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THE BRENDAN BROWN LECTURE SERIES

SHAPING THE CHURCH: OVERCOMING THE TWIN CHALLENGES OF SECULARIZATION AND SCANDAL

Mark E. Chopko

I. INTRODUCTION

The past twenty-four months have been long and difficult for the Roman Catholic Church and for people who have placed their trust in Her. A seemingly endless stream of bad news has been revealed every day since the first reports of scandal from Boston were reported on

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1 General Counsel, United States Conference of Catholic Bishops (USCCB), Washington, D.C. Mr. Chopko is a graduate of the University of Scranton (B.S.) and Cornell Law School (J.D.). This article is based on The Brendan Brown Lecture at the Columbus School of Law, Catholic University of America, delivered January 15, 2003. See Columbus School of Law, Catholic University of America, Wide Awake, Paying Attention and Praying Hard (Jan. 2003) at http://law.cua.edu/news/prayinghard.cfm (last visited Dec. 19, 2003). A speaking text was previously published. See Mark E. Chopko, How Abuse Scandal Exacerbated Other Existing Problems for the Church, ORIGINS, Vol. 32, No. 33 (Jan. 30, 2003). The author wishes to thank Professors Robert Destro and Harvey Dale for their review, comment, encouragement, and support. The views expressed in this article are the author’s alone, and not necessarily those of the Conference of Bishops or any of its members.

Because the lecture was presented to the Law School community, especially students, some observations about the demands of the law practice offered in the lecture are restated here for students:

As the chief lawyer to the Conference of Catholic Bishops in the United States, I have watched the pressures on Bishops ebb and flow for sixteen years. Regardless of the situation, the pressure and competing demands on Bishops is enormous. Whether the issue is school funding, the allocation of community resources, or clergy sexual misconduct, there is no end to the line of people who have the "right" answer, as well as a critique of all the other suggested answers. I have imagined my goal as creating a free space for a Bishop—free of the demands of government officials, insurers, church bureaucrats, litigants, and anyone else who would force a particular decision or approach on a Bishop. In that free space, a Bishop would have the freedom to follow his best pastoral instincts, and to seek and follow the Truth to serve the people, the Church, and the common good. Sometimes this requires me to be an advocate, to defend the institution from the outside world. Sometimes it requires me to be an insider, to assure compliance with applicable laws. But it always requires that my moral compass be on and fully functional, because lawyering for this client demands rigorous attention to doing the right thing, not just the legal thing, every day. As
January 6, 2002. According to opinion polls, the public, including us Catholics, thinks less of the Bishops than they did in June 2002. The work of those in positions as lawyers and administrators will continue for at least another twelve months as the fallout from years of relentless scandal is sorted out. The damage has been great and the cost in trust and good relations with the people of God are only now being counted.

There is never a good time to have a public scandal, but this was absolutely the wrong time. Like other religious institutions in this society, Catholic institutions were already under tremendous pressures from regulators, legislators, and litigants to conform their operations to the prevailing cultural behaviors. The theme of this lecture is simple, stark, and urgent: there are forces at work in society that will, unless checked, radically remake the religious institutions serving the public.

Unless Catholics are prepared to defend our constitutional rights as a community of believers, our gifts to the larger society in the areas of

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1. On January 6, 2002, the Boston Globe began its reporting of files made public in litigation over the alleged liability of the Archdiocese of Boston for the misconduct of John Geoghan, a defrocked priest of the Archdiocese. Globe Spotlight Team, Church Allowed Abuse by Priest for Years, BOSTON GLOBE, Jan. 6, 2002, at A1, available at www.boston.com/globe/spotlight/abuse/stories/010602_geoghan.htm; see also Walter V. Robinson & Michael Paulson, The Cardinal's Apology, BOSTON GLOBE, Jan. 10, 2002, at A1. Articles are collected in a special archive. Spotlight Investigation: Abuse in the Catholic Church, BOSTON GLOBE, available at http://www.boston.com/globe/spotlight/abuse/ (last visited Nov. 18, 2003). Those files had been subject to a confidentiality order. Kathleen Burge, Judge's Ruling Frees Documents in Geoghan Case, BOSTON GLOBE, Nov. 30, 2001, at B5. When the judge who issued the confidentiality order was promoted to the Court of Appeals, the Boston Globe renewed its request to lift the order before the new judge, Judge Constance M. Sweeney. Id. Judge Sweeney granted the Globe's request and those files, as well as files from dozens of other cases released by Judge Sweeney, have been the fodder for daily stories since January 6, 2002. Id.; Spotlight Investigation, supra. As noted below, the Geoghan story had been written about for years. See infra note 123 and accompanying text.


4. Id.
health, education, and welfare are in jeopardy. Those forces already are
there and are exacerbated by the scandal.

The Church must deal with both the push toward secularization and
the scandal. This article offers some thoughts about how society might
emerge from this present moment to re-engage the debate over the shape
and direction of our shared public life in the United States. In the
interim, we must deal with a bewildering array of challenges and much
confusion about which way to go.

Consider this story. A taxi driver and Bishop are killed in a car
 crash—both ascend to heaven. The Bishop is assigned a tiny flat on a
main street. The cabbie is given a mansion. The Bishop complains and
asks St. Peter about the seeming disparity. Peter says, “Here in heaven,
we reward results. When you were doing your job, teaching and
preaching, what were the people doing?” The Bishop admitted that
many, okay most, of the people were asleep. Peter said, “Exactly. But
when the cabbie drove, everyone was wide awake, paying close attention
and praying hard.”

Those of us who have been in the back of the cab called “Church” this
year have had much to watch, pray about, and worry over. Many have
wondered, “Who is driving? And where are we going?” Although the
answers may not be clear, we are wide awake, paying attention and
praying hard. Because of the uncertainty about the course and direction
of the Church as a whole, or perhaps because of disagreement over the
course and direction, many of us have been tempted to turn the
trajectory toward a favorite end point: we find answers in themes like
fidelity, breaking the clerical class, reformation of doctrine, or any
number of similar issues. There are as many suggestions as there are
Catholics, and that is very American. Catholics may be impatient about
waiting for anything, much less answers, and we are part of a culture that
values self-determination. We like taking things into our own hands and
shaping them ourselves. This temptation must be resisted, along with the
temptation to do nothing. If Catholics simply leave things alone,
individual litigants and their lawyers or government regulators will work
their wills on the Church. If this occurs, Catholics, and our society, will
be worse off. Catholics must help fix the Church, and not allow others to
re-make it.

II. TWO CLEAR REFERENCE POINTS

First, let me state quite plainly that child abuse—a crime in both the
civil law and a horrible offense to the Commands of God—must be
stopped and the perpetrators brought to justice. The Catholic Bishops in
Dallas strengthened the path they began to walk more than fifteen years
ago by lifting up the voices of victims and honoring the Holy Father's words that the priesthood is no place for anyone who would harm a child. When Church ministers commit the crime or hide misconduct through deliberate inaction or worse, they can and should be personally responsible; our institutions can, and do, face liability claims based on

5. United States Conference of Catholic Bishops, Report of the National Review Board, July 29, 2003, available at http://www.usccb.org/comm/restoretrust.htm (outlining the course and scope of the Bishops' work on child abuse in the Church). Since the summer meeting in 1985, the Bishops have been working collectively on this problem. Id. At first, those efforts were made behind closed doors, but after the appointment of an ad hoc Committee in 1993, the Bishops' work has been in public session and the Committee's reports, three volumes entitled Restoring Trust, have been published. United States Conference of Catholic Bishops, Restoring Trust: Response to Clergy Sexual Abuse, Nov. 2002, available at http://www.usccb.org/comm/restoretrust.htm. From about 1997 until 2002, most stories about sexual abuse in the Church were episodic and local, but it was no secret that priests who abused minors might have been returned to some ministry, after "successful" treatment and with monitoring and other restrictions. Eugene C. Kennedy, Culture Watch: The Church in Sexual Denial Also Denies Its Roots, NEWSDAY, Apr. 18, 2001, at B08; Brooks Egerton & Michal Saut, Statement Indicates Kos Told Psychiatrist He Molested Boys, News Surprises Priest's Attorney, DALLAS MORNING NEWS, Oct. 30, 1997, at 1A. The ad hoc Committee in 1994 noted that such decisions were controversial and required consultation with a pastoral team of parents, clergy, psychologists, lawyers and other resource persons, and also should be accompanied with some disclosure, certainly to co-workers and lay leadership. United States Conference of Catholic Bishops, Diocesan Policies Dealing With Sexual Abuse of Minors, Nov. 1994, available at http://www.usccb.org/comm/kit3.htm.

what leaders, in fact, knew. Although everyone needs to recognize that the first responsibility of Catholics is to serve all the people of God through our churches and institutions. We have a responsibility to resolve these claims justly, whether the civil law requires it or not.

Another key point of reference concerns the law and the Church. The Church is not above the laws of the United States, but operates within the rule of law. The Church is subject to a myriad of laws and regulations. However, the Church also operates within a constitutional

7. In articulating the proposition this way, one distinguishes between crimes of abuse committed by individual clerics, employees, or volunteers, any of whom can be considered “ministers,” according to the use of the term in legal literature. See, e.g., EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 801 (4th Cir. 2000). The notion of “minister” and “ministry” is not dependent on categorical classes of ordained versus non-ordained, but turns on the function of the position. Id. On the other hand, the possibility of the leadership committing a crime is real but remote. For example, if clergy are not required reporters of abuse, a Bishop’s failure to report abuse is not a crime. On the other hand, the Archdiocese of Cincinnati pled nolo contendere to five violations of an Ohio statute for their failure to report a felony, one for each year from 1978 to 1982. State of Ohio v. Archdiocese of Cincinnati, Case No. B 0311000, Court of Common Pleas, Hamilton County, OH (Richard Niehaus, Judge). Although very few states have broad child endangerment laws, such as New Hampshire, even those states have hurdles to prosecutions based on knowledge and intent. See N.H. REV. STAT. ANN. § 639.3 (2001). A Bishop would not allow a priest to continue in ministry knowing with certainty that another person would be harmed. However, such re-assignments have always presented a risk of re-offense, and actual knowledge of a prior assault could form the basis for a negligent supervision claim. In this regard, absent some specific knowledge about the infirmity of the cleric, those cases ascribing all inferences from all conduct as creating liability because a Bishop, looking back “should have known,” go too far. E.g., Koenig v. Lambert, 527 N.W.2d 903, 905 (S.D. 1995) (ascribing knowledge from repeated confessions in the diocese), overruled on other grounds by Stratmeyer v. Stratmeyer, 567 N.W.2d 220 (S.D. 1997). Those kinds of claims too often invite courts to examine Church disciplinary systems implicating constitutional concerns. See Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 790 (Wisc. 1995) (determining that “the First Amendment . . . prevents the courts . . . from determining what makes one competent to serve as a Catholic priest”); Bryan R. v. Watchtower Bible & Tract Society, 738 A.2d 839, 848 (Me. 1999) (“Allowing a secular court or jury to determine whether a church and its clergy have sufficiently disciplined, sanctioned, or counseled a church member would insert the State into church matters in a fashion wholly forbidden by the Free Exercise Clause of the First Amendment.”). The same problem is not presented where the knowledge is clear and the re-assignment is intentional, accepting the risk of a future occurrence however unlikely a Bishop and his advisors think it might be. Gibson v. Brewer, 952 S.W.2d 239, 249 (Mo. 1997) (alleging the Diocese acted intentionally in its improper investigation of a priest who allegedly had sexually abused a minor).

8. Thomas J. Paprocki, Methods of Avoiding Trials, in NEW COMMENTARY ON THE CODE OF CANON LAW, 1803-04 (John P. Beal, et al. eds., 2000) (“In fact, as long as civil laws are not contrary to divine law or unless canon law provides otherwise, canon law often defers to civil laws (c. 22), especially civil contract law (c. 1290), labor laws (cc. 231, §2 and 1286), prescription (cc. 197-199 and 1268-1270), the laws of wills and inheritance (c. 1299, §2), and probably also tort law (compensation for negligent and intentional harms and injuries; see c. 128).”).
regime set in place more than 210 years ago; that regime rests on the idea that the functions of both religion and government work best if they are kept separate. The legitimate functions of religion do not belong to government and vice versa. This idea is enshrined in the Religion Clauses of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Those sixteen simple words overflow with complex political, cultural, and legal meanings. Those who seek to make religion the basis of government would make religious dogma the law of the State. Those who demand that all religious traces be stripped from public life, including those religious institutions who serve the common good, make the law of the State into religious dogma. Both are wrong. Each institution—religion and government—has autonomy appropriate to its sphere.

The guarantee of this institutional autonomy is not some mere technicality or exception to the rule; it is the rule, wrought from difficult conflict and offered to point the way to a preservation of authentic freedom for religion in the United States. The First Amendment was part of the price demanded by the States in exchange for their votes of ratification of the Constitution. There are, therefore, limits on what


10. Everson, 330 U.S. at 15-16 (explaining that the Establishment Clause of the First Amendment prohibits states and the federal government from setting up a church).

11. U.S. CONST. amend I. This article does not debate whether there is one Clause or two Clauses. E.g., Stephen L. Carter, God's Name in Vain 217 n.21 (2000). I accept the convention in the Supreme Court's cases that reflect an Establishment Clause and a Free Exercise Clause. E.g., Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). Both, according to the Court, are complementary and buttress the idea of religious liberty. Id.


13. Id. This problem exists not just here in the United States but elsewhere, as democracies struggle to balance the rights of religious minorities and religious institutions with the common good. Id.

14. E.g., Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (stating that the Court "will not tolerate either governmentally established religion or governmental interference with religion").

15. States addressed the need for express protection of religious freedom. George Clinton, Supplement to the Journal of the Federal Convention (1787), reprinted in 1 Debates on the Adoption of the Federal Constitution 328 (Jonathan Elliott ed., 2d ed., Phil., J.B Lippincott Co. 1901); Daniel Owen, Ratification of the Constitution by the Convention of the State of Rhode Island and Providence Plantations (1790), reprinted in 1 Debates on the Adoption of the Federal Constitution 334 (Jonathan Elliott ed., 2d ed., Phil., J.B Lippincott Co. 1901); Another Engrossed Form of the Ratification (June 27,
religion can demand of the government (e.g., government-sponsored prayer) and what government can demand of religion (e.g., disregarding religious teaching in the religious workplace).

Church autonomy forms one critical aspect of the constitutionally mandated separation between governmental and religious entities that has been expressly noted in the case law. In the nineteenth century, Watson v. Jones concluded that a church's decisions on questions of ecclesiastical discipline, faith, and law, and the application of those principles belong solely to the church, not the government. A half century later, in Gonzales v. Roman Catholic Archbishop of Manila, the Court applied the same rule to hold that the government, even applying secular law, could not prescribe standards for church office. Those pre-incorporation decisions were elevated to constitutional principle in the 1952 decision, Kedroff v. St. Nicholas Cathedral.

Kedroff held an attempt by the New York legislature to divest ownership of the Russian Orthodox Cathedral from the Church in Russia to a U.S. faction to be unconstitutional. The Court embraced and expanded Watson, explaining that the principle of religious autonomy embraces "an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." It is clear that religious autonomy is not merely a power to believe, but also extends to apply those beliefs in concrete ways in religious organizations. Religious institutions have broad autonomy to order their internal affairs according to religious doctrine and should not have to recede from religiously motivated actions for fear of legislators, regulators, or courts. Those robust rights are threatened today.


16. E.g., Walz, 397 U.S. at 672.
17. 80 U.S. (13 Wall.) 679 (1871).
18. Id. at 727. Watson has been cited numerous times for this principle.
19. 280 U.S. 1 (1929).
20. Id. at 16.
22. Kedroff, 344 U.S. at 119, 121.
23. Id. at 115-16.
III. PRESSURES TOWARD SECULARIZATION

Some in this society would shape religious institutions, through the civil courts and the legislatures, to be clones of public institutions in all but the most trivial ways. The current scandal over the response to sexual abuse only serves to accelerate this existing trend toward shaping the Catholic Church to the prevailing culture, through litigation and legislation or regulatory action. Each is examined in turn.

A. Litigation

Cases are frequently filed in the United States that target a class of defendants that is related through a common commitment to some undertaking; that commonality is, at times, the same religious faith. These may be referred to as “nameplate” cases because all the defendants have some common name, such as Catholic, Lutheran, etc. Nameplate cases can also include litigation against other institutions, such as schools and the Boy Scouts of America. The theory is that one sues all possible defendants, and those defendants will sort out who is responsible among them by pointing the finger at the proper party. These cases allege that the institutional structure masks some larger antisocietal conspiracy. Consider the following real examples.

Some years ago in the litigation brought against the Dallas Diocese and the Conference of Bishops, the plaintiffs charged that the Church had not behaved “as a reasonably prudent religious organization.” One might ask: Compared to what? The Lutherans or the Presbyterians? At the same time in a neighboring state, a lawsuit was filed against the

26. See Mark E. Chopko, Stating Claims Against Religious Institutions, 44 B.C. L. REV. 1089, 1091-94 & n.6 (2003) (discussing Krider v. General Council on Finance & Administration, a non-Catholic case where a plaintiff named the local church, regional judicatory, and a national Methodist body in a suit resulting from a ladder accident).
27. Sessions of the American Corporate Counsel Association (1999) and the American Bar Association, Tort and Insurance Practice Section (2000), presented a review of this litigation phenomenon. Outlines and other materials were available through ACCA and the ABA/TIPS. A version of the ABA presentation was published in the United Kingdom. Mark E. Chopko, Emerging Liability Issues in Non-Profit Organizations: An Overview, 8 CHARITY LAW & PRACTICE REVIEW, 17-34 (2002).
28. Id. at 25-26.
30. See id.
31. Doe IV v. Diocese of Dallas, Amended Complaint, Count I, para. 28, No. 93-05258-G (134th Judicial District). The decision by the judge to refuse to dismiss this claim fueled a discovery dispute and a motion to compel. See infra note 37.
National Assembly of the Presbyterian Church-USA (PC-USA).\(^3\) This lawsuit resulted from the sexual misconduct of a minister who served in regional judicatories of the PC-USA in two states.\(^3\) The basis of the lawsuit was a statement in the PC-USA’s Book of Discipline that the action of one Presbyterian agency is the action of all.\(^4\) In accordance with this theory, the negligence of one became the negligence of all. The intended defendants were every current and former member of the Presbyterian Church.\(^5\) The case against PC-USA was properly dismissed,\(^6\) but the Dallas case resulted in a verdict of nearly $120 million against the Diocese.\(^7\) Both cases were framed on the same flawed idea that people bound together in faith consent to be legally bound to each other in tort liability.\(^8\) The claimants in these cases invite

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\(^{33}\) Id. at 594-96. Ultimately, the minister was sentenced to prison and died at the hands of fellow inmates. Barbara Hoberock, Former Minister Fatally Stabbed in Prison Cell, TULSA WORLD, June 14, 1994, at N9, available at http://www.reformation.com/CSA/brigden1.htm.

\(^{34}\) Hosey v. Presbyterian Church (USA), Petition, paras. IV, 3-5, V, I-K (Sept. 30, 1997).

\(^{35}\) Id. Petition, IV, paras. 3-5. See also Appellants’ Brief at 1, N.H. v. Presbyterian Church (USA), 998 P.2d 592 (Okla. 1999) (plaintiffs seek a judgment to be enforced against any Presbyterian church body or entity wherever found).

\(^{36}\) N.H., 998 P.2d at 603. The trial court found the invocation of the Book of Discipline to reach every Church member necessarily implicated the Constitution, and dismissed the case on that basis. Id. at 597. On direct appeal to the state supreme court, the dismissal was affirmed, but on narrower, common law grounds. Id. at 602-03. In the Presbyterian Church, like the Catholic Church and other churches, discipline and supervision of clergy is vested only in the regional jurisdictories called presbyteries, what Catholics might call “dioceses” or Lutherans call “synods.” PC (USA) BOOK OF ORDER, section G-11.0103n (Responsibilities of Presbyteries: to “ordain, receive, dismiss, install, remove, and discipline ministers . . . .”). Text available at http://www.pcusa.org. All knowledge of the minister’s crimes remained in the presbyteries involved and never reached the national assembly. N.H., 998 P.2d at 601. No knowledge meant no basis for liability based on supervision. Id. The court noted the division of cases on the constitutionality of negligent supervision. Id. at 602 n.47.

\(^{37}\) See BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH 43 (Ben Bradlee Jr. ed., 2002). The jury returned its verdict in July 1997 against the Dallas Diocese alone. Id. The verdict eventually was resolved by settlement for around $30 million. Id. The claims against the USCCB were made the subject of the Conference’s petition for writ of mandamus of the judge’s decision to compel discovery. United States Catholic Conference of Bishops v. Ashby, No. 95-0250 (Aug. 1996). The Texas Supreme Court stayed proceedings against the Conference in March 1995, pending further review. In July 1996 the Court set the petition for argument, overruling all attempts by plaintiffs to dismiss it. Id. Literally on the eve of oral argument, all plaintiffs dismissed all claims against the Conference. Id. One lawyer admitted her clients could not prevail on their claims. Id.

\(^{38}\) Both cases also target a class of defendants beyond the defendant civilly empowered and bound to act against an offending minister. In New Hampshire, the target
the courts to discard the Constitution, as well as the actual structure of the churches, to grant relief.

**B. Regulatory and Legislative Pressures**

There are four examples of regulatory demands that religious institutions have faced and will face, in increasing degree and amount. Each instance proposes to force religious institutions to choose between religious identity and service to their communities. The pressures are sometimes direct, sometimes more insidious, but always involve a seemingly broad regulatory mandate that causes a disproportionate impact on religious institutions. This trend was accelerated by the end of the strict scrutiny standard in claims of violations of religious rights following *Employment Division v. Smith* in 1990, and the subsequent demise of the Religious Freedom Restoration Act in 1997. The State may now challenge religion if done in a neutral and general way without ever facing a searching judicial review.

First, religious institutions are pressured to deliver services exactly as their secular counterparts. This is evidenced by the demand of government agencies that review combinations in healthcare, and the constant threat of litigation by Planned Parenthood and others over what they see as a loss of reproductive health services. Whenever healthcare

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39. 494 U.S. 872 (1990). Prior to *Smith*, a prima facie claim of religious infringement shifted the burden of proof to the government to show (1) a compelling interest accomplished through (2) the least restrictive means. *Id.* at 883 (citing *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963)). After *Smith*, neutral, generally applicable rules prevail, unless the person shows the government acted unreasonably. *Id.* at 884-85. This holds true although the new rules may directly burden religious rights. *Id.*


41. The Supreme Court later invalidated RFRA as applied to the states in *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

42. *City of Boerne*, 521 U.S. at 534-35.


combinations are presented, challenges arise over certificates of need, state antitrust laws, and other grounds.\textsuperscript{45} The real target is to restrict Catholic or other healthcare groups that will not offer abortion services.\textsuperscript{46} The premise on which the State acts is that abortion is a public service, or "health care," provided by publicly supported institutions, or "hospitals."\textsuperscript{47}

Although many legal bases for state action are asserted, one powerful regulatory act is a governmental attempt to impress a public charitable trust on private charitable assets.\textsuperscript{48} This action has been applied to situations involving the sale of large charities, such as hospitals.\textsuperscript{49} The idea is that public support, when coupled with community service, creates a public charity subject to plenary state attorney general control.\textsuperscript{50} This approach is not limited to agencies that serve the public, but can apply fairly broadly.\textsuperscript{51} A state supreme court adopted this action in a lawsuit brought by dissenting members over the evangelism of the leadership of the Christian Science religion.\textsuperscript{52} The religious dissenters urged the courts to intervene, arguing that Mary Baker Eddy's trust was being administered wastefully, and contrary to the dissenters' belief of her vision for the Church.\textsuperscript{53} The Church protested the litigation under the First Amendment and a number in the religious community joined an amicus brief urging dismissal.\textsuperscript{54} The Massachusetts Supreme Court held that the dissenters could not sue the church over the evangelism efforts, not because the Constitution barred litigation over church doctrine, as the religious amici urged, but because only the State could regulate public charitable trusts.\textsuperscript{55} Some state regulators have taken the position that these charities are a trust for the community and cannot be sold or

\begin{itemize}
\item \textsuperscript{45} Spitzer, 734 N.Y.S.2d at 673-74.
\item \textsuperscript{46} See COHEN & MORRISON, supra note 43, at 5-6.
\item \textsuperscript{47} See id. at 2.
\item \textsuperscript{48} The NWLC urges use of this tactic against religious charities. Id. at 17-18. The tactic rests on an assumption that the local community, through donations and volunteer service, underwrites the charity, making its control and disposition a matter of public concern. See id.
\item \textsuperscript{49} Id. at 30-32 (discussing the proposed consolidation of Good Samaritan and St. Mary's Hospitals in West Palm Beach, Florida).
\item \textsuperscript{50} Id. at 2, 24.
\item \textsuperscript{51} See id. at 23-24.
\item \textsuperscript{52} Weaver v. Wood, 680 N.E.2d 918, 918, 922 (Mass. 1997). The ostensible theory was the regulation of a charitable trust. Id. In fact, the dispute was about evangelization in an electronic age. Id. at 919.
\item \textsuperscript{53} Id. at 919-20.
\item \textsuperscript{54} Id.; see also Brief of Amici Curiae Americans United for Separation of Church and State at 1, Weaver v. Wood, 680 N.E.2d 918 (Mass. 1997) (No. 07156).
\item \textsuperscript{55} Weaver, 680 N.E.2d at 922. The means of spreading the Gospel by Churches would seem obvious (even to regulators) to be beyond the governmental power.
\end{itemize}
significantly changed without government approval.\textsuperscript{56} The purpose of such approval is to assure that the years of local giving and volunteerism are protected.\textsuperscript{57} If accepted, such a power would sweep far beyond service providers, to schools and church buildings, or anything open to and supported by the public—even through private donations.

Second, calls are increasing in certain circles for a conditioning of tax exemption status on an institution's willingness to abide by either the governing secular model or public policy. This call is based in part on a Supreme Court decision denying an exemption to Bob Jones University because it sanctioned racial discrimination contrary to "public policy."\textsuperscript{58} Some have called for extending that disqualification to institutions that discriminate on other grounds, e.g., on the basis of gender.\textsuperscript{59} Recently, a case was filed against the Bishops Conference and the Internal Revenue Service to revoke the Bishops Conference's tax exemption.\textsuperscript{60} The plaintiff was a woman who applied to the seminary and was told she could not be ordained a priest of the Catholic Church.\textsuperscript{61} Although the case was dismissed on a variety of grounds, it illustrates that there are those who would use the courts to secularize the Church or cause it to forfeit benefits. In other states there have been attempts to preclude the extension of tax-free bond financing to Catholic hospitals because they


\textsuperscript{57} Id. at 1211.

\textsuperscript{58} \textit{Bob Jones Univ. v. United States}, 461 U.S. 574, 591-93, 595-96 (1983). The Court held that religious schools that discriminate on the basis of race do not qualify as tax exempt entities and contributions to them are not tax deductible. Id. at 595-96. The Constitution did not compel a different result. \textit{See id. at} 594-95 (citing an Executive Order by President Kennedy in 1962). Some commentators have urged a broader reading of \textit{Bob Jones} and deny tax exemptions (which they see only as a subsidy, and not as an accommodation or autonomy issue) to any institution that discriminates on gender, sexual preference, or a host of other potential public policy grounds. \textit{E.g.}, David A. Brennan, \textit{Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities}, 2001 BYU L. REV. 167, 169-72.


\textsuperscript{61} Id. at *1. Three Catholic agencies were named as defendants, including USCCB. Id. The trial court, applying local rules for prose complaints, reviewed the complaint and dismissed it sua sponte, finding no legal basis on which to proceed. Id. at *1-*.3. At the time of this writing, an appeal has been filed and briefed, and awaits disposition in the U.S. Court of Appeals.
practice medicine according to the Church’s religious tradition. In this way, a relationship exists to the first trend or pressure.

Third, there are efforts to restrict the ability of a religious agency to exercise employment preferences based on religious values, which an exemption in Title VII of the Civil Rights Act of 1964 expressly protects, if that agency participates in government contracts. This issue has been a prominent part of the debate over the President’s Faith Based Organizations initiative. At the federal level, such a restriction would change a major provision in the original charitable choice law dealing with welfare reform, which provides that religious institutions are not required to sacrifice their institutional autonomy or Title VII religious employer exemption to participate in such a government program. Even if the federal exemption is preserved, restrictions on religious preferences in employment increasingly will be a feature of the efforts of local and state governments.

At stake here is a principle of common sense and a right of constitutional dimension. In today’s society, it is generally accepted that companies can hire those who agree with the mission of the company. The American Civil Liberties Union (ACLU) would not be forced to retain a staffer who publicly rebuked efforts to promote civil liberties. An environmental protection group would not be required to retain a

62. See, e.g., Assemb. 525, 1999 Leg. Sess. (Cal. 1999). California has considered and, under pressure, rejected attempts to impose such conditions. See id.

63. See supra notes 43-55 and accompanying text. Although the pressure on service delivery is direct and overt, the denial of tax exemption or access to tax exempt bonds is indirect. See supra notes 43-62 and accompanying text.


68. SAN FRANCISCO, CAL., ADMIN. CODE § 12B.2(b) (2003), available at http://www.sfgov.org/site/sfhumanrights_page.asp?id=5922#sec12b.2 (last visited Nov. 18, 2003) (limiting government contracts, unless the contractor provides domestic partnership benefits to employees).
staffer who argued the Endangered Species Act was unnecessary and wasteful. Microsoft would not be forced to retain an employee who operated web sites proclaiming Bill Gates is a monopolist. The ACLU, other advocacy groups, and even Microsoft, like other employers, are entitled to a work force that does not publicly discredit the institution based on their conduct. This is one of the lessons of Boy Scouts of America v. Dale. Mr. Dale, as an assistant scout master, publicly became associated with a gay rights group, and said he intended to use this public forum to reform the Boy Scouts' refusal to allow gay men as scout leaders. The U.S. Supreme Court overruled a state supreme court and held that the Scouts constitutionally could insist on associating leaders based on their willingness publicly to adhere to that message.

Dale illustrates that private groups have the right to insist that their leaders and their practices reflect the group mission, even if the leaders do not believe in the mission. In the area of religion, this right is more fundamental. The mission of religious institutions is measured by religious doctrine and practice. Religious groups have the same ability to employ those who reflect the values and teaching of the religion as secular agencies. The mission of religious institutions is not civil liberties, the environment, or computers, or even Scouting, but religion. Plainly, some people inside religious organizations disagree with aspects of the teaching and values of the institution and wish to use the civil law to force change on religious institutions. The mantra of civil rights is repeated in these debates, forgetting that freedom of religion is the first

69. It is well settled that institutions may not be forced to retain employees whose goals or actions are intended to communicate a message contrary to the employer. Boyd v. Harding Academy, 88 F.3d 410, 414-15 (6th Cir. 1996) (holding that it was acceptable to terminate a preschool teacher for engaging in premarital sex); Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 701, 705 (8th Cir. 1987) (holding that an employee may be terminated for violating the club's "role model rule"); Harvey v. YWCA, 533 F.Supp. 949, 955 (W.D.N.C. 1982) (holding that the YMCA is not required to employ counselors who maintain "an alternative lifestyle"); See also Hall v. Baptist Memorial Health Care Corp., 27 F.Supp. 2d 1029, 1038 (W.D. Tenn. 1998) (indicating that homosexuality is incompatible with job of Student Services Specialist). Political parties also have the right to prevent their ranks from invasion by those of differing political principles. Democratic Party v. Wisconsin, 450 U.S. 107, 124 (1981); Rosario v. Rockefeller, 410 U.S. 752, 760-62 (1973).

70. 530 U.S. 640 (2000).

71. Id. at 640 (2000).

72. Id. at 644, 646, 661.

73. See supra notes 52-55 and accompanying text. The plaintiffs in Weaver v. Wood were Christian Scientists. 680 N.E.2d 918, 918-19 (Mass. 1997). The litigants in most employment litigation against religious institutions belong to the defendant institution. E.g., EEOC v. Catholic Univ., 83 F.3d 455 (D.C. Cir. 1996); Maguire v. Marquette Univ., 814 F.2d 1213 (7th Cir. 1987).
civil right proclaimed in the constitutional text. Religious people and their institutions also have civil rights. Others are confused about the nature of religious organizations and forget that when such an organization loses the right to direct and shape itself according to religious doctrine, it ceases to be a religious institution. Yet, others do not recognize that the law allows a diversity of religious structures to serve a diverse and pluralistic society. Many may believe these pressures will make religious institutions more “American”, and by that they mean purely democratic, and yet they would prefer the secular model. One set structure and set of behaviors for all churches is actually un-American. Historically, the constitutional system has allowed a multiplicity of beliefs and practices to flourish. These efforts are unconstitutional because they allow the government to invade the internal, faith-directed practices of the Church. More than that, these efforts are an affront to plain old common sense. Everyone else has a self-evident right to hire and fire according to the institutional mission. Why not religion?

Fourth, an issue that is moving quickly in the state legislatures and the courts is the addition of mandatory contraceptive coverage to employer-provided health or prescription drug plans. This issue, along with the

74. See U.S. CONST. amend. I.
75. See Silo v. CHW Med. Found., 103 Cal. Rptr. 2d 825 (Cal. Dist. Ct. App. 2001) (involving a non-Catholic records clerk who proselytized his Catholic co-workers at breaks). After he was fired, the clerk sued, alleging religious discrimination. Id. at 829. A California intermediate appellate court agreed, finding that a public policy interest trumped a state law exempting religious institutions. Id. at 836. The California Supreme Court reversed, holding that federal and state constitutions give religious employers some latitude in hiring according to their mission. Silo v. CHW Med. Found., 45 P.3d 1162, 1169 (Cal. 2002).

76. Mark E. Chopko, Intentional Values and the Public Interest—A Plea for Consistency in Church/State Relations, 39 DEPAUL L. REV. 1143, 1178-81 (1990). In a southern California case, regulators sought to condition a homeless services contract on renaming the Saint Vincent de Paul Center the Mr. Vincent de Paul Center. See Mark E. Chopko, Don’t Exclude the Churches, NAT’L L.J., Feb. 29, 1988, at 14. Regulators backed down when confronted with the silliness of the suggestion. Id.

77. There is a long historical struggle over using the law to “Americanize” the Church. See, e.g., Philip Hamburger, Illiberal Liberalism: Liberal Theology, Anti-Catholicism, and Church Property, 12 J. CONTEMP. LEGAL ISSUES 693, 710 et.seq. (2002) (discussing intentions of New York legislators in the 1850s to force Catholic agencies into the congregational property model).

78. Zorach v. Clausen, 343 U.S. 306, 313-14 (1952) (“When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.”).

79. The trigger for contraceptive coverage is the presence of an employer health insurance program that provides prescription drug coverage. Catholic Charities of Sacramento, Inc. v. Superior Court, 109 Cal. Rptr. 2d 176, 182 (Cal. Dist. Ct. App. 2001), review granted, 112 Cal. Rptr. 2d 258 (Cal. 2001). If drugs are covered, all FDA-approved
eradication of any religious conscience exception, has become a top legislative priority of Planned Parenthood. The part of that strategy appears to be the passage of these mandatory coverage laws with as little public attention as possible so as not to attract opposition or amendment. Some states have enacted these laws with broad and conscientious protection for religious employers faced with contraceptive mandates, but others have denied the exemption to those religious employers who serve the community. Litigation in California and New York has directly challenged the laws denying exemptions and offered a constitutional basis for the Church's claims. The California Third District Court of Appeals has rejected the claim of Sacramento Catholic Charities for a constitutionally required exemption from the contraceptive mandates law. A trial court in New York has rejected the constitutional claim, relying on the California appellate decision.

The contraceptive mandate laws change everything about the proper limits on the government to dictate the internal faith-driven practices of religious institutions. These mandates infringe upon the religious expression of church employers, and invert the constitutional order on

contraceptive drugs (including abortifacient) must be included. Id. at 182 n.1. Catholic institutions cover prescription drugs as an expression of Catholic social teaching. Id. at 184. Thus, these laws present a classic dilemma. See id.


81. See Planned Parenthood of Metropolitan Washington, NEWSLETTER, Aug. 2001, available at http://www.ppmw.org/news/august2000newsletter.pdf. In the District of Columbia, such a bill was added after Catholic leaders were told no such measure would be proposed. The bill passed the City Council and was "pocket vetoed" by the Mayor after threatened intervention by the U.S. House of Representatives. The history of the bill is discussed in City Council Refuses Conscience Clause, ZENIT.ORG (Jul. 12, 2000), at http://www.consciencelaws.org/Examining-Conscience-issues/background/Contracept/BackContracept01.html.


85. Catholic Charities of Albany, No. 8229-02. Summary judgment was denied to Catholic Charities on November 25, 2003 (slip op.), and an appeal was filed in the state Appellate Division on December 19, 2003 (awaiting docketing in Third Department of App. Div.).
religious freedom issues and religious autonomy. If upheld, these mandates would revolutionize the essential power of the government in ways every citizen should find dangerous and offensive.

Research by the United States Conference of Catholic Bishops (USCCB) legal office has not yielded any case where government has forced a religion to pay for something out of its funds that the religion teaches is immoral. There is one possible historical analogue. In Colonial Virginia, a tax was proposed that was to be used to support religious teachers. Who could object to such a bill, which was supported broadly by the legislature and perceived to advance the very nature of human persons, thereby enhancing one's relationship with God? James Madison rallied support against the bill in his famous Memorial and Remonstrance:

The Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. . . . We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.

Madison acknowledged that once the principle was established that government had the power to compel such violations of conscience, there was no real limitation on that authority. Therefore, rather than wait for the powerful State to come to the door, "it is proper to take alarm at the first experiment on our liberties."

The situation involving contraceptive mandates is even more offensive. Madison was protesting a tax (placed evenly on citizens) from which direct tax support for religion would be offered. No one is proposing a state-sponsored insurance fund that might underwrite a public program;

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87. Id. at 71-72.
88. Everson v. Bd. of Educ., 330 U.S. 1, 63 (1947) (reprinted as an appendix, James Madison, Memorial and Remonstrance, para. 1); see NOONAN, supra note 86, at 72.
89. NOONAN, supra note 86, at 73.
90. Everson, 330 U.S. at 65.
91. See NOONAN, supra note 86, at 71-72. There are numerous challenges to taxation alleging that the tax program supports public initiatives that are offensive to religious conscience, e.g., war. Yet every effort to compel an exemption on religious grounds from the general tax program has been defeated. E.g., United States v. Lee, 455 U.S. 252, 254 (1982). Even an attempt to limit taxation on religious goods for sale has been rejected. Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 380, 382, 384 (1990).
the contraceptive mandate is a requirement placed on employers and funded by employers. Mr. Madison would be outraged.

The cases decided under the Religion Clause make clear that the government lacks the power to dictate choices inside a religious institution that are controlled by religious doctrine. Gonzalez v. Archbishop of Manila presented a controversy over enforcement of a private beneficial trust, which was trumped by religious institutional rights when litigants attempted to use the trust to circumvent Church law. Kedroff involved a legislative attempt to decide who would hold power in a church. Any governmental attempt to intrude into the inner order and governance of a church by artificially classifying certain matters as non-religious is per se unconstitutional. The State lacks the constitutional power to determine which issues are “religious” for a religion, or to “determine the place of a particular belief in a religion.”

Some state laws provide a so-called “religious employer” exemption from the contraceptive mandate. However, the exemption is designed not to exempt religious institutions by a narrow limitation to those institutions that teach their own, serve their own, and hire their own adherents. If a religious institution’s interpretation of Scripture causes it to look outward and serve the broader community, no exemption

92. See Petitioners Brief on the Merits at 5-8, Catholic Charities of Sacramento, Inc. v. Superior Court, 31 P.3d 1271 (Cal. 2001). Far from being a neutral law enacted out of concern for the welfare of women, the California act and its history reveal a direct attempt to violate the rights of Catholic employers in particular. See id. When a similar mandate could only pass with a broad religious exemption, proponents pulled the legislation rather than accommodate religion. Id.


95. Kedroff, 344 U.S. at 95-96.


98. See, e.g., CAL. HEALTH & SAFETY CODE § 1367.25(b)(1) (Deering 2003); N.Y. INS. LAW § 4303(cc)(1)(A) (McKinney 2003).

99. New York, California, and other states have a so-called exemption for “religious employers,” defined as:

an entity for which each of the following is true:

(A) The inculcation of religious values is the purpose of the entity.

(B) The entity primarily employs persons who share the religious tenets of the entity.

(C) The entity serves primarily persons who share the religious tenets of the entity.

(D) The entity is a nonprofit organization as described in Section 6033(a)(2)(A) or iii, of the Internal Revenue Code of 1986, as amended.

applies. Under this definition, Mother Teresa's Missionaries of Charity are "secular" employers because they do not limit their care of AIDS victims to Catholics. By enacting this legislation, the State claims the power to classify among admittedly religious institutions according to the State's determination of what is and is not religious. The government claims that it has the authority to regulate all matters within a workplace—even a workplace that is ordered and regulated according to religious teaching—as long as the regulation makes no derogatory statements about religion. In other words, the government appears to be religion-neutral. A closer look, however, reveals the inherently religious exercise in which the State is engaged.

The exemption statute classifies religious institutions according to whether the State ultimately thinks the institution exists to "inculcat[e] . . . religious values." The State is therefore classifying religious institutions somewhere on the continuum of its definition of "inculcation." Whether this means proselytizing directly, simply teaching about religion, or offering public witness about religious values through the provision of charity, indirect evangelism, or something else entirely, the determination must await a decision from the all-mighty State. No secular meaning exists for this terminology, and therefore, the exemption makes the State the arbiter of religion according to vague, elastic, and inherently religious, concepts.
In addition, to qualify for an exemption an institution must employ "primarily" those who "share the religious tenets" of the employer. Whether this is a numerical test based on church membership or affiliation versus those employees who actually practice the faith, or is a doctrinal test based on agreement with the Church on contraception, the test is still based on religious action alone. The exemption further requires service "primarily" to those "who share the religious tenets of the entity." Whether the State will decide this means that a Catholic Charities agency must serve only Roman Catholics versus all Eastern Rite Catholics in union with the Pope of Rome, or whether their decision will be based on agreement with some specific set of beliefs versus all religious tenets, illustrates the patent unconstitutionality of the exemption. In other words, the State is administering a process based on vague and elastic words that lack any secular meaning. In measuring the religiosity of the social gospel practiced by any agency, how can the State make that decision without resorting to its own potentially unconstitutional decision about what religion is and what it means? While the elasticity and vagueness of the terms implicates the autonomy rights of religious institutions, the inherent and undeniable religiosity of the terminology is what makes it non-neutral and religiously offensive.

Under either test, the law is unconstitutional.

However, for argument's sake, assume the State correctly asserts that the law is neutral. By arrogating the power of careful definition and avoiding derogatory statements about religion, the government says it can ignore the legitimate concerns of religion and still interfere in a religious workplace. The result is an attempt to coerce religion to abandon its teachings or withdraw from serving the society, but that the most basic command of the Establishment Clause—not to prefer some religions (and thereby some approaches to indoctrinating religion) to others.

*Id.*

105. CAL. HEALTH & SAFETY CODE § 1367.25(b)(1)(B) (Deering 2003); N.Y. INS. LAW § 4303(cc)(1)(A).

106. CAL. HEALTH & SAFETY CODE § 1367.25(b)(1) (Deering 2003); N.Y. INS. LAW § 4303(cc)(1)(A).

107. CAL. HEALTH & SAFETY CODE § 1367.25(b)(1)(C) (Deering 2003); N.Y. INS. LAW § 4303(cc)(1)(A).

108. CAL. HEALTH & SAFETY CODE § 1367.25(b)(1) (Deering 2003); N.Y. INS. LAW § 4303(cc)(1)(A). Both sets of issues are implicated here. The State claims the power to decide who and what are religious. That power is the very power rejected by the Court in *United States v. Ballard*, 322 U.S. 78, 86-88 (1944), the power to determine what is, and is not, orthodox. As framed, the exemption violates the most basic restriction on the States' power with respect to religion—that it has none. The exemption, like the statute it modifies, is per se unconstitutional. The use of religious terms presents the same problem as in *Lukumi* and triggers strict scrutiny, another means to render the statute unconstitutional. *See supra* note 104 and accompanying text.
attempt is valid, according to the State, if done in a neutral way. Therefore, health insurance is simply that; it is not a statement about religion. In the California legislative debates, it was questioned whether anyone, including Catholics, according to polling data introduced into the legislative record, could have any real objection to expanding access to contraception.\textsuperscript{109} Using this analysis in future cases, for example, the government might say, “food” is food; it has not barred or regulated kosher diets. More directly to the point, the State could determine what constitutes healthcare if it prevails, even if the State determines healthcare must include abortion. Citizens should be outraged at a government that claims the unbridled power to remake agencies within our society, while sweeping aside religious differences. As Jim Woods of the Church-State Institute at Baylor University said, “[I]f we lose the right to be different, we lose the right to be free.”\textsuperscript{110} Plainly the government does not possess the constitutional authority to remake religious functions in a free society. The First Amendment circumscribes the general powers of government, even its police powers.\textsuperscript{111} There are places that the government may not reach and there are constitutional, not merely political, limits on what the government may do.\textsuperscript{112}

\textsuperscript{109} Petitioners Brief on the Merits, at 11 n.7, Catholic Charities of Sacramento, Inc. v. Superior Ct., 31 P.3d 1271 (Cal. 2001) (indicating support of Catholics for contraceptives and urging legislators to do the “right thing” by providing insurance coverage for contraceptives).

\textsuperscript{110} Chopko, Intentional Values, supra note 76, at 1180.

\textsuperscript{111} U.S. CONST. amend I.

\textsuperscript{112} E.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925) (“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”). It is interesting to contemplate why the mandates have any exemption, even a contrived exemption, at all. There are only three possibilities: politics, the Constitution, or both. The political explanation is that without the fig leaf of the exemption, no mandate would pass. With the fig leaf, legislators are able to delude the electorate and each other into believing the “real religious institutions” are exempted. Without it, the State risks broadscale religious objections from citizens and groups who can see this effort for the affront to religion that it is. The constitutional explanation is that the State recognizes there are limits to its authority. Could the State coerce every religious institution, even those who do not serve the public, such as a group of contemplative religious women, to provide contraceptive coverage? If it did so, the plaintiff would be a Mother Superior forced to fund morally offensive practices for religious women, and a judgment of unconstitutionality likely would be automatic. Thus, the case about mandates is a classic one concerning who decides where to draw the line about religion. Normally, line drawing is the paradigmatic legislative function. However, attempts to segregate “secular” from “religious” jobs in religious institutions are invariably unconstitutional. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979); Espinoza v. Rusk, 634 F.2d 477, 479-82 (10th Cir. 1980); Walsh v. Montrose Christian Sch. Corp., 770 A.2d 111, 128-29 (Md. 2001). Classifying among institutions is also unconstitutional. See Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1346 (D.C. Cir. 2002).
Historically, those limits on government were well understood. It is difficult to contemplate the framers of the First Amendment debating the extent to which the government might intrude into the internal affairs of religious institutions. The idea that government could even consider seeking such invasive authority with respect to religion, much less wield it, was simply beyond the Framers' contemplation. The fight over those limits in contemporary society has been joined in earnest and will be significant not just for the shape of the Church, but also for the shape of a free society.

In addition to the First Amendment's Religion Clauses, these regulatory mandates also implicate the rights of speech and association. The Supreme Court has held that free speech protects not only spoken and written words, but also expressive conduct. The Court has stated, "[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." The Court clearly rejected governmental "intrusion into the internal structure or affairs of an association" when it limits a group's ability to communicate its message. Free speech and association, therefore, offer protection against a state-enforced orthodoxy.

In a particular application, the Supreme Court has held that compelled funding of conduct contrary to one's belief violates these guarantees. What one does, as much as what one says, expresses what one believes. Indeed, conduct often does more than words to express one's true religious convictions: "Religion may have as much to do with why one takes an action as it does with what action one takes." In the Christian tradition, a faith not expressed in conduct is inauthentic. Religious organizations cannot condemn something as immoral, and then fund that very immoral act through their institutions. Indeed, they have a right not

118. Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1346 (D.C. Cir. 2002).
119. See, e.g., 1 John 2:3-6; James 2:14-26.
to propound a view contrary to their beliefs. 120 "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 121 Regulatory mandates, if upheld, would void this constitutional tenet by forcing Catholic agencies to fund something that contravenes its body of Catholic teaching.

Even if the Constitution did not protect an institution's religious freedom and other freedoms, such as speech and association, the diverse set of institutions serving our society still deserve the right to be different. Left alone, our diverse peoples would create diverse institutions to serve their legitimate needs. But the question is not whether there is room in this society for the delivery of health, education, and social services by religiously diverse means. The people have already answered that question. 122 The question is whether, in pursuit of government-defined orthodoxy, the government has the right and the power to remake, or suppress, the religiously and philosophically diverse institutions created by our pluralistic citizenry. What is truly at stake is the claimed power of government to remake the churches in the graven image of the golden calf, the State. It is unfathomable why the danger, the lunacy, the repugnance—if not the patent unconstitutionality—of that claimed power is not self-evident to all citizens.

IV. THE IMPACT OF SCANDAL

The scandal, given new life in 2002 with the first re-reporting of the situation in Boston, did not begin overnight and it will not soon pass from the scene. 123 The scandal was not the creation of the Boston Globe nor any other media outlet; rather, it was created by a failure in the leadership of the Church, not everywhere or across the board, but in

120. Dale, 530 U.S. at 655.
122. For example, the wide array of public and private institutions, including religious institutions serving the people, is testament to the pluralism and diversity of the country and those who serve it.
enough places to raise, in the minds of the faithful, legitimate questions of the type with which this article began: who is driving and where are we going? This scandal is the Church's ENRON. Church leaders did not enrich themselves at the expense of the faithful or their works, but some of them failed in a more fundamental way. The Church has set high standards for itself and the world, and thus should not be surprised when those same standards are applied to it.

This institution of the Catholic Church was founded to lead people by speaking the truth about life, salvation and eternal life. Some of the leaders of this institution did not trust the people with the truth about their own ministers. People had legitimate questions about who was allowed to minister to them and why. These questions all had fair answers—answers that were sometimes not given or were lost in the storm that began to blow again in 2002. Because the initial answers by Church leaders were inadequate, in fact, they were withdrawn, updated, and recast; people lost faith in the ability or willingness of all the leaders of the Church to tell the truth, the whole truth. Because the process itself was secret and accountable to only the Bishop, additional concerns arose as to how the problems escalated. In turn, the faithful called for increased scrutiny by the government because the Church's responses were considered at best, incomplete and unreliable, and at worst, downright dishonest. The conduct of some in leadership could not have come at a worse time for the Church, already facing enormous pressures by litigants and regulators to force religious institutions to conform to the general secular model.

124. See United States Conference of Catholic Bishops, Diocesan Policies Dealing with Sexual Abuse of Minors, (Nov. 1994), available at http://www.usccb.org/comm/kit3.htm (discussing the treatment of complaints in the media). The Bishops' ad hoc Committee on Sexual Abuse identified some disclosure about the background of the person as one of the prerequisites for re-assignment. Id. Other prerequisites were successful completion of therapy and aftercare, a strong supervisory or monitoring program, the lack of public scandal, and favorable review by a dioceses advisory board or team, which was a precursor to the dioceses review boards in 2003. Id.

125. See BETRAYAL, supra note 37, at 101. Several days after the initial reporting in January 2002, the Archbishop held a news conference in which he stated emphatically that, to his knowledge, there were no priests in ministry who had committed sexual crimes against minors. Id. That statement was revised and explained several times over the intervening days and weeks. Id.


127. See supra Part II.
dangerous ways. We look for strong, effective, and moral leaders when we need them most. Someone has to say “enough is enough.”

V. SPECIFIC PROBLEMS STEMMING FROM THE 2002 SCANDAL

Three areas where the scandal of 2002 has exacerbated existing problems or created new ones for the Church are in governance, liability, and public responsibility.

A. Governance

For more than a century, canon lawyers and civil lawyers have discussed and considered the best civil law structures to use for the patrimony of the Church. It appears that the civil structures used by United States dioceses follow historical patterns and have more to do with custom and comfort than anything else. In the last twenty years since the New Code of Canon Law, there is increasing discussion about the propriety of certain corporate forms such as the sole corporation. The liability crunch that all institutions have faced in the same period of time has accelerated the attention given to these questions. When dioceses create new collections, central schools, or endowment funds, they are more likely to pay attention to whether the new matter is a part of the central administrative structure. If not, the entity takes a separate form, usually a corporation or trust.

Recently, renewed attention has focused on the structures that exist within the Church or each diocese, but little real attention has been given as to why these structures exist. Media, including even the most reputable periodicals like the Wall Street Journal, have reported that the dioceses that have been structured as multiple corporations for a century

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128. THOMAS W. SPALDING, THE PREMIER SEE 116-17 (1989). Parish Trustees often controlled parish property and competed with Bishops. Id. Baltimore received authority for a “corporation sole” in 1832, and became the model for similar laws in other states. Id. In the 1960s, property was transferred back to parish corporations, partially for liability reasons. Id. at 430-31. A parish is a public juridic person and is capable of ownership and administration of parish property under the canon law. NEW COMMENTARY ON THE CODE OF CANON LAW c.116, c.1255, c.1256 (John P. Beal, et al. eds., 2000).


130. NEW COMMENTARY ON THE CODE OF CANON LAW, supra note 128, at c.1256.


132. Id. at 118.

133. Id.
or more, do so to hide assets from plaintiffs.\textsuperscript{134} The scandal has increased the scrutiny and attributed improper motives to matters of ordinary business planning. The DePaul Institute for Church-State Studies completed a study on the structure of America's religions, finding a number of corporate and other forms adopted by religious institutions, which concern their own understanding of how they should be organized and how a church should best express itself.\textsuperscript{135} Such patterns, structures, affiliations, allocation of ecclesial responsibility, supervision (or autonomy), and governance reflect religious practices about basic polity issues. Unfortunately, what was accepted as normative church planning and organization is now under a microscope. Self-expression of the religious polity is under assault.

\textbf{B. Liability}

Dean Nicholas Cafardi of the Duquesne Law School has said that Americans use litigation to show their displeasure.\textsuperscript{136} If so, they are very displeased with the Church. Years ago, most of the victims that came to the Church sought two things: an apology or acknowledgment; and assurance that such misconduct could never occur again.\textsuperscript{137} The Church's institutional failure to deliver on these basic needs helped fuel the scandal of 2002 and the litigation in between.\textsuperscript{138} The bottom line is that dioceses and religious institutes should not seek out litigation as a first resort, nor should they provoke plaintiffs into such a forum. If sued, however, the Church has the same right to defend itself as anyone else. Failing to defend itself would expose the patrimony of the Church,

\begin{itemize}
\item \textsuperscript{134}Milo Geyelin, \textit{Beseiged Church Tries to Protect Vast Real Estate}, \textit{WALL ST. J.}, May 15, 2002, at A1. Although I explained the canon civil issues to the \textit{Wall Street Journal} in three interviews lasting more than four hours, apparently it did not fit the story line. I do not appear in the story, and neither does the correct view of the Church's internal law.
\item \textsuperscript{137}This conclusion is my own opinion, derived from observing hundreds of individual cases.
\item \textsuperscript{138}This observation, of course, also is my private opinion but one based on the observation of hundreds of cases, and discussions with countless lawyers on both sides and diocesan victim assistance personnel over the years. Compensation was secondary to the victims. That fact seemed truer years ago than today, where the monetary claims seem to have a greater prominence. Said another way, when I first started in this work, it was just as likely that dioceses would hear directly from victims (or their parents) than from a lawyer. Today it seems most claims are stated in the courts (or at least the press) first.
\end{itemize}
dedicated to the service of the people and the community, to potentially ruinous dissipation.\textsuperscript{139}

Every first-year law student knows that liability follows responsibility.\textsuperscript{140} If a religious body structures itself in a particular way, placing responsibility for some action in a specific body or structure, that body or structure (and not some other entity) has responsibility and liability for the failure of responsibility.\textsuperscript{141} In \textit{N.H. v. Presbyterian Church (U.S.A.)}, the supervision and discipline of ministers was placed in regional judiciaries, not in local congregations or in the national assembly.\textsuperscript{142} Thus, civil courts must respect the structural demarcations between entities. Moreover, in the case of religion, the allocation of responsibility among various entities is done for religious reasons respecting the denomination’s self-understanding of each entity’s role. A grandiose complaint against a religious body, such as in \textit{N.H. v. Presbyterian Church (U.S.A.)},\textsuperscript{143} or the Dallas litigation, invites the civil courts to disregard the basic rules of corporate and constitutional law to remake the polity.\textsuperscript{144}

In addition, the scandal has brought criminal actions to the threshold of the Church.\textsuperscript{145} Certainly, priests who abused children committed crimes. Their religious superiors, however, are another matter. Absent a legal requirement, usually one based on an intention to harm a child or aid in the commission of a crime, it is difficult to discern the criminal

\textsuperscript{139} Again, this is my private opinion. The absence of legal liability (due to statute of limitations or failure to state a claim) does not mean the end of moral responsibility to assist victims.

\textsuperscript{140} Chopko, \textit{Ascending Liability}, supra note 29, at 292-95.

\textsuperscript{141} See id. at 289; see also Chopko, \textit{supra} note 26, at 1096-97.

\textsuperscript{142} \textit{N.H. v. Presbyterian Church (U.S.A)}, 998 P.2d 592, 598 (Okla. 1999).

\textsuperscript{143} See, e.g., id. at 594.

\textsuperscript{144} Generally, facts pleaded in a complaint are regarded as true for the purposes of ruling on a motion to dismiss. \textit{See} \textit{Fed. R. Civ. P. 8(f)} (indicating that pleadings should be liberally construed). To make a stronger case, litigants claim facts as true regarding religious structure, doctrine, or authority, essentially pleading a polity that sometimes bears no resemblance to the actual polity. \textit{See}, e.g., \textit{N.H.}, 998 P.2d at 594-98. Motions to dismiss that challenge the subject matter jurisdiction of courts, however, shift the burden to plaintiffs and false facts may not be regarded as true. Hiles \textit{v. Episcopal Diocese of Mass.}, 773 N.E.2d 929, 938 (Mass. 2002); Bryce \textit{v. Episcopal Church}, 121 F.Supp. 2d 1327, 1334 (D. Colo. 2000), \textit{aff’d}, 289 F.3d 648 (10th Cir. 2002).

elements that would be involved. Nonetheless, aggressive prosecutors, with the stick of grand jury subpoenas and potential fines and punishments, review the deliberations of priest personnel boards and second-guess assignment decisions made generations ago under different circumstances.\footnote{146} The result has been a series of reports, based on selective testimony and without cross examination, that proves to be derogatory to the Church. The actions of religious superiors might have been misguided, but not criminal.\footnote{147} On the other hand, in some instances where Bishops have removed priests, some accused priests have retaliated with defamation and other lawsuits, and even some have sued the victims.\footnote{148}

Finally, some of the novel claims are fanciful: there is no RICO liability in sexual misconduct cases for personal injury,\footnote{149} there is no liability in the Holy See,\footnote{150} and confidentiality agreements negotiated in good faith between litigants and approved by a judge are not part of a diocesan cover-up.\footnote{151} Frankly, the financial demands of some claimants, and their lawyers, are so large that they are forcing litigation rather than inviting compromise.\footnote{152} The huge Dallas verdict in 1997 has so skewed

\footnote{146. For example, in 2003 the Archdiocese of Cincinnati pled that it failed to report felonies a generation ago. Ohio v. Archdiocese of Cincinnati, Case No. B0311000, Ct. Com. Pl. Hamilton County, Ohio. \textit{See generally} Baker, \textit{supra} note 145, at 1061 (noting the inherent difficulties with prosecutions for church scandal cases and arguing that “bishops and their dioceses are not proper targets for possible criminal indictment for the crimes of individual priests”).

\footnote{147. If indeed Bishops satisfied the criminal standard, an indictment is not out of the question at this writing. More worrisome is the publication of “reports” that present “the case” for church wrongdoing with no opportunity for the other side to present evidence. \textit{See, e.g.}, Robert D. McFadden, \textit{L.I. Diocese Deceived Victims of Abuse, a Grand Jury Says}, \textit{N.Y. Times}, Feb. 11, 2003, at A1; Daniel J. Wakin, \textit{Rockville Centre Bishop Rebuts Grand Jury Report, N.Y. Times}, Feb. 13, 2003, at B5.


\footnote{149. RICO claims do not lie for personal injuries and raise difficult First Amendment issues with respect to religion. \textit{E.g.}, Hughes v. Tobacco Inst., Inc., 278 F.3d 417, 422 (5th Cir. 2001); Van Schaick v. Church of Scientology, 535 F.Supp. 1125, 1135, 1139 (D. Mass. 1982).


\footnote{151. \textit{But see} Elissa Gootman, \textit{Vindication, and Sadness, at Release of Jury Report, N.Y. Times}, Feb. 12, 2003, at B6. The issue of litigants’ confidentiality agreements also is complex. Also perplexing is that many lawsuits are commenced in the name of “Doc” plaintiffs, who themselves do not want disclosure. \textit{E.g.}, Malicki v. Doe, 814 So.2d 347, 352 (Fla. 2002) (identifying plaintiffs as Jane Doe I and Jane Doe II).

\footnote{152. Gustav Niebuhr, \textit{Dioceses Settle Case of Man Accusing Priest of Molestation, N.Y. Times}, Aug. 22, 2001, at A17 (pointing out that a recent Dallas jury award of $120 million, although reduced by the judge, nonetheless “created a more adversarial legal environment with which Catholic authorities have had to contend”).}
the negotiating table that insurers would rather defend than settle,\textsuperscript{153} which means that we go off to war instead of determining how to win the peace.

The situation has degenerated to such an extent that the Church has already seen more than a thousand new claims and claimants over the past twenty-four months beginning in January 2002. The toxic media attention to every action, construing every ambiguous passage or kind reference to indicate a lapse of morality,\textsuperscript{154} treating every reported allegation as true, giving undue attention to half-truths about the church in grandiose lawsuits (but virtually no attention to their dismissal or withdrawal),\textsuperscript{155} is too long and complex a subject for this article; however, every litigator recognizes the deliberate effect that media attention has on the jury pool and on the legislatures.\textsuperscript{156} Consequently, legislators in a number of states have been invited to narrow the privileges available for all churches,\textsuperscript{157} to drop the statutes of limitations for all charitable and child caring institutions,\textsuperscript{158} and to flirt wholesale with the disregard of constitutional principles,\textsuperscript{159} such as not policing the internal affairs of churches.

\textsuperscript{153} Id.

\textsuperscript{154} Complimentary language in letters to clerics from Bishops does not indicate agreement with the conduct, but in my long experience, it is simply the way that clerics talk to each other. Even so, I confess, that I am unable to explain all of what I have read in the public record.

\textsuperscript{155} For example, there was an abundance of news coverage surrounding RICO suits against dioceses, orders, and the Holy See. See CBSNews.com, New Tactic in Catholic Sex Scandal, Mar. 22, 2003, available at http://www.cbsnews.com/stories/2002/03/22/national/printable504352.shtml (last visited Nov. 18, 2003) (indicating that although plaintiffs have sued under federal racketeering laws, such suits have often failed); Amy Driscoll, Church Faces Racketeering Suit, MIAMI HERALD, Mar. 22, 2002, available at http://www.miami.com/mld/miamiherald/2910364.htm (announcing an ex-seminarian’s racketeering claims against a former Florida Bishop). By contrast, no news coverage occurred when the claims in Los Angeles and Florida were withdrawn; the coverage was almost non-existent. The best example is the Dallas Morning News report of Bishops’ alleged actions concerning accused priests on the eve of the June Bishops meeting. Brooks Egerton & Reese Dunklin, Two-Thirds of Bishops Let Accused Priests Work, DALLAS MORNING NEWS, June 12, 2002, available at http://www.dallasnews.com/religion/bishops/stories/061202dnmetntlbishops.49a25.html. The report simply repeats claims (even unproved ones), but not their resolution. Id.


\textsuperscript{158} CAL. CIV. PRO. CODE § 340.1 (Deering 2003). California suspended its statute of limitations in civil cases for a year. Id. §§ 340.1(b), (c).

\textsuperscript{159} See U.S. CONST. amend I.
Litigation will waste resources on attacking and defending the Church that can be better spent resolving claims with fairness and justice. Bankrupting churches and forcing them to recede from the ministries of preaching, teaching, sanctifying, and serving is not the answer. It has come as quite a shock to the news media over the last year, that the vast majority of the money contributed by the faithful every Sunday remains in the parish where it is directly applied, and consumed.\textsuperscript{160} The contributions are used for the daily life of the parish church: keeping the lights and heat on, running schools and homeless shelters, and reaching out to the poor and vulnerable.\textsuperscript{161} The money is not there for the taking (or even the giving) without the pinch being felt somewhere else in the Church’s life.\textsuperscript{162} Yet, even if no legal liability exists, there are obligations in justice to which lawyers for the Church must respond. If the Church is able to see beyond the smoke of litigation and give of its resources, will the insurers and the lawyers do the same? Insurers can give a little more by way of proceeds, and lawyers can reduce their own contingency fees and compensation if such actions result in better and more efficient compensation for victims. To move beyond the present moment, individuals within the Church must feel the pain of those victims to make the Church whole again. Both the Church and the victims must respond with justice. The Bishops have apologized and declared a scandal will never happen again.\textsuperscript{163} We must hold them to that commitment.

\textbf{C. Responsibility}

There are increased internal and external pressures from the Church for leaders to be transparent and accountable.\textsuperscript{164} The Church’s law provides for a number of structures and consultative bodies.\textsuperscript{165} The law invites the publication of financial reports and accounting to donors.\textsuperscript{166}


\textsuperscript{162} See \textit{id.}


\textsuperscript{164} \textit{Id.} at arts. 7, 8. The Office of Child & Youth Protection (USCCB) has produced a public report on diocesan efforts to respond to the Charter. See http://www.usccb.org/ocyp/audit 2003/report.htm.

\textsuperscript{165} \textit{The Code of Canon Law: A Text and Commentary} c.1277, c.1278, c.1280 (James A. Coriden, et al. eds., 1985) (providing for involvement of consultants and a finance council in the administration of property).

Individual donors are insisting on new assurances about protecting donations from use in litigation or settling claims. Tax and law enforcement authorities are inquiring about the sources of funds for certain payments and activities. The turnover of individual contributors creates a drain on some diocesan finances that, coupled with a downturn in the economy, has necessitated layoffs and reductions in services at a time when the Church’s institutions are under greatest pressure. The biggest sign of the impact on donors and the faithful was the report of one Bishop during the discussion in the Dallas meeting about a national day of reconciliation and penance. He reported that one member of the faithful asked him why the people should do penance for the Bishops, when it should be the other way around.

The impact on responsibility occurs significantly in the area of public witness. Church leaders are questioned about why they would testify in Congress about protecting children in Africa when they have not protected the Catholic children entrusted to their care in the United States. The messenger is being shot, in part because the messenger is disliked, even if the message itself is truthful and vital to the formation of a moral policy. A curious example of this situation occurred in the Supreme Court’s decision in *Atkins v. Virginia*, striking down as unconstitutional the application of the death penalty to mentally retarded prisoners. The Court’s jurisprudence for a half century has required the Eighth Amendment and the death penalty to be measured against the “evolving standards of decency that mark the progress of a maturing society.” That inquiry is a moral question that requires resort to the views of moral institutions: religious bodies. On behalf of a group of religious bodies in the United States, Christian and non-Christian, western and eastern religions, the USCCB filed a brief asking the Court

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172. *Id.* at 318-26.
to recognize these religious voices as important to the resolution of the question.\textsuperscript{174} The brief also asked the Court to express the views of these representative religious bodies that believed the application of the death penalty to the mentally retarded was immoral, was not reflective of a civilized society, and should be ruled unconstitutional.\textsuperscript{175} The majority opinion decided in June 2002, one week after the Bishops' meeting in Dallas, so noted the brief.\textsuperscript{176} In his dissent, the Chief Justice noted the brief, and said such views were legally irrelevant.\textsuperscript{177} Justice Scalia, who is Catholic, went beyond the Chief Justice's statement to say: "The attitudes of [the United States Catholic Conference] regarding crime and punishment are so far from being representative, even of the views of ordinary Catholics, that they are currently the object of intense national (and entirely ecumenical) criticism."\textsuperscript{178}

VI. STRUGGLING WITH SCANDAL

It is unacceptable to demand that the Church's witness be silenced because of the sins of a few of its ministers and the inept behavior of a few of its leaders. Long-term principles must not be sacrificed for short-term punishments. Voices of religion are essential to shaping a free society. Moral questions pervade public policy and demand moral voices. Should we be at war with Iraq? Should we tax ourselves more to care for the poor? Should we restructure the way education is delivered? Should we execute snipers even if they are minors? These questions go to the heart of who we are as a people, struggling to shape a society to be more just, more charitable, more loving, and more chaste. George Washington made plain that the shape of this democracy depends on the voices of religion for stability and values.\textsuperscript{179} That statement is even more true today. The message cannot be discarded on account of the sinfulness of a few of the messengers.

\textsuperscript{175} \textit{Id.} Although the brief was filed in \textit{McCarver v. North Carolina}, it was transferred to \textit{Atkins} when \textit{McCarver} was rendered moot. McCarver v. North Carolina, 533 U.S. 975 (2001).
\textsuperscript{176} \textit{Atkins}, 536 U.S. at 316-17 n.21.
\textsuperscript{177} \textit{Id.} at 325-26 (Rehnquist, C. J. dissenting).
\textsuperscript{178} \textit{Id.} at 347 n.6 (Scalia, J., dissenting). It could be that Justice Scalia was commenting on the apparent rejection by Catholics of the Holy Father's condemnation of the death penalty. \textit{See id.} That the Church leadership is ahead of the flock would, however, warrant different wording. This sentence may be viewed as a slap at the Church over the scandal and, if so, warrants some explanation from the Justice.
\textsuperscript{179} 149 CONG. REC. S2549 (daily ed. Feb. 24, 2003) (annual reading of Washington's farewell address on his birthday). Washington said that "religion and morality are indispensable supports" for national prosperity and stability. \textit{Id.} at S2552.
The scandal also gives pause to ask whether it will be the excuse to abandon time-tested constitutional principles about the properly limited role of government in regulating the internal operations of religious institutions. The handiwork of legislatures and regulators has placed pressure on religious institutions, but it has been made worse by scandal. Scandal causes merited and principled arguments about the autonomy of religious institutions to sound hollow and empty. It causes legislators and judges to give less credence to those arguments in particular cases. It incites those who have policy agendas that run counter to religious institutions to take new interest in commencing campaigns that limit the reach and impact of religion.

Scandal, however perceived, is never a reason to abandon the rule of law. Even worse, one cannot use scandal as a reason to secularize and abandon religious institutions. In Robert Bolt's play *A Man for All Seasons*, Thomas More says he would "give the devil the benefit [of the rule] of law," for when all the laws are twisted and rent, and torn down by the State to do its will, where will the just find shelter? If this excuse is allowed to limit or void vital constitutional principles, society will come to regret and rue the day when the rights of society's vital mediating institutions were traded for policing and punishment. Lawyers have a particular responsibility by virtue of our professional oaths to preserve

180. See supra Part III.B.

181. For example, the police could not demand a place at the table of a priest, minister, or rabbi personnel board to assure the purity of candidates for parochial assignment. That is unconstitutional. *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (holding that government must avoid excessive entanglement with religion). It seems to be a short step, if one at all, to the grand jury second-guessing of those decisions a generation later. Yet, resisting a subpoena on sound legal principle provokes a negative reaction in the public and the press. Invoking the rule of law, even correctly, appears as if the Church has something to hide.


183. Larry Witham, *Church Faces Calls for Complete Change*, WASH. TIMES, July 7, 2002, at A04. The story reported Planned Parenthood's announcement that it would not desist from its efforts to restrict the Church and advance its agenda for contraceptive equality. *Id.* Indeed, in this political environment, why should it?


More: And go he should, if he was the Devil himself, until he broke the law!
Roper: So now you'd give the Devil benefit of law!
More: Yes. What would you do? Cut a great road through the law to get after the Devil?
Roper: I'd cut down every law in England to do that!
More: Oh? And when the last law was down, and the Devil turned round on you– where would you hide Roper, the laws all being flat?

*Id.*
the rule of law and not to abandon constitutional precepts. Remaking
the Church in the image of the government was not the answer in the
eighteenth century and is not the answer in the twenty-first either.

VII. RECOVERING THE CHURCH

Who, then is driving the cab called "Church," and where is it going?
Clearly, some people have decided to make their own way and choose
what they deem an appropriate direction for the Church. Many issues
must and will be addressed as the Church moves forward and evolves in
ways as yet imperceptible.

For what it is worth, I believe that the Church has started on the right
path. The Charter for the Protection of Children and Young People is a
good beginning—just the beginning—to making things right, and to
restore not just confidence and trust, but pride in the Church. If the crux
of the problem was failure to trust the people with the truth about the
men ministering to them and the secrecy in the review and assignment
system, opening up that process to legitimate lay assistance is part of the
remedy. Pulling back the cloak of secrecy, the Church has a
responsibility to collaborate in this work in lay review boards, in financial
transparency, and in calling its leaders to the task of doing things right.
Unfortunately, future abuse in the Church may be unavoidable. That
these cases occur only marks the humanity or weakness of the people
within the Church. But the true measure of progress will be whether the
victims are treated with the respect and dignity they deserve.

Ultimately, the people of God must take a stand as to whether we
believe that God still lives through this institution we love and whether it
is worth preserving, allowing it to shape itself to God's will, not ours. We
citizens of this country have to decide whether the limits on government
can be disregarded in this time of crisis and scandal. Church and State
meet in the person, the child of God, and the citizen of this country. Religious liberty is a human right because it allows the person to seek the

185. The New York Times survey on priest abuses and victims ended with a reference
to a professional opinion that the Church will see an influx of cases in 2005. Laurie
Goodstein, Trail of Pain in Church Crisis Leads to Nearly Every Diocese, N.Y. TIMES, Jan.
12, 2003, at A1. But an influx would mean that, despite the thousands of new cases
coming forward, there are still many who will wait. Right now, the media and political
environment are favorable and lawyers are actively seeking cases. Second, there are far
fewer instances of abuse reported after the diocesan policies went into effect in the early
1990s, and the reports are a fairly constant handful every year. Id. at A20 (charting the
percentage of priests accused, by year or ordination).

186. Raymond Cour, C.S.C., Catholics and Church-State Relations in America, in
ROMAN CATHOLICISM AND THE AMERICAN WAY OF LIFE 107 (Thomas T. McAvoy ed.,
1960).
Truth as revealed. Religious liberty is a constitutional right to assure that the search for the Truth, and the institutions created to express that Truth in a society should be protected from the expansive powers of government. Neither “Church” nor “State” exists in the abstract—each has concrete expression in every person.

The shape of the Church in the next months and years will be different than it was in the months and years we have just experienced. Recovering the Church and preserving it from the secular forces that buffet it will require the hard work and dedication of good and strong women and men who will allow God’s will to work, rather than their own or the government’s. Catholic people, especially Catholics in government and law, must lead the way to resist change for its own sake when the price tag is the surrender of religious witness, religious expression, and religious institutions.


188. ANSON STOKES, CHURCH AND STATE IN THE UNITED STATES 560 (1950) (“The various governments in the United States do not merely refrain from interfering with religious affairs, but act affirmatively to protect the public worship of all denominations . . .”).