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2016]

A CATHOLIC WAY TO COOK A HAMBURGER?  
THE CATHOLIC CASE AGAINST McLAW

PATRICK MCKINLEY BRENNAN\*

I. PART I

**I**S there a Catholic way to cook a hamburger? No, I'm not kidding. Joke, in a law review? I'm dead serious: Is there a Catholic way to cook a hamburger?

Before you take a stab at the question, laugh it off, or (odds are) Google it for a quick-fix, consider that this seemingly straightforward question is no exception to the universal fact that the meanings of questions, and thus of their respective answers, depend upon available common meanings. Dictionaries record schedules of probable meanings, while the actual meanings of words change depending upon how they are understood by their users. For example, the possible meanings of the word "marriage" differ today from what they were not too long ago.

As it goes for marriage, so it goes for the "hamburger." What *Obergefell v. Hodges*<sup>1</sup> and its cultural and juridical causes and consequences were to marriage, McDonald's and its ilk have been to the hamburger. The *possible* meanings of the unchanged nine-letter word "hamburger" were forever altered by the global empire Ray Kroc built and then by the shared hegemony of its countless imitators, competitors, and road kill (e.g., Wendy's, Burger King, In 'n' Out Burger, Sonic Burger, Jack in the Box, White Castle, Whataburger, The All American Burger (1968–2010), and G.D. Ritz's (1980–1991)). What unexceptionably passes today as a hamburger at the aforementioned purveyors of "fast food" would be unrecognizable to J. Wellington Wimpy.

The folks in "corporate" at McDonald's stopped updating the number of their hamburgers sold when the total reached 99 billion. That was back in 1994, almost a quarter century ago. Although the familiar Golden Arches sign has read "billions and billions" ever since, the number was

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\* John F. Scarpa Chair in Catholic Legal Studies and Professor of Law, Villanova University Charles Widger School of Law. This paper was prepared for the 60th anniversary volume of the *Villanova Law Review*, and I am grateful for the invitation to contribute it. I had completed a final draft of this Essay several months before the untimely death of Antonin Scalia, Associate Justice of the Supreme Court of the United States, on February 13, 2016. I have left my text as it concerns Justice Scalia just as I wrote it, changing only the verb tenses as necessary. It was an honor to have known Justice Scalia even just a little bit, and the news of his passing from this life made even more precious to me the memories of him I had shared in this Essay and others that I had not shared on paper. When comes such another?

1. 135 S. Ct. 2584 (2015).

unofficially projected to top 300 billion by 2013.<sup>2</sup> In 2012, McDonald's served 68 million customers per day (approximately 1% of the world's population) and pumped out seventy-five hamburgers per second. This was no case of auto-genesis; in the same year, McDonald's employed 761,000 employees worldwide, and according to corporate estimates one in eight Americans has worked at a McDonald's "restaurant."<sup>3</sup>

My point is that the question—"Is there a Catholic way to cook a hamburger?"—is presumptively asked and answered from within McWorld. "McWorld," you say? The term was coined by political scientist Benjamin Barber to name how you, I, and the neighbors probably live, whether we recognize it or not.<sup>4</sup> Barber's neologism refers to a *modus vivendi* or a culture (understood as the set of reasons a particular people has for valuing and choosing) in which "everything is drowned in the universal solvent of kitsch and consumerism, white noise and Bostockiana."<sup>5</sup> It is from this ambient perspective that we first ask—to the extent McWorld hasn't already arrested our capacity to inquire into the deep things and the high things—about things Catholic (or Jewish or Islamic or "spiritual"), about things legal, and even about things hamburger. Almost irrespective of the *object* of our inquiry, our McWorldly situatedness has traceable implications for our questions' meanings and therefore for their answers.

Before saying more about how things look, feel, and (mal)function within McWorld, however, let us return once more to the question on the table: Is there a Catholic way to cook a hamburger? The reason the question almost inevitably sounds ridiculous is that within McWorld, first, we unconsciously assume that what McDonald's produces is in fact a hamburger, while, second, it is bloody obvious that the McDonald's way of doing things is not Catholic. In a world—McWorld—in which something purchased as a "hamburger" began as poured sludge (and "shakes" have succeeded milkshakes, and so forth), there is little or no mental room for even imagining a Catholic way of cooking or, for that matter, of doing much of anything else.<sup>6</sup>

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2. See Spencer Jakab, *McDonald's 300-Billionth Burger Delayed*, WALL ST. J., Jan. 22, 2013, <http://on.wsj.com/1QuTlpg> [<https://perma.cc/B9A3-VUWU>].

3. See Gus Lubin, *13 Disturbing Facts About McDonald's*, FISCAL TIMES (Apr. 30, 2012), <http://www.thefiscaltimes.com/Articles/2012/04/30/13-Disturbing-Facts-About-McDonalds> [<https://perma.cc/A75A-4MGD>].

4. See generally BENJAMIN R. BARBER, *Jihad vs. McWorld* (1995).

5. See MORRIS BERMAN, *THE TWILIGHT OF AMERICAN CULTURE* 6 (2000).

6. See, e.g., CHARLES TAYLOR, *A SECULAR AGE* (2007); CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* (2004); cf. WILLIAM T. CAVANAUGH, *THEOPOLITICAL IMAGINATION* 48–49 (2002) ("In the Eucharist, we receive the gift of Christ, not as mere passive recipients, but by being incorporated into the gift itself, the Body of Christ. As members of the Body, we then become nourishment for others—including those not part of the visible Body—in the unending Trinitarian economy of gratuitous giving and joyful reception. Property and *dominium* are thus reconfigured." (footnote omitted)).

This is because our unchosen experience is that *method* has been all but monopolized by the way of doing things—whatever that way turns out to be—that produces Happy Meals by the millions. Differences among methods matter, however. Product is not immune to process, and there are goods internal to some practices. In sum, the way we do things, including in terms of our motives, has consequences.

Not only do the ways and means behind the scenes of McDonald's (which research reveals to be far uglier than you'd likely expect) not include "butter and love"; they render the potential relevance of the operation of sanctifying grace seemingly mad. In a world in which McDonald's passes as a "restaurant" that "serves" "hamburgers," the intelligibility of the question whether there might be a Catholic way to cook a hamburger approximates that of a surd, and, to the extent that it remains remotely intelligible at all, an object of cultural ridicule.

Why, then, bother to ask whether there is a Catholic way to cook a hamburger? And why ask the question in, of all venues, a law review? And why in the *Villanova Law Review* in particular?

For the deferred quick-fix, Google my opening question and you'll find dozens and dozens of links to a speech by Antonin Scalia, late Associate Justice of the United States Supreme Court. You'll also find there myriad mootings of his declaration in that speech that "there is no Catholic way to cook a hamburger." It is a conversation begun by Justice Scalia that I continue here, and I respectfully dissent.

## II. PART II

Justice Scalia gave the speech to a standing-room-only audience of more than 500 people at the Second Annual John F. Scarpa Conference on Law, Politics, and Culture at Villanova University School of Law in October 2007. The Conference was dedicated to "The Role of Catholic Faith in the Work of a Judge," and among the others contributing to the conversation were Paul Kahn, Paula Ochoa Espejo, James Stoner, Jean Porter, and Jeremy Waldron. Among them they represented some of the very best in the disciplines of law, jurisprudence, theology, philosophy, and political theory. It was an intellectual feast (though not of the Bork sort), and the home-made food and ample drink enjoyed by the interlocutors at conference meals elongated the feasting.<sup>7</sup> (Would it have made a difference if we'd instead been handed Happy Meals at every sitting, especially if they included, as Happy Meals recently did, "Minions" "speaking" "Minionese,"

7. This was owing to the good taste and sound judgment of Villanova Law's Director of Events extraordinaire, Nicole Garafano. She has orchestrated nearly every Scarpa Conference and has done so with perfect aplomb; the speakers who have visited Villanova for the Scarpa Conference always remark on and remember Nicole's hospitality. Mira Baric, too, has been a great help in organizing the Conference and receiving our guests worthily and warmly. Finally a word of thanks to my friend and colleague, Michael Moreland, who has contributed in countless and varied ways to the success and enjoyableness of the annual conference.

which to some with unclogged ears sounded vulgar, though of course McDonald's denied the charge)?

Now for the proximate context of Justice Scalia's denials of Catholic method, at the grill and on the bench: "There is no such thing as a 'Catholic judge,'" Justice Scalia declared

The bottom line is that the Catholic faith seems to me to have little effect on my work as a judge . . . . Just as there is no 'Catholic' way to cook a hamburger, I am hard pressed to tell you of a single opinion of mine that would have come out differently if I were not Catholic.<sup>8</sup>

The judicial lobbing of these jurisprudential hand-grenades left the campus buzzing with inquiry for several semesters, an educator's dream come true. But the buzz wasn't confined to Villanova. Covered by, quoted and analyzed in, and bastardized by national news and a host of other venues, they've been deployed for and against Supreme Court nominees ever since. There is no surprise in this, of course. Like his judicial opinions, Justice Scalia's way of speaking was memorable. A controversialist's controversialist and a rhetorician's rhetorician, he was a man who knew how both to gin up a controversy and to stack the persuasive deck in a way that would give the accusers of Socrates a run for their drachmae.

Especially memorable to me personally during Justice Scalia's visit to Villanova was his magnanimity as a teacher. I shall never forget his genial and unassuming manner of engaging the questions of the countless Villanova law students of all political and religious (and irreligious) stripes who could hardly wait to meet him and perhaps receive his autograph, nor the relaxed way he chatted and laughed with the students who gathered around him on a lush lawn on that sunny autumn afternoon. Who there and then could have sensed that a McDonald's lurked just .96 miles away (according to Mapquest)?

The Scarpa Chair in Catholic Legal Studies was inaugurated at Villanova University in 2005 thanks to the munificence of John F. Scarpa. The purpose of the Chair was to advance the University's Catholic mission of service to the Church and the world in the way universities in the Catholic tradition do just that: by pursuing and sharing the truth understood through the complementarity of faith and reason.

From its inception in 2006, the annual Scarpa Conference on Law, Politics, and Culture has facilitated learned dialogue about law in a spirited conversation conspicuous, perhaps above all, for its refusal to leave anything out,

not person, nor present, nor freedom, nor will, nor madness, nor the individual, nor the delight of a child, nor the eyes of a fellow

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8. Robert T. Miller, *Antonin Scalia: Not a Catholic (Judge)*, FIRST THINGS (Oct. 23, 2007), <http://www.firstthings.com/web-exclusives/2007/10/antonin-scalia-not-a-catholic> [<https://perma.cc/6YDS-WFKA>] (alteration in original).

human being, nor our sense of the ultimate, in its effort to make sense of our experience and make statements that are consistent and understandable in light of it all.<sup>9</sup>

Such are the words of Joseph Vining, whose body of work was the focus of the fourth annual Scarpa Conference (about which more below). It has been Vining's signature insight that law that has not been deformed into a (pseudo-) science is like theology *in that it "leaves nothing out."*<sup>10</sup>

At the time of its endowment (and perhaps still now) the only academic chair of its kind, the Scarpa Chair in Catholic Legal Studies has gathered lawyers, jurists, jurisprudents, philosophers, political scientists, theologians, and experts in many other disciplines, as well as Catholic priests and prelates,<sup>11</sup> to ponder and plumb the familiar mystery that is law.<sup>12</sup> To suggest, as I have just done, that law is in a way a "mystery" is already to stage an escape from the McWorld view of law that designedly does indeed leave much out. To be clear, I do not mean that the practice of law is a "mystery" in the strict theological sense of the term (for example, the Holy Trinity), but what I do mean, at least, is that law that leaves nothing out will acknowledge God and His rightful place in the human enterprise of lawmaking, and this acknowledgment will work itself out in pulls and tugs of method that McWorld could never generate, nor even allow. Lawmaking for and by people made in the image and likeness of God precludes the possibility of, say, a strictly agnostic "rule of recognition."

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9. JOSEPH VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* 201 (1986).

10. *See id.*

11. The priests and prelates, in addition to being ordained ministers of the Church, were experts in their respective academic fields. For example, William Cardinal Levada, who spoke at the eighth Scarpa Conference, was formerly the Prefect of the Congregation for the Doctrine of the Faith, where he succeeded Joseph Cardinal Ratzinger upon the latter's election to the Chair of Peter.

12. I would like to take this opportunity to renew my gratitude to all who have accepted my invitation to speak at the Scarpa Conference over the past decade, many of whose contributions to the Conference are explored herein. They are (in rough chronological order): Avery Cardinal Dulles SJ, Rick Garnett (thrice), Amy Uelman, Justice Antonin Scalia, Paul Kahn, Jeremy Waldron, Jean Porter, James Stoner, Paula Ochoa Espejo, Martha Nussbaum, Rick Hills, Jesse Choper, John McGreevy, Geoff Stone, Kent Greenawalt, Rev. Richard Schenk OP, Joe Vining (twice), Jeff Powell (twice), Steve Smith, Jim White, Jack Sammons, Lee Bollinger, Judge John Noonan (twice), Rev. John McCausland, Bill Eskridge, John Ferejohn, Martin Shapiro, Jane Schacter, Kristin Hickman, David Stras, Ted Ruger, Tom Merrill, Henry Monaghan (twice), John Finnis, George Christie, Michelle Dempsey, John Keown, Frederick Lawrence, Mark Murphy, Rev. Martin Rhonheimer, Candace Vogler, Michael J. White (twice), Anna Moreland, Matthew Lister, Rev. Richard Munkelt, Archbishop Charles J. Chaput OFM Cap., Peter Steinfelds, Rev. Bryan Hehir, H. David Baer, William Cardinal Levada, Rev. Michael Sweeney OP, Richard Painter, Ken Pennington, Helen Alvare, Susan Stabile, Rob Vischer, John Breen, Michael Scaperlanda, Lisa Schiltz, Kevin Walsh, Marc DeGirolami, Gillian Metzger, Jim Pfander, Tom Lee, Cathy Lanctot, and John Manning.

What I propose to do here is to sketch the escape route from McLaw (as I shall call it) with the help, among others, of many who have contributed to the Scarpa project over the past decade. I cannot in this short compass do the past ten rich years anything approaching justice, but I can, I believe, make a start at showing the prescience of the project, a measure of its accomplishment, and something of its future promise, for all of which we are indebted to John Scarpa. I would like to record here my personal gratitude to John Scarpa for attending nearly every conference and encouraging by his engaged and smiling presence the work of the Chair he endowed.

What I mean by “the Scarpa project” I telegraphed in introducing the first Scarpa Conference in the *Villanova Law Review* in 2007, quoting words of Jacques Maritain (1882–1973) published in 1952: “Whereas, for centuries, the crucial issues for religious thought were the great theological controversies centered on the dogmas of faith, the crucial issues now will deal with political theology and political philosophy.”<sup>13</sup> What I mean by the project’s “prescience” will come into finer focus as I proceed, but at root it pertains to the need, presciently identified by Maritain, for politics and law to be transformed by the wisdom of the Catholic tradition and bathed afresh in the grace offered by the Church.

Why? In a word, because “McWorld’s takeover of the mental sphere on a global scale . . . amounts to a kind of ‘default totalitarianism.’”<sup>14</sup> To a degree far greater than Maritain probably ever could have imagined, and certainly more than most Catholics and other Christians did imagine a scant decade ago, or even today, the Christian content of our shared life, under law but not just there, is being wrung out of it by a near-universal mangle that is at once philosophically sophisticated but brutal.

In a Catholic world, however, unlike in McWorld, there just might be a Catholic way—or many Catholic ways—to cook a hamburger, and even, *mirabile dictu*, to do law, including in the role of judge.<sup>15</sup> McLaw is not inevitable; it would be a choice.

### III. PART III

At about the time the Scarpa project was getting underway, Harvard University Press published Steven Smith’s book *Law’s Quandary* and Justice

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13. Patrick McKinley Brennan, *Introduction*, 52 VILL. L. REV. [ii] (2007) (quoting JACQUES MARITAIN, *THE RANGE OF REASON* 94–95 (1952)) (internal quotation marks omitted); see also Patrick McKinley Brennan, *Law and Who We Are Becoming*, 50 VILL. L. REV. 189 (2005) (inaugural Scarpa Chair lecture).

14. BERMAN, *supra* note 5, at 48 (quoting BARBER, *supra* note 4, at 150).

15. To eliminate an elementary confusion, it is a fact that there are some people who are both judges and Catholic. Such a person is a Catholic judge, but this is not to say that he or she judges (or can judge) in a specifically Catholic way. The claim I am defending is that we can correctly put the adjective “Catholic” in the attributive position with respect to the noun “judge” and thus claim, and correctly, that there is a specifically Catholic way to judge.

Scalia reviewed it, opening his review as follows: “Steven Smith takes us on a lively, thought-provoking romp through the philosophy of law. Like most romps, it has no destination, but the experience is worth it.”<sup>16</sup> Justice Scalia was undoubtedly correct: The experience is indeed worth it. Still, the *exact* sense in which Smith intends (as Scalia avers) “no destination” merits explication. The basic thesis of Smith’s book is that the way we *practice* law depends for its coherence upon the truth of a *theological metaphysics* that today’s academicians and cognoscenti reject (and even condemn). Smith’s purpose was emphatically, but only, aporetic, however; he does not end by “endorsing,” so to speak, the theological metaphysics on which (he claims) our practice of law depends.

So where does all this leave Scalia? Scalia’s answer comes, in the last two paragraphs of his review, in the form of a taunt to Smith and of a boast about being able to do law just fine, thank you very much, without “the Almighty”:

One would never expect Smith to violate the “norm prescribing that religious beliefs are inadmissible in academic explanations.” [Joseph] Vining (with appropriate disclaimer) is about as far as one can go without offending the proprieties. Could it be, however, that Smith is inviting, tempting, seducing his fellow academics to *consider* the theological way out of the quandary—the way that seemed to work for the classical school?

As one reaches the end of the book, after reading Vining’s just-short-of-theological imaginings followed by Smith’s acknowledgment of “richer realities and greater powers in the universe,” he (she?) is sorely tempted to leap up and cry out, “Say it, man! Say it! Say the G-word! G-G-G-God!” Surely even academics can accept, as a hypothetical author, a *hypothetical* God! Textualists, being content with a “modest” judicial role, do not have to call in the Almighty to eliminate their philosophical confusion. But Smith may be right that a more ambitious judicial approach demands what might be called a *deus ex hypothesi*.<sup>17</sup>

That’s a lot, but one thing is for sure: A cook (merely) *ex hypothesi* never nourishes anyone, no matter how hungry a person may become. But does a “textualist” fare any better in his chosen profession?

Quite the opposite, and this because Scalia has things upside down. Let me explain why.

By the grace of the teaching of the Catholic Church, I am a firm believer in the freedom of the human will. I believe, in other words, that humans can, without causal compulsion, will to choose either good or evil. Indeed, I believe, with the Catholic Church, that the very reason God cre-

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16. Antonin Scalia, *Review of Steven D. Smith’s Law’s Quandary*, 55 CATH. U. L. REV. 687, 687 (2006).

17. *Id.* at 694.



ated us human beings was to give us the opportunity to choose and pursue good and to avoid its contrary, evil. And by the good, I mean (following St. Thomas Aquinas and the central Catholic tradition) that which perfects something as an end.<sup>18</sup>

Here is where things get really interesting. The highest good (*summum bonum*) is God Himself, and God, because He loves the rational creatures He first loved into existence, has not left them clueless about whether to choose good and, above all, the *summum bonum* Himself. Thomas Aquinas explains:

It is apparent, [ ] that it was necessary for law to be divinely given to man. . . .

. . . .

[L]aw should be given to those having the ability to act and not to act. Now, this is true of the rational creature only. Therefore, only the rational creature is capable of receiving law.

Furthermore, since law is nothing but a rational plan of operation, and since the rational plan of any kind of work is derived from the end, anyone capable of receiving the law receives it from him who shows the way to the end. Thus does the lower artisan depend on the architect, and the soldier on the leader of the army. But the rational creature attains his ultimate end in God, and from God . . . . Therefore, it is appropriate for law to be given men by God.

Hence it is said in Jeremiah (31:33): “I will give my law in their bowels”; and in Hosea (8:12; Douay modified): “I shall write my manifold laws for them.”<sup>19</sup>

The divine law given by God to man has as its principal end to order man towards God:

[T]hat from which the law derives its efficacy should be the most important thing in the law. But the divinely given law derives its efficacy among men from the fact that man is subject to God, for no one is bound by the law of a ruler if he is not subject to him. Therefore, this should be of primary importance in divine law: that the human mind must cling to God.<sup>20</sup>

In sum, man is subject to God, and the divine law orders men toward acts of virtue but, ultimately, toward God Himself.<sup>21</sup>

18. See ST. THOMAS AQUINAS, *QUESTIONES DISPUTATAE DE VERITATE Q. 21*, Art. 2 (Robert W. Schmidt, S.J., trans., Henry Regnery Co. 1954).

19. See ST. THOMAS AQUINAS, *SUMMA CONTRA GENTILES III ART. 114*, ¶¶ 1, 4–6 (Vernon J. Bourke trans., Hanover House 1955–1957), available at <http://dhspriority.org/thomas/ContraGentiles3b.htm#114> [<https://perma.cc/99GA-4PRZ>].

20. *Id.* ch. 115, ¶ 5.

21. See *id.* ¶¶ 4–6.

Setting aside the not-uninteresting but distracting drive-by charge (to which I demur) that some people “call in the Almighty to eliminate their philosophical confusion,” the relevant point elided by Justice Scalia is that man is under divine law not just individually *but also socially*. One can imagine a variation on the familiar Mel Brooks performance in which a third tablet, reading “The Preceding Ten Commandments Shall Not Be Construed to Apply in Situations of Popular Democracy or Self-Conferred Self-Sovereignty,” gets lost on Moses’ way down Mt. Sinai. In reality, however, the divine law, including but by no means limited to the Ten Commandments, binds men as individuals *and as members of the body politic*.<sup>22</sup> That law was promulgated and made binding before we (?) decided whether to “call [it] in.” That law directs man to acts of virtue that *both* instantiate human goods *and* to his *summum bonum*, God Himself.

This is a tall order, and its tallness has tall implications for human lawmaking. By his own proud admission, however, Justice Scalia’s overriding concern was to resist this tall order and its requirements. As Justice David Souter wrote for the Supreme Court in a related vein, “Justice Scalia’s first priority over the years has been to limit and simplify,”<sup>23</sup> and one of the biggest tools in Scalia’s satchel was “a ‘modest’ judicial role.” The bespoke judicial robe for that role was “the new textualism,” a radical theory of judicial interpretation designed to simplify and thus limit the lawmaking–interpreting–enforcing process.<sup>24</sup> As I have argued elsewhere at some length, by treating texts as repositories of depersonalized meaning (“objectified” intent,” as Scalia called it),<sup>25</sup> the lawgiver is replaced and supplanted by texts and schedules of merely probable meanings (which, again, are all dictionaries can offer).<sup>26</sup> But the human lawmaker isn’t the only casualty; the divine lawgiver is also excluded at the same stroke.

We have it on good authority, however, that God’s ways are not man’s ways (*cf.* Is. 55:89; *James* 1:2-5; Phil. 4:4-7), and God’s priorities are not man’s priorities. Man’s priorities ought to be God’s priorities, and the latter are in fact set out *and made binding* by the divine law. To the extent textualism contributes to blocking the efficacy of the divine law, to hell with textualism.

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22. To be sure, some precepts of the divine law apply only to individuals, but others apply both to individuals and to societies, including political society.

23. *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001).

24. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 9–25 (Amy Gutmann ed., 1997).

25. See *id.* at 17; see also Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 354, 371–72 (1994); Gordon S. Wood, *Comment*, in *A MATTER OF INTERPRETATION*, *supra* note 24, at 49, 63; *cf.* STEVEN D. SMITH, *LAW’S QUANDARY*, 123–53 (2004).

26. See Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B.C. L. REV. 227, 305–18 (2002). See generally Patrick McKinley Brennan, *Locating Authority in Law, and Avoiding the Authoritarianism of “Textualism,”* 83 NOTRE DAME L. REV. 761 (2008).

Justice Scalia had more than one retort, of course, to the suggestion that judges should be judging according to the divine law, but his trump card was a concept that starts with the letter “d.” He played it, for example, in rejecting what he conceded was the creative intellectual role of the judge functioning in the mode of the common law tradition: “All of this would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy.”<sup>27</sup> It may come as a shock to many that Antonin Scalia was trendy, but his fundamentalism about democracy and the consequent sacrosanctity and inviolability of its deliverances for political and legal purposes made him oh-so-trendy, whether he fancied the label or not.

Justice Scalia once self-described as a “faint-hearted originalist,”<sup>28</sup> but later claimed to have converted to “stout-hearted originalis[m].”<sup>29</sup> He was, in any event, a stout-hearted fundamentalist, indeed a dogmatist, about human political sovereignty and popular democracy. Here exactly is what he said:

[M]y only authority as a judge to prevent the state from doing what may be bad things is the authority that the majority has given to the courts. . . . To say, “Ah, but it is contrary to the natural law,” is simply to say that you set yourself above the democratic state and presume to decide what is good and what is bad in place of the majority of the people. I do not accept that as a proper function. . . . Yes, it is dogmatic democracy . . . . I have been appointed to apply the Constitution and positive law. God applies the natural law.<sup>30</sup>

*Sed contra.* There is something above the democratic state, and it is not you, or I, or the majority; it is the divine law and the God who promulgated it (and will enforce it in the great eschatological rectification).

That Justice Scalia was willing to be “dogmatic” about democracy and to follow its deliverances whithersoever they lead in terms of law, he made monumentally unmistakable in his dissent (joined by Thomas, J.) in *Obergefell*:

I join the Chief Justice’s opinion in full. I write separately to call attention to this Court’s threat to American democracy.

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27. See SCALIA, *supra* note 24, at 9.

28. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

29. See Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 6, 2013, <http://nymag.com/news/features/antonin-scalia-2013-10> [<https://perma.cc/UK5W-4DQD>].

30. CIVILIZING AUTHORITY: SOCIETY, STATE, AND CHURCH 161, 166 (Patrick McKinley Brennan ed., 2007) (alterations in original) (quoting Antonin Scalia, *Of Democracy, Morality and the Majority*, Address at Gregorian Univ. (May 2, 1996), in 26 ORIGINS 81, 88–89 (1996)).

The substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. Those civil consequences—and the public approval that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.<sup>31</sup>

The transcendent issue for Scalia was *who* the human "Ruler" [sic] is, and to satisfy this ideological fetish he rushed to subordinate, to the point of dismissal, the issue of *what* the omnipotent Ruler commands in the law He has promulgated. Scalia did not much care about the "substance" of the law, he said, because what was of "overwhelming importance" to him was *who* among his fellow humans rule(d) him. Overwhelmed, indeed. This is a definite *deus ex machina*, if ever I've seen one, because it is the substance of human law, not the categorical identity of its human sources, that *either* contributes to, *or* impedes or blocks, humans' achievement of the good and even of the *summum bonum*.

"The state of mankind," Aquinas explains, "may change according as man stands in relation to one and the same law more or less perfectly."<sup>32</sup> It is for this reason that I regretfully consider the language quoted above from Scalia's dissent in *Obergefell* to be the most disturbing thing written in all of the *Obergefell* opinions. It makes regrettably unmistakable the seductive path by which a fine man, a devout and learned Catholic, can succumb to the tempting thesis of modernity that God and His law do not rule socio-political life.

Any jurisprudence of "I don't much care about the substance of the law" is contradicted, indeed condemned, by the Catholic thesis that in making substantively worthy laws for fellow human beings, the lawmaker is

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31. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626–27 (2015).

32. See ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* II Q. 106 Art. 4 (Fathers of the English Dominican Province trans., 1981) (1911).

acting in a God-like way because he is being provident for himself and for others. As Aquinas explains, “among all others, the rational creature is subject to the divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others.”<sup>33</sup> He does so by following the divine law and prudently making it effective in human living. He does so, as I’ve described it elsewhere, by adopting the *divine style*.<sup>34</sup>

Let me now anticipate a familiar but baseless objection. To assent to this theological thesis about the bearing of divine law on human lawmaking is by no means to settle the terms of how responsibilities for lawmaking, adjudication, and enforcement are to be divided up and assigned among human offices and officers; those are distinct, severable, subordinate, and important questions (ordinarily) left by divine law to the prudent judgment of particular human commonwealths. My present point is that to assent to the thesis I am defending is, however, to acknowledge that the good, and the common good above all, are by divine law the rule and measure of human law.<sup>35</sup>

Is there a Catholic way to judge? Sure there is, just as there are Catholic ways to legislate, to administrate, to vote, and to do anything else that shows or denies *care* to human persons or their societies. Chesterton saw the point in the round:

There is a Catholic view of learning the alphabet; for instance, it prevents you from thinking that the only thing that matters is learning the alphabet; or from despising better people than yourself, if they do not happen to have learnt the alphabet.

. . . .

When schooling was supposed to consist of spelling, of counting and making pothooks and hangers, you might make out some kind of case for saying that it could be taught indifferently by a Baptist or Buddhist. But what in the world is the sense of having an education which includes lessons in “citizenship[.]”[ ] for instance; and then pretending not to include anything like a moral theory, and ignoring all those who happen to hold that a moral theory depends on a moral theology.<sup>36</sup>

There are Catholic ways to do anything that matters, and assuming there isn’t a Catholic way to do something, how much does the thing matter?

As concerns judging in particular, it includes, as the common good allows or requires, a judge’s or court’s *not proceeding to judgment that would*

33. *Id.* at Q. 91, Art. 2.

34. See Patrick McKinley Brennan, *An Essay on Christian Constitutionalism: Building in the Divine Style, for the Common Good(s)*, 16 RUTGERS J.L. & RELIGION 478, 510–17 (2015).

35. See *id.* at 517–24.

36. G.K. CHESTERTON, *THE COMMON MAN* 167, 169 (1950).

*violate the divine law* (as interpreted by the Catholic Church).<sup>37</sup> This claim will sound exotic, wildly anti-democratic, and even theocratic, plus a whole host of other unmentionables, exactly because the divine law has been exiled from McWorld in order to make straight the way for McLaw.<sup>38</sup> McLaw is not inevitable, but currently it is enabled by distinguished jurists who admit that they don't much care that the law they enforce has a health value to humans equivalent to that of the "meal" consisting of a Big Mac, a Supersized raft of "fries," and a quart of Diet Coke.

#### IV. PART IV

I am not courting nostalgia (*moi?*), but already in 1885, Pope Leo XIII lamented that "[t]here was once a time when States were governed by the philosophy of the Gospel."<sup>39</sup> "Then it was," he continued, "that the power and divine virtue of Christian wisdom had diffused itself throughout the laws, institutions, and morals of the people, permeating all ranks and relations of civil society . . . Church and State were happily united in concord and friendly interchange of good offices."<sup>40</sup> The result, Leo concluded, was that "[t]he State, constituted in this wise, bore fruits important beyond all expectation . . ."<sup>41</sup>

As Peter Steinfelds pointed out to me in public conversation at the seventh annual Scarpa Conference (September 14, 2012), the history was not quite as uniform as Pope Leo's words might be thought to suggest. Of course it was not, and Leo was as aware as anyone of the legion struggles in which the Church had long been forced to engage in her effort to exercise her rightful jurisdiction vis-à-vis the state. Still, Leo was undoubtedly correct that the trend he witnessed was in the direction perennially opposed by the Church, and by now some might say that, *pace* Leo, it has long since been too late to put the toothpaste back in the tube. Such was Justice Scalia's attitude, I would suggest, when he invoked that "trend in recent years called democracy" to justify a particular politico-legal position, and specifically one that designedly constricts the range of judicial practical reason in order to give flat-footed effect to legislation enacted in conformity with the procedures set out in Article I of the Godless Constitution.

Under the power of the same human artifact written at Philadelphia in the summer of 1787, moreover, the requirements of democracy or political liberalism are invoked and enforced in order to limit religious exercise and to restrict its effects to the private sphere. So accustomed are we

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37. For a nuanced discussion of Aquinas's account of what a judge is to do in the face of an unjust law, see RUSSELL HITTINGER, *THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD* 81–91 (2003).

38. See generally Patrick McKinley Brennan, *Are Catholics Unreliable from a Democratic Point of View? Thoughts on the Occasion of the Sixtieth Anniversary of Paul Blanchard's American Freedom and Catholic Power*, 56 *VILL. L. REV.* 199 (2011).

39. POPE LEO XIII, *ENCYCLICAL LETTER IMMORTALE DEI* ¶ No. 21 (1885).

40. *Id.*

41. *Id.*

to the *ideal* of “separation” of Church from state, that it might come as a surprise to some that the question of the rightful jurisdiction of the Church vis-à-vis the state was the subject of disputation in the conversation of the first Scarpa Conference, held on September 15, 2006.

On that occasion, the Scarpa project (as I have called it) was worthily inaugurated and its direction set by the late Avery Cardinal Dulles, SJ, in his keynote address, *The Indirect Mission of the Church to Politics*. It is a marker of how rambunctious human history can be that Joseph Cardinal Ratzinger had been elected to succeed now-Saint Pope John Paul II only a year and a half earlier, making Cardinal Dulles *au courant* when he devoted his keynote address primarily to “the ideas of Joseph Ratzinger, now Pope Benedict XVI, on the relationship of the Church to politics.”<sup>42</sup>

According to Dulles, Pope Benedict recognized the following dilemma: “If the Church gives this claim up [to public validity] it no longer achieves for the state what the latter needs of it. But when the state accepts this claim it ceases to be pluralist and both state and Church are lost.”<sup>43</sup> The Pope’s way out of this dilemma, according to Dulles, was twofold.

In the first place, the State, without ceasing to be pluralist and tolerant of other views, can recognize as a historical fact that its basic framework of values is derived from biblical revelation, mediated to it by the Church. In doing so, he says, the State simply acknowledges its historical situation, the ground from which it cannot divorce itself without falsification.<sup>44</sup>

Dulles continues that, according to Benedict, in acknowledging as much under current pluralist conditions, there is no “risk” of “theocracy.”<sup>45</sup>

Moving on, Dulles contends that:

The present Pope’s second avenue of escape between the horns of the dilemma is to distinguish between the State and the society, meaning the civic community. Some years ago, John Courtney Murray pointed out that although there is a separation of Church and State in the United States, there is no such separation between religion and society. From the origins of the nation there has been a broad consensus regarding certain moral and religious principles; for example, that the universal moral law is the foundation of society; that the legal order of society (the State) is subject to judgment by a law that is inherent in human

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42. See Avery Cardinal Dulles, S.J., *The Indirect Mission of the Church to Politics*, 52 VILL. L. REV. 241, 241 (2007).

43. *Id.* at 246 (quoting CARDINAL JOSEPH RATZINGER, CHURCH, ECUMENISM AND POLITICS: NEW ESSAYS IN ECCLESIOLOGY 218–19 (1988)).

44. *Id.*

45. See *id.*

nature; that the nation in all its aspects is under God. Conscious that the American consensus was threatened even in his day, Murray defended it for the benefits it had brought to the nation and to the Catholic Church herself.<sup>46</sup>

Murray did indeed defend that consensus, and for both of the reasons specified by Dulles.

Murray also defended a novel political arrangement, of course:

The key to the whole political edifice was the freedom of the individual conscience. Here precisely lies the newness of the modern experiment. A great act of trust was made. The trust was that the free individual conscience would effectively mediate the moral imperatives of the transcendental order of justice (whose existence was not doubted in the earlier phases of the modern experiment). Then, through the workings of free political institutions these imperatives would be transmitted to the public power as binding norms upon its action. The only sovereign spiritual authority would be the conscience of the free man. The freedom of the individual conscience, constitutionally guaranteed, would supply the armature of immunity to the sacred order, which now became, by modern definition, precisely the order of private conscience.<sup>47</sup>

In a world already characterized by wild moral disagreement (of the sort Alasdair MacIntyre diagnosed in *After Virtue*),<sup>48</sup> the free individual conscience was loosed to ensure, if it could, that the socio-political order would reflect the protections of true morality.

Having identified the terms of the “great act of trust” by which the Church’s jurisdiction was displaced in favor of an ongoing plebiscite of individual consciences, Murray with admirable candor proceeded to identify “troubles today:”

The challenge [ ] is to the validity of the suprapolitical tenet upon which modernity staked the whole success of its political experiment. This tenet, I said, was that the individual conscience is the sole ultimate interpreter of the moral order (and of the religious order too), and therefore the sole authentic mediator of moral imperatives to the political order. But the truth of this tenet, confidently assumed by modernity, is now under attack from a battery of questions.

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46. *Id.* at 246–47 (footnotes omitted).

47. JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 206* (1960).

48. See ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (3d ed. 2007).



In a word, in consequence of having been enthroned as the One Ruler of this world, has the *conscientia exlex* [outlaw conscience] of modernity succumbed to *hubris*, and is it therefore headed for downfall—its own downfall, the downfall of the concept of the moral order amid the bits and pieces of a purely “situational” ethics, and the downfall of the political order projected by the spirit of modernity?

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This is what Romano Guardini has expressively called “the interior disloyalty of modern times.” He means, I think, that there has occurred not only a falsification of history, but a basic betrayal of the existential structure of reality itself.<sup>49</sup>

The deteriorated situation described by Murray already in 1960 reads almost like a roadmap for how to arrive by the most direct route at the position *defended* by Scalia in his dissent in *Obergefell*, right down to the nonstandard capitalization of the human “Ruler.”

The handwriting had long been on the wall, as my own contribution to the first Scarpa Conference, *The Decreasing Ontological Density of the State in Catholic Social Doctrine*, warned, including with reference to the example (quoted in full above) of Justice Scalia’s own fulfilling of Murray’s prophecy:

One can affirm that the Church is sacred in a way that the state, properly understood, is not, without having to deny that the state is possessed of a share of sacred ruling authority. If what authority for rule the state possesses is in no way sacred, however, then it can be no part of [that is, participation in] the divine ruling power. Do we humans have a self-possessed power to rule, a rival to the divine? If we have not received a law [from God], then on what basis do we proceed to make law? In one of my favorite lines of all time, Justice Antonin Scalia opined that “God,” not man, “applies the natural law.” If that be true, what, then, do *we* do? Inasmuch as a devoutly Catholic Justice of the Supreme Court has consigned us to a fate without benefit of the natural law, the question is not merely speculative.<sup>50</sup>

It is elementary Catholic philosophy (as Scalia of course knew) that God promulgates the natural law, and men either apply it, or they fail to apply it. It is not Catholic teaching that human freedom is felicitously canceled—and potentially wayward judges thereby thwarted before they have a chance to cause mischief—by God’s applying the natural law through direct divine agency.

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49. MURRAY, *supra* note 47, at 213, 214–15.

50. Patrick McKinley Brennan, *The Decreasing Ontological Density of the State in Catholic Social Doctrine*, 52 VILL. L. REV. 253, 279 (2007) (footnote omitted).

Devoted to the topic “Living the Catholic Faith in Public Life,” the seventh Scarpa Conference continued the conversation begun at the first, this time, however, in the wake of the now-familiar “birth control” mandate imposed by the Department of Health and Human Services. In his scripturally-based keynote address, “*We Have No King But Caesar: Some Thoughts on Catholic Faith and Public Life*,” Most Reverend Charles J. Chaput, OFM Cap, the Archbishop of Philadelphia, made the case that the Church in America today faces a culture like none the world has ever seen before, the one I have encapsulated as McWorld:

Selfishness dressed up as individual freedom has always been part of American life. But now it infects the whole fabric of consumer society. American life is becoming a cycle of manufactured appetites, illusions, and licenses that turns people in on themselves and away from each other. As communities of common belief and action dissolve, the state fills in the void they leave. And that suits a lot of us just fine, because if the government takes responsibility for the poor, we don’t have to.<sup>51</sup>

Against this cultural background, and speaking from a profoundly Augustinian perspective about the aims and limits of politics and law, Chaput called for Christian action:

We need to prove our love by our actions, not just in our personal and family lives, but also in the public square. And that includes our social and business relations, as well as our politics.

Christians individually, and the Church as a believing community, engage the political order as an obligation of the Word of God. Human law teaches and forms, as well as regulates, and human politics is the exercise of power—which means that both law and politics have moral implications. Christians can’t ignore those implications and still remain faithful to their vocation as a light to the world and salt of the earth.<sup>52</sup>

Chaput might have cited in support of his summons any number of passages from the documents of Vatican II, which in this respect are faithful to Catholic tradition. In its Decree on the Apostolate of the Laity, *Apostolicam Actuositatem*, for example, the Council taught that:

The whole Church must work vigorously in order that men may become capable of rectifying the distortion of the temporal order and directing it to God through Christ. Pastors must clearly state the principles concerning creation and the use of temporal

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51. Charles J. Chaput, O.F.M. Cap., “*We Have No King But Caesar: Some Thoughts on Catholic Faith and Public Life*,” 58 *VILL. L. REV.* 371, 376–77 (2013).

52. *Id.* at 374–75.

things and must offer the moral and spiritual aids by which the temporal order may be renewed in Christ.<sup>53</sup>

The distortion of the temporal order must be “rectified,” not merely “accompanied.” Lest there be any confusion about whether this obligation “of rectifying . . . and directing” governs not just “private” life but also socio-political life, in the same document the Council defines the “apostolate [of the laity] in the social milieu” as “the effort to infuse a Christian spirit into the mentality, customs, laws, and structures of the community in which one lives . . . .”<sup>54</sup> In sum, the Church teaches that the body politic and its laws are to take their bearings from the law of Christ as taught by the Church. Is a Catholic free to reject this perennial teaching of the Church?

This is the teaching even of the Second Vatican Council, but some of what some Catholic prelates have been saying would suggest a preference for the unevangelized status quo. This episcopal slippage was a focus of my own contribution to the seventh Scarpa Conference, “*Religious Freedom, The Individual Mandate, and Gifts: On Why the Church Is Not a Bomb Shelter*.”<sup>55</sup> My reference to a bomb shelter was suggested by some U.S. bishops’ insipid refrain that their beef [sic] wasn’t with contraception per se but solely with something else. Commenting on “Our First, Most Cherished Liberty,” the U.S. Conference of Catholic Bishops’ statement regarding the HHS mandate, I wrote, “[t]he document claims that the problem with the mandate is that ‘we,’ the Catholic Church, are being forced to do something that *we* Catholics regard as immoral, or, as Timothy Cardinal Dolan, the Archbishop of New York and President of the USCCB, put the point elsewhere, something that violates ‘*our* standard of respecting . . . religious liberty.’”<sup>56</sup> “With all due respect,” I continued, “this is a remarkably self-referential position. . . . It is a diversion to frame the issue concerning the mandate as exclusively, or even principally, as about what *the Church* is being forced to do. That is only the start of it.”<sup>57</sup> As I went on to explain:

The problem with this law is not just that it forces *us* (“the Church”) to do what *we* regard as immoral; it is not just that it forces us *and others* to do what we *and they* regard as immoral. The problem is *also and above all* that it forces us and others to do what is immoral, regardless of who does or does not consider it to be immoral. It is not anyone’s disagreement with the required act that makes the required act objectionable; the final cause of the act itself is sufficient to make the act immoral. (The degree

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53. POPE PAUL VI, DECREE ON THE APOSTOLATE OF THE LAITY: APOSTOLICAM ACTUOSITATEM ¶ 7 (1965).

54. *Id.* ¶ 13.

55. 58 VILL. L. REV. 437 (2013).

56. *Id.* at 451 (second alteration in original) (emphasis added).

57. *Id.*

of individual culpability is, of course, another question—and one that is perhaps affected by the Bishops’ own disavowals and bashfulness).<sup>58</sup>

Reading the bishops’ statement, one might reasonably conclude that the bishops consider that the Church has precious little to offer the world in terms of teaching what the moral law requires or allows to be impressed upon the human city.

And that is exactly what Cardinal Dolan proudly asserted: “*We just want to be left alone* to live out the imperatives of our faith to serve, teach, heal, feed, and care for others.”<sup>59</sup> (Yes, Cardinal Dolan says “to . . . teach,” but it is also instructive that Cardinal Dolan, unlike most other senior American prelates, issued no public statement when the decision in *Obergefell* was handed down).

The “we just want to be left alone” abdication—in which only deaf or compromised ears cannot but hear the episcopal analogue of the judicial “I don’t much care” posture—has placed the bishops “in the exemption-seeking business”—the business of seeking not to comply with laws billed as advancing human rights for women. “This,” as Helen Alvare further explained at the seventh Scarpa Conference, “is a position more than a little disagreeable to anyone pushed to take it.”<sup>60</sup> Writing in the same context, I contended that to choose “[s]elf-marginalization or abnegation, verging perhaps on self-imposed exile”<sup>61</sup> is for the Church to flout the obligation taught by the Second Vatican Council, the obligation Archbishop Chaput explained is required by the Word of God. “The Church,” I wrote there, “was not founded to repose in a gilded [or I might now say, “humble”] cage but, instead, to save men’s souls and, to that end, to correct and transform this fallen creation.”<sup>62</sup>

It’s as though Cardinal Dolan said with respect to contraception, “you go ahead and eat at McDonalds, enjoy McWorld for whatever it has to offer—but just don’t bother those of us lucky enough to be holed up in, say, the (reopened) Russian Tea Room (oh, but don’t you worry, we’ll ‘serve’ you by throwing some crumbs your way).”

## V. PART V

These issues engaged at the Scarpa Conference in 2012 in the midst of litigation high and low had been proleptically but spiritedly mooted, in

58. *Id.* (emphasis added) (footnote omitted).

59. *Id.* at 452 (emphasis added) (quoting Timothy Cardinal Dolan, *Religious Freedom and Protecting Healthcare for Women*, ARCHDIOCESE N.Y. (Mar. 16, 2012), <http://blog.archny.org/index.php/religious-freedom-and-protecting-healthcare-for-women-and-children/>) (internal quotation marks omitted).

60. Helen M. Alvare, *No Compelling Interest: The “Birth Control” Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 379 (2013).

61. See Brennan, *supra* note 55, at 452.

62. See *id.* at 454.

2009, at the third Scarpa Conference, dedicated to exploration of Martha Nussbaum's "striking and powerful book,"<sup>63</sup> *Liberty of Conscience: In Defense of America's Tradition of Religious Equality*.<sup>64</sup> Nussbaum's *Reply* in the *Villanova Law Review* to the papers of the conference speakers (Kent Greenawalt, John T. McGreevy, Jesse H. Choper, Geoff Stone, Rick W. Garnett, and the present author) merits careful study for its deft defense of the mechanisms—social, political, legal, and of course coercive—of a world in which, it is supposed, God does not exist.<sup>65</sup> I am now persuaded, thanks in part to conversation with Nussbaum on the occasion, that Jacques Maritain, whom Nussbaum cites in her book in defense of leaving God out of the picture when "constitutional essentials and matters of basic justice"<sup>66</sup> are at stake, did indeed become in some respects a proto-political liberal in way of which I was then still inclined to exonerate him.<sup>67</sup>

The ideal of justifying political structures and particular laws without recourse to God or sacred doctrine has a long intellectual history. It was hardly new, though there was a certain historical urgency to it, when Hugo Grotius (1583–1645) uttered his so-called impious hypothesis in the Prolegomena to his book on law *De Iure Belli ac Pacis*: "What we have been saying would have a degree of validity even if we should concede [*etiamsi daremus*] that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him."<sup>68</sup> Nussbaum quotes and invokes Grotius in order to claim that "[Roger] Williams," a hero in Nussbaum's defense of liberty of conscience, "argues like Grotius: in such a way that his conclusions follow even if we leave aside the religious doctrines, thus in a way that can be followed and accepted by someone who does not share Williams's own religious views."<sup>69</sup>

Be that as it may, what is often overlooked is that Grotius's context makes clear that his point is only to stress the immutability of natural law. In the case of Grotius, however, his theory reduced the content of the natural law to man's urge to self-preservation and thus resulted, ultimately, "in a natural law theory which can be regarded as a universal foundation

63. Kent Greenawalt, *Religion, Conscience, and Equality*, 54 VILL. L. REV. 581, 581 (2009).

64. MARTHA NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* (2010).

65. See generally Martha Nussbaum, *Reply*, 54 VILL. L. REV. 677 (2009). Geoff Stone argued, persuasively, that, given all the givens, "[i]t is inevitable that the Supreme Court will hold the ban on same-sex marriage unconstitutional." Geoffrey R. Stone, *Same-Sex Marriage and the Establishment Clause*, 54 VILL. L. REV. 617, 617 (2009).

66. See JOHN RAWLS, *POLITICAL LIBERALISM* 227 (expanded ed. 1996); see also Nussbaum, *supra* note 65, at 680.

67. See Patrick McKinley Brennan, *Equality, Conscience, and the Liberty of the Church: Justifying the Controversiale Per Controversialius*, 54 VILL. L. REV. 625, 639–51 (2009).

68. HUGO GROTIUS, *De Iure Belli ac Pacis*, Prolegomena ¶ 11 (Paris, 1625).

69. Nussbaum, *supra* note 65, at 678.

of 'expediency[.]'<sup>70</sup> Exactly how that declension occurred is a story for another day.

My present point is that efforts, including those of some Catholics, to fulfill the moral demands of politics and law without benefit of God began long before the Post-Reformation period. Writing in 1880, the German historian Otto von Gierke recorded that "[a]lready . . . medieval Schoolmen had hazarded the saying, usually referred to Grotius, that there would be a Law of Nature discoverable by human reason and absolutely binding, even if there were no God, or the Deity were unreasonable or unrighteous."<sup>71</sup> In our day, the thinker who has done most to develop "a theory of natural law without needing to advert to the question of God's existence or nature or will" is John Finnis.<sup>72</sup> A faith-filled Catholic whose work was the focus of the sixth annual Scarpa Conference, held in 2011 and coinciding with Oxford University Press's publication of the five volumes of the *Collected Essays of John Finnis* and a new edition of his now-classic book *Natural Law and Natural Rights*, first published by Oxford in 1980. Finnis's reply to the conference speakers (George Christie, Michelle Dempsey, Matthew Lister, Frederick G. Lawrence, Rev. Martin Rhonheimer, Anna Moreland, Candace Vogler, Michael Moreland, Michael J. White, Rev. Richard Munkelt, and the present author) ranges across such varied topics as judicial decision-making, legal positivism, Bernard Lonergan (and possible true senses of Pascal's "The heart has its reasons . . ."), practical reason and human nature, moral absolutes, and whether and in what sense practical reason is law-like.<sup>73</sup>

The question about McLaw, if unnamed, was everywhere. It is a familiar fact that many "natural lawyers" are reputed to contend that unjust laws are not laws at all, and, as Michael White observed in his contribution on Finnis, "[o]ne of the many signal services performed by John Finnis . . . is his destruction of a number of myths concerning the relation—supposedly 'according to the natural law tradition'—between natural law and positive law."<sup>74</sup>

Among other achievements, Finnis's service in this respect has clarified how a theory of natural law provides a criterion for judging positive law in terms of the latter's success in making the natural law effective. Finnis does not imagine that the natural law applies itself; indeed, he argues serenely that our human obligation to make the natural law effective

70. See PAULINE C. WESTERMAN, *THE DISINTEGRATION OF NATURAL LAW THEORY: AQUINAS TO FINNIS* 290 (1997). On the reasons why theorists of political absolutism are attracted by *DE IURE BELLI*, see RICHARD TUCK, *NATURAL LAW AND NATURAL RIGHTS: THEIR ORIGIN AND DEVELOPMENT* 77–81 (1979).

71. OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* 174 (Frederic William Maitland trans., 1913) (1900) (internal quotation marks omitted).

72. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 49 (2d ed. 2011) (1980).

73. See generally John Finnis, *Response*, 57 *VILL. L. REV.* 925, 935 (2012) (alteration in original) (internal quotation marks omitted).

74. See Michael J. White, *What Makes Practical Reason Law-Like?*, 57 *VILL. L. REV.* 911, 911 (2012).

for the common good is the product of our “divine filiation” and “membership in the divine household,” natural or supernatural. “In either and both” he concludes, “such membership requires of us a fitting attentiveness to the needs and good of all in that household.”<sup>75</sup> He continues: “This is an ethics markedly different from and, I think, rationally superior to any idea that the rationale and necessity of treating God as authoritative precisely and most fundamentally is that doing so is what one needs ‘to achieve one’s own perfection.’”<sup>76</sup>

While I agree, of course, a question for future conversation is whether in his contribution to the *Villanova Law Review* or elsewhere Finnis has succeeded in showing that the theory of natural law he defends, as the demands of practical reasonableness *simpliciter*, succeeds in showing that the natural law is (as Aquinas understood) an extrinsic principle and genuine *precept of law*. In other words, as Michael White pressed the point, does practical reasonableness stand in a heteronomous relationship in the sense of being “subject to a standard external to itself,” viz. the *lex aeterna*?<sup>77</sup> One can be excused for worrying that human lawmaking efforts not ruled and measured by higher law can do no better than McLaw.

## VI. PART VI

One of the defining features of legislatures (in our legal system, at least) is that, unlike administrative agencies or courts, they are rarely *required* to give reasons. (In this respect, among others, our legislators are in a position just like that of those who wrote and ratified our Constitution). It is also the case—indeed, an often undigested consequence of what legislatures are not required to do—that “[s]tatutes and regulations are only candidates for attention, not just in competition for enforcement resources, but in the very analysis of situations. This, Joseph Vining continues, “is to be observed historically from without. It is also experienced by lawyers from within.”<sup>78</sup> Vining softens the blow of this iconoclastic insight by exemplifying the point from another legal system:

The piece of writing that emerges from Parliament is not the law. It is evidence of the law, which is used in the course of arriving at a statement of law. Legislation is the arbitrary that we allow—but also limit. To make the point in its strongest form, it could be said that legislation is lawless behavior, except that by a paradoxi-

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75. Finnis, *supra* note 73, at 955.

76. *Id.* at 955.

77. See White, *supra* note 74, at 911 (internal quotation marks omitted). Finnis notes that Candace Vogler presses essentially the same question at the end of her paper. See Finnis, *supra* note 73, at 952; see also Candace Vogler, *In Support of Moral Absolutes*, 57 VILL. L. REV. 893, 905 (2012).

78. JOSEPH VINING, FROM NEWTON’S SLEEP 227 (1996).

cal trick we make legislative statutes materials we use in determining what the law is.<sup>79</sup>

Is legislation the arbitrary that we allow *but also limit*? The textualist will say “no,” and then proceed to make an arbitrary exception for “patently absurd” results.

The work of Joseph Vining, whose name has already appeared several times in this Essay, was celebrated as it was studied at the fourth annual Scarpa Conference, held in 2010. In introducing the volume of *Villanova Law Review* that contained the conference papers, I recalled that “[t]he affinity felt by those who experienced the day remains in memory. More than a few commented that the experience was ‘magical.’ Indeed it was.”<sup>80</sup> The papers published in this Review were later also published in book-form under the title *Legal Affinities: Explorations in the Legal Form of Thought*. The conference speakers included Lee Bollinger, Rev. John McCausland, Judge John T. Noonan, Jr., James Boyd White, Steven D. Smith, Jack L. Sammons, H. Jefferson Powell, and the present author, the last three of whom co-edited *Legal Affinities*.

I consider Vining’s work to offer the best phenomenology of law we have, for it irradiates *how law and lawyers really work* from the insight that “[l]aw has not accepted the spirit of the age that (in Keats’s words) would clip an Angel’s wings and empty the haunted air.”<sup>81</sup> And so, Vining continues,

[l]aw is the great overlooked fact in modern thought. Its true acknowledgment would threaten *radical change* . . . . With law enters personification, in the large and in the small, substance that does not ultimately become form or process, responsibility that goes beyond the existence of things that consciousness reflects upon.<sup>82</sup>

My incapacity to do justice here to the ten years of the Scarpa Conference is at its zenith when it comes to Vining’s contribution to jurisprudence. The same is true of the eighth annual Conference, held in November 2013 and dedicated to the work of the Honorable John T. Noonan Jr., for whom I had the privilege to clerk on the United States Court of Appeals for the Ninth Circuit in 1993–1994.<sup>83</sup>

I can do no better in terms of explaining why, than to quote some of what I said when I introduced Noonan at Villanova:

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79. *Id.* at 253.

80. Patrick McKinley Brennan, *Introduction*, 55 *VILL. L. REV.* 1085, 1086 (2010).

81. VINING, *supra* note 9, at 5.

82. VINING, *supra* note 78, at 3–4 (emphasis added).

83. The other speakers at the Conference honoring Judge Noonan were William Cardinal Levada, Richard Painter, Ken Pennington, Fr. Michael Sweeney, O.P., and Joe Vining.



John T. Noonan, Jr.'s brilliance and erudition are apparent from afar through the printed and televised word. Those who have been privileged to know the man in person, and even to work with him day by day, can testify, though, that John Noonan understands and shows himself to be a pilgrim in the law, but before that a pilgrim in a pilgrim Church, a church that teaches (here in the words of Josef Pieper) that "[b]eing created by God actually does not suffice . . . the fact of creation needs continuation and perfection by the creative power of human love." In the shadow of Judge John T. Noonan, Jr., at work in the law, one can see how in fact, quietly but certainly, "the great commandments become dynamic and move to realization in completeness."<sup>84</sup>

The quoted reference to the "great commandments" is taken from Noonan's refutation, in the *Harvard Law Review*, of Judge Richard Posner's impoverished understanding of law's and legal actors' preferred aims and methods.<sup>85</sup> A Catholic way to judge? You bet, but "not," however, by "dispensing with distinctions and discipline but by giving love its rightful place."<sup>86</sup> What is this love? "Love is a movement of the rational will seeking the good. That movement manifests two human desires, always mixed: the desire to meet the needs of one's own insufficiency and the desire to share one's goodness."<sup>87</sup> This just might even describe, *mutatis mutandis*, a Catholic way to cook a hamburger, but that would be to get ahead of things.

"Joe Vining," Judge Noonan observed at the Scarpa Conference honoring Vining, "has advised us to look at the ontology—that is, the real—in the law. Persons are there. Persons with purposes are there. Rational human beings are there, engaged in rational communications with other human beings. The persons embody and embrace values to be preserved and promoted."<sup>88</sup> In his contribution to the Vining conference, "Persons All the Way Up," Steven Smith (author of *Law's Quandary*), unpacks the significance for law of Vining's contention that "the first and last thing we know, the ultimate object of knowledge and belief, is a person, not a prin-

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84. Patrick McKinley Brennan, *John T. Noonan, Jr.: An Introduction*, 59 VILL. L. REV. 649, 652–53 (2014) (alterations in original) (footnote omitted).

85. See John T. Noonan, Jr., *Posner's Problematics*, 111 HARV. L. REV. 1768, 1775 (1998).

86. Brennan, *supra* note 84, at 651.

87. *Id.*; see also Patrick McKinley Brennan, *Meaning's Edge, Love's Priority*, 101 MICH. L. REV. 2060 (2003) (book review); Michael Sweeney, O.P., "To Erasmians, Everywhere": Reflections on the Life and Work of Judge John T. Noonan, Jr., 59 VILL. L. REV. 707, 710 (2014). From the first Scarpa Conference, see also Richard W. Garnett, *Church, State, and the Practice of Love*, 52 VILL. L. REV. 281 (2007); Amelia J. Uelmen, *Reconciling Evangelization and Dialogue Through Love of Neighbor*, 52 VILL. L. REV. 303 (2007).

88. John T. Noonan, Jr., *Through Papers to Persons*, 55 VILL. L. REV. 1121, 1123 (2010).

principle . . . . This is what we know, what is real, what has meaning.”<sup>89</sup> Smith’s synthetic gloss on Vining is worth quoting *in extenso*:

[I]f there is an answer to the doubts I have raised about Joe’s personalist approach, I think the answer itself will ultimately be a personal one. Which seems fitting. We act without certainty but with faith—faith that there is some sort of authority in law, and faith that the universe is more than mindless particles in pointless motion. Both as lawyers and as persons, we believe (in part because we necessarily presuppose) that there is “spirit,” or “mind,” or a transcendent something or someone who is personal, and who is caring and cognizant of our halting, uncertain efforts. Without this faith, we would remain oblivious: that is because “[m]ind is not known before it is searched for.” In acting on this faith, we do not act blindly, moreover, but rather on the basis of careful examination into what we really believe and who we are, and into what is presupposed by what we do and say and believe. Still, we *might* be deceiving ourselves. And if so, our faith—and our lives—will remain bare and ultimately meaningless.

But if our faith is well-founded, then we will find ourselves engaged with an authoritative, caring mind that “draws [us] into the spirit of it.” And so it will turn out that “the first and last thing we know, the ultimate object of knowledge and belief, is a person . . . .”<sup>90</sup>

When one recalls Scalia’s mock impatience with what he referred to as “Vining’s all-but-theological imaginings,” in favor of textualism from which persons, *at least the legislating (or “framing”) persons*, are designedly exiled *by the judge*, note that Vining had long anticipated—and answered—just such an anti-person mentality: “[T]here is always the temptation in law to approach a statute as if its words had meanings in themselves and by themselves—the authoritarianism sometimes shown by those devoted to maintaining the supremacy of democratic politics and legislative authority.”<sup>91</sup> The judge who imposes textualism gives himself a promotion at the expense of the banished lawmaker.

Vining’s account of how we practice law, especially but not exclusively when we do it well, happily satisfies and vindicates the model of law and of

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89. See VINING, *supra* note 78, at 201.

90. Steven D. Smith, *Persons All the Way Up*, 55 VILL. L. REV. 1177, 1190 (2010) (second, third, and fourth alterations in original) (emphasis added); see also Joseph Vining, *The Filaments of the Vicarious*, 55 VILL. L. REV. 1089, 1097 (2010). In the same vein, see Rev. John McCausland’s contribution to the Vining Conference, John L. McCausland, *Finding a Footing: A Theological Perspective on Law and the Work of Joseph Vining*, 55 VILL. L. REV. 1107 (2010).

91. VINING, *supra* note 78, at 240.

ruling and being ruled *by persons* taught by Aquinas.<sup>92</sup> Law occurs only by person ruling person—the divine persons ruling human persons, and human persons ruling human persons according to the divine rule, always for the common good. The generators of McLaw set themselves above the divine law in order piously to satisfy the dogmatic demands of democracy, and above even human *meaning*—all of which is exactly what one would expect in conformity with the totalitarian meaninglessness of McWorld.

## VII. PART VII

It has been one of the great privileges and joys of my professional life to organize the annual Scarpa Conference. I again thank John Scarpa and the many others who have made this conversation possible. I have been told by many—and hope it to be true—that the ten conferences and the project that unites but distinguishes them have provided a service to Villanova, to the Church, to the profession, and to the world that all three are called to serve. Professor Kathryn Tanner, the Marquand Professor of Systematic Theology at Yale University, will deliver the keynote address of the eleventh annual Scarpa Conference, which will be devoted to the topic “the culture of finance,” which in turn will have been the topic of Professor Tanner’s 2015–2016 Gifford Lectures. The topic coincides perfectly and no doubt providentially with Pope Francis’s calling a Jubilee of Mercy for 2015–2016. Other speakers at the Conference will include Mary Hirschfeld, Joe Kaboski, Patrick Byrne, Andrew Yuengert, Robert Hockett, Brian McCall, and Jesús Fernández-Villaverde.

Judge Noonan and Joseph Vining took the occasion of their contributions to the Conference to recognize those from whom they had received the learning they have sought to pass on and add to. Jack Coons, who graced my inauguration as the first occupant of the Scarpa Chair by his presence and characteristically eloquent and wise words, deserves my special thanks. Jack has cooked me more than one hamburger, and I would venture to say that he would have made a great judge (an office to which, to the best of my knowledge, he never aspired).<sup>93</sup> I have never known Jack to commit the sin of McDonald’s, nor of McLaw. One could do worse than to enjoy his essay, *Confessions of a Semi-Pelagian* in Kevin and Marilyn Ryan’s, *Why I Am Still a Catholic* (1998). I owe more to Jack Coons than I can say.

This self-indulgence of thanking my betters needs to come to an end in short order, and in reaching it I shall sketch a programmatic conclusion with the help of the three of the ten Scarpa Conferences that remain to be mentioned, each worthy, as are the other seven, of more words than space allows.

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92. See generally Patrick McKinley Brennan, *Are Legislation and Rules a Problem in Law? Thoughts on the Work of Joseph Vining*, 55 VILL. L. REV. 1191 (2010).

93. See, e.g., John E. Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 NW. U. L. REV. 750 (1963).

The ninth Scarpa Conference assembled a group of legal scholars—all among them warm friends but divided on matters of law and policy, and even on some matters of Catholic doctrine—who have long and publicly united in a project they call “Catholic legal theory”: Susan Stabile, Rob Vischer, John Breen, Michael Scaperlanda, Lisa Schiltz, Michael Moreland, Kevin Walsh, Marc DeGirolami, and the present author. This conversation among fellow travelers left me (and some others among the speakers) especially impressed by the second element of the Conference’s subtitle: “Catholic Legal Theory: Aspirations, Challenges, and Hopes.” My own account of the challenges followed the ominous lines traced by Romano Amerio in his *tour de force* book *Iota Unum: A Study of Changes in the Catholic Church in the Twentieth Century* (1985) and Dietrich von Hildebrand, *The Devastated Vineyard* (1973). The facts about the post-Conciliar belie the propaganda about our living, or almost living, in “a new spring-time.” Ironically, it was Pope Paul VI himself who felt compelled to state, just three years after he closed the Second Vatican Council: “The Church is in a process of auto-demolition.”

The tenth annual Conference, still fresh in memory, took as its focus the work in constitutional law of the Harlan Fiske Stone Professor of Constitutional Law at Columbia Law School, Henry Paul Monaghan. Henry is one of a kind, as the speakers who honored and good-naturedly provoked his good nature variously attested. They were Jeff Powell, John Manning, Gillian Metzger, Jim Pfander, Tom Lee, and my friend and colleague at Villanova, Cathy Lanctot, and together they illuminated how a masterful lawyerly mind at work leaves nothing out, as Vining said of law’s likeness to theology, though it does set priorities and make distinctions tailored to serve the human need for stability and predictability. Monaghan is emphatically not an idolator of the Constitution he defends, nor is he an originalist. His welcome defense of constitutional *stare decisis* was my own focus at the conference, and I argued that Monaghan should attend more than he has to the *openness* of *stare decisis* to methodical, progressive, and cumulative development, than to its capacity to stabilize and to justify the (non-originalist) *status quo*.<sup>94</sup> This provocation led Monaghan to chide me for being a “perfectionist” about the Constitution, which of course Monaghan thinks it is a bad thing to be.<sup>95</sup> I pled “Nolo,” but with a qualification.

Here is one of those places where the onion needs to be chopped a little finer than it often is, and to do just that I would like to turn to the formidable contribution to the Scarpa project offered by Bill Eskridge and John Ferejohn at the fifth Conference, held in February 2010. Dedicated to reckoning with the tectonic thesis of their book, *A Republic of Statutes: The New American Constitution*, the conversation included Martin Shapiro

94. See generally Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).

95. See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 396 (1981).

(from whom I learnt much as a law student), Jane Schacter, Kristin Hickman, Ted Ruger, Tom Merrill, and Henry Monaghan.

Eskridge and Ferejohn defend a version of a large-C U.S. Constitution according to which the thing develops, without formal amendment by guaranteeing not just negative liberties but also positive liberties associated with civic republican values and a deep and deepening commitment to equality. Articulating a “horticultural rather than an engineering approach” to constitutional design and development, they note:

Henry Paul Monaghan observes that most of the Supreme Court’s Constitutional jurisprudence is old-fashioned common lawmaking. Rather than reasoning from the language of a text and its legislative history (or original meaning), the Court’s opinions in equal protection, due process, dormant commerce clause, and federalism cases typically start with a review of the principles and precepts announced in precedents of the Court and then apply those principles and precepts to decide the case at hand, usually reasoning by analogy to previous judicial decisions rather than reasoning deductively from original meaning or even purpose.<sup>96</sup>

Whatever the extent of agreement between the Eskridge–Ferejohn position and the Monaghan position, Eskridge and Ferejohn are clearly (and proudly) guilty of the perfectionism Monaghan condemns because, inter alia, he judges it to be subversive of the Constitution that, by its own terms, can be amended only according to the provisions of Article V.

The aforementioned qualification of my “Nolo” plea is that I do not seek a perfect constitution. It would be a fool’s errand, because among us humans the good always is under construction (or destruction). I seek instead a constitution that optimizes legal and thus cultural conditions for constructing the good. Any constitution worthy of its supporters/subjects should assist those it rules by assisting them to perfect both themselves and the common good. (A point more or less clear already with Aristotle, but lost on modernity). To grasp this is to call for a constitution interpreted according to the common law method, with due modification, and this exactly because that method is isomorphic with the method of human intelligence itself, in that it is *methodical* and therefore potentially progressive and cumulative.<sup>97</sup> Methodism with a small-*c* must be recovered and sustained if we are to escape McLaw.

Justice Scalia contended that our Constitution once was, and should again be, “rock solid.” Such would be McLaw: rock solid. Dynamic

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96. WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 445 (2010).

97. See Patrick McKinley Brennan, *Asking the Right Questions: Harnessing the Insights of Bernard Lonergan for the Rule of Law*, 21 J.L. & RELIGION 1 (2005); Patrick McKinley Brennan, *Discovering the Archimedean Element in (Judicial) Judgment*, 17 LAW & PHIL. 177 (1998).

human intelligence, by contrast, is a rock on which to build exactly because it allows knowledge, both theoretical and practical, to “make [its] slow, if not bloody entrance.”<sup>98</sup>

There are no cosmic guarantees that knowledge will make an entrance (we remain at liberty to elect nescience and evil), and meanwhile McWorld through its agent McLaw does violence to human potential, and specifically to our potency for social obedience to divine law, by attempting to stop history by the currently enacted rules (which fallible humans enacted fallibly). Textualism is an antidote that reduplicates but also radiates the evil: arbitrary fixity. One could do worse than the common law judge ridiculed by Scalia as “Mr. Fix-it.”<sup>99</sup> For example, Judge Ronald McDonald, Mayor McCheese, the Hamburglar, and the rest of McWorld at play.

#### VIII. CONCLUSION

Cultures in crisis witness and do strange things. Pope Benedict XVI abdicated. Earlier, the Pope had argued that people of the Catholic faith should ask non-Catholics to acknowledge Grotius’s hypothesis and turn it on its head:

I should like to make a proposal to those outside the Church. In the age of the Enlightenment, the attempt was made to understand and define the essential norms of morality by saying that these would be valid *etsi Deus non daretur*, even if God did not exist. . . .

[T]he attempt, carried to extremes, to shape human affairs to the total exclusion of God leads us more and more to the brink of abyss, toward the utter annihilation of man. We must therefore reverse the axiom of the Enlightenment and say: Even the one who does not succeed in finding the path to accepting the existence of God ought nevertheless to try to live and to direct his life *veluti si Deus daretur*, as if God did indeed exist. This is the advice Pascal gave to his non-believing friends, and it is the advice that I should like to give to our friends today who do not believe. This does not impose limitations on anyone’s freedom; it gives support to all our human affairs and supplies a criterion of which human life stands sorely in need.<sup>100</sup>

98. 3 BERNARD LONERGAN, *Insight: A Study of Human Understanding*, in COLLECTED WORKS OF BERNARD LONERGAN 209 (Frederick E. Crowe & Robert M. Doran eds., 5th ed., 1992) (1957).

99. See SCALIA, *supra* note 24, at 14. *Pace* Justice Scalia, the natural law has played a significant, and accepted if disputed and undertheorized, role in our tradition of judging, including in the work of statutory interpretation. See, e.g., PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 612–17 (2008); R.H. HELMHOLZ, *NATURAL LAW IN COURT* 142–78 (2015).

100. JOSEPH RATZINGER, *CHRISTIANITY AND THE CRISIS OF CULTURES* 50–52 (Brian McNeil trans., 2006).

Justice Scalia was committed to the dogma that a majority of people can compel the people's government to live *veluti Deus non daretur*. The assumed and imposed non-existence of God entails that Christ's Church is nothing special (just another among countless examples of "religion"), and certainly not possessed of rightful jurisdiction to correct the state and its law. Meanwhile, the bishops busy themselves litigating to undo the deeds of democracy, begging like mendicants to receive exemptions from laws of general applicability based on "conscience." Claims of conscience are not unlimited as our culture of rights correctly insists, however.<sup>101</sup>

But what are the limits? In traditional Catholic theology, the common good bounded exercises of conscience, but according to the *Zeitgeist* today any curtailment of individual autonomy is limited to the harm principle, including a growing list of dignitary and psychic harms, the justification and limitation of which cannot avoid terminal arbitrariness.<sup>102</sup>

The Church understood that man's natural abilities are wounded by sin, and so it was that the Church sought to correct and transform man and his culture, including his political culture and law, through the grace of the supernatural. But now we have, instead, checks-and-balances, separation of powers, separation of church and state, toleration as a meta-value, and so forth. We have McWorld and McLaw, in which Vining was right to observe that sometimes, just sometimes, law pushes through and gives those with ears to hear a cause for hope, hope for the "radical change" Vining discerned possible.<sup>103</sup>

Responding critically but appreciatively to Justice Scalia's defense of textualism, Gordon Wood wrote:

But first I suppose we must reverse some of the *reductio ad absurdum* tendencies of legal realism and remystify some of what lawyers and judges do. The real source of the judicial problem that troubles Justice Scalia lies in our demystification of the law, which is an aspect of the general demystification of all authority that has taken place in the twentieth century.<sup>104</sup>

I more or less agree, yet I wonder whether the notion of "remystifying" isn't an invitation to more Mc. There exists no ontological half-way house in which to take refuge, as Nietzsche said with boldness that eluded

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101. Richard Schenk, O.P., offered a sophisticated Catholic corrective to Nussbaum's extravagant claims on behalf of conscience at the third Scarpa Conference, Richard Schenk, O.P., *Voices of Conscience*, 54 VILL. L. REV. 593 (2009).

102. See BRAD S. GREGORY, *THE UNINTENDED REFORMATION: HOW A RELIGIOUS REVOLUTION SECULARIZED SOCIETY* 224–34 (2012); STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* 154–56 (2014).

103. The aural metaphor is an oblique reference to Jack Sammons's riveting contribution to the Vining Scarpa Conference, Jack L. Sammons, *The Law's Melody*, 55 VILL. L. REV. 1143 (2010).

104. Gordon S. Wood, *Comment*, in *A MATTER OF INTERPRETATION*, *supra* note 24, at 49, 63.

Grotius.<sup>105</sup> Even if Justice Scalia wouldn't say "G-G-G-God," someone should.<sup>106</sup> McLaw would be a choice, and we have the reason that is the Logos not to choose it.<sup>107</sup>

Is there a Catholic way to cook a hamburger? Sacred Scripture records that "they recognized Him in the breaking of the bread" (Lk. 24:35). The rest is *a fortiori*.

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105. Jeff Powell's contribution to the fourth Conference marshalls Vining's insights into the actual practice of law and shows how lawyerly work in good faith avoids what Mark Tushnet called "legal nihilism." See generally H. Jefferson Powell, *The Humanity of Law*, 55 VILL. L. REV. 1161 (2010).

106. If *per impossibile* I entertained any hope for a purely natural solution, I would derive some comfort from the food industry changes and trends described in Hans Taparia & Pamela Koch, Op-Ed., *A Seismic Shift in How People Eat*, N.Y. TIMES, Nov. 6, 2015, [http://www.nytimes.com/2015/11/08/opinion/a-seismic-shift-in-how-people-eat.html?\\_r=0](http://www.nytimes.com/2015/11/08/opinion/a-seismic-shift-in-how-people-eat.html?_r=0) [<https://perma.cc/F4SD-HNZ3>].

McDonalds needs to do more than use antibiotic-free chicken. The back of the house for its 36,000 restaurants currently looks like a mini-factory serving fried frozen patties and french fries. It needs to look more like a kitchen serving freshly prepared meals with locally sourced vegetables and grains—and it still needs to taste great and be affordable.

These changes would require a complete overhaul of their supply chains, major organizational restructuring and billions of dollars of investment, but these corporations have the resources. It may be their last chance.

*Id.*

107. On how the Word (or Logos) is made present through authority that is not authoritarian, see James Boyd White's contribution to the Vining Conference, *The Creation of Authority in a Sermon by St. Augustine*, 55 VILL. L. REV. 1129 (2010).