGION IN POLITICS, *supra* note 5, at 47-48. See also Howard J. Vogel, *The Judicial Oath and the American Creed: Comments on Sanford Levinson's The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1107, 1113 (1990).

<sup>38</sup>RELIGION IN POLITICS, *supra* note 5, at 51-54.

<sup>39</sup>*Id.* at 14-15.

ground.<sup>40</sup> However, even if we would accept generally that the judiciary is no more, and perhaps even less, competent to make moral judgments on the actions of individuals and state because of its peculiar elite vantage point, judges are surely entitled to do so in three circumstances:

1. Where a litigant has engaged in what an overwhelming consensus would agree is morally repugnant behavior, especially as it violates key constitutional principles such as equal respect and liberty, the Court should be as entitled to speak truth about such matters as anyone. Thus, if a state deliberately neglects a dying prisoner, or a Klansman burns a cross on someone's front yard, or a social worker stands by while a child is abused, the Court's failure to speak epideictically signals to members of the public that they are similarly excused from the duty of denouncing such action.
2. Where the Court exercises particular competence on a matter, the Court's expertise should give it warrant for forensic and epideictic speech. For instance, values of liberty, due process, even equal treatment, are matters in which constitutional courts do have more experience and have given more thought than the average person. Just as we would expect a bioethics expert to share what she knows about death and dying, we should expect the Court to speak about the harms to certain values that we hold dear, even if it decides that the Constitution requires the Court to prefer other values to those. Traditionally, the outcry against the loss of such values has been given to the dissenting opinion to raise, but the Court's role as an institution that will speak even painful truth is at least tarnished if the majority will not also exercise this function.
3. The way in which the Court describes the persons who come before the Court can, over time, send a message that they are to be praised or blamed, even if the Court does not explicitly use evaluative language to do so. Such a message over time, particularly as repeated in the opinions of particular Justices, is almost a foregone conclusion. For, as David Tracy writes, "[e]very discourse expresses conscious and unconscious ideologies, whether the someone who speaks or writes is aware of them or not."<sup>41</sup>

Thus, if the state is regularly referred to in disapproving or distrustful terms, or religious claimants are implicitly described as potential freeloaders out to defraud the government by making religious claims for exemptions, over time the Supreme Court will have sent an epideictic message that may well be unjustified by any set of facts before the Court. Because these unspoken epideictic choices of the Court may even carry some weight decisionally—in the religious exemption case, for instance,

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<sup>40</sup>In respect to questions of religious truth, of course, they share their competence with other branches of government. See *RELIGION IN POLITICS*, *supra* note 5, at 19 (quoting James Madison's view that "religion is wholly exempt from [civil society's] competence").

<sup>41</sup>DAVID TRACY, *PLURALITY AND AMBIGUITY* 61 (1987).

creating a “sincerity” criterion that many unorthodox Free Exercise claimants must meet as their part of the burden—it is particularly important for the Court to be deliberate, over time, about how such groups are described and evaluated through judicial language. In keeping with their responsibilities to the truth, judges need to describe with complexity the facts and the characters before them—the good and the bad in each person or institution which confronts them. And it is important that the Court’s epideictic views not be hidden, or if they are unintentionally hidden, for constitutional critics to expose “the hidden, even repressed, social and historical ideologies in all texts, in all language as discourse, and, above all, in all interpretations.”<sup>42</sup>

In some ways, it is only realistic to expect that religious belief will inform the epideictic, if not the forensic, aspects of a judge’s opinion. As Perry, Greenawalt and others have argued,<sup>43</sup> individual lawmakers’ attempts to hide what is particular about their commitments may be an illusory quest. If they are indeed formed in a religious tradition, these aspects of their insight into the world, and their biases on matters of principle and policy, may be impossible to eliminate from their framing of a response. And it is perhaps only a matter of fairness that a constitutional reader be enabled to spot a religious argument when it appears in another guise.

Borrowing from a religious tradition can give depth, and possibly even bring authority and competence to the Court’s epideictic and forensic arguments that merely personal insight cannot give. Judicial critics sometimes refer to a judge’s religiously informed construction of the social landscape as tantamount to his personal taste about some issues. While one may find judges so ignorant of their own traditions and communities that religion really *is* a matter of their taste, the rigorous interpretation of a religious tradition is surely more “objective” than the judge’s personal feelings or views.

Religious traditions, at least most of them, have much in common with the political tradition from which we derive the meanings of our most precious values. By and large, the moral understanding of religious traditions is formed in community, often around interpretation of ancient and concrete texts and rituals; it has stood the test of time; and it has had the opportunity to change and be changed by the concrete problems of the culture(s) around it.<sup>44</sup> As just one example, the Lutheran understanding of the relationship of church and state has had to speak to, withstand, and be forged in the fires of such diverse historical movements as the Peasants’ War, Scandinavian nationalism, the English Reformation, the Holocaust, and the Namibian struggle for freedom.

Religious traditions offer a treasure trove for forming and substantiating epideictic judgments in a way that does not sound in personal moralizing. Many

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<sup>42</sup>*Id.*

<sup>43</sup>Religious reasons may be both hard to uncover, and their impact hard to gauge compared to the importance of secular arguments, by the legislator himself or a reviewing judge. RELIGION IN POLITICS, *supra* note 5, at 34.

<sup>44</sup>See RELIGION IN POLITICS, *supra* note 5, at 80-81; THIEMANN, *supra* note 7, at 132 (“[religious convictions] are present ‘in, with and under’ the myths, narratives, rituals, and doctrines of a community”).

traditions offer narratives, sometimes wry, often complex, to describe the ways in which a civilization is formed, including the ways in which virtuous people are expected to behave, and vice is unmasked.<sup>45</sup> Some, such as Judaism, Catholicism, and Islam, have extensive legal and ethical casuistries to draw from;<sup>46</sup> some traditions have brilliant theological and philosophical thinkers and complex treatises.<sup>47</sup> Together, these traditions contain millennia of human wisdom, some of which is “substantially nonrevelational and even nontheological,” can be “presented in public discussions in ways that do not presume assent to them on the specific premises of a faith grounded in revelation,” and “can enhance and qualify rationality with community experience, intuition, attention to symbol, ritual and narrative.”<sup>48</sup>

While religious *language* in the Court’s forensic and epideictic functions is clearly problematical—one has no farther to look than Justice Stone’s famous dictum, “this is a Christian nation,”<sup>49</sup> to understand its potentially destructive role—the same rules which apply to any of the Court’s justificatory language can also be applied to religiously informed rhetoric, ruling Justice Stone’s comment and others like it out of order. For instance, our expectation that the Court should not rhetorically exclude vast portions of the populace from its audience, by implying that they do not “count” as citizens, can be applied to religiously informed as well as to secular argument that excludes them.<sup>50</sup> Similarly, just as a court may use a wide range of philosophical/policy arguments to demonstrate consensus on some issue

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<sup>45</sup>TRACY, *supra* note 41 at 12-14. As examples of epideictic stories from widely varying traditions, e.g., ISAAC BASHEVIS SINGER, *THE COLLECTED STORIES* (Farrar, Straus & Giroux, eds. 1982); AMERICAN INDIAN MYTHS AND LEGENDS (Richard Erdos & Alfonso Orth eds., 1984).

<sup>46</sup>The great legal schools of Islam offer a wealth of perspectives on morality and law, *see, e.g.*, Azizah al-Hibri, *Islamic Constitutionalism and the Concept of Democracy*, 24 J. INT’L LAW 1, 4-10 (1992); Khaled Abou El Fadl, *Muslim Minorities and Self-Restraint in Liberal Democracies*, 29 LOY. L.A. L. REV. 1525 (1996)(passim). Protestantism, while it has not developed a body of “Christian law,” boasts numerous denominational church statements on moral issues and monographs by thoughtful theologians. *See, e.g.*, Evangelical Lutheran Church in America, *The Church in Society: A Lutheran Perspective* (September 4, 1991); Lutheran Church in America, *Social Statement: The Church and Social Welfare* (June 19-27, 1968)

<sup>47</sup>Those traditions with extensive legal traditions also can draw on the insights of ethicists from Thomas Aquinas to Charles Curran, Maimonides to Emmanuel Levinas. For examples of such insights within the Protestant tradition, *see* KARL BARTH, *ETHICS* (Dietrich Braun ed., Geoffrey W. Bromiley trans., The Seabury Press 1981) (originally published in two volume edition as *ETHIK I* 1928 (Theologischer Verlag Zurich 1973) and *ETHIK II* 1928/1929 (Theologischer Verlag Zurich 1978)); STANLEY HAUERWAS, *A COMMUNITY OF CHARACTER* (1981); H. RICHARD NIEBUHR, *THE RESPONSIBLE SELF* (1963); PAUL RAMSEY, *BASIC CHRISTIAN ETHICS* (1950); JOHN HOWARD YODER, *THE POLITICS OF JESUS* (1972); GLENN TINDER, *THE POLITICAL MEANING OF CHRISTIANITY* (1989).

<sup>48</sup>RELIGION IN POLITICS, *supra* note 5, at 81, quoting in part Martin Marty, *When My Virtue Doesn’t Match Your Virtue*, 105 CHRISTIAN CENTURY 1094, 1096 (1988).

<sup>49</sup>Rector, et al., *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892).

<sup>50</sup>*See Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring).

before it, it may also take into account a consensus among religious traditions without adopting a sectarian (e.g., Jewish or Calvinist) position on some question.<sup>51</sup>

*B. Analogical Reasoning as a Legitimate Method of Reasoning from Religious to Constitutional Traditions*

If we accept the usefulness of religious tradition for framing forensic and epideictic aspects of judicial opinions, we must still ask how such traditions may be borrowed. Modern legal scholarship has been slow to recognize the use of analogy to import religious insights about human behavior, the construction of human community, and other areas of mutual concern to both the disciplines of law and religion. Perhaps the most direct analogical adaptations have occurred in legal and ethical interpretation. Professor Levinson, for instance, borrows from the “essential tensions” between “Protestant” and “Catholic” in Western thought to help us understand Americans’ varying commitments to, and interpretations of, the U.S. Constitution.<sup>52</sup> Professor Perry has mined a history of interreligious dialogue to describe an “ecumenical” politics,<sup>53</sup> and has compared judicial review to the prophetic tradition.<sup>54</sup> Yet other work has richly profited from these religious insights, if not always directly by analogy.<sup>55</sup> For instance, Thomas Shaffer explicitly uses theology to frame the ethics of a Christian lawyer;<sup>56</sup> while Milner Ball has borrowed biblical metaphors, and indeed whole narratives, to understand substantive law as well as the lawyer’s task.<sup>57</sup> Some writers publishing in law reviews have recently been using religious argument in a more directly deductive way, using the theologies of Karl Rahner or Paul Ramsey, for instance, to construct a theological critique of

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<sup>51</sup>Compassion in Dying v. Washington, 85 F.3d 1440 (9th Cir. 1996), *rev’d sub nom* Washington v. Glucksberg, 521 U.S. 702 (1997) (illustrating how the “common law” of religious traditions can be instructive, used in the court’s forensic and epideictic functions).

<sup>52</sup>See SANFORD LEVINSON, CONSTITUTIONAL FAITH 18-53 (1988). Thomas Grey, Joseph Vining and Michael Perry explore similar themes. Smith, *supra* note 17 at 585-86. Some, like Stephen Smith, are conversely criticizing the use of the theological language of ultimate concern in discussing legal interpretation. *Id.*

<sup>53</sup>LOVE AND POWER, *supra* note 4, at 83-127.

<sup>54</sup>MORALITY, POLITICS, AND LAW, *supra* note 2, at 136-45; Smith, *supra* note 17, at 585.

<sup>55</sup>For instance, a number of scholars are working to uncover theological or religious assumptions hidden in legal doctrine or jurisprudence. See, e.g., Frank S. Alexander, *Beyond Positivism: A Theological Perspective*, 20 GA. L. REV. 1089 (1986); Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CAL. L. REV. 1011 (1989); Arthur J. Dyck, *Beyond Theological Conflict in the Courts: The Issue of Assisted Suicide*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 503 (1995)(arguing that hidden religious assumptions in judicial opinions about suicide are inappropriate); Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 25 GA. L. REV. 923 (1991).

<sup>56</sup>See, e.g., Leslie E. Gerber, *Can Lawyers Be Saved? The Theological Legal Ethics of Thomas Shaffer*, 10 J. LAW & RELIG. (1993-94); Thomas L. Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181 (1981).

<sup>57</sup>See, e.g., Milner S. Ball, LYING DOWN TOGETHER: LAW, METAPHOR AND THEOLOGY (1985); MILNER S. BALL, THE PROMISE OF AMERICAN LAW (1981); MILNER S. BALL, THE WORD AND THE LAW (1993).

existing legal doctrine;<sup>58</sup> or their own theological arguments about the practice of law,<sup>59</sup> or particular legal problems such as Free Exercise jurisprudence,<sup>60</sup> civil rights,<sup>61</sup> or criminal law and procedure.<sup>62</sup>

Although there is some danger in borrowing from religion in legal interpretation,<sup>63</sup> the analogical method presents perhaps the most useful way of incorporating religious insights into the secular discussion of constitutional issues. While a theory of appropriate analogy is beyond the scope of this article, it is important to say a few words about why it might be more legitimate to use analogy to borrow from religious traditions than theological reasoning deductively applied to a legal case.

To accept the possibility of analogy between a sectarian religious argument and a “secular” legal argument is to accept the “similarity-in-difference”<sup>64</sup> which is analogical reasoning. It is to accept the notion that two widely divergent systems of human meaning might be able to find common referents, common “moments of recognition” of that which is both disclosed and concealed in analogical argument.<sup>65</sup> It is just such moments that can illuminate our quest to understand who we are as human beings and what we might become as a constitutionally organized community. To illustrate with just one example, if as radically different conversation partners, we can see theological and secular correspondences on the nature of human beings (e.g., that they are self-interested and self-justifying), we can agree to those understandings without being required to adopt fully the world-views from which they came, the secular economics world of the rational maximizer or the Christian world of the idolatrous sinner. And we can work with such understandings in a

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<sup>58</sup>See, e.g., Robert J. Araujo, *Political Theory and Liberation Theology: The Intersection of Unger and Gutierrez*, 11 J. LAW & RELIG. 63 (1994-95); R. Conte, *Toward a Theological Construct for the New Biology: An Analysis of Rahner, Fletcher, and Ramsey*, 11 J. CONTEMP. HEALTH L. & POL’Y 429 (1995); H. Jefferson Powell, *The Gospel According to Roberto: A Theological Polemic*, 1988 DUKE L.J. 1013 (1988); Joel E. Friedlander, *Comment, Constitution and Kulturkampf: A Reading of the Shadow Theology of Justice Brennan*, 140 U. PA. L. REV. 1049 (1992); David S. Clark, *Judge Posner’s Theology and the Temples of the Law—The Federal Courts: Crisis and Reform*, 1985 WIS. L. REV. 1183 (1985) (book review).

<sup>59</sup>See, e.g., JOSEPH ALLEGRETTI, *THE LAWYER’S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE* (1996).

<sup>60</sup>See Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 GEO. WASH. L. REV. 782 (1992).

<sup>61</sup>See Rachel Mariner, *Burdens Hard to Bear: A Theology of Civil Rights*, 27 HARV. C.R.-C.L. L. REV. 657 (1992).

<sup>62</sup>See THE CHRISTIAN FOUNDATIONS OF CRIMINAL RESPONSIBILITY: A PHILOSOPHICAL STUDY OF LEGAL REASONING (Crawford & Quin eds., 1991); George C. Thomas III & David Edelman, *An Evaluation of Conservative Crime Control Theology*, 63 NOTRE DAME L. REV. 123 (1988).

<sup>63</sup>Steven Smith notes the dangers of assuming that legal interpretation is a “religious enterprise,” for instance, see Smith, *supra* note 17, at 587.

<sup>64</sup>TRACY, *supra* note 41 at 20-21, 92-93.

<sup>65</sup>*Id.* at 20. See also RELIGION IN POLITICS, *supra* note 5 (describing the indeterminacy of shared moral premises as “the mediation of dissensus”).

practical way without diverting our attention to whether we can irrefutably prove the validity of those understandings using science, logic or other forms of certainty reasoning.

Analogy permits a diversity of meanings to exist independently, refusing to dilute any of them to a commonly defined meaning, and permitting each to retain its distinctive differences, the complexity and intensity of its understanding of the truth. Indeed, it is the strength of analogy that permits illumination of those differences critically necessary to the uniqueness of a tradition, without allowing such differences to become an insuperable barrier to our understanding each other. Or as Tracy puts it, an analogical imagination

can remind conversation partners that difference and otherness once interpreted *as* other and *as* different are thereby acknowledged as in some way possible and, in the end, analogous. Any one who can converse can learn to appropriate another possibility. . . . [T]here exists in every authentic conversation an openness to mutual transformation.<sup>66</sup>

In particular, analogy may provide a way of avoiding the battle waged among Christians and perhaps others between natural law and revelation as the basis for judging the moral validity of positive law. Analogy gives our pluralistic culture an alternative to natural law, for it does not insist on prior agreement that truth (including religious truth) is discoverable by observation of the natural world and/or human reason, without the need for special revelation or religious commitment. (Such an agreement may be more troublesome to many religious people than to the non-religious in our culture!) Nor does it demand the acceptance of a particular revelation as a predicate for discussing moral truth. Thus, analogy permits us to dispense with some religious preconditions before we can begin to hear or respond to religious arguments in constitutional litigation.

Religious traditions are particularly important sources for analogy in constitutional reasoning in a deeply ambiguous, pluralistic culture like our own because religions are “exercises in resistance,”<sup>67</sup> particularly resistance to “more of the same” that blind adherence to political consensus or tradition can represent. This resistance is necessary if humans are going to be creative in generating law that reflects the sacredness of their own existence together. Religious traditions can issue a radical challenge to the seductions of the law—the drive to simplify complexity, to cling to the past, to resolve the past without responding to the present, to quickly identify the needs of two sole litigants with our common aspirations, in fact the drive not even to see those litigants:

Through their knowledge of sin and ignorance, the religions can resist all refusals to face the radical plurality and ambiguity of any tradition, including their own. Through their most fundamental beliefs in Ultimate Reality, the religions can resist the ego’s compulsive refusal to face the always already power of that Ultimate Reality that bears down upon us. The religions also resist the temptations of many post-modernists to see the problem but not to act. But the religions also join secular

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<sup>66</sup>TRACY, *supra* note 41 at 93.

<sup>67</sup>*Id.* at 84.



postmodernity in resisting all earlier modern, liberal or neoconservative contentment with the ordinary discourse on rationality and the self.<sup>68</sup>

Analogy permits the possibility of a conversation between religion and law which is at once committed and critical, each challenging the other “through every hermeneutic of critique, retrieval, and suspicion we possess”<sup>69</sup> without refusing to see correspondence where it exists.

The use of the analogical model permits a religious judge who sees disjunctures between the “common wisdom” and his religious world view to refuse the elements of that “common wisdom” which jar. For instance, a religious judge might be skeptical of a popular world-view that the human body is personal property. A judge who, working from his religious world-view, understood the human body as sacred or “given” could refuse to apply a property metaphor in an abortion, child custody, or organ transplant case, this time based on the dissimilarity between religious and secular world-views, as analogical reasoning permits. And still, we might legitimately demand that such a judge not justify his decision using the language of “sacredness” unless he is prepared to show its acceptance in secular as well as religious human rights discourse.<sup>70</sup>

Analogical adaptation (suggesting likenesses as well as differences) rather than theological inference (applying theological principles or assumptions to particular situations) is a more useful way to proceed in critiquing law in a pluralistic society for other reasons.

First, many religious views, including Lutherans’, do not understand most moral situations to be resolved by a direct command by God to do action A or refrain from A.<sup>71</sup> For such believers, analogy represents a better strategy than deductive reasoning, because it would be incoherent to argue that a theological doctrine results in a particular jurisprudence. For instance, the reasoning that certain judgments or outcomes (such as absolute pacifism) ineluctably follow from the Christian faith is foreign to the basic Lutheran understanding of faith as a way of seeing a moral situation, a way of imagining a new relationship between the self and the neighbor. In the Lutheran view, Christian obedience is not ordered in an authority-subservience political model, at the command of a Divine Voice, even though law is, in some senses, a demand on the self. Instead, obedience is a way of responding to the gift of one’s own freedom,<sup>72</sup> expressed in the paradoxical language that we are freed for servanthood, freed to be bound in response to the neighbor’s need. It is not a set of prescriptions or outcomes. Analogical reasoning, or the use of metaphorical language (to suggest its literary analogue), permits a larger discussion about what inference one may draw from an image, a factual situation, or even a moral principle than mechanical application of a theological insight might yield.

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<sup>68</sup>*Id.*

<sup>69</sup>*Id.*

<sup>70</sup>Michael Perry makes this case in RELIGION IN POLITICS, *supra* note 5.

<sup>71</sup>Carl E. Braaten, *God in Public Life: Rehabilitating the “Orders of Creation,”* FIRST THINGS, Dec. 1990, at 32, 36. Lutherans subscribe to a version of natural law, described at more length at note 176-78 *infra* and accompanying text.

<sup>72</sup>*Id.* at 35-36.

The potential evil of analogical argument must also be faced: analogy permits not only the confusion of multiple possibilities, but the consequent justification of unjust action or inaction. Indeed, to take my immediate example, Lutherans have been justly criticized as “quietistic” sometimes for their failure to firmly demand particular legal outcomes,<sup>73</sup> or their failure to act at all in the face of injustice. And some of those who called themselves Lutherans have conversely participated in unspeakable injustice, distorting the central claims of the faith while claiming its heritage.<sup>74</sup> However, these facts do not differentiate Lutherans from others who consider themselves bound more unambiguously by the dictates of a sacred text. As Lutherans recognize, all human beings, whatever their convictions, are sinners who can believe and yet not live up to their beliefs, who can distort the claims of any faith and indeed blaspheme the sacred name in causes of their own self-delusion and self-interest, who can justify injustice even from their own sacred texts.

Second, it is difficult to know precisely what might be lost in applying theological doctrine to a particular human endeavor when God drops out of the sentence. However, any person of faith must understand that loss to be immeasurable and even be fearful of the profound disrespect for God inherent in such activity. In a directly theological argument, the limits of human ability to keep a theocentric focus can be recognized; but the trustworthiness of theological reflection when one moves from a discussion of God’s relationship to us, to our relationship to each other (the ethical) is less clear. Analogical or metaphorical application by its method recognizes the incommensurability of talk about the creative work of God and talk about human attempts to instantiate that work in practical ways.

Yet, hospitality is better served by an analogical rather than an interpretive response to theological understandings. As many thoughtful writers, among them Pat Keifert<sup>75</sup> and Michael Perry,<sup>76</sup> have concluded, we who are strangers—each of us to some other’s particular religious or secular tradition or experience—must all be welcomed to a conversation about what constitutes the good. Welcoming the

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<sup>73</sup>See THOMAS W. STRIETER, CONTEMPORARY TWO-KINGDOMS AND GOVERNANCES THINKING FOR TODAY’S WORLD: A CRITICAL ASSESSMENT OF THE TYPES OF INTERPRETATION OF THE TWO-KINGDOMS AND GOVERNANCES MODEL, ESPECIALLY WITHIN AMERICAN LUTHERANISM 63-64 (1986) (dissertation, Lutheran School of Theology at Chicago). Karl Barth, among others, properly criticized the 20th century distortions in Lutheran ethics that separated the worldly realm or kingdom from God’s authority and suggested that the Gospel had nothing to do with the worldly realm.

<sup>74</sup>*Id.* at 52-72. These distortions led to “ethical bankruptcy” on social justice and political doctrines of a number of German Lutheran theologians during the Hitler era, including the Rengsdorft Theses which stated that Christianity had its roots in the German nation and that there was no contradiction between allegiances to the Gospel and to the Nazi state. *Id.* at 64-75. This theological position, however, was met strongly by the Barmen Theological Declaration led by Karl Barth and others, who “revitalized the concept of the ‘lordship of Christ’ relating it to all of life,” although Barth ultimately broke from the Lutheran tradition by understanding law as the will of God manifested by grace and our acceptance of that grace, rather than distinct and prior to the Gospel. *Id.* at 68-73.

<sup>75</sup>PATRICK KEIFERT, WELCOMING THE STRANGER (1992).

<sup>76</sup>LOVE AND POWER, *supra* note 4, at 43-51.

stranger is pragmatic (how can a people be governed by a language which they do not understand?) and it is ethically demanded. In a pluralistic democratic culture, that ethic is embedded deep within culture, necessary for its survival, and hence not a “nice thing to do” but an imperative.

While analogical argument does not create immediate understanding among persons of different faith traditions, it has a greater chance of permitting a wider dialogue among people with very different religious understandings. Just as people from different cultural traditions can find meaning in the communal narratives of others, analogy permits diverse peoples to find common ground without surrender of the particularities of their beliefs, and to bring creative insights into interpretation of the analogy itself. The possibilities for such rich diversity are particularly potent for metaphors and other images that resonate in countless fresh ways.

Analogical argument also has a better chance of avoiding the “trump” syndrome at the heart of so many fears about religion in public: the concern that the believer will attempt to triumph over his non-believing or different-believing conversational partner by arguing that such a person “doesn’t really understand” the demands of God or the claims of a particular religious tradition from which the root meaning is drawn.

Finally, whether one argues that an individual must ethically speak out of a voice clear to all in public policymaking, or one welcomes voices of those who cannot in conscience speak “ecumenically”, analogical argument permits the possibility of common ground without requiring prior agreement on the rules for conversation. As such, it may welcome to the conversation those religious and non-religious people who fear that they may have to concede an important truth to be taken seriously.

### III. SITUATING LUTHERANS IN THE PROTESTANT WORLD

The situation of the Lutheran Justice faced with a constitutional dilemma is a perfect concrete case to explore what specific insights a Lutheran jurist might borrow from his faith to understand the human context of the case, and the parameters of his role as a jurist. Lutheranism as a body of thought offers a proposal of paradox: human beings who are good creations with corrupted wills, worlds of law and love that co-exist, and freedom to act that is constrained by gift and service rather than rules.

As Carl Esbeck illustrates, and church-state debates often ignore, there are any number of Christian positions on the relationship between the state, the church and the individual, even counting only Protestant positions.<sup>77</sup> Some religious positions have loomed in the background of Supreme Court jurisprudence, particularly in free exercise cases,<sup>78</sup> while others (like Lutheranism) have been largely overlooked in constructing church-state paradigms.

Esbeck and Michael McConnell have situated Lutheranism in a “paradoxical position” in their typologies of American religious views of church and state

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<sup>77</sup>Carl H. Esbeck, *A Typology of Church-State Relations in Current American Thought*, in RELIGION, PUBLIC LIFE AND THE AMERICAN POLITY 3 (Luis E. Lugo ed., 1994).

<sup>78</sup>Some authors suggest that Puritanism has had a major influence on American law. See *id.*, at 5-6. Levinson, *supra* note 14 at 1050, 1054.

relations.<sup>79</sup> Utilizing H. Richard Niebuhr's *Christ and Culture* to organize modern American<sup>80</sup> religious views on church-state issues into typologies, McConnell situates Lutheranism in the model which he terms "Church Accommodated by Culture." In terms of prioritizing loyalties to one's faith and the state, McConnell includes in the Accommodated model those denominations who accept "the ordinary morality and natural reason of the culture insofar as they go. But they also recognize obligations to a higher standard, not based on the values of the secular world."<sup>81</sup> Thus, they seek to adhere to both worldly and Christian values, recognizing that they are distinct. While Martin Luther and the Apostle Paul are included in this McConnell group, Niebuhr describes Lutherans as part of a distinct "Christ and Culture in Paradox" group.<sup>82</sup> This "Paradox" group understands the "conflict between the City of God and the City of Man," joining radical Christians in "pronouncing the whole world of human culture to be godless and sick unto death," but knowing that they "belong to that culture and cannot get out of it."<sup>83</sup>

Paradox/Accommodated theologies thus take distinctively different positions toward the problem of church vs. state loyalties compared with other Christian positions. Unlike Church Apart from Culture groups<sup>84</sup> and Church in Conflict with

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<sup>79</sup>McConnell's project is to describe religious views about how the law should respond to their religious, normative demands and "[h]ow far . . . the normative authority of the world extend[s]." Michael W. McConnell, *Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence*, 42 DEPAUL L. REV. 191, 192 (1992). Esbeck's proposal is to describe different categories of ecclesiology and philosophy of the state, and how the state and church should be related, given those understandings. Esbeck, *supra* note 77 at 3-24; cf. THIEMANN, *supra* note 7, at 95-114 (typing liberalism's critics as sectarian communitarians and liberal revisionists). To avoid confusion, I will be largely following McConnell's typology, mindful that I am losing some of the rich complexity of Esbeck's scheme that focusses on five concerns:

- a. the purpose and authority of government and the nature of the church;
- b. the juridical protection accorded religious speech;
- c. the degree of autonomy accorded a church or other religious organization;
- d. discrimination by the state in the distribution of goods and opportunities [along religious lines]; and
- e. juridical protection accorded religiously based conscience.

Esbeck, *supra* note 77, at 6.

<sup>80</sup>McConnell also adds two historical models of the relationship between Christianity and Culture. One is "Church Controlling Culture" or theocracy, the model in which a single church "has actual political authority" rather than simply the power to persuasion. McConnell, *supra* note 79, at 218. The other "Culture Controlling Church", which McConnell sees in the Church of England, "is the view that the church is subordinate to the civil authorities." *Id.* Neither of these models is currently recognized in American jurisprudence as an option, according to McConnell, except perhaps in cases of church property disputes. *Id.*

<sup>81</sup>*Id.* at 209.

<sup>82</sup>*Id.* at 210.

<sup>83</sup>*Id.* (quoting H. RICHARD NIEBUHR, CHRIST AND CULTURE 156).

<sup>84</sup>McConnell notes that this group is subsumed in Niebuhr's typology as a subgroup of Christ Against Culture. McConnell, *supra* note 79 at 194.

Culture groups,<sup>85</sup> Lutherans do not see themselves as “radical” Christians forced, as a matter of worldly polity, to choose between the irremediably evil world and Christ.<sup>86</sup> Unlike Church Apart from Culture groups, such as the Amish and some fundamental Protestants,<sup>87</sup> Lutherans do not feel impelled to separate themselves culturally and even physically from the wider society; they do not ask to be let alone by the legal system. Indeed, they would resist the Apart denominations’ abandonment of the public sphere to secularism conditioned upon the world’s response granting them religious accommodations, as the Supreme Court did for the Amish in *Wisconsin v. Yoder*.<sup>88</sup> Nor would Lutherans fully align with McConnell’s “Church in Conflict with Culture” groups, who choose not to opt out but to live in conflict with the state, radically committed to Jesus Christ and his teachings as authoritative for public life.<sup>89</sup> Lutherans recognize the state not as the evil other, but as a divine gift for which gratitude is owed and critique demanded.

Lutherans would thus similarly reject the response of Esbeck’s “strict separationists” who want “a state that is decidedly nonreligious but not necessarily hostile to religion”<sup>90</sup> and “aspire to government unalloyed by even vestiges of religion from bygone days.”<sup>91</sup> Whether they are secular, only vaguely religious people or Christ against Culture believers fearful of persecution, strict separationists try to avoid traditional religious influence on civic or public matters, so that public issues such as education, law, and economics are publicly debated in purely secular terms. Rejecting this strict division, Lutherans would want to avoid three outcomes Esbeck identifies from strict separationism, which ironically parallel the expected outcome of Justice Rehnquist’s views:<sup>92</sup> dualistic lives, split between a privatized

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<sup>85</sup>The best comparison with McConnell’s Church Apart and Church in Conflict groups in Esbeck’s formulation are the “freewill separationists,” who insist on “soul freedom” or voluntaristic religion, which must include freedom from a government incompetent to determine which religious world view is correct. Esbeck, *supra* note 77 at 10. Such a government, in the freewill separationist view, will prostitute the churches to serve the civil power. Prophetic freewillers who are “calling [the state] back to its true course” have been selectively involved in issues of personal morality, such as gambling, pornography, and alcohol; peace issues; and social welfare, labor and hunger legislation. *Id.* at 11-12.

<sup>86</sup>McConnell, *supra* note 79 at 196, 198-99.

<sup>87</sup>McConnell notes that these groups are increasingly ending up on the losing side of church-state battles. *Id.* at 198.

<sup>88</sup>406 U.S. 205 (1972).

<sup>89</sup>McConnell, *supra* note 79, at 198-99. For example, sanctuary movement workers and religious objectors to the draft, have “insisted not only that [they were] obliged to adhere to a standard of conduct that differs from the government’s, but that the wider society should conform to the religious standard as well.” Such groups, McConnell argues, invariably lose when they challenge government on an issue that “matters much” to the government.” *Id.* at 202.

<sup>90</sup>Esbeck, *supra* note 77, at 7.

<sup>91</sup>*Id.* at 8.

<sup>92</sup>Esbeck’s strict separationists and Justice Rehnquist’s views on religion tend to lead to the similar separation of important human values and experiences, even though Justice Rehnquist, rejects the strict separation argument in his Establishment Clause jurisprudence,

family life and secular public life; a marginalized, trivialized “therapeutic” religious life focussed on personal beliefs; and the employment of pragmatic instrumentalism and “liberal political theory” alone for public choices.<sup>93</sup>

Lutherans would agree with Esbeck’s “institutional separationists” on three points:

A. “[A] universal, transcendent point of reference or ethical system for the state exists and is required in order to secure human rights and maintain a republican structure of government.”<sup>94</sup> Indeed, Lutherans acknowledge the role of natural law and the priority of independent human reason about the nature of the good, although the state, as organized in positive law, is equally seen as good, however infected it may be with human sin.<sup>95</sup>

B. *The state must be theocentric but not theocratic.* That is, the state is not bound by a set of theological particulars, like a positive law superseding the Constitution, yet (paradoxically) the theological worldview of separationists should be used as precedent. Church and state should “maintain distinct responsibilities that should be honored as each institution fulfills its proper role.”<sup>96</sup> Yet, because both “the people” and human institutions are fallen, the will of God must be recognized as in some sense “higher” law if the state is to have any check.<sup>97</sup>

As Esbeck’s typology suggests, Lutherans do not understand divine authority or texts as prescribing a jurisprudence or particular legal order. Lutheranism recognizes three major forms of critique of the legal order: in serious cases, where the witness to the Gospel itself is jeopardized by the state, the church must stand in *statu confessionis*, against each and every presumption of the state (as in Nazi Germany); in cases of significant departure from the most fundamental presumptions of natural law, including the duty to the neighbor, Christians must stand in prophetic critique of the state; and in all cases, Christians are obliged to participate as loving creator/critics of law, and to use their gifts in service of the community, including the state if they have the vocation to do so.<sup>98</sup>

C. *Religious people have the duty “to preserve the good in culture and reform the bad.”*

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*see, e.g.,* Mueller v. Allen, 463 U.S. 388, 399 (1983)(majority opinion); Zobrest v. Catalina Foothills School Dist, 509 U.S. 1, 5 (1993)(majority); Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 811-12 (1973)(dissenting).

<sup>93</sup>Esbeck, *supra* note 77, at 9. In addition, strict separationists tend to view religious freedom broadly, to include any philosophically based conscientious objection, and vigorously protect consciences from coercion, particularly those of minority religions. *Id.*

<sup>94</sup>*Id.* at 13.

<sup>95</sup>Braaten, *supra* note 71, at 33-34.

<sup>96</sup>Esbeck, *supra* note 77, at 15.

<sup>97</sup>*Id.* at 13; Human Law and the Conscience of Believers (statement of the American Lutheran Church, October 20, 1984).

<sup>98</sup>STRIETER, *supra* note 73, at 9, 45-46, 111, 214, 248-49, 277; Braaten, *supra* note 71, at 35.

Lutherans and Esbeck's institutional separatists<sup>99</sup> share the view that the privatized faith of strict separationists and secularism's narcissism are a more immediate threat to culture than isolated violations of religious liberty that might be occasioned by religiously informed pursuit of the good.<sup>100</sup> They probably depart from others in Esbeck's category in being much more concerned about the harm civil religion can cause to the mission of the church, by potential confusion of social expectations and the Gospel.<sup>101</sup> While they too believe that faith must be integrated into all aspects of life, Lutherans might not precisely advocate "an achievable balance between proclaiming eternal values and addressing the present in a practical and humble manner,"<sup>102</sup> because they would understand these concerns to be different dimensions of life rather than extremes needing to be balanced.

Lutherans would similarly not view the world with McConnell's Churches Aligned with Culture (Niebuhr's "cultural Christians"), who tend not to see tensions between the Church and culture, but "interpret culture through Christ," and "understand Christ through culture," selecting elements of each which are most in accord with the other.<sup>103</sup> Unlike Cultural Christians, Lutherans are suspicious about borrowing "the highest ideals of our culture" or fully cooperating with the government to ensure that shared social and moral objectives will be more effectively reached, for they have a realistic view about human distortion of political ideas and social progress. Because of their cautious view about the possibilities for social progress in a world peopled by sinners, Lutherans are similarly wary of "Church Influencing Culture" groups seeking to "reclaim and uplift the world" which in their view is not evil, but perverted and convertible to good.<sup>104</sup>

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<sup>99</sup>Esbeck defines institutional separationists as agreeing on a universal transcendent point of reference for the state, theocentric but not theocratic, viewing religious speech as important because the church must influence public policy in an integrated way, and viewing privatized faith as a threat to public life while having confidence that a state in which religious language is well-heard can still protect minority religions by promoting the values of tolerance and civility. Esbeck, *supra* note 77, at 12-15.

<sup>100</sup>*Id.* at 14.

<sup>101</sup>*Id.*

<sup>102</sup>*Id.* at 14-45.

<sup>103</sup>McConnell, *supra* note 79 at 204 (quoting H. RICHARD NIEBUHR, *CHRIST AND CULTURE* 83 (1951)).

<sup>104</sup>*Id.* at 214. Niebuhr describes these groups as Christ Transforming Culture groups. Citizens in McConnell's Church Influencing Culture model are fully entitled to participate in public life to achieve their ideas, *id.* at 215, and "political activism by the religiously motivated" is recognized as "part of our heritage." *Id.* at 216 quoting *Edwards v. Aguillard*, 482 U.S. 578, 615 (1987) (Scalia, J., dissenting). In Esbeck's scheme, Niebuhr's "cultural Christians" and McConnell's "Church Influencing Culture" groups might be nonpreferentialists, who want a nondenominational state that recognizes traditional religion as the basis for inculcating fundamental moral virtues necessary to citizenship. In the nonpreferentialist view, religious organizations serve as the foremost mediating institution between individual and state, and provide the individual with "a sense of community in an often impersonal world." Nonpreferentialists would permit governmental aid, including symbolic aid, to religion so long as there was no coercion of conscience. Esbeck, *supra* note 77, at 18.

McConnell believes that the “Accommodated” groups’ views, symbolized by Roger Williams, “lie at the intellectual foundation of the First Amendment,” in that they recognize the simultaneous corruption of the church and state which occurs when the two are aligned.<sup>105</sup> Separation of these spheres reinforces the simultaneity of a citizen’s allegiance to both spheres while recognizing the difference in claims between the civil and spiritual “kingdoms.” Yet, the Free Exercise Clause is available to reduce the dissonance between religious dictates and worldly norms, to permit full citizenship in both the civil and religious realms.<sup>106</sup> However, McConnell’s explanation does not fully capture the tensions in the Lutheran position that neither separation nor Free Exercise can fully resolve.

Luther’s work on the problem of transcendent law accounts for the paradoxes the McConnell/Niebuhr/Esbeck typologies identify. Luther accepts much of the natural law tradition: that human beings have the capacity to reason about their own situation and to understand how they must order their lives apart from faith (although they do not have the capacity to reach or comprehend God on their own).<sup>107</sup> He accepts that such a capacity is a gift from God to everyone, not just a chosen few.<sup>108</sup>

Luther suggests, however, that human nature reveals incapacity as well as capacity, human wickedness as well as goodness. He replies to Erasmus that “free choice, or the most excellent thing in men—even the most excellent men, who were possessed of the law, righteousness, wisdom, and all the virtues—is ungodly, wicked, and deserving of the wrath of God[; but] [t]he righteousness of God is revealed and avails for all and upon all who believe in Christ. . . .”<sup>109</sup> And he further declares that in God’s sight, those most devoted to keeping the law in its detail, or the “works” of the law, are farthest from fulfilling the law, because they lack the Spirit who truly fulfills the law.<sup>110</sup> In that claim, Luther gives insight into the central animating paradoxes of Lutheranism, some of which have eluded modern Western thought about law and particularly judicial review.

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<sup>105</sup>McConnell, *supra* note 79, at 210.

<sup>106</sup>*Id.* at 210-211.

<sup>107</sup>Braaten, *supra* note 71, at 34.

<sup>108</sup>George W. Forell, *Luther and Conscience and The Political Use of the Law* in MARTIN LUTHER: THEOLOGIAN OF THE CHURCH 59, 89 (Word and World Supplement Series 2, 1994).

<sup>109</sup>Martin Luther, *The Bondage of the Will*, in MARTIN LUTHER’S BASIC THEOLOGICAL WRITINGS 173, 180 (Timothy F. Lull ed., 1989).

<sup>110</sup>*Id.* at 190.



IV. TURNING TO JUSTICE REHNQUIST: JUXTAPOSING LUTHERAN THEOLOGY AND REHNQUIST'S CONSTITUTIONAL PRINCIPLES

In my view, Justice Rehnquist's failure to be Lutheran in his jurisprudence<sup>111</sup> severely impoverishes it. A review of his work suggests that Rehnquist as a jurist fails to accept the theological insights of the Lutheran tradition about the relationship between God and human beings. He also fails to borrow analogically from Lutheranism in ways that could lead to a more nuanced version of his own principles, and which could bring more complexity to the forensic and epideictic aspects of his opinions.

A Lutheran jurist who thought his faith was relevant to his work would come to the table with certain theological understandings about the relationship between the individual and the state. Because these are theological understandings—that is, God is a necessary actor in these sentences, and without God, they cannot make any sense—Rehnquist might be legitimately subjected to criticism for justifying decisions in these ways, but they might serve as important background for the forensic and epideictic aspects of his opinions. More importantly, Lutheran theology also leads the way to several somewhat paradoxical positions on the large problems of jurisprudence, such as the relationship between the individual, authority, and the state, which can be fruitfully borrowed.

These Lutheran understandings potentially conflict, in important ways, with the major themes identified by students of William Rehnquist's jurisprudence as well as some of his public pronouncements on the judicial office.<sup>112</sup>

Strict Constructionism: Internally to his discipline, Justice Rehnquist's interpretive approach to the Constitution is characterized by most scholars as "strict construction," planning a limited role for the judicial use of reason in resolving a constitutional dispute.<sup>113</sup>

State Sovereignism: In terms of relationships of power and authority, Justice Rehnquist almost invariably sides with the state, writ large, in conflicts between the individual or his group and the state; and the state, writ small, in conflicts between

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<sup>111</sup>Howard Lesnick helpfully notes the distinction between judges who seek to do what their religion demands of them, and those who seek to understand the teachings of their religion, and to consider what they say about how they should do their job as a jurist. Letter from Howard Lesnick (May, 1997) (on file with author). And, one can, of course, embody Christian virtues or even follow denominational expectations without understanding a denomination's teachings; and can understand the faith without living it or even following specific religious dictates. This article does not attempt the former, to describe an ethics of Lutheran judging, but it does commingle the questions of what Lutheran judges understand about their own role in securing justice, and how they think law and legal institutions must themselves be organized to account for both the Creation and the Fall.

<sup>112</sup>A former law clerk, Robert Giuffra, identified Rehnquist's jurisprudence themes as deference, interpretivism, and federalism and state autonomy. IRONS, *supra* note 13, at 331 (1994). Irons reports that one study found that these factors predicted Rehnquist's votes between 85-100% of the time. *Id.*

<sup>113</sup>SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 28-29 (1989)(hereinafter Davis); D. DAVIS, *supra* note 13, at 14-17. *But see* Nicholas S. Zeppos, *Chief Justice Rehnquist, The Two Faces of Ultra-Pluralism, and the Originalist Fallacy*, 25 RUTGERS L.J. 679, 690, 692 (1994) (arguing that Rehnquist is more committed to his substantive ideology than to originalism or any interpretive theory).

the federal and the state government.<sup>114</sup> Other writers have described this constant as a preference for “order over liberty” or “the rights of majorities ahead of the rights of individuals.”<sup>115</sup> He has also been termed deferential to the views of other governmental actors in his judicial role.<sup>116</sup> The one glaring, indeed troubling, exception is his fierce protection of traditional private property, which does not extend to the protection of government entitlements or benefits as private property.<sup>117</sup>

Positivism: In his understanding of the relationship of law and morality, reviewers of his work have found in Justice Rehnquist’s jurisprudence a commitment to legal positivism.<sup>118</sup> By that, they reference Rehnquist’s belief that there is no moral critique available to Americans to substantiate the propriety of particular legislation.<sup>119</sup>

Thomas Merrill describes Rehnquist as an “ideal pluralist” or “ultrapluralist.”<sup>120</sup> An ultrapluralist understands democratic politics as a process of aggregating or summing private, divergent interests and values that are “largely exogenously determined, in the sense that they are not much influenced by participation in the political process.”<sup>121</sup> Public decisions will produce public policies “based on compromise [not necessarily] a coherent conception of the common good.”<sup>122</sup>

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<sup>114</sup>D. DAVIS, *supra* note 13, at 19-22; DAVIS, *supra* note 113, at 24-26; David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 294 (1976); Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 623 (1994); Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567, 573 (1991). It is perhaps interesting that Justice Rehnquist’s first memorable case as Justice Jackson’s clerk involved the Steel Seizure Case, in which the President’s lawyers claimed that constitutional limitations applied only to Congress, not the President. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Justice Rehnquist’s lengthy discussion underscoring his uneasiness with such a broad demand for power in his book *THE SUPREME COURT* is telling. WILLIAM REHNQUIST, *THE SUPREME COURT* 63-64 (1987).

<sup>115</sup>Merrill, *supra* note 114, at 632; Shapiro, *supra* note 114, at 294.

<sup>116</sup>Davis, *supra* note 113, at 17-19.

<sup>117</sup>Mark Tushnet, *A Republican Chief Justice*, 88 MICH. L. REV. 1326, 1329-30 (1990) (book review) (suggesting Rehnquist’s positions are more consistent with a Republican ideology than a pure federalist one).

<sup>118</sup>*See, e.g.*, DAVIS, *supra* note 113, at 23-24. Tushnet disagrees, noting that Rehnquist does not uphold fundamentally wrong legislation such as private property takings. Tushnet, *supra* note 117, at 1331-32.

<sup>119</sup>*See* DAVIS, *supra* note 113, at 26, who asserts that Rehnquist is a moral relativist. Federal Judge William Justice, who agreed with this assessment in replying to Justice Rehnquist’s 1976 speech, argues that relativism was foreign to the Framers, and even went beyond Holmes’ views in his critique of Justice Rehnquist, entitled “A Relativistic Constitution.” IRONS, *supra* note 13, at 333-34.

<sup>120</sup>Merrill, *supra* note 114, at 631. *But see* Zeppos, *supra* note 113, at 680-84 (characterizing Rehnquist as an originalist ultra-pluralist, not a dynamic ultra-pluralist, sometimes enforcing the expectations of the original legislature rather than a later one).

<sup>121</sup>Merrill, *supra* note 114, at 626.

<sup>122</sup>*Id.*

Democratic institutions reflect “an accurate weighing of majority and minority interests” more than any other outcome.<sup>123</sup>

In the ultra-pluralist view, judges function as a branch of this system, acting “on exogenously-determined values and reach outcomes based on bargaining and compromise.”<sup>124</sup> They are moral skeptics; that is, they think it is not meaningful to speak about the common good, only about an individual’s personal tastes and preferences.<sup>125</sup> Thus, even a discussion among Justices about the majority and dissenting opinions would be unavailing, as values are not shaped by dialogue.<sup>126</sup>

However one packages this set of views, if rigidly applied,<sup>127</sup> they are inconsistent with the theological values that inform Lutheranism.

*A. Strict Construction vs. Law as Gift: Toward Affirming Universal Suspicion*

A Lutheran View: Law, and the state, are a gift from God, but not a command from God.<sup>128</sup> Political authority is an order of creation, a means by which God preserves humanity by ensuring order, peace and justice in the world,<sup>129</sup> but its direct progenitors are human. Thus, (paradoxically) law is always suspect as the creation of human beings “deserving of wrath,” for the natural law discoverable by means of human reason is always obscured by human evil.<sup>130</sup> Or as Luther would say, Satan blinds reason to the natural law.<sup>131</sup>

A constitutional judge’s view of his own internal discipline depends in large part upon his views about two related issues: the judge’s faith in the power of reason, and the legal body in which that faith is located. On the bench and within the academy, both some interpretivists and non-interpretivists largely distrust human reason and emotion, and they divide only on whom they most distrust and where they will place authority in the wake of reason’s default. Interpretivists’ skepticism over the ability of human reason to find the good is largely focussed on judges.<sup>132</sup> In

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<sup>123</sup>*Id.*

<sup>124</sup>*Id.* at 628.

<sup>125</sup>*Id.* at 629.

<sup>126</sup>Merrill, *supra* note 114, at 634-35.

<sup>127</sup>Of course, any jurist might from time to time express the concerns that inform positivism, statism, and strict construction without applying these concepts ideologically or predominantly.

<sup>128</sup>Braaten, *supra* note 71, at 33-35.

<sup>129</sup>Christian Faith and U.S. Political Life Today 2 (ELCA Teaching and Discussion Resource 1995) (describing the role of Government to “maintain peace, to establish justice, to protect and advance human rights, and to promote the general welfare of all persons,” (quoting *The Nature of the Church and Its Relationship with Government* (CALC, AELC, LCA 1984)).

<sup>130</sup>Braaten, *supra* note 71, at 34; Christian Faith, *supra* note 129, at 2.

<sup>131</sup>Human beings are also blinded to their own nature; as Luther explains, “[t]his hereditary sin [original sin, which bears all subsequent evil deeds] is so deep a corruption of nature that reason cannot understand it. It must be believed because of the revelation in the Scriptures. . . .” *The Smalcald Articles*, Lull, *supra* note 109, at 516.

<sup>132</sup>*See, e.g.,* Harry M. Clor, *Chief Justice Rehnquist and the Balances of Constitutional Democracy*, 25 RUTGERS L.J. 557, 563 (1994). Rehnquist understands the Court’s Equal

the most extreme cases, they reduce judicial review to searching out the beliefs of the framers (intentionalism) or rubber-stamping the presumed will of the current population (using the so-called majoritarian presumption).<sup>133</sup> Justice Rehnquist's judicial skepticism regularly results in this sort of response, along with severe epideictic criticism for his fellow judges, whom he has compared to "platonic guardians" and Pontius Pilate.<sup>134</sup> If the individual citizen is not to be trusted, surely the jurist who appears as no more than an individual wolf in law's clothing should not lay claim to any special expertise on justice nor should he be self-righteous about his calling. As Justice Rehnquist describes some judges:

[T]hey are a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country. . . . If there is going to be a council of revision, it ought to have at least some connection with popular feeling.<sup>135</sup>

For mistrustful statist, the judicial role is to tell the litigants what the majority, or their elected representatives, would have told them if the majority could have packed into the courtroom, and not much more, although even Rehnquist will concede that "[a] merely temporary majoritarian groundswell should not abrogate some individual liberty *truly protected* by the Constitution."<sup>136</sup>

Non-interpretivists who also distrust human reason tend to assume a skeptical stance largely toward the legislative and executive branches. Where interpretivists distrust the elitism, emotionalism, and arrogance of judges, these non-interpretivists assume that legislative and executive action is often the product of power-lust, greed, bureaucratic insensitivity or popular resentment against government employees and minorities.<sup>137</sup> For some rights advocates, the jurist's task is to stand as a shield

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Protection jurisprudence, for instance as "an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle." Irons, *supra* note 13, at 247 (quoting *Trimble v. Gordon*, 430 U.S. 762, 777 (1977)).

<sup>133</sup>See William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995); Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government*, 80 VA. L. REV. 625, 657 (1994); William G. Ross, *The Need for an Exclusive and Uniform Application of 'Neutral Principles' in the Adjudication of Church Property Disputes*, 32 ST. LOUIS U. L. J. 263 (1987).

<sup>134</sup>See, e.g., IRONS, *supra* note 13, at 252 (quoting *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 525 (1979)). For their judicial activism, Rehnquist has also accused his colleagues of borrowing ideas from George Orwell's 1984; and escape artist Houdini. *Id.* at 261

<sup>135</sup>Rehnquist, *supra* note 3, at 698.

<sup>136</sup>*Id.* at 697 (emphasis added).

<sup>137</sup>See, e.g., Jonathan R. Macey, *Chief Justice Rehnquist, Interest Group Theory and the Founders' Design*, 25 RUTGERS L.J. 577, 593 (1994) (discussing judicial insulation from the interest group process). Such groups may also differ on whether national or state power is most trustworthy, as demonstrated by the debate between Anti-Federalists, who believed that smaller, more homogeneous states would enhance civic virtue; and Federalists, who thought that larger, more heterogeneous constituencies would reduce the possibility of minority or majority factional oppression. See Ronald Kahn, *The Supreme Court as a (Counter) Majoritarian Institution: Misperceptions of the Warren, Burger, and Rehnquist Courts*, 1994 DET. C.L. REV. 1, 7-8 (1994).

between the oppressiveness of government and the vulnerability of the individual,<sup>138</sup> and his obligations are limited only by the sharp edges of the constitutional text, the finitude of judicial power, the limits of judicial wisdom, and practical matters such as knowing who is telling the truth in a particular case.<sup>139</sup> For some “critical legal” theorists, majorities and power-holders are suspect, while minorities and powerless people are not,<sup>140</sup> except as they have false consciousness. Thus, in one feminist critical model, men are oppressors and women are victims; the patriarchy silences women who demand reproductive rights,<sup>141</sup> but feminist collectives cannot wield abusive power over women who disagree with the feminist platform. Again, the contrast between good and evil is sharp: the patriarchy rarely does good, and feminism rarely does evil.

Still other interpretivists and non-interpretivists have a high regard for the ability of human reason to resolve individual and social problems. They want to believe that lawmakers, if they only spend time reflecting without the taint of constituent interest or bias, will eventually discover the course for the common good. Many interpretivists locate these civic virtues in legislators, mouthpieces for the full range of human concerns that their constituents hope to express in legislation.<sup>142</sup> Non-interpretivists often locate civic reasoning in the judicial process.<sup>143</sup> In their view, judicial review is legitimated by the judges’ distance from the fray of politics and by their power to use Prof. Bickel’s “passive virtues” and 14th Amendment review to demand full rational re-consideration of laws by legislatures.<sup>144</sup> Some pro-reasonists imagine the individual as innocent by nature compared to the corruptibility of corporate bodies, such as bureaucracies and legislators, and presume that the individual, if left to his own devices, will more often than not do the right thing by his neighbor. They represent a distinct contrast to many statist who suspect the

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<sup>138</sup>See ROGER GOLDMAN & DAVID GALLEN, JUSTICE WILLIAM J. BRENNAN, JR.: FREEDOM FIRST 125-30 (1994)(describing Justice Brennan’s comparable “rights” views).

<sup>139</sup>The rights model can perhaps most clearly be seen in the Warren Court development of criminal procedural protections for individuals. For examples, see GOLDMAN & GALLEN, *supra* note 138 at 179-192. The narrative summary in the development of those protections is that the police are so tempted toward oppression for the sake of controlling criminals that the only antidote is to take away their power to imprison each time they step out of line.

<sup>140</sup>Guyora Binder, *On Critical Legal Studies as Guerilla Warfare*, 76 GEO. L. J. 1, 29 (1987); Clark Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1083 (1986).

<sup>141</sup>See Catharine MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 795-96 (1991).

<sup>142</sup>For instance, Merrill claims that Justice Scalia posits “that legislative judgments reflect an imminent rationality—a single coherent truth about the nature of mankind and the proper ordering of human relationships.” Merrill, *supra* note 114, at 662.

<sup>143</sup>See generally Owen Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789 (1990); Frank Michelman, *Law’s Republic*, 97 YALE L. J. 1493, 1509 (1988). Obviously, it is possible to create a complex matrix using the trust/distrust and judicial/legislative/executive categories, even without qualifying them; but most theorists betray a preference for trust/distrust in the rhetorical choices they make.

<sup>144</sup>See D. DAVIS, *supra* note 13, at 18 (arguing that the “keepers of the covenant” rationale is embraced by them as well).

individual for his own self-interest; some think democracy's virtue is in canceling out self-interest (or at least making it irrelevant) through majoritarianism. For statist, the state can do no wrong, and individual citizens are suspect for raising any questions about whether the state's activity is proper.

The pure positivist approach, by contrast to all these theories, suggests that no particular locus of power, individual, group or state, is subject to particular suspicion; and none entitled to claim the moral high ground. In a purely positivist conception, morality is a private irrational activity meant for private space; and in the public arena, where no values can be demonstrably true, only a sustained commitment to governmental process will provide community security for law. At their most extreme, some interpretivists and non-interpretivists, such as Judge Bork and Justice Rehnquist, sound like non-cognitivist: they muse that maybe there is no such thing as right, even for the individual; there is only what individuals want and feel.<sup>145</sup>

Lutheranism enlists the paradox of affirming, universal suspicion toward power (ideological and practical) and its corruption in the individual and in society. Lutherans affirm the world: they believe that human beings, and their governmental and other structures of relationship, are a creation of God and therefore have the capacity to reason about their situation and the common good. This fundamental sense that God made human beings (and through them human institutions) and found them good underlies any critical interpretation of individuals or structures; Lutherans reject profound, radical skepticism about the human ability to create any government that can do good, or participate in any sustaining and nurturing human activity. Nor is pure positivism a solution, for moral concern is always, in the Lutheran conception, a necessary part of governing.

On the other hand, Lutherans are universally skeptical of all human activity, whether individual or bureaucratic, as in bondage to sin; the tremendous gifts of thinking, speech and action with which human beings have been endowed are mediated through a corrupt human will. Thus, boundless faith in the capacity of individual or even collective human reason to fully understand the human condition or to deduce the programme that will perfect human nature, or human institutions, is equally misplaced.<sup>146</sup> Liberationists are as suspect as authoritarians in this model, individuals as much as governments.<sup>147</sup> This paradox—that it is possible to affirm and to be suspicious at the same time and about everyone—can be borrowed without the theological predicate or story of origin, although it must be borrowed analogically, due to the disjunctures between the relationships of God to humans, and humans to humans.

Justice Rehnquist's interpretive approach to the Constitution, most often characterized even further as "strict construction," evidences none of these Lutheran premises. As a general matter, Rehnquist combines strict construction with textualism,<sup>148</sup> arguing for application of the plain meaning of the text, although he

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<sup>145</sup>See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L. J.* 1, 8-11 (1971); Rehnquist, *supra* note 3, at 317.

<sup>146</sup>Braaten, *supra* note 71, at 36.

<sup>147</sup>STRIETER, *supra* note 73, at 30, 243 (discussing Robert Jensen's views).

<sup>148</sup>See, e.g., *Director, Office of Workers' Comp. Programs v. Rasmussen*, 440 U.S. 29, 36-37 (1979)(rejecting plaintiffs' "tortuous" construction of statutory language to effectuate

will fall back on intentionalism<sup>149</sup> or structuralism<sup>150</sup> in the case of clear ambiguity.<sup>151</sup> In Dworkin's view, strict construction depends on the assumption that "what the law is" is a matter capable of objective interpretation,<sup>152</sup> that the interpreter himself (or the power of his reason) is not part of the interpretive process if he narrowly reads the words of the text. Rehnquist apparently agrees with this assessment.<sup>153</sup>

Yet, if both interpretivism and textualism can be signs of judicial denial, strict construction textualism is potentially the most powerful form of denying the place and the danger of the human will. Whereas an intentionalist must at least reconstruct a human context and set of ideas specific to historical characters to give evidence for his argument, a textualist purports to "find" the meaning of language apart from a human context, within a "science" of linguistic understanding. (Prof. Stephen Smith points out similar problems with some intentionalism theories, quoting a number of modern interpreters for the proposition that intentionalists are not really trying to discern the historical author's voice.)<sup>154</sup>

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congressional intent for the "plain language and legislative history" of an amendment to a workers' compensation act); Davis, *supra* note 113, at 28 n.11 (quoting Paul Brest who notes that strict textualism is one of the most extreme forms of originalism). Tushnet argues that Rehnquist's federalism is structural, in contravention of a strict textualist approach. Tushnet, *supra* note 117, at 1333.

<sup>149</sup>Compare SAVAGE, *supra* note 13, at 150 (noting Rehnquist's skepticism with Ed Meese's "original intent" theories) and Clor, *supra* note 132, at 559-60 (1994) (noting Rehnquist's distinction between specific authorial intentions and broad principles); *with* Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (school meditation or prayer legislation) (Rehnquist attacks the "wall of separation" metaphor and "its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights"), and *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 179 (1972) (Rehnquist castigates fundamental rights doctrine as a "judicial superstructure . . . engrafted upon the Constitution itself," while he advocates for determination of rights based on the choices of "[t]hose who framed and ratified the Constitution"). *But see* Phelps and Gates, *supra* note 114, at 589, 591 (noting strong preference for doctrinal arguments by both Rehnquist and Brennan; relatively small difference in textual versus extrinsic arguments by both).

<sup>150</sup>Clor, *supra* note 132, at 561-62 (citing Davis, *supra* note 113, at 33-35).

<sup>151</sup>Phelps and Gates, *supra* note 114, at 585. Ironically, the pragmatism Justice Rehnquist employs against affirmative action programs is not employed in judicial review. In Rehnquist's book, *THE SUPREME COURT*, he notes both the way in which public opinion and judicial temperament influence cases. Joseph S. Larisa, *A Supreme Court Primer for the Public*, 1988 DUKE L.J. 203, 205, 207 (1988) (reviewing WILLIAM H. REHNQUIST, *THE SUPREME COURT* (1987)). Merrill disagrees with the characterization of Justice Rehnquist as a textualist, citing cases in which he will fall back from "plain meaning" if contradicted by legislative history and background." Merrill, *supra* note 114, at 651-52.

<sup>152</sup>D. DAVIS, *supra* note 13, at 14-16 (citing DWORKIN, *TAKING RIGHTS SERIOUSLY* 14-22 (1977)).

<sup>153</sup>Davis, *supra* note 113, at 108 (belief in fixed meaning of the Constitution, which is "a set of rules rather than a vision of a good society"); *see* Larisa, *supra* note 151, at 208 (quoting Rehnquist's view that personalities should not "encroach" into the judicial process, and feelings that a law is silly are easily translated from "visceral reactions" into unconstitutionality decisions).

<sup>154</sup>Smith, *supra* note 17, at 594-95.

The purported objectivism of which Dworkin speaks blinds the judge himself to the prejudices and values he brings to bear on the text,<sup>155</sup> not requiring him to locate himself in relationship to the human beings and context of the case. The presumption is doubly arrogant in that the strict construction textualist often simultaneously berates non-interpretivists for their own injection of “personal values” into the decision-making process. Thus, the “human” part of judicial interpretation can be obscured or elided; and the dual nature of human understanding as gifted and flawed likewise buried. As intentionalists probe a rich conflicting treasure of characters and events to explore the dynamics of an interpretation, textualists look at a desert in which one fixed, unchangeable meaning survives for the past, present, and future.

In his textualism, Justice Rehnquist provides little evidence that he accepts the Lutheran paradox of affirming, universal suspicion in doctrine or its application to cases. Perhaps the most powerful example of Justice Rehnquist’s strict construction textualism is his “bitter with the sweet” approach, first formulated to limit judicial review of due process,<sup>156</sup> but then loaned to other areas such as commercial speech.<sup>157</sup> Rehnquist explains that “where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet.”<sup>158</sup> Combined with Rehnquist’s view of textual interpretation, which requires that one must “stop [at the statute’s text] if the text fully reveals its meaning,”<sup>159</sup> his version of strict construction precludes any challenge to the effects of a statute ostensibly “clear” on its face. A court or executive officer may not challenge whether Congress acted wrongfully or mistakenly in constructing a resolution of the public concern it faced; and a litigant may not challenge the wrongful or unwise application of that statute to his own situation through a due process hearing.

*Loudermill*, the case that overturns Rehnquist’s use of the “bitter with the sweet” metaphor, is a potentially compelling case to illustrate its problems, because, in one reading of the facts, the case results not even from evil intention, but from

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<sup>155</sup>As Spaeth and Teager suggest, “most people who have reached adulthood no longer believe [the] myth [that judges only find and do not make law] anyway.” Harold J. Spaeth & Stuart H. Teager, *Activism and Restraint: A Cloak for Justices’ Policy Preferences*, in *SUPREME COURT ACTIVISM AND RESTRAINT* 297 (Stephen C. Halpern & Charles M. Lamb eds., 1982).

<sup>156</sup>*Arnett v. Kennedy*, 416 U.S. 134, 154 (1974); see also *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 527-28 (1990) (Rehnquist, J., dissenting) (guarantee of Medicaid “reasonable and adequate” rates places limitation on rate review to Secretary’s review); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 559 (1985) (Rehnquist, J., dissenting); *Heckler v. Ringer*, 466 U.S. 602, 613-14 (1984) (claimants’ due process complaint that they are required to undergo hearings which in every case results in a determination that Medicare should pay for their operations is inseparable from the substantive claim that the Secretary must pay for the operations, precluded by exhaustion policy). See also *Davis*, *supra* note 113, at 102-09.

<sup>157</sup>See, e.g., *Posadas De Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 346-47 (1986) (if state can ban “vice activity,” it can ban commercial speech about such activity).

<sup>158</sup>*Arnett*, 416 U.S. at 153-54.

<sup>159</sup>*Wilder*, 496 U.S. at 526 (Rehnquist, J., dissenting).



administrative mistake. In *Loudermill*, the government asks what is apparently a simple question—whether the applicant has been convicted of a felony—and Loudermill answers what he honestly believes, that he has not. Had the state constructed the question more carefully, to ask if Loudermill had been convicted at all, Loudermill might have disclosed what he thought was a misdemeanor theft conviction, which turned out to be a felony.<sup>160</sup> And yet his legal mistake—that his crime was a misdemeanor not a felony—is judged to be a lie; and he must lose his job, under Rehnquist’s approach with no constitutional recourse to explain the mistake. Similarly, in *Fritz*, strict constructionist Rehnquist refuses to look at legislative context to see whether Congress was indeed misled to believe that it was not taking vested benefits away from any retired railroadmen.<sup>161</sup>

[T]he plain language of [the statute] marks the beginning and the end of our inquiry . . . where, as here, there are plausible reasons for Congress’ action, our inquiry is at an end. It is, of course, “constitutionally irrelevant whether this reasoning in fact underlay the legislative decision . . .” because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. . . . if this test [whether Congress was unaware or misled by groups appearing before it] were applied literally to every member of any legislature that ever voted on a law, there would be few laws which would survive it.<sup>162</sup>

Rehnquist’s willingness to brush aside government mistakes that result in human hardship is paralleled by his refusal to inquire into more serious, intentional attempts by the government<sup>163</sup> to circumvent the law or to harm individuals. In the area of religious liberty and establishment jurisprudence, Rehnquist has been also unrelenting in refusing to question whether the government’s motives for suppressing or assisting religious expression are compatible with the concerns of the First Amendment. In Establishment Clause cases, Rehnquist has called for an evisceration of the “secular purpose” prong of the *Lemon* test, in line with his view that government neutrality is a fiction not to be found in the Framers’ intentions.<sup>164</sup> In his view, any legislative reason offered is sufficient to end judicial inquiry, even in statutes where there is clear evidence that the legislature mixed impermissible reasons (e.g., to endorse Christianity) with permissible reasons.<sup>165</sup> In arguing for the

<sup>160</sup>*Loudermill*, 470 U.S. at 535.

<sup>161</sup>In Justice Brennan’s view, *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980) is a case of legislative mistake, in which Congress was misled. *Id.* at 194.

<sup>162</sup>*Fritz*, 449 U.S. at 176, 179 (citations omitted), *partially quoting* *Flemming v. Nestor*, 363 U.S. 603, 612 (1960).

<sup>163</sup>For that matter, Rehnquist seems indifferent to intentional individual actions that harm persons. *See infra* notes 278-97 and accompanying text; *Savage, supra* note 13, at 32, 37.

<sup>164</sup>D. DAVIS, *supra* note 13, at 84; David Schimmel, *Education, Religion & the Rehnquist Court: Demolishing the Wall of Separation*, 56 EDUC. L. REP. 9, 15 (1990) (Establishment Clause prohibits establishment of national religion and discrimination among sects).

<sup>165</sup>*See, e.g.,* *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting) (Rehnquist states, “The purpose prong means little if it only requires the legislature to express any secular purpose and omit all sectarian references, because legislators might do just that.

right of a state to require the posting of the Ten Commandments in *Stone v. Graham*,<sup>166</sup> and in the school prayer cases, Rehnquist has said that a secular purpose stated on the face of the statute is sufficient to deflect judicial inquiry, even when that secular purpose would seem thin compared to the religious ones.<sup>167</sup>

In the Free Exercise area, Rehnquist has supported the use of a “reasonableness” test for evaluating state restrictions on even religious worship, negating the opportunity for an inquiry into government dislike for minorities and their concerns.<sup>168</sup> Indeed, though a case of blatant discrimination against a minority religion is in his view forbidden by the Framers’ intent,<sup>169</sup> such discrimination has to be unquestionable, as demonstrated when he dissented from a holding that Minnesota’s religious solicitation statute was unconstitutional despite legislative history indicating that it was directed against Moonies.<sup>170</sup> His position is a mixed blessing for majority religions: on one hand, he believes that government may accommodate religion, but on the other, where a state or the federal government has decided to limit freedom of religion, Rehnquist is deferential to that decision.<sup>171</sup>

In the case of public benefits, Rehnquist’s strict construction textualism similarly leads him to decline the opportunity to look for government prejudice, disinterest or outright mean intent. In *Jefferson v. Hackney*, for instance, he truncates inquiry into Texas’ decision to grant disparate welfare grants to recipients of old age, blind and disability assistance (who statistically were largely white); and AFDC assistance

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Faced with a valid legislative secular purpose, we could not properly ignore that purpose without a factual basis for doing so.”); see also *Bowen v. Kendrick*, 487 U.S. 589, 603 (1988) (even if part of Adolescent Family Life Act was motivated by “improper [religious] concerns,” statute will survive if also motivated by “other, entirely legitimate secular” concerns); Richard A. Brisbin & Edward V. Heck, *The Battle Over Strict Scrutiny: Coalitional Conflict in the Rehnquist Court*, 32 SANTA CLARA L. REV. 1049, 1075, 1077, 1083 (1992); Schimmel, *supra* note 164, at 11-14 (noting that Rehnquist views the primary effect prong similarly).

<sup>166</sup>449 U.S. 39, 43 (1980) (Rehnquist, J., dissenting).

<sup>167</sup>See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 610-36 (1987) (Scalia, J., dissenting); see also *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (state private school tuition deduction program; the Court will not attribute unconstitutional motives to the state “particularly when a plausible secular purpose for the state’s program may be discerned from the face of the statute”). In his dissent in *Wallace v. Jaffree* while expressing the skeptical view that the purpose prong is easily evaded simply by an expression of secular purpose in the legislative history, Rehnquist nevertheless notes, in a somewhat restated form, “we could not properly ignore that purpose without a factual basis for doing so.” 472 U.S. 108 (Rehnquist, J., dissenting).

<sup>168</sup>See, e.g., *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349-52 (1987); Brisbin & Heck, *supra* note 165, at 1066.

<sup>169</sup>D. DAVIS, *supra* note 13, at 86; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (Scalia, J., concurring in part and concurring in judgment, joined by Rehnquist, J.)

<sup>170</sup>*Larson v. Valente*, 456 U.S. 228, 264 (1982) (Rehnquist, J., dissenting).

<sup>171</sup>See D. DAVIS, *supra* note 13, at 84-87; Schimmel, *supra* note 164, at 18. Rehnquist has also expressed displeasure with incorporation of the Religion Clauses. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 721-22 (1981) (Rehnquist, J., dissenting); D. Davis, *supra* note 13, at 91-94.

(who were largely black and Mexican), as fortuitous rather than intended.<sup>172</sup> On one hand, he declares that there is no evidence of such intent; on the other, he bans such as inquiry as a matter of law.

This refusal to explore the context or human dynamics of law-making gives lie to the Lutheran suspicion that all human activity, including the work of human governors, is infected with sin, whether it is indifference to human suffering, ignorant prejudice, or even malice. It refuses the notion that suspicion must be leveled universally, a notion that can be borrowed analogically into judicial decision-making. Luther's call for the ruler to "maintain an untrammelled reason and unfettered judgment" with respect to other public officials<sup>173</sup> cannot be fulfilled if the judge refuses to investigate or to judge. Whether it is the individual Jehovah's Witness leafletting a city street, a collective of women advocating for their rights, or the tremendous power of the federal government itself, Lutheranism cautions skepticism about how human beings will justify their own actions and wield their power. In the Lutheran conception, then, "rights" would not be assigned by determining who are the good guys and who are the bad guys; they would be assigned to uphold and nurture the human being, on one hand, and restrain his evil ways on the other.

Similarly, the problem of judicial responsibility is framed by the paradox of human beings who are both God's creations and thoroughly sinners. Because the jurist is skeptical as well about the powers of his own reason, he/she must design an understanding that incorporates respect for other governmental institutions having distinct responsibilities with a self-critical decision-making process that is always inspecting the judge's own prejudices and commitments. However, using the doctrine of orders of creation, a Lutheran jurist might not approach such a problem in the radically skeptical way that strict judicial constructionists have done, by defining the judicial office over against the other locations of power within government. Rather, the Lutheran position would construct a positive vision of the role of the judge, both in restraining evil and in providing for the nurture of the community. The "conservative" view of judicial interpretation uses the term "judicial restraint," which suggests that the jurist knows better than the legislature but forces himself not to overrule them for some higher good; or "judicial deference," which suggests an uncritical bow to boundaries of legislative power. By contrast, a Lutheran jurist would have a developed theory about the ways in which each branch of government performs a peculiar task in the preservation and ordering of the world, recognizing the office of the other governors within the system, while at the same time retaining a critical perspective and relationship with each.

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<sup>172</sup>406 U.S. 535 (1972). As Justice Marshall points out, these disparities continued because, as state officials put it, AFDC "is politically unpopular," despite dramatic statistics in the racial make-up particularly of the old age program (roughly 2/3 white and 1/3 non-white) versus the AFDC program (roughly 87% black or Mexican). *Id.* at 575 (Marshall, J., dissenting). See also Jerome M. Culp, *Understanding the Racial Discourse of Justice Rehnquist*, 25 RUTGERS L.J. 597, 610-11 (1994).

<sup>173</sup>On Temporal Authority, Lull, *supra* note 109, at 700.

Moreover, the giftedness which marks a Lutheran understanding of law<sup>174</sup> is largely absent in a textualist approach. In one narrow sense, textualism attempts to express the humility of the reader not as a constitutional creator but a constitutional recipient. Textualism looks at constitutional meaning as a given: the text is there, it does not reside within or come from ourselves, and we are stuck with it. We have to live with its demands, even when we would do otherwise for short-term gains; we have to live with the specific tradition from which the text came, for it is ours, even if we would remake it.

But in another, more important sense, textualism (unlike intentionalism) neglects the beneficiary's imagination with which a Lutheran would approach a text. Unlike ideological textualism, which focusses on the words themselves, as if their meaning is a separate objective reality ultimately unrelated to those who write or read such words, true giftedness is not most importantly about the characteristics of the gift itself. The gift, the text, is most important as it creates a relationship of the giver and the recipient. The gift is a signpost, pointing back to the intention of the giver, and forward to the response of the recipient; but it also transforms intention and response, the relation of giver and recipient into the future. Just as God's giving of law is understood to be the expression of God's compassion for human beings, so the giving of human law expresses a benevolent intention of the givers toward those who receive. In the case of the founders, for instance, the Constitution may be thought of as their expressed desire to leave an institutional legacy of freedom and equality within the constraints of their culture. In this sense, strict ideological intentionalism similarly rejects a giftedness approach by relieving the constitutional givers' intentions inside the past moment, rather than accepting the motivation of the givers to leave a lasting legacy for a changing context. Again, the theological predicate for a "gift" understanding is not necessary so long as analogy is employed.

This relational understanding of interpretation transforms the attitudes and actions (for good or ill) of the givers toward those who are its beneficiaries. And the response of the people, those who receive the gift, will shape the tenor of the social and political system in which they are immersed: their embrace of law, their resistance (whether self-interested or conscientious), or their willingness to scoff at or ignore it, will recreate the link between tradition, the present and the future generations.

Luther described judging as this sort of gift relationship, that focusses on the relational rather than the propositional:

For when you judge according to love you will easily decide and adjust matters without any lawbooks. But when you ignore love and natural law you will never hit upon a solution that pleases God, though you may have devoured all the lawbooks and jurists. . . . A good and just decision . . . must come from a free mind, as though there were no books. Such a free decision is given, however, by love and by natural law, with which all

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<sup>174</sup>See, e.g., Braaten, *supra* note 71, at 37; GEORGE W. FORELL, FAITH ACTIVE IN LOVE 25, 129, 146 (1954)(describing the divine institution and presentation of secular authority.) It should be noted that at other times, when Luther is explaining God's saving action, he describes law as God's demand and grace as God's gift, see Forell, *supra* note 108 at 85.

reason is filled; out of the books come extravagant and untenable judgments.<sup>175</sup>

By contrast, as an ideology rather than a constraint, strict construction textualism borrows the divine watchmaker metaphor, neglecting the ongoing relational quality of the gift of the Constitution or of the laws. In the watchmaker analogy, the legislator or constitutional “framer” sets the law in motion, expects the courts to ensure that the law runs smoothly and efficiently, and sees unexpected consequences, including human suffering or social dislocation, as obstacles to the smooth purring of the law. Such a construction no more realizes the Lutheran concept of law as gift than it does the concept of moral relationship between lawmakers and public.

*B. State-Sovereignism and Positivism: Toward Simultaneous Conflicting Loyalties*

A Lutheran View:

1. Natural law, understood as a dynamic creation of God, is precedent over positive law,<sup>176</sup> and must be used to critically evaluate positive law;<sup>177</sup> it is always and universally valid, though constantly being transformed, while positive law is always situational. Even the natural orders, however, cannot be so absolutized as to deny the freedom of God to do a new thing in the world.<sup>178</sup>

Yet, paradoxically, government is ordained by God as a holy institution, as a creating act of God,<sup>179</sup> and thus deserves the obedience and respect of those who live under its laws,<sup>180</sup> even in some cases when they independently conclude that positive law will bring about moral injustice in the immediate case.<sup>181</sup>

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<sup>175</sup>On Temporal Authority, Lull, *supra* note 109, at 702.

<sup>176</sup>GEORGE W. FORELL et al., LUTHER AND CULTURE 14, 16 (1960). “In the state one must act on the basis of reason . . . for God has subjected the government of this world and the affairs of the body to reason.” *Id.* at 17 (quoting Luther’s Sermon on Keeping Children in School (1530)). Unlike the traditional account of natural law, however, Lutherans reject a static picture of creation in favor of an understanding that the orders of creation are dynamic and changing, because God is free to do new things in the world. Moreover, Lutherans understand that the creation has been distorted by the fall, so that the “discovery” of natural law must always be viewed with suspicion. *Id.* at 33-34.

<sup>177</sup>LUTHER AND CULTURE, *supra* note 176, at 18 (quoting Luther’s Commentary on the Galatians). In Luther’s view, “[l]aw binding for rulers as well as the ruled because . . . it is ultimately rooted in God’s will and authority.” *Id.* at 13.

<sup>178</sup>Braaten, *supra* note 71, at 35.

<sup>179</sup>*Id.* at 32, 37.

<sup>180</sup>Luther quotes Romans 12, “authority which everywhere exists has been ordained by God. He then who resists the governing authority resists the ordinance of God, and he who resists God’s ordinance will incur judgment.” On Temporal Authority, Lull, *supra* note 109, at 659-60.

<sup>181</sup>Luther’s strong stand against rebellion was in great part pragmatic and proceeded out of his strong focus on care for the neighbor and recognition of authority as God’s gift. He noted

2. The government of this world imposes order upon the unjust;<sup>182</sup> and its symbol is the sword used to restrain evil,<sup>183</sup> while the governance of Christ redeems. Luther argued that both governments are necessary, the spiritual to bring righteousness and the temporal “to bring about external peace and prevent evil deeds.”<sup>184</sup> Yet, as a creation of God, the secular government goes beyond the use of force, and exercises an office similar to a parent, nourishing and caring for its people.<sup>185</sup> Luther called for a four-fold responsibility in the ruler: “true confidence and earnest prayer” toward God; “love and Christian service” toward the subject; “untrammelled reason and unfettered judgment” toward other government officials; and “restrained severity and firmness” toward evildoers.<sup>186</sup> Yet, he acknowledged that a competent ruler need not be a Christian, that ““Caesar does not need to be a saint,”” so long as he uses reason to exercise his authority.<sup>187</sup>

3. The Christian, who lives under the law and yet not under the law, and for the neighbor,<sup>188</sup> is called not to forsake government, but to serve God

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that insurrection “is devoid of reason and generally hurts the innocent more than the guilty. . . . The harm resulting from it always exceeds the amount of reformation accomplished. . . .” LUTHER AND CULTURE, *supra* note 176, at 53 (quoting Luther’s An Earnest Exhortation for All Christians Warning Them Against Insurrection and Rebellion (1522)). Yet, Lutheranism calls upon Christians to resist the evil even of governors, to “admonish and punish them on account of their injustice,” Strieter, *supra* note 73, at 43 (quoting Luther’s weekly sermons on John 16-20 (1528-29)), giving rise to debate about the proper limits of conscientious disobedience.

<sup>182</sup>As Luther explains, “Therefore God has established magistrates, parents, teachers, laws, bonds and all civil ordinances, that, if they can do no more, at least they may tie the devil’s hands so that he cannot rage after his pleasure.” LUTHER AND CULTURE, *supra* note 176, at 10 (quoting Luther’s Commentary on Galatians (1535)).

<sup>183</sup> “[I]t is God’s will that the temporal sword and law be used for the punishment of the wicked and the protection of the upright.” On Temporal Authority, Lull, *supra* note 109, at 661; *see also id.* at 665.

<sup>184</sup>On Temporal Authority, Lull, *supra* note 109, at 666.

<sup>185</sup>*To the Councilmen of All Cities in Germany*, Lull *supra* note 109, at 712-13; On Temporal Authority, Lull, *supra* note 109, at 694 (exhorting the ruler to “serve and protect [subjects], listen to their problems and defend them, and govern to the sole end that they, not [the ruler], may benefit and profit from [his] rule”). Braaten notes that “some Lutheran theologians prefer to speak of ‘orders of preservation,’ taking into account what God is doing to sustain the world under the conditions of sin, even using means sin-laden themselves, such as war and capital punishment, to fight against still more serious attacks on the goodness of God’s creation.” Braaten, *supra* note 71, at 34.

<sup>186</sup>On Temporal Authority, Lull, *supra* note 109, at 700.

<sup>187</sup>LUTHER AND CULTURE, *supra* note 176, at 29 (quoting Sermons (1528)).

<sup>188</sup>Luther explains, “A man does not live for himself alone in this mortal body to work for it alone, but he lives also for all men on earth; rather, he lives only for others and not for himself.” *The Freedom of a Christian*, Lull, *supra* note 109, at 616, 617.

in government if the neighbor's needs demand it.<sup>189</sup> Yet, the call to serve goes to others besides Christians; it is part of the natural law which stands in critique of all positive law, especially that which does not adopt care as its first principle.<sup>190</sup>

Lutherans employ the metaphor that human beings stand in (at least) two worlds, simultaneously. As Esbeck and McConnell point out, the belief in dual loyalties to God and world is not peculiar to Lutheranism, but the way in which Lutherans resolve this problem is distinctive. Other traditions try to resolve this tension: those who understand that they must choose between God and the world either separate from the world or commit themselves to warfare against government when it demands action in violation of the separationist's radical faith commitment.<sup>191</sup> As suggested, in McConnell's scheme following Niebuhr, some traditions align themselves with culture; and compromise any tension between the Christian's commitment to this world and to his faith, understanding culture through Christ and Christ through culture.<sup>192</sup>

Lutheranism, as McConnell points out, refuses to resolve this tension by separation, battle, or compromise. However, Lutherans understand their relationship to the world to be somewhat more positive than McConnell would describe it. McConnell, following Niebuhr, describes Luther's view as:

the Christian cannot escape his attachment to the sinful world and owes it a certain allegiance, but . . . the demands of the world and the demands of God are in inherent tension with one another. "[M]an is seen as subject to two moralities, and as a citizen of two worlds that are not only discontinuous with each other but largely opposed." The only ultimate resolution of this struggle is redemption through the death and resurrection of Jesus. . . . "[T]he dualist joins the radical Christian in pronouncing the whole world of human culture to be godless and sick until death" . . . but "the dualist knows that he belongs to that culture and cannot get out of it."<sup>193</sup>

Lutheran church statements, by contrast, suggest that the Christian does not live in the world as a person wishing but not able to escape his attachment, nor a person who gives his allegiance to it grudgingly. A most recent Evangelical Lutheran Church in America statement on the subject of church in society explains, "God does not take the Church out of the world, but instead calls it to affirm and to enter more deeply into the world. Although in bondage to sin and death, the world is God's

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<sup>189</sup>The Freedom of a Christian, Lull, *supra* note 109, at 617-619, 674.

<sup>190</sup>See, e.g., Braaten, *supra* note 71, at 34; ROBERT BENNE, THE PARADOXICAL VISION: A PUBLIC THEOLOGY FOR THE 21ST CENTURY 82 (1995), *Whether One May Flee from a Deadly Plague*, Lull, *supra* note 109, at 738-741.

<sup>191</sup>See *supra* notes 85-93 and accompanying text.

<sup>192</sup>See *supra* notes 103-04 and accompanying text.

<sup>193</sup>McConnell, *supra* note 79, at 210 (quoting H. Richard Niebuhr, CHRIST AND CULTURE (1951)).

good creation, where, because of love, God in Jesus Christ became flesh.”<sup>194</sup> Yet, paradoxically, “the presence and promise of God’s reign makes the church restless and discontented with the world’s brokenness and violence. Acting for the sake of God’s world requires resisting and struggling against the evils of the world.”<sup>195</sup>

The possibility of simultaneous conflicting loyalties does not appear often in the jurisprudence of William Rehnquist. Those who have analyzed Justice Rehnquist’s opinions at length note that as between individual or group rights and state/federal law, Justice Rehnquist nearly always sides with the government.<sup>196</sup> His strong defense of private property is anomalous, an exception perhaps referencing his political history rather than his jurisprudential views. Moreover, he nearly always resolves federal-state conflicts in favor of the state.<sup>197</sup> Indeed, some commentators have described Justice Rehnquist’s role as very deferential to other branches of government,<sup>198</sup> though his recent advocacy on behalf of an independent bench raises the question whether he is changing his views slightly.<sup>199</sup>

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<sup>194</sup>Evangelical Lutheran Church in America, *A Social Statement: The Church in Society: A Lutheran Perspective 2* (August 28-September 4, 1991).

<sup>195</sup>*Id.* at 3.

<sup>196</sup>*See, e.g.*, Davis, *supra* note 113, at 24; IRONS, *supra* note 13, at 51, 123; Zeppos, *supra* note 113, at 680; Ronald W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1, 2 (1995). As suggested earlier, the one exception has been in affirmative action cases, Savage, *supra* note 13, at 301.

<sup>197</sup>Zeppos, *supra* note 113, at 680. Such deference is not always to rights-claimants’ disadvantage, where two rights-claimants are in a dispute. *See* Ohio Civil Rights Comm’n v. Dayton Christian Sch., 477 U.S. 619 (1986), where Rehnquist’s majority opinion found that the federal court should have abstained from intervening in a sex discrimination case filed against Dayton Christian schools by the state because of comity and federalism concerns. *Id.* at 626-27. Johnson and Martinis also claim that Rehnquist favors the state over sovereign Indian nations, which is truly an anomaly since states have been virtually excluded from power over Indian tribes since Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Johnson & Martinis, *supra* note 191, at 7-8, 18, 20-22. They also argue that Rehnquist has rejected fundamental caselaw on issues such as federal trust responsibilities, Indian sovereignty, Indian jurisdiction. *Id.* at 8-17.

<sup>198</sup>*See, e.g.*, Irons, *supra* note 13, at 63, 127; Savage, *supra* note 13, at 319 (describing Justice Rehnquist’s view in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), that the U.S. government need not follow Fourth Amendment protections for non-citizens; decisions for the government in nearly all criminal cases). Such deference is reflected in his choice of the lowest of the three levels of the rational basis test. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961) (“[s]tate legislatures are presumed to have acted within their constitutional power. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it”); *see, e.g.*, *Jiminez v. Weinberger*, 417 U.S. 628, 640-41 (1974) (Rehnquist, J., dissenting); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 178 (1972) (Rehnquist, J., dissenting); *see also* *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (review of military regulations “far more deferential” than others; courts must give “great deference” to the professional judgment of military authorities regarding the importance of a military interest); *Nyquist v. Mauclet*, 432 U.S. 1, 21 (1977) (Rehnquist, J., dissenting) (“extremely great” deference due states on questions of economic legislation). Assistant Attorney William Rehnquist noted that “Disobedience cannot be tolerated, whether it be violent or nonviolent disobedience. . . . If force or the threat of force is required in order to enforce the law, we must not shirk from its employment.” Savage, *supra* note 13, at 40. Yet



A particularly important subtext to Rehnquist's theory on constitutional interpretation is his emphasis on delegation. In his view, the Constitution delegates specific and quite restricted powers to the federal branches—the executive, the legislature and the federal judiciary—and reserves “the remaining authority normally associated with sovereignty to the States and to the people in the States.”<sup>200</sup> Similarly, the judiciary's duty is simply to prevent transgression of the other branches' authority boundaries, not to assess the wisdom of their actions.<sup>201</sup> His views on delegation and constitutional jurisdiction square with what at least one reviewer of his work calls Rehnquist's revival of “the long-absent doctrine of state sovereignty,”<sup>202</sup> discrediting “the conventional wisdom that there were virtually no enforceable judicial limits on congressional power.”<sup>203</sup> Indeed, he is one of the few members of the Court who has attempted to keep alive the notion that the Establishment Clause prohibits only national, not state, establishments of religion.<sup>204</sup>

Yet, Justice Rehnquist's self-description of judges as “keepers of the covenant” is probably a more accurate account of his own understanding of his jurisprudence.<sup>205</sup> Rehnquist defines this covenant primarily as the promise of the federal branches of government not to exceed the powers delegated to them. Indeed, he has been

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he was apparently speaking only of individuals, as Rehnquist wrote that police and federal agents could hold Vietnam War protesters indefinitely without charges, and suggested that the executive branch, including the Army, could be trusted to “police itself” from abusing constitutional rights. *Id.*

<sup>199</sup>See, e.g., *Rehnquist Unhappy with Planned Inquiry*, DAYTON DAILY NEWS, Jan. 1, 1996, at 3A (warning against micromanagement of judicial system and need to protect judicial independence); David S. Broder, *Space for a Judge*, WASH. POST, April 4, 1996, at CO7 (chastising Senator Bob Dole and President Clinton for threatening a federal judge's job after a controversial decision); *Rehnquist Warns on State of Court System*, 14 NAT'L L.J. 5, Jan. 13, 1992, at col 1. Merrill disagrees with the standard wisdom on Rehnquist, noting that Justice Rehnquist deferred to only about 64% of state agency interpretations, sometimes more and sometimes less than the Court as a whole. Merrill, *supra* note 114, at 653-54. Oddly, Rehnquist does not express the same deferential concerns when it comes to previous judicial decisions through embrace of stare decisis. See Shapiro, *supra* note 114, at 290-91, 419; Merrill, *supra* note 114, at 657-59.

<sup>200</sup>*Trimble v. Gordon*, 430 U.S. 762, 778 (1977) (Rehnquist, J., dissenting).

<sup>201</sup>See Davis, *supra* note 113, at 31.

<sup>202</sup>D. DAVIS, *supra* note 13 at 20. Davis notes that when Rehnquist believes federal action encroaches on the states' authority, he is quick to use judicial review. *Id.* at 23-26.

<sup>203</sup>D. DAVIS, *supra* note 13, at 20. See, e.g., Rehnquist's insistence that there is little evidence that Civil Rights Act of 1871, 42 U.S.C. § 1983, was not intended “to override the traditional sovereign immunity of the States.” *Quern v. Jordan*, 440 U.S. 332, 341 (1978).

<sup>204</sup>See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 97-100 (1984) (Rehnquist, J., dissenting). *Wallace* represents a case in which Rehnquist makes a “cultural Christian” rather than a public-private argument, as he does in other Establishment Clause cases at times, suggesting that religion is part of the fabric of our culture. *Id.* at 97 passim.

<sup>205</sup>William H. Rehnquist, *supra* note 3 at 698; D. DAVIS, *supra* note 13, at 20. It is interesting that Rehnquist would borrow covenantal language from some part of his history.

scarcely deferential to Congress or the federal executive when they have violated the sovereignty of states or their practical ability to govern.<sup>206</sup>

That covenant, however, does not recognize that judges may have conflicting responsibilities to states, Congress and individuals at the same time. Indeed, Rehnquist has worked to “dispel” the “cliche” that the Constitution is a charter that guarantees rights to individuals against the government, rather than a balancing act among all of the “players” in the constitutional system.<sup>207</sup> In one study of his votes between 1976 and 1981, Rehnquist sided with state governments in more than 80% of all cases (compared with the majority at 52%); sided with criminal appellants in only 12% of the cases (vs. majority which went for criminal defendants 41% of the time); and held for First Amendment plaintiffs in 16% of cases (compared to the majority’s 44%).<sup>208</sup>

One way to explain Justice Rehnquist’s state-sovereignism is to accept his self-understanding as Court prophet, calling other Justices back to the source of constitutional power—the people—and the key notion of limited government. That is, Rehnquist might be understood as rhetorically attempting to restore constitutional balance<sup>209</sup> by reminding us that the Constitution does not simply recognize the individual and the federal government as the only constitutional actors or audience. In *Usery*, for instance, Rehnquist asserts, “[A] state is not merely a factor in the ‘shifting economic arrangements’ in the private sector of the economy, . . . but is itself a coordinate element in the system established by the framers for governing our Federal Union.”<sup>210</sup> And in “The Notion of a Living Constitution,” he points out:

The people are the ultimate source of authority. . . . They have granted some authority to the federal government and have reserved authority not granted it to the states or to the people individually. As between the branches of the federal government, the people have given certain

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<sup>206</sup>D. DAVIS, *supra* note 13, at 19-21.

<sup>207</sup>Davis, *supra* note 113, at 41 (citing William H. Rehnquist, *Government by Cliche*, 45 MO. L. REV. 379 (1980)). An unvarnished view of how Rehnquist may view individuals who dissent from government demands may be his response to anti-war protesters during the Vietnam era, when he aligned all of the left with the Weathermen, claiming, “[t]he very notion of law and of a government of law is presently under attack from a new group of barbarians. Just as the Barbarians who invaded the Roman Empire neither knew or cared about Roman government and law, these new barbarians care nothing for our system of government and law. They believe that the relatively civilized society in which they live is so totally rotten that no remedy short of the destruction of that society will suffice.” Irons, *supra* note 13, at 51-52; Savage, *supra* note 13, at 39-40.

<sup>208</sup>IRONS, *supra* note 13, at 63. In Free Exercise cases, Rehnquist has nearly always voted against the claimant as well. See SAVAGE, *supra* note 13, at 322. One survey notes that Rehnquist has voted with Scalia and Thomas 83% of the time since they have been on the court. Joan Biskupic, *Balance of Power*, WASH. POST, July 5, 1996, at A13.

<sup>209</sup>Clor, *supra* note 132, at 561 (quoting REHNQUIST, THE SUPREME COURT at 317-18).

<sup>210</sup>Davis, *supra* note 113, at 33 (quoting *National League of Cities v. Usery*, 426 U.S. 833, 849 (1976) (citations omitted)). Indeed, Justice Rehnquist points out that power is also reserved to the people, although he does not pursue what that might mean apart from his presumption that the people vest their power in the first instance in the legislation and agency of state government.

authority to the President, certain authority to Congress, and certain authority to the federal judiciary. . . . Marshall said that if the popular branches of government . . . are operating within the authority granted to them by the Constitution, their judgment and not that of the Court must obviously prevail.<sup>211</sup>

Indeed, Rehnquist is keen on restoring respect for states' discretion, even in joint federal-state projects. For example, in *Wilder v. Virginia Hospital Ass'n*,<sup>212</sup> Justice Rehnquist dissents from the majority's holding that Congress' requirement that Medicaid-granting states pay reasonable and adequate fees to medical providers means that findings on those fees must be correct, arguing: "[T]he Court's suggestion that the States would deliberately disregard the requirements of the statute ignores the Secretary's oversight incorporated into the statute and does less than justice to the States."<sup>213</sup>

Rehnquist's "keepers of the covenant" dissents might be superficially understood as implementing a Lutheran doctrine of orders, "the common structures of human existence, the indispensable conditions of the possibility of social life."<sup>214</sup> In the Lutheran understanding, God has provided certain social arrangements or organizations, which are "prior to and apart from belief in Christ," that ensure our care.<sup>215</sup> In his time, Luther identified the church, the state, and the household (oeconomia) as these orders,<sup>216</sup> although Lutheranism has recognized that other divinely given orders come into being as human needs and communities changed.<sup>217</sup>

Although these orders function "apart from and in tension with the Christian revelation," Lutherans have consistently understood that, as an order, the state exercises its rightful power or role in restraining evil and in nurturing good,<sup>218</sup> and the branches of government use their distinctive competences toward this end. Luther spoke to the special vocation of magistrates to "punish evil and protect the good" as God's servants and "workmen."<sup>219</sup> For a judge who serves within such an order to have a God-given vocation to fulfill a need in forming and securing human community requires both humility about the limits of one's competence and jurisdiction. It also requires support for the callings of others and the role of the different orders in the securing of a just and humane future.

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<sup>211</sup>Rehnquist, *supra* note 3, at 696.

<sup>212</sup>496 U.S. 498 (1990) (challenge by a nonprofit association of public and private hospitals to Medicaid reimbursement rates; the Court determined that providers have a cause of action, under the Boren Amendment to the Medicaid Act, if states fail to adopt reasonable and adequate rates).

<sup>213</sup>*Id.* at 528 (Rehnquist, dissenting).

<sup>214</sup>Braaten, *supra* note 71, at 34.

<sup>215</sup>*Id.* at 32.

<sup>216</sup>*Id.*

<sup>217</sup>STRIETER, *supra* note 73, at 193-96 (discussing views of Robert Bertram and Edward Schroeder).

<sup>218</sup>*Id.* at 32.

<sup>219</sup>On Temporal Authority, Lull, *supra* note 109, at 674.

A Lutheran doctrine of vocation can be borrowed analogically into a philosophy of judicial restraint or balance of judicial power with the responsibilities of other branches of government and individuals in securing these goods. Indeed, Luther himself understood that conflicting interests and peoples would tend to check both each other and the power of the rulers.<sup>220</sup> If there is no political authority to overbalance judicial interpretation of public values and call the intellectual blindness or stubbornness of the judiciary to account, the Lutheran understanding of a bound heart and mind would counsel for institutional self-restraint, and for a willing ear to the judgments of other authorities.<sup>221</sup>

However, the thorough-goingness of Rehnquist's commitment to state power and state rights, even in those cases when the balance of power does not appear threatened by individual rights or federal governmental action, suggests that his commitment to so-called "state's rights" is more than a corrective to a power imbalance, which would be called for by a Lutheran understanding. Ironically, given his deep skepticism about individual plaintiffs, Rehnquist sometimes take umbrage at judges or litigants who question the motivations and actions of those with authority. In his view, for instance, the Court should not question the motivations of state officials,<sup>222</sup> prison officials,<sup>223</sup> employers,<sup>224</sup> or schoolteachers;<sup>225</sup> and should nearly always balance equities in favor of the state rather than the individual.<sup>226</sup> Rehnquist's distrust of outsiders and his strong alliance with authority figures seems at least somewhat incompatible with Lutheran doctrine that simultaneously recognizes the giftedness of authority and the fallenness of all (including the most powerful), which places conflicting demands upon the lawmaker.

<sup>220</sup>FORELL et al., *supra* note 174, at 38-39.

<sup>221</sup>Forell, *Luther's Theology and Domestic Politics in MARTIN LUTHER: THEOLOGIAN OF THE CHURCH*, *supra* note 108, at 38-39.

<sup>222</sup>In commenting on an NAACP challenge to Texas' all-white primaries, young clerk Rehnquist noted that he took a "dim view of this pathological search for discrimination." SAVAGE, *supra* note 13, at 37; *see also* Mueller v. Allen, 463 U.S. 388, 402 (1983) (Rehnquist brushes past the problematic question whether state officials need to make a decision that textbooks are secular or religious).

<sup>223</sup>Cruz v. Beto, 405 U.S. 319, 323 (1972) (Rehnquist, J., dissenting).

<sup>224</sup>*See, e.g.*, Thomas v. Washington Gas Light Co., 448 U.S. 261, 295 (1980) (Rehnquist, J., dissenting) (Rehnquist defends employers against what he believes is the majority's suspicion that they coerce or maneuver injured workers into selecting a favorable jurisdiction for worker's compensation claims).

<sup>225</sup>School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 401 (1985) (Rehnquist, J., dissenting) (invalidation of shared time and community education programs in parochial schools "impugns the integrity of public school teachers . . . assumed to be eager inculcators of religious dogma . . . [and] . . . requiring 'ongoing inspection'" (quoting Aguilar v. Felton, 473 U.S. 402, 412 (1985)).

<sup>226</sup>For instance, Rehnquist concluded that the Secretary of Health and Human Services would be irreparably injured if she were required to make \$2.6 million in AFDC payments with little hope of recouping the money if she lost in litigation, while the welfare clients disputing her calculation of their income countable to reduce their welfare benefits can always collect the back AFDC payments due them if they ultimately win. Heckler v. Turner, 468 U.S. 1305, 1307-08 (1984).

Similarly, Rehnquist employs legal metaphors which preclude even self-criticism. In *International Society for Krishna Consciousness v. Lee*, for instance, Rehnquist responds to the Krishnas' religious practice of sankirtan in the airport using the metaphor of government as a proprietor, "managing its internal operations" when it controls public property rather than a rights-balancing approach.<sup>227</sup> Yet the proprietor metaphor only makes sense in a system in which the government's power and rights must be unrestrained, rather than part of a balance that includes the speaker's rights and other individual harms, such as passengers' need to "decide whether or not to contribute," to the cause of their solicitors.<sup>228</sup>

Rehnquist often explains his reliance on state legislatures as the key players in democratic decision-making by suggesting that the state is located closest to true democracy, or the will of the people.<sup>229</sup> Moreover, he credits the states as the location in which the response to context might be taken most seriously, or as he says, the place where the problems of the future are to be solved.<sup>230</sup> In his view, judicial review with national standards simply will "smother a healthy pluralism."<sup>231</sup> At other times, he has suggested that his preference for state sovereignty is simply realistic: whatever the Court may say about rights, in the long run the majority will have its way, so there is no use in the Court's attempting to thwart the majority will.<sup>232</sup> Fiss and Krauthammer give a third interpretation: they locate the center of power for Rehnquist closer to the individual, describing Rehnquist's state power focus as an

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<sup>227</sup>See *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Moreover, Rehnquist takes a strict approach to finding a dedication of property for speech purposes, noting the need for evidence that the government is "intentionally opening a nontraditional forum for public discourse" and that it is not a "special enclave." *Id.* at 680 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)). Rehnquist even accuses the Krishnas of shady dealings; their organization "attempt[s] to circumvent" the history and practice of airport activity by "blithely equat[ing]" it to bus and train stations, and boat wharves. *Id.* at 681-82.

<sup>228</sup>*Id.* at 683 (quoting *United States v. Kokinda*, 497 U.S. 720, 734 (1990)). Rehnquist's opinion also equates the Krishnas with "the skillful, and unprincipled, solicitor [who] can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation. . . . The unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase." *Id.* at 684.

<sup>229</sup>Davis, *supra* note 113, at 24. States similarly are arguably potentially more accountable to a public than judges, Davis, *supra* note 113, at 16, or national legislatures. Davis, *supra* note 113, at 24. Macey notes, however, that Rehnquist seems sensitive to the problems of "interest groups in the judicial process" while ignoring these same problems in the legislative process. Macey, *supra* note 137, at 592.

<sup>230</sup>Rehnquist, *supra* note 3, at 699-700. Davis notes that Rehnquist's democratic focus may seem inconsistent with his record on free speech, where he gets marks for supporting protection of speech claimants in fewer cases than any other Justice, perhaps because he has expressed disagreement with incorporation of the Speech Clause to regulate states. Davis, *supra* note 113, at 70-73. In fact, Rehnquist has not sided with the speech claimant even when he also asserted a property rights claim, i.e., ownership of a flag or license plate. *Id.* at 73-75.

<sup>231</sup>*Id.* at 44-45 (quoting *Richmond Newspapers v. Virginia*, 448 U.S. 555, 606 (1980)).

<sup>232</sup>See, e.g., SAVAGE, *supra* note 13, at 36.

attempt to be consistent with laissez-faire theory “which reduces the function of government to protecting private exchanges and the aim of the Constitution to protecting the rights and expectations of property holders.”<sup>233</sup>

Whether Rehnquist’s views are simply state-sovereignist, motivated by a belief in the popular will, or ultimately individualistic, as a consistent ideology (rather than a constraining voice), they seem inconsistent with a Lutheran understanding of orders or vocation. In the Lutheran view, institutions no less than human beings must constantly be challenged and corrected, for as human creations, they are as apt to fall into error and even perversion of their original purposes as any person. Luther recognized that each of the orders—*oeconomia*, the church, and even the state—can be both fruitful and perverse *at the same time*.<sup>234</sup>

Second, the freedom which God gives in the orders, including the states, permits human sinfulness, so that democratic acts are as likely to be an expression of individual self-interest as those of tyrants or even judges.<sup>235</sup> Similarly, in the Lutheran view, even democratic authority can be exercised with blindness as well as insight, with the self-delusion that one is working for the common good when one is merely perpetuating evil.<sup>236</sup> Indeed, from a conscience perspective, as deTocqueville recognized early, popular sentiment can be as tyrannical and can suppress individual judgment just as any other authoritarian scheme, and the whim of the majority tends to replace the demand of king or tyrant in a democratic society.<sup>237</sup>

Yet, Rehnquist’s preference for legislative actions suggests a presumption of correctness simply because they are authorized by the people. For instance, in *Furman v. Georgia*, he suggests that if a legislative body makes a mistake, the only repercussion is that a majority will is left in place; if a judicial body does so, the view of nine Justices is imposed upon an entire public.<sup>238</sup> Such a justification of state acts on the basis of popular will rejects the insight that “there is no authority except from God; the authority which everywhere exists has been ordained by God,”<sup>239</sup> so

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<sup>233</sup>Davis, *supra* note 113, at 73 (quoting Owen Fiss & Charles Krauthammer, *The Rehnquist Court*, NEW REPUBLIC, Mar. 10, 1982, at 14, 21 (1982)). *But see* Macey, *supra* note 133, at 586-89 (arguing that Rehnquist has failed to “check legislative excess” in favor of deference).

<sup>234</sup>*See* Braaten, *supra* note 71, at 34.

<sup>235</sup>Smith notes, “Henry David Thoreau, however, was hardly the only human being for whom it was not self-evident that a group acquires moral authority to command merely by virtue of numerical superiority.” Smith, *supra* note 17, at 592.

<sup>236</sup>*See* Macey, *supra* note 137, at 578-86 (describing how the Founders separated powers to check public interest group pressures).

<sup>237</sup>ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 11-13 (Francis Bowen ed. & Henry Reeve, trans., Vintage, 1995)

<sup>238</sup>*Furman v. Georgia*, 408 U.S. 238, 467-70 (1972). *See* characterization in Davis, *supra* note 113, at 25.

<sup>239</sup>On Temporal Authority, Lull, *supra* note 109, at 659-60.

that democracy itself can never be an ultimate justification. Taken to its ultimate extreme, such a view, expressed as *vox populi vox dei*, is idolatrous.<sup>240</sup>

Thus, Lutheranism has incorporated the responsibility of challenge to the evil done by the state as well as recognition of its authority. A Lutheran is called to be at once obedient to and skeptical of authority, even that of a duly constituted government, though Lutherans have described the formula in which obedience and resistance are related in different ways.<sup>241</sup> Yet, Rehnquist has missed this insight into the possible evil of majoritarianism throughout his life, from his early political days when he argued against a Phoenix civil rights ordinance because the majority was “‘well satisfied with the traditional . . . system’ and did not want it ‘tinkered with’ by ‘social theorists’ who asserted a ‘claim for special privileges’ by the black minority.”<sup>242</sup> In fact, in his perhaps most infamous professional opinion, arguing that his judge, Justice Jackson, should vote to uphold *Plessy v. Ferguson*,<sup>243</sup> he claimed, “[t]o the arguments made by Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are.”<sup>244</sup>

Justice Rehnquist’s statist-majoritarian thrust can be explained by his commitment to legal positivism, i.e., the belief that no moral critique is available to substantiate the propriety of particular legislation.<sup>245</sup> Rehnquist’s particular brand of positivism incorporates the separation of private and public values. Though he

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<sup>240</sup>I owe Howard Lesnick for this insight. As Howard points out, the “popular will” can be heavily influenced by powerful elite interests, e.g., through heavy financing of political campaigns. Letter from Howard Lesnick (May, 1997) (on file with author).

<sup>241</sup>Strieter, for instance, describes four American Lutheran responsive models as the “participatory reform-resistance type” taken by William Lazareth and George Forell; the “christological-trinitarian” model preferred by Franklin Sherman and Larry Rasmussen, the “confessing movement” response of Robert Bertram and Edward Schroeder, and Carl Braaten and Robert Jensen’s “historical eschatological type.” STRIETER, *supra* note 73, at 3.

<sup>242</sup>IRONS, *supra* note 13, at 50 (quoting Rehnquist’s 1967 letter to the editor published in the *Arizona Republic*).

<sup>243</sup>163 U.S. 536 (1896)(holding that “separate but equal” accommodations on public transportation did not violate the Equal Protection Clause).

<sup>244</sup>Rehnquist continued “One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—whether those of business, slaveholders, or Jehovah’s Witnesses—have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men. . . . I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by ‘liberal’ colleagues but I think *Plessy v. Ferguson* was right and should be reaffirmed.” SAVAGE, *supra* note 13 at 36. In a now-infamous blemish on his moral character, in his confirmation hearings, Rehnquist attempted to disavow this statement, claiming it represented Justice Jackson’s views rather than his own, though Jackson’s secretary repudiated this account as “incredible on its face.” IRONS, *supra* note 13, at 60-61; see also Savage, *supra* note 13, at 35-38; D. Davis, *supra* note 13, at 7.

<sup>245</sup>Davis, *supra* note 113, at 26-27.

sometimes advocates that individuals act on the basis of their moral beliefs, “the most common and most powerful wellsprings of action,” they cannot demand that others join them, for public values are validated only by the will of the people whom one can convince to vote the same way.<sup>246</sup> Rehnquist’s acceptance of the notion that conscientious decisions, like property decisions, are “personal” is (ironically for a state-sovereignist) streaked with a little autonomy ideology, which may also explain his strong defense of private property. He once wrote, “[i]mplicit in each of our daily lives is the reliance on *our right to act as we choose* in areas not proscribed by law, and reliance that the law will be enforced against those who wrongfully interfere with this exercise of freedom on our part.”<sup>247</sup> Yet, Rehnquist has written that it would not be immoral or improper to repeat the entire Bill of Rights, since its “trump” value lies in its majoritarian source.<sup>248</sup>

Rehnquist’s own positivist views have been held since early adulthood, as evidenced by his *Stanford Daily* editorial that opined, “moral standards are incapable of being rationally demonstrated’ . . . it ‘is logically impossible to weigh the merits of one of these *emotions* [about whether German officers should be allowed to speak on campus] against the other. . . . [O]ne personal conviction is no better than another.’”<sup>249</sup> That these views are part of his judicial philosophy is demonstrated in his definitive “The Notion of a Living Constitution,” which castigates non-interpretivist judges:

Beyond the Constitution and the laws in our society, there simply is no basis other than the individual conscience of the citizen that may serve as a platform for the launching of moral judgments.

There is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience, and vice versa. Many of us necessarily feel strongly and deeply about our own moral judgments, but they remain only personal moral judgments until in some way given the sanction of law. . . .

I know of no other method compatible with political theory basic to democratic society by which one’s own conscientious belief may be

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<sup>246</sup>See, e.g., Rehnquist, *supra* note 3 at 704-706; see also Davis, *supra* note 113, at 26-27 (describing positivism as “moral relativism”); Clor, *supra* note 132, at 563 (describing Rehnquist’s views as “legal positivism with a vengeance,” in which justice cannot precede law).

<sup>247</sup>IRONS, *supra* note 13, at 51 (emphasis added). A judicial example is *Patterson v. McLean Credit*, 491 U.S. 164 (1989), in which Justice Rehnquist initially wanted to write an opinion determining that the Civil Rights statute on discriminatory contracts, 42 U.S.C. § 1981, should not be made applicable to private employers. Savage, *supra* note 13, at 190.

<sup>248</sup>Merrill, *supra* note 114, at 633 (citing William H. Rehnquist, *Government by Cliche*, 45 MO. L. REV. 379, 390-92 (1980)).

<sup>249</sup>IRONS, *supra* note 13, at 48 (quoting William H. Rehnquist, *Emotion vs. Reason*, STANFORD DAILY (editorial)) (emphasis added).



translated into positive law and thereby obtain the only general moral imprimatur permissible in a pluralistic, democratic society.<sup>250</sup>

Justice Rehnquist specifically disavows that laws are generally accepted “because of any intrinsic worth [or] because of any unique origins in someone’s idea of natural justice. [I]nstead [they are accepted] simply because they have been incorporated in a constitution by the people.”<sup>251</sup> Indeed, Rehnquist quotes Holmes approvingly for skepticism about natural law arguments;<sup>252</sup> and rarely recites a moral argument in support of a state’s position.<sup>253</sup>

Rehnquist’s positivism and his consignment of moral questions to the private sphere unless they can obtain the assent of a majority represents a complete disavowal of the Lutheran position that natural law ultimately trumps positive law.<sup>254</sup> Of course, Lutheran doctrine simultaneously recognizes the office of the authority and the responsibility to honor those who hold the office, even to the point of refusing rebellion.<sup>255</sup> However, nothing about Lutheran doctrine suggests that Christians should be quiet in the face of evil or even neglect by those who exercise their office. In fact, Luther himself never used any excuse of office or jurisdiction to avoid castigating the rulers of his own time:

The temporal lords are supposed to govern lands and people outwardly. This they leave undone. They can do no more than strip and fleece, heap tax upon tax and tribute upon tribute, letting loose here a bear and there a wolf. Besides this, there is no justice, integrity, or truth to be found among them. They behave worse than any thief or scoundrel, and their temporal rule has sunk quite as low as that of the spiritual tyrants.<sup>256</sup>

Yet Rehnquist’s state-sovereignist conception of government leaves little or no room for institutional challenge or epideictic criticism of office-holders, or claims that law or public policy is based on the tyranny of self-interested public will or the fallen institutional judgment of parallel lawmakers. Rehnquist’s view of the Court’s ability to challenge is simply jurisdictional: it is only when “these branches overstep the authority given them by the Constitution . . . or invade protected individual rights” that “the Court must prefer the Constitution to the government acts.”<sup>257</sup>

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<sup>250</sup>Rehnquist, *supra* note 3, at 704, 705.

<sup>251</sup>*Id.* at 704; IRONS, *supra* note 13, at 32.

<sup>252</sup>Rehnquist, *supra* note 3, at 704-05.

<sup>253</sup>A notable exception is *New Jersey Welfare Rights Organization v. Cahill*, in which Justice Rehnquist argues that the state could logically conclude that it should enforce traditional “family values” by subsidizing intact families with married spouses and excluding parents who live together without benefit of marriage and their children from welfare benefits. 411 U.S. 619, 621 (1973) (Rehnquist, J., dissenting).

<sup>254</sup>Clor, *supra* note 132, at 564 (noting Rehnquist’s fondness for quoting Justice Holmes who debunks natural law and other claims that there is a right or goods).

<sup>255</sup>On Temporal Authority, Lull, *supra* note 109, at 668-69.

<sup>256</sup>*Id.* at 683.

<sup>257</sup>Rehnquist, *supra* note 3, at 696.

By contrast, a Lutheran jurist would be bound to morally criticize the state for its substantive failures, not simply its failure to observe its own jurisdictional limits or promises. Even a Lutheran jurist who believed that jurisdiction is an expression of the orders, a manifestation of God's will for each of the three branches of government, would feel obliged to exercise his epideictic authority to call the other branches to account.

Justice Rehnquist steadfastly refuses to acknowledge this responsibility. As one example, in *City of Cleburne v. Cleburne Living Center*,<sup>258</sup> Justice Rehnquist refuses to say, with the majority, that the democratic decision of the people of Cleburne to ban a half-way house for mentally retarded people is the product of fear, ignorance, distaste, and dislike of retarded people.<sup>259</sup> Even a Lutheran Justice who was committed to an expansive view of the responsibility of a democratically chosen legislative body to decide even wrongly, even a Justice who thought that a Court opinion was likely to have no useful effect,<sup>260</sup> would feel bound to denounce decisions based on ignorance and resentment. Thus, even if Justice Rehnquist were right in challenging a more rigorous "rational basis" application in *City of Cleburne*, he is not excused from admitting rather than avoiding the basis for the City's decision.

Moreover, contrary to the natural law tradition accepted by Lutherans, which posits a moral order given by God through human institutions, Rehnquist's thoroughgoing positivism claims that no moral critique is available to judge the actions of either individual or government, whether democratic or not. Rehnquist treats moral decisions as appropriate only to the "private sphere," refusing to acknowledge the public dimensions of moral choice as natural law and Lutheran doctrine assume. When Eddie Thomas calls on the state to grant him unemployment compensation because he conscientiously refuses to work on gun turrets, Rehnquist suggests that such decisions may well be "purely 'personal philosophical'" or "personal subjective" ones, not demanding state protection.<sup>261</sup>

In accepting the public/private divide, Justice Rehnquist neglects the Lutheran insight that it is possible to have simultaneous conflicting commitments. The public-private metaphor, which imagines human beings shuttling back and forth between

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<sup>258</sup>473 U.S. 432 (1985).

<sup>259</sup>Rehnquist does exercise an epideictic role sometimes; a rare case where it was exercised "against" the decision was in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), where Rehnquist's opinion excoriated Hustler's cartoon while upholding it under the First Amendment. See SAVAGE, *supra* note 13, at 162.

<sup>260</sup>See, e.g., SAVAGE, *supra* note 13, at 32 (quoting Rehnquist's 1964 letter to the editor published in the *Arizona Republic*) (describing attorney Rehnquist's view that public accommodations laws would only result in blacks and property owners "glowering at one another across the lunch counter"); *id.* at 77 (quoting clerk Rehnquist's memo that indicated, "It is about time the Court faced the fact that the white people of the South don't like the colored people: the constitution . . . most assuredly did not appoint the Court as a sociological watchdog to rear up every time private discrimination raises its admittedly ugly head."); Larisa, *supra* note 151, at 208 (quoting author Rehnquist's opinion, as stated in his book *THE SUPREME COURT* (1987), that Court challenge to legislative majority decisions set the Court "in the process of sowing a wind, with the whirlwind to be reaped years later").

<sup>261</sup>*Thomas v. Review Bd. of Indiana Employment Sec Div*, 450 U.S. 707, 723 (1981).

their private lives and public lives, suggests that private matters are beyond public reach or critique, while public matters are fully subject to scrutiny, discussion and regulation by the community. Thus, sexuality (and its manifestations, such as viewing pornography, selecting a sexual partner, choosing whether to procreate or not) is out of bounds for moral conversation or legal constraint so long as it stays in a private space; once it becomes public (adult movie theaters, public nudity, a request for public funding for an abortion), the individual is at the moral and legal mercy of the community. Or pollution of the earth cannot be questioned when it affects only one's "private" property, but once it has the potential to affect public concerns, it is up for the highest scrutiny.

In the McConnell typology, Church Apart from Culture or Church in Conflict with Culture groups would tend to accept the private-public split as perhaps a necessary evil, and thus the legal implications I have described.<sup>262</sup> Churches Aligned with Culture groups might tend to refuse to accept the split (or substantially narrow the private sphere), and determine that most aspects of one's life are potentially the subject of government regulation, so that private morality, communications and actions could be regulated by the whole except for good reasons.<sup>263</sup>

By contrast, analogizing from the Lutheran understanding, the debate over the line between private and public can be substantially reframed if one understands the human being to be simultaneously committed to the conflicting demands of the relationships in which she lives, with family, friends, local community, and nation-state. The line between private and public becomes meaningless, because the relevant metaphor is relational, not spatial. The tensions between such relations, and the structures in which the human is placed, cannot be resolved by reference to a black-letter command of the Bible, nor "locating" one's activity in the private or public.

Indeed, even the priority of relationship (with God as first) does not resolve the tension of conflicting demands between one's proper loyalties. That priority merely puts such demands in proper perspective: these simultaneous conflicting demands are not ultimate demands on the self.<sup>264</sup> And they are most likely infected with sin and resolvable only in brokenness—that is, with unwarranted pain to one or more of the demandants. But resolution of those demands, even through a legal rule or decision, is ultimately not a matter of salvation, either for the self or for the world.

To give just one example, the question whether the state may enter Michael Hardwick's partially open bedroom and arrest him for sodomy,<sup>265</sup> or confiscate Stanley's pornographic pictures<sup>266</sup> does not, in the Lutheran understanding, intrinsically come down to the question about where the spatial line between private and public is drawn. Even if one made a practical argument on Lutheran grounds that some clear boundaries for state intervention must be established by law, a Lutheran would not conceptualize the problem in "property line" terms.

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<sup>262</sup>See *supra* notes 85-89 and accompanying text.

<sup>263</sup>See *supra* notes 103-04 and accompanying text.

<sup>264</sup>See Braaten, *supra* note 71, at 35.

<sup>265</sup>See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>266</sup>See *Stanley v. Georgia*, 394 U.S. 557 (1969).

Rather, a Lutheran would understand the moral problem as one of conflicting loyalties, to the individual person, the intimate relationships that might be involved, the community of friends in which Hardwick or Stanley lived, the larger community, and the state. To give the "right" to Hardwick or Stanley or to give power to the state is to take moral action which is always burdened with fallenness and responsibility for the actor and for those around him. Nothing about Lutheran theology reflects the understanding that moral decisions (whether Hardwick's or Attorney General Bowers') are personal and autonomous; moral action is always responsive rather than autonomous, responsive to God, to the community, and to the neighbor.

*C. The Equality of Authority: The Problem of Majoritarianism, Equal Protection and Individual Rights*

A Lutheran View: Love for the neighbor, rightly understood, is the sole basis for ethical action, for both individuals and the government. It is both the demand of the natural law and the response of freedom in the gift of God's love and salvation.<sup>267</sup> Thus, love is expressed in wrath and in care.

If there is one dramatic way in which Rehnquist's jurisprudence departs from Lutheran theology, it is in a thorough lack of rhetorical concern for the neighbor. Concern for the neighbor is theologically based for Lutherans, for it is justified not by the worthiness of the neighbor nor by emphasis on moral self-improvement as a path to human self-fulfillment or eudamonia, but on what God has done for the giver. Yet, the premise that neighbor-love is responsive to God's love need not be the predicate of a claim that government must act both responsively and realistically about the neighbor's need.

Lutheranism's lifting up of care of the neighbor, including defense of the neighbor against evil even at the risk of grave loss or death to oneself,<sup>268</sup> is perhaps its most remarkable aspect given Lutheran acknowledgement of the inherent sinfulness of both the neighbor and the self. Normally, a "logical" corollary to the recognition of human self-interest would be that government should be framed to account for that self-interest, not in contradiction to it. Yet, the Lutheran mandate to care for the neighbor is realistic about, and willing to denounce, the neighbor's flaws and wrongdoing, while it does not justify disengagement or turning away from the neighbor who exhibits those flaws. Rather, for the Lutherans, Christians must give their lives even for those who are most unworthy in conventional terms.<sup>269</sup>

This seemingly contradictory stance of judgment and love can be explained, in part, by the metaphor of the two governances. The Lutheran concern for the neighbor is at once a demand of both kingdoms, the kingdom of God where neighbor-love is responsive to God and the other, and the kingdom of the world, where the responsibility to care for the neighbor is built into the fabric of natural law. From natural law, all persons, whether or not Christian, discern the principles of justice and respect for human persons; and can describe a ground for human interaction that both prescribes and exhorts care for the neighbor, justifying the

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<sup>267</sup>See FORELL, *supra* note 174, at 100-105; discussion by Robert Benne, *The Lutheran Tradition and Public Theology*, Lutheran Theological Seminary Bulletin 19-20 (Fall 1995).

<sup>268</sup>On Temporal Authority, Lull, *supra* note 109, at 738-43.

<sup>269</sup>FORELL, *supra* note 174, at 98-101, 103-104.

restraint and punishment of those who evilly transgress those boundaries.<sup>270</sup> The Christian will, in Luther's view, exceed his duties under natural law principles of judgment and obligation out of gratitude and responsive love to the Creator.<sup>271</sup>

Perhaps the most critical misinterpretation of Lutheran texts for our purposes is the equation of the restraining and judging function of the law with natural justice, and the nurturing and sacrificial response of human beings with the Gospel. In fact, Luther and his successors have underscored that natural law, and positive law as reformed by natural principles of justice, must be understood as having an affirmative role in helping and supporting the neighbor;<sup>272</sup> that task is not consigned only to Christians. Thus, even the godless judge or magistrate may be called to account if he does not exercise the "fatherly" responsibilities he has to see for the care of those who are particularly vulnerable.

Justice Rehnquist's opinions contain little evidence that he understands the distinction between disciplined love and lack of concern for the neighbor. The epideictic text of Rehnquist's opinions toward those individuals entreating the government can only be described as turning his back, whether it is to the conscientious claims of individuals challenging the state,<sup>273</sup> or claims of need from the vulnerable.<sup>274</sup> Rehnquist's steadfast refusal to challenge any state action against vulnerable people, however ill-motivated, is one example. When Congress attempted to get at "hippie communes" by refusing food stamps to unrelated people who lived in the same household in *U.S.D.A. v. Moreno*,<sup>275</sup> Rehnquist recognized the possible unfortunate consequence of the law,<sup>276</sup> although he would not talk about Jacinto Moreno, the plaintiff, directly. Yet he pronounced, "our role is limited to the determination of whether there is any rational basis" for denying food stamps.<sup>277</sup> Since the government could "conceivably" have thought that the regulation would

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<sup>270</sup>See Braaten, *supra* note 71, at 33-34.

<sup>271</sup>See FAITH ACTIVE IN LOVE, *supra* note 174, at 86-88, 110-111; On Temporal Authority, Lull, *supra* note 109, at 668-69.

<sup>272</sup>*Id.* at 663, 668-69.

<sup>273</sup>IRONS, *supra* note 13, at 52 (quoting Rehnquist's view that the conscientious objector owes an "unqualified obligation to obey a duly enacted law" and "does not fully atone" for his disobedience" by serving his sentence). In the Justice Department, Rehnquist referred to Vietnam protesters, for instance, as the "new barbarians." *Id.* at 51; SAVAGE *supra* note 13, at 40.

<sup>274</sup>See, e.g., SAVAGE, *supra* note 13, at 362 ("[w]here Brennan saw the best in the lowest of human beings, Rehnquist saw murderers, thieves and thugs"); Culp, *supra* note 172, at 609 (calling Rehnquist "the most hostile justice toward claims of civil rights in this half century and . . . perhaps ever"); Phelps & Gates, *supra* note 114, at 572 (quoting Edward V. Heck, *Civil Liberties Voting Patterns in the Burger Court, 1975-1978*, 34 W. Pol. Q. 193, 202 (1981), who states that "Rehnquist's 'voting record . . . is characterized by almost unrelenting hostility to the assertion of civil liberties claims'").

<sup>275</sup>413 U.S. 528 (1973). Justice Brennan labeled these regulations a punishment for "only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility." *Id.* at 538 (emphasis added).

<sup>276</sup>*Id.* at 545 (Rehnquist, J., dissenting).

<sup>277</sup>*Id.* at 545-46; see also IRONS, *supra* note 13, at 17-18.

deny stamps to those households “which have been formed solely for the purpose of taking advantage of the food stamp program” (although no legislative history supported this conception), the statute could not be attacked.<sup>278</sup>

Regularly, Rehnquist also implicitly refers to the “neighbor” who calls upon the state for assistance as a troublemaker, suggesting deep skepticism about the willingness of individual rights claimants to cheat the government. More than Lutheran realism about human nature, both its good and evil, he expresses unremitting disdain for the character or situation in which such people find themselves. For instance, in response to Eddie Thomas, the conscientious factory worker, he argues that granting benefits to people who refuse to do morally repugnant work based on “purely ‘personal philosophical choices’” will mean that “[p]ersons will then be able to quit their jobs, assert[ing] they did so for personal reasons, and collect unemployment insurance.”<sup>279</sup> Similarly, Fred Cruz, who demands the right to hold services with state assistance and for equal consideration of his religious activity in parole hearings, is met with some scorn: “The inmate stands to gain something and lose nothing from a complaint stating facts that he is ultimately unable to prove. Though he may be denied legal relief, he will nonetheless have obtained a short sabbatical in the nearest federal courthouse.”<sup>280</sup>

Such skepticism is not reserved only for religious claimants, however. Justice Rehnquist also suspects the motives of unconventional claimants, such as resident aliens whom he thinks will not apply for citizenship and will try to take advantage of

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<sup>278</sup>*Moreno*, 413 U.S. at 547 (Rehnquist, J., dissenting).

<sup>279</sup>*Thomas v. Review Bd.*, 450 U.S. 707, 723 n.1 (1981) (Rehnquist, J., dissenting). Rehnquist puts Thomas’ reason for refusing to make war instruments in the same category as “every personal subjective reason for leaving a job.” *Id.*

<sup>280</sup>*Cruz v. Beto*, 405 U.S. 319, 326-27 (1972) (Rehnquist, J., dissenting). Indeed, Rehnquist goes so far as to cite a prisoner account that writ-writers in prison are essentially con artists who rip off their “clients” and try to snow the courts with fantastic causes of action and fake citations. *Id.* at 327 n.7; Charles Larsen, *A Prisoner Looks at Writ-Writing*, 56 CAL. L. REV. 343, 348-49 (1968). Whatever the truth of the article, its relevance to Fred Cruz’s request for a hearing on his claim that Buddhists were being treated unequally in the prisons is a stretch.

*See also* *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986), where Justice Rehnquist, writing for the majority, overturns a lower court’s mandate that an employer who cannot demonstrate hardship must offer the employee’s preferred accommodation of his religious beliefs instead of the employer’s offer under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j). The claimant, Ronald Philbrook, a Worldwide Church of God believer, asked the school board to permit him to use authorized personal leave for required religious observances (which was prohibited) instead of taking unpaid, unauthorized leave or scheduling medical leave on the same day. *Id.* at 62, 64-65. Rehnquist noted that under the employee preference rule, “the employee is given every incentive to hold out for the most beneficial accommodation, despite the fact that an employer offers a reasonable resolution of the conflict.” *Id.* at 69. Of course, Rehnquist holds no brief for secularists, either, noting that the First Amendment does not require the “extreme approach” of throwing the Court’s “weight on the side of those who believe that our society as a whole should be a purely secular one.” *Meek v. Pittenger*, 421 U.S. 349, 395 (1975) (Rehnquist, J., concurring and dissenting). Rehnquist quotes approvingly from Justice Douglas’ famous *Zorach v. Clauson* language that begins, “We are a religious people whose institutions presuppose a Supreme Being.” 343 U.S. 306, 313-314 (1952). *Id.*

the state;<sup>281</sup> or ones he believes may come from a bribe-taking country or have a contemptuous attitude toward public service.<sup>282</sup> Families involving unmarried couples, particularly women and their children, are another group that has come in for Rehnquist's disapproval. For instance, he wanted to uphold a rule denying benefits to children of unmarried parents, because "[t]he Constitution does not require that special financial assistance designed by the legislature to help poor families be extended to 'communes' as well."<sup>283</sup>

Indeed, Rehnquist suspects fraud in a vast number of claimants: speaking on Congress' refusal to give some illegitimate children their father's Social Security benefits, he described it as an appropriate "effort[] to cope with *spurious* claims of entitlement, while preserving maximum benefits for those persons mostly likely to be *deserving*. . . ."<sup>284</sup> Even in Medicare claims, Rehnquist is suspicious: he notes that permitting Medicare claimants to come directly to federal court instead of the administrative hearing system will mean litigation by many a person who thinks "someday he might wish to have some kind of surgery."<sup>285</sup> Rehnquist adds, "it is of no great moment to the dissent that after [such litigation] that individual may simply abandon his musings about having surgery."<sup>286</sup>

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<sup>281</sup>Rehnquist acknowledges the state's right to assume that aliens are unlikely to stay in the United States and "contribute to the future well-being of the State." *Nyquist v. Mauclet*, 432 U.S. 1, 21 (1977) (Rehnquist, J., dissenting) (dissenting from holding that New York's refusal to provide resident aliens with higher education financial assistance because they refused to apply for naturalization when they could, violated the Equal Protection Clause).

<sup>282</sup>*Sugarman v. Dougall*, 413 U.S. 634, 662 (1973) (Rehnquist, J., dissenting); see *Irons supra* note 13, at 272-73.

<sup>283</sup>*New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619, 622 (1973) (Rehnquist, J., dissenting); see *IRONS, supra* note 13, at 282-84, noting that Rehnquist stood alone in his consistent view that lawmakers can exclude illegitimate children from definitions of family. He had already expressed the view, as an assistant attorney general, "that the ERA would be 'almost certain to have an adverse effect on the family unit as we know it.'" *Id.* at 298.

<sup>284</sup>*Jiminez v. Weinberger*, 417 U.S. 628, 638 (1974) (Rehnquist, J., dissenting) (emphasis added); see also *Califano v. Boles*, 443 U.S. 282, 289 (1979) (Rehnquist dismisses the claim of an unmarried, live-in mother of a dead man's child for mother's Social Security benefit, noting that the mother's benefit was intended to protect the family unit by making the surviving parent's "choice to stay home easier."). In Rehnquist's view, however, it was not meant as a "system for the dispensing of child-care subsidies" to women who were not married to, and therefore didn't have the expectation of support from, men by whom they had children. *Id.* Moreover, Rehnquist compares the interest of these women's illegitimate children as comparable to "those who are gratified in a nonmaterial way to see a friend or relative receive benefits." *Id.* at 295.

<sup>285</sup>*Heckler v. Ringer*, 466 U.S. 602, 625 (1984).

<sup>286</sup>*Id.* Surprisingly, Rehnquist goes on to admit that such a problem will be routine because "millions of people, like Ringer, who desire some kind of controversial operation but who are unable to have it because their surgeons will not perform the surgery without knowing in advance [whether they will be paid]." *Id.* at 625. Yet, he is indignant at the thought "that those individuals, as well as Ringer, are entitled to an advance declaration so as to ensure them the opportunity to have the surgery they desire." *Id.* at 626; see also *Director, Office of Workers' Compensation Programs v. Rasmussen*, 440 U.S. 29, 46 (1979), where Rehnquist

Even when he is not excoriating plaintiffs, Rehnquist's opinions often evince a flavor of indifference in the problems of people coming to court for relief.<sup>287</sup> For instance, he is a proponent of the position that unless government has placed an "obstacle in the path of" a fundamental rights claimant, the government has not violated her right;<sup>288</sup> in abortion cases, he has refused to speak either in favor of the fetus' right to life or the mother's right to privacy or liberty.<sup>289</sup> Similarly, to Air Force Captain/Rabbi Simcha Goldman's plea that wearing his yarmulke is "silent devotion akin to prayer" required by his religious belief, Rehnquist responds merely that due to such rules, "military life may be more objectionable for petitioner and probably others."<sup>290</sup>

Of course, even Justice Rehnquist on occasion expresses concern for some claimants, particularly when the state is faced with competing claims on limited resources,<sup>291</sup> though he favors those traditionally considered innocent and not responsible for their own plight,<sup>292</sup> such as elderly or disabled married women. Most notably, in *Califano v. Goldfarb*, he cites the "plight of [dependent] widows [as] especially severe," justifying a presumption that widows are dependent on their spouses, while widowers must prove their dependency to get Social Security benefits.<sup>293</sup> And in the majority opinion in *Herweg v. Ray*, he takes the unusual step of talking about nursing home patient Elvina Herweg more personally,<sup>294</sup> ultimately upholding federal over state regulations in her favor.<sup>295</sup>

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posits that maximum benefit limits for disabled workers' families may have been retained "to discourage feigned disability, a consideration wholly inapplicable to death benefits."

<sup>287</sup>Rehnquist has tirelessly worked to eliminate Death Row subsequent appeals, thinking them wasteful and abusive of law enforcement. *Savage*, *supra* note 13, at 412; *Culp*, *supra* note 168, at 603-04 (discussing the resurgence of disregard for the interests of African-Americans with the Rehnquist Court).

<sup>288</sup>*Webster v. Reproductive Health Servs.*, 492 U.S. 490, 509 (1989) (quoting *Harris v. MacRae*, 448 U.S. 297, 315 (1980)); *see also* *Blum v. Yaretsky*, 457 U.S. 991, 1001 (1982) (quoting *Golden v. Zwickler*, 394 U.S. 103, 108 (1969)) (Rehnquist counters nursing home residents' pleas that they were in danger of losing their Medicaid payments because of decisions that they should be transferred to a lower-level facility by saying that the threat was "quite realistic," yet not "of sufficient immediacy and reality" to justify their bringing the lawsuit).

<sup>289</sup>*See* *SAVAGE*, *supra* note 13, at 261.

<sup>290</sup>*Goldman v. Weinberger*, 475 U.S. 503, 509 (1986).

<sup>291</sup>*See, e.g., Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 278-79 (1974) (Rehnquist, J., dissenting) (newly resident poor compete with long-resident near-poor for free medical care); *Califano v. Boles*, 443 U.S. 282, 296 (1979) (providing Social Security to unwed mother of deceased father's child will reduce benefits to later married mother and her children).

<sup>292</sup>For instance, in *Maricopa County* Rehnquist expresses a preference for taxpaying long-term residents over new, poor residents; and in *Boles*, for the claims of the deceased's wife and her children over those of his previous live-in girlfriend and her children. *Id.*

<sup>293</sup>430 U.S. 199, 232-33 (1976).

<sup>294</sup>Rehnquist's opinion notes "Petitioner Elvina Herweg has been in a comatose state since August 1976 as a result of two cerebral hemorrhages." *Herweg v. Ray*, 455 U.S. 265, 270 (1982). We also discover that Elvina's husband, whose income is attributed to her, is a



Lutheranism offers a different epideictic and deliberative approach to the problem of equality of persons. Constitutionalist have had a difficult time framing a theory that will deal with the facts of real life: that inequalities abound, from maldistribution of material goods to social inequalities of birth that are unrelated to inherent talents or virtues, to the life-contingencies which find otherwise equally matched individuals in very unequal life circumstances. Justice Rehnquist's positivist approach recognizes existing inequities, but takes a no-moral-blame approach that gives a rebuttable presumption of propriety to current social and economic arrangements in any equality discussion. In such a laissez-faire view, courts are not able nor responsible to deal with these inequalities of life, though they should perhaps "call" the government on intentional government malice against individuals if it is sufficiently obvious and grievous. Rehnquist's approach contrasts with others, for instance, the view that courts can respond to public inequalities, but not to private ones,<sup>296</sup> or the formal equality approach,<sup>297</sup> which also selectively defines cognizable inequalities according to various Equal Protection theories, such as political powerlessness, or human autonomy.<sup>298</sup> While in these formal (selective) equality approaches, all real inequalities are not "seen" by the Court,<sup>299</sup> radical equality theory tends to "see" all inequalities and redistributes material possessions to compensate for them.

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butcher, and that they have three children at home. *Id.* One other case recognizing the needs of the poor is Rehnquist's dissent in *Aguilar v. Felton*, 473 U.S. 402, 420 (1985), where Rehnquist dissents from invalidation of a public remedial education, clinical and guidance service program in religious schools, arguing such aid is "sorely needed," although the case can be explained more by Rehnquist's views on the Establishment Clause than on the role of constitutional courts with respect to the poor.

<sup>295</sup>*Herweg*, 455 U.S. at 278.

<sup>296</sup>See, e.g., David Abraham, *Liberty Without Equality: The Property-Rights Connection in a 'Negative Citizenship' Regime*, 21 LAW & SOC. INQUIRY 1, 9, 41-42 (1996). Advocates of the public/private approach might call on *Plessy v. Ferguson*, 163 U.S. 537 (1896) to define the "public" very narrowly to include only those participatory rights which are inherent in democratic citizenship.

<sup>297</sup>See discussion in Neil Gotanda, *A Critique of Our Constitution is Colorblind*, 44 STAN. L. REV. 1 (1994).

<sup>298</sup>Compare John Hart Ely, *Policing the Process of Representation: The Court as Referee*, and Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, in MODERN CONSTITUTIONAL THEORY: A READER 3-23 (John H. Garvey & T. Alexander Aleinikoff, 3d ed. 1984).

<sup>299</sup>I use the metaphor of vision because, ironically, Justice John Harlan's pronouncement, "our constitution is color-blind" kicks off the debate about equal protection in the last century. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting.) The constitutional interpreter "sees" the criteria used to differentiate, and then pronounces that the Constitution does not "see" it and therefore it cannot be used. If, however, the judge refuses to "see" the criteria as a constitutional question, then the Constitution implicitly "sees" it as viable basis for difference. Thus, a person who is denied a job because of her gender (an immutable characteristic and/or historically a basis for creation of insular communities of women) has a difference that the court "sees" and then (ironically) pronounces that the Constitution does not "see;" but if a person is denied a job because of her pregnancy, that difference cannot be "seen" by the court for purposes of adjudication (although her pregnancy can be "seen" by the legislature).

The problem with equality talk, however, is precisely in its selective vision: the Court narrows its vision to those things jurists believe the Constitution permits them to see, and disregards other inequalities in daily life, some of them disregarded because they are viewed as necessary to sustain a capitalist democracy.<sup>300</sup> The Lutheran approach to the problem of inequality is to recognize it for what it is—a given and yet corrupted aspect of living in this world.

Borrowing from ancient notions of station, Lutheranism recognizes the assignment of status in this life both as a gift of God's endowment of vocation upon the individual and as the result of human greed for material possessions and hierarchical power.<sup>301</sup> As a gift of vocation, any particular status in the world—whether one is a garbage hauler or a governor—contains the capacity for fulfillment and the responsibility to do good.<sup>302</sup> In that sense, all stations in life are “equal opportunity” stations, capable of providing for human happiness, well-being, and meaningful contribution. Authority, in the Lutheran understanding, becomes an office, a responsibility, rather than a perquisite of a particular status which entitles the holder to dangle the lives of human beings for his personal whims.<sup>303</sup>

Yet, as an assignment from a community formed by corrupt wills, any particular status inherently contains the diminishment of the human person and involves corrupt powerlust and resentment. In that sense, all stations in life participate in, and subject their holders to, the very tangible evils that we commonly understand when we talk about inequality in any of its versions: power or vulnerability in life and death, human respect or its diminishment, safety or precariousness of daily existence, material wellbeing or material hunger. People in different stations may not participate in a precisely equal way in these evils, just as they may not participate in a precisely equal way in goods, but they all participate significantly.

The Lutheran acknowledgement of the equally authorized stations of all persons makes it possible for a jurist to recognize and probe the corruptions attendant on all authority, and to expose them epideictically, even while affirming the authority itself and even many of its decisions. Thus, unlike Justice Rehnquist's jurisprudence, where the government, once authorized to take care of public property, becomes its “owner” and may use the property at its discretion, the Lutheran position recognizes the simultaneous authority of the individual and the state to stewardship of that property, and their common tendency to hoard it for their own purposes. Or, in the refusal of treatment cases, Lutheran doctrine can recognize at the same time the authority of a parent's conscientious decisions about his child's medical care, and the state's authority to care for its children, as well as simultaneously exposing the self-

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<sup>300</sup>Republican government, for instance, does not work unless the few represent the many, unless there are presidents, Cabinet members, and agency heads. Capitalism does not work unless there is a boss for every worker, rich people whom the poor can aspire to be if they work hard, indeed poor people whom the rich must fear they will be if they don't.

<sup>301</sup>Braaten, *supra* note 71, at 34.

<sup>302</sup>See *The Freedom of a Christian*, Lull, *supra* note 109, at 621; Braaten, *supra* note 71, at 34. Lutherans sometimes talk about the human agent as cooperator dei (cooperator with God). According to Duchrow, for instance, Luther explained that works are not “good through a person alone, but by acting in accordance with the office in which God has placed him.” STRIETER, *supra* note 73, 46-48.

<sup>303</sup>See, e.g., On Temporal Authority, Lull, *supra* note 109, at 692-94.

delusion and self-interest of each in exercising that authority. In such an understanding, individual rights do not “trump” majorities; nor do majorities overwhelm the conscience of the individual before the courts.

Similarly, a Lutheran judge would take a different view of legislative outcomes than existing policy positions, liberal or conservative. Some liberals and conservatives view government as potentially capable of making an impact on human efforts to make progress toward perfection of human nature. For instance, some “liberals” suggest that government can change work attitudes of non-working welfare recipients simply by providing them with sufficient financial incentives to escape their economic and social setting,<sup>304</sup> while similar-thinking “conservatives” suggest that the government should withdraw enough benefits to force welfare recipients into a moral lifestyle, including marriage and work in the mainstream economy.<sup>305</sup> Another camp despairs the government’s ability to change human nature, proposing that only the individual who has accepted responsibility for his own moral, social, and economic development is likely to become a moral person in this sense.<sup>306</sup> Proponents of this view might argue that privatizing the moral, social, and economic world of the individual citizen is most likely to bring about real change in the human condition, and excoriate any government response to human need (emotional or physical) as incapable of providing for human well-being, except for the “big” common needs such as security from external attack or transportation/communications networks.

The Lutheran position does not understand the project of government to be life-changing, in the sense that government can make “bad” individuals or cultures into “good” if only it hits on the right programs.<sup>307</sup> Nor, however, does the Lutheran position accept the notion that the human condition is purely a private matter, and that government has no role to play in recognizing and responding to the situations of individual persons. From the Lutheran position, what the government can and must recognize is human need (which it must alleviate) and human evil (which it must resist).<sup>308</sup> The legal metaphor which perhaps best describes Luther’s view about the purpose of the law is the criminal “defense of others” metaphor, which permits and even obliges a person to come to his neighbor’s defense, whether from physical

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<sup>304</sup>See JOEL F. HANDLER, *THE POVERTY OF WELFARE REFORM* 28-31, 56-58 (1995).

<sup>305</sup>Frank Block, et al. *THE MEAN SEASON*, 81-83, 85-88 (1987). This view can extend to entire communities or culture as well, as evidenced by the debate on what should be done about the “culture of poverty.” See, e.g., WILLIAM RYAN, *BLAMING THE VICTIM* 112-35 (1971); KEN AULETTA, *THE UNDERCLASS* 260-65 (1983).

<sup>306</sup>See representation of this position as Charles Murray’s in BLOCK et al., *supra* note 310, at 45, 115-16, 161-65.

<sup>307</sup>However, Luther did believe that people’s conduct could be restrained by the law: See, e.g., Lull, *supra* note 109, at 92. Braaten notes that “[t]here is among the orders no ideal state. . . . Every structure of life must be examined as to whether it measures up to God’s intention for it, whether in its current form it works for the common good in the service of justice, liberty, and community.” Braaten *supra* note 71, at 35.

<sup>308</sup>On Temporal Authority, Lull, *supra* note 109 at 692-93.

attack or from want, without regard for himself, even (justly) harming the aggressor.<sup>309</sup>

The theological position of Lutheranism on recognition of human need is radical in the preference of the other over the self, while not diminishing or refusing recognition to the needs of the self.<sup>310</sup> As one example of this radical preference for the neighbor, when Luther is asked to recommend whether people should flee the plague, abandoning their communities including those who cannot flee, Luther has the same response to both the authorities and to those who are asking out of relationship to individual persons. The governing authorities, those in public office—to include mayors, judges and the like—are “under obligation to remain,” for [t]o abandon an entire community which one has been called to govern . . . exposed to all kinds of danger such as fires, murder, riots and every imaginable disaster is a great sin.”<sup>311</sup> However, even those who are not carrying on an official government office must prefer the neighbor’s wellbeing: anyone who does not run the risk of losing everything he holds dear in this life for the neighbor “but forsakes him and leaves him to his misfortune becomes a murderer in the sight of God.”<sup>312</sup>

As the radicalness of that position is made possible by the theological claim that God alone saves, a legal theorist in American culture might analogically resort to a less radical claim—namely, that government intervention is rationally limited to the resistance of human evil and the alleviation of the need of the neighbor. That is, one need not accept the Lutheran position, or indeed any theology, to conclude that neither government nor the individual human working on his own self-improvement is likely to achieve a vast improvement in the human condition.

Such a position does not despair of human action, for human need and human evil continue to impel both individuals as neighbors and as holders of government office to act. It does require acceptance of the possibility that government can be government both when it responds wrathfully to human evil, indifferent or malicious; and when it responds in care, indeed sacrificially on behalf of the needy, “for the betterment of the community.”

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<sup>309</sup>Luther, for instance, argued that “a Christian should be so disposed that he will suffer every evil and injustice without avenging himself; neither will he seek legal redress in the courts but have utterly no need of temporal authority and law for his own sake. On behalf of others, however, he may and should seek vengeance, justice, protection, and help, and do as much as he can to achieve it.” On Temporal Authority, Lull, *supra* note 109, at 675; *see also id.* at 677. In fact, Luther suggested that if the governing authority failed a Christian, he should suffer evil rather than avenge himself in the courts. *Id.* at 675.

<sup>310</sup>*See* Braaten, *supra* note 71, at 37. Responding to the plague, Luther noted, “It is not forbidden but rather commanded that . . . [we] avoid destruction and disaster whenever we can, as long as we do so without detracting from our love and duty toward our neighbor. How much more appropriate it is therefore to seek to preserve life and avoid death if this can be done without harm to our neighbor. . . .” Whether One May Flee From a Deadly Plague, Lull, *supra* note 109, at 740.

<sup>311</sup>Whether One May Flee From a Deadly Plague, Lull, *supra* note 109, at 738.

<sup>312</sup>*Id.* at 743.

## VI. CONCLUSION

In 1990, Carl Braaten noted why the Lutheran tradition holds promise for dealing with the challenges of democratic pluralism. In this tradition, he writes, Christians “have a double identity”:

[T]he God of the gospel is for them also the God of the law, at work in the secular realm where the church and the unchurched share a common ground. This scheme allows that the rule of God in the public orders is not primarily in the hands of believers but is communicated to all persons through the natural orders and can be grasped through conscience and moral reason.

There is for Lutheran Christians no secular world in which God is dead; there is no empty world into which believers have to introduce the law of God for the first time. God is at work through his ongoing creativity and through the law that orders life in the world. . . . There is no sphere of life where God is not active through the law that impinges on the human conscience. . . .

. . . Lutherans believe that we experience God’s law as the driving force behind the demands that human beings impose on each other as they live in community. . . .

. . . The core of justice in all times and places is care for the neighbor. The force required to administer justice through law is the “strange work” of love (*opus alienum*) in public life.<sup>313</sup>

This paradoxical position, in which Christians are at once believers and members of a world which does not recognize belief as a criterion for membership, is a powerful alternative to exclusivist politics which recognize revelation and personal conversion as a condition for moral good in the world. Yet, it is a position which does not cast aside, privatize or subordinate the faith of the Christian believer to the concerns of the world, or reduce the radical demands and promises of the Gospel to moralisms or even a legal code. It does not reject or separate itself from the fallenness of the world, nor does it confront the world as “other” than itself. Rather, it confronts the demands of the neighbor for justice.

As I have suggested, the Lutheran position contains both a more realistic and yet optimistic view of law-making than Justice Rehnquist’s judicial philosophy. It recognizes at once the fallenness of all human beings and political institutions at every level, while refusing to desist from those fallen persons in their need, refusing to walk away from affirming criticism of those institutions that have served human need with blindness, self-interest, and short-sightedness as well as creativity and hope.

Unlike Justice Rehnquist, the Lutheran position rejects both objectivity and relativism as ultimate ways of understanding the role of the orders, including judicial review. It demands recognition of the role of the interpreter, the temptations to

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<sup>313</sup>Braaten, *supra* note 71, at 37.

which she may succumb, and the way in which natural law must ultimately guide her deliberations for the good of a diversity of citizens.

Yet, these kinds of arguments are precisely those which would make for a judicial confirmation “religion-hunt” of the kind that the Catholic justices have undergone. The evidence on Justice Rehnquist suggests, however, that such hunts are likely to be fruitless, diverting the inquirer from more significant non-religious influences on judicial philosophy, as both Justice Rehnquist’s story and Justice Brennan’s confirmation suggest.<sup>314</sup> It is perhaps unfortunately true that a confirmation process focussing on denominational membership may be self-defeating, failing to smoke out what a judge believes about the Constitution or his own religion, while also being invidious—subjecting Catholics, Jews and other outsider religions to “faith-tests” not demanded of Protestants.<sup>315</sup> Indeed, the task of asking Justices about their religious beliefs might impose peculiar moral taints upon the confirmation process. As we review Justice Brennan’s jurisprudence, we must either ask if he didn’t mean it when he suggested that his religious beliefs would have nothing to do with his judicial decisions,<sup>316</sup> or we must ask whether we have

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<sup>314</sup>Justice Brennan, as Levinson interprets, is a particularly good example of the short-sighted foolishness of denomination-typing. His “anti-Catholic” pledge apparently obviated the need, in the minds of many senators, to ask him whether the other influences in his life—his father’s union leadership and Brennan’s own judicial struggles with issues such as gerrymandering as a judge—might not influence his jurisprudence. Goldman & Gallen, *supra* note 138 5, 47 (1994). As a result, President Eisenhower ended up with a “bum steer” from a conservative perspective—a Justice who predictably might be a liberal, looking at the other influences in his life.

Moreover, such a “litmus test” may be self-defeating because it does not take seriously the possibility that a Justice—of any faith-persuasion—may not understand his own theological tradition. A judge’s or politician’s religious affiliation is at its best an informed creedal commitment; at worst, conformity to cultural practices and beliefs of an only nominally religious community or a way to rub elbows with a powerful elite necessary for an official’s personal advancement. If the Senate does not call in a Catholic theologian to quiz Antonin Scalia on his grasp and acceptance of Catholic doctrine, then it will be difficult for either a Justice’s inquisitors or the Justice himself to recognize when his religious views are playing a role.

Thus, a Senate that assumes that a Catholic will understand and apply Catholic theology may find itself surprised to discover: a) that Catholics don’t believe what the Senate thought they did, as Justice Brennan’s case points out; b) that Catholics don’t assume that their Catholicism has much to do with their job, as Justice Scalia’s record points out; or c) that Catholics may not know Catholic theology, and in fact be closet Protestants, Deists, or New Agers.

<sup>315</sup>See Levinson, *supra* note 14, at 1056-58.

<sup>316</sup>Brennan reports that by the time of his confirmation hearings, he had settled that he had a constitutional obligation “which could not be influenced by any of my religious principles. As a Roman Catholic, I might do as a private citizen what a Roman Catholic does, and that is one thing, but to the extent that that conflicts with what I think the Constitution means or requires, then my religious beliefs have to give way.” Goldman & Gallen, *supra* note 134, at 16. While Levinson expresses doubt that the Catholic Justices ended up meaning what they say, he also suggests that vibrant constitutionalism might counsel against forcing Catholic justices (and other justices) into positivism as a way of ensuring that the religious and the judicial never mix, *id.* at 1078-80.

encouraged Justices to reconstruct that question so narrowly—i.e., in Brennan’s case, as a crass Kennedyesque question about whether he would “take orders from the Pope”—that they themselves will not realize when they have crossed the line from “strict” judicial interpretation to moral or even religious argument.<sup>317</sup>

If we force religion underground, judges may easily mistake latent religious or moral beliefs for public policy, creating real monsters of vagueness or unpredictability, when they are not faced with a hard moral-formal choice, such as the Coverian dilemma of choosing between a Fugitive Slave Act or human freedom.<sup>318</sup> As I have suggested, however, the more serious moral risk is that Justices will faithfully KEEP their promises not to mix religious beliefs and jurisprudential justifications. Although judges surely live in a sheltered world,<sup>319</sup> perhaps the most important source of self-critique for a judge is his or her faith. Despite caricatures of the mindless faithful, for a Justice coming from a mainline Western religious tradition (as most have come) faith is an encounter with the uneasy questions. It demands that a religious person ask himself or herself when he is abandoning truth for convenience, when she is confusing the good with self-interest, when she is confusing political pressure with community good. It is, of course, not the only challenge to a Justice’s own limitations and self-delusions; there are the

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<sup>317</sup>Numerous statements suggest that Brennan at least instinctively employed natural law understandings in his jurisprudence. See, e.g., *Paul v. Davis*, 424 U.S. 693, 734-35 (1976) (Brennan, J., dissenting) (“[O]ne of this Court’s most important roles is . . . securing . . . the legitimate expectations of every person to innate human dignity and sense of worth.”); Goldman & Gallen, *supra* note 134, at 38 (quoting Justice Brennan’s Holmes lecture, “[L]aw, when it merits the synonym justice, is based on reason and natural insight.”). In light of his jurisprudence, that Justice Brennan demurred to the question suggests that he himself did not know about the Catholic tradition of natural law, or did not assume that the natural law tradition was “religious.” Levinson suggests as much. See *supra* note 15 at 1074.

<sup>318</sup>Robert Cover described the moral-formal dilemma of anti-slavery judges conflicted over their legal responsibility to administer the Fugitive Slave Law and their moral beliefs that slavery was wrong. Robert Cover, *JUSTICE ACCUSED* 197-259 (1975).

<sup>319</sup>Thus, justices will rarely be confronted about the validity of their longest-held private beliefs; and have only the same one-way conversations with newspapers and television that any of the rest of us has. Perhaps the most constant encounter with other-generational thinking, for example, is from a judge’s clerks. Yet, many of them may be immediately out of law school, where the headiness of pure legal argument for its own sake is largely unencumbered by the tragedies and costs, humiliation and anger, the history and the communities of the litigants, even after the most sensitive legal education. And Rehnquist describes his own group of clerks as follows: “it would be all but impossible to assemble a more hypercritical, not to say arrogant, audience than a group of law clerks criticizing an opinion circulated by one of their employers.” WILLIAM H. REHNQUIST, *THE SUPREME COURT* 37 (1987). According to Rehnquist, the clerks “like nothing better than to discuss and refine abstract legal issues.” *Id.* at 48. Mark Tushnet has similarly noted the heavy influence of the clerks. Mark Tushnet *supra* note 117 at 1327. Of course, the Justice has his/her colleagues, all of whom live in roughly the same socioeconomic, professional, and geographical cocoon. Although as Justice Rehnquist describes the Court’s review of cases, the influence of the justices on each others’ first impressions seems minimal, since the culture encourages justices to be “certain” and relatively final about their views on cases before they speak. Rehnquist, *supra* note 114, at 290-95.

conversations of the present and the past, with human beings and ideas. But faith, at least in these particular traditions, is always a challenge.<sup>320</sup>

The major Western religions, at least, suggest that human beings are more likely to be deluded from within than from without. If they are correct, then we have more to fear from the Justice who keeps his promise to lock away his religion than from the Justice who admits that it may influence him on occasion. For example, had Justice Rehnquist felt himself permitted by his office to take the insights of his faith into public life, one central concern of his jurisprudence—judges' need for humility before the democratic outcomes in a pluralistic moral culture—might have been better worked out than through his clinging to any other ideology, whether interpretive, political, or moral. He is perhaps a good “poster child” for a new approach to the problem of religious values in judicial decision-making, an approach which proceeds cautiously by analogy and with respect for its own limitations.

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<sup>320</sup>Perry also suggests that holding religious people to the standard of secular justification or other external critique requires them to ask questions about their own interpretation of tradition. RELIGION IN POLITICS, *supra* note 5, at 84-85.