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The Pope's Submarine

JOHN H. GARVEY*

This Article looks at the conflict between religious authority and liberal politics from a point of view within the Catholic Church. It examines the grounds of the teaching authority asserted by the Church, the scope and strength of that authority, and the possibility that obedience to authority will create dilemmas for religiously committed public officials. For purposes of illustration it uses New York Governor Mario Cuomo's religious and political observations on the subject of abortion.

This Symposium was convened to discuss the place of religious arguments about public policy in a liberal democracy. We typically look at the problem through the lens of legal theory or political theory. I want to approach it from the opposite direction—to look at how liberal politics might get in the way of a public official's religious obligations, and how the conscientious politician can deal with this dilemma. Religious obligations differ across denominations, so I will confine my observations to the Catholic politician. I focus on Catholics for several reasons. I myself am one, so the issue has some personal interest. And Catholics are the largest denomination in the United States, so the question matters for a lot of people. The Catholic Church also asserts more authority over its members (a stricter obligation on their part to obey) than most American sects do. In

* Ashland Professor of Law, University of Kentucky. I would like to thank Walter Bado, Gerard V. Bradley, James T. Burtchaell, David Little, Thomas L. Shaffer, Richard G. Wilkins, and the Symposium participants for reading this Article with unusual care and making a host of thoughtful suggestions, some of which I have been wise enough to heed.
addition, the American Catholic bishops in recent years have exercised their teaching authority across a range of publicly salient issues—the economy, nuclear war, abortion, medical care, and so on. These facts, taken together, multiply and intensify the occasions when Catholic politicians are forced to reconcile their religious and political loyalties. Sometimes the drama is compelling enough to capture the attention of the newspapers.

Consider the case of Mario Cuomo. He is the Governor of New York and a liberal Democrat. In September 1984, he gave an address at the University of Notre Dame entitled *Religious Belief and Public Morality: A Catholic Governor’s Perspective*.\(^1\) He began by explaining that he accepted the Church's teaching about abortion as the rule for his own life.\(^2\) But as a public official he could not approve a legal prohibition of abortion.\(^3\) Most of New York's citizens were not Catholics, and many of them (indeed many Catholics) disagreed with what the Church said. An anti-abortion law would be unfair to them, and ineffective in the way Prohibition was.\(^4\) Cuomo added that he also favored Medicaid funding of abortions for the poor.\(^5\)

A month later Archbishop (now Cardinal) John J. O'Connor of New York said that, although he would not urge voters to choose any particular candidate in the upcoming elections, the most important question they faced was the need to “protect the rights of the unborn.”\(^6\) O'Connor may have had several politicians in mind. Geraldine Ferraro, another New York Catholic whose views mirrored Cuomo's, was then running for Vice President. Two years later O'Connor's Vicar General, Bishop Joseph T. O'Keefe, announced that parishes within O'Connor's archdiocese should not provide a platform to speakers “whose public position is contrary to [the] teaching of the Church.”\(^7\) O'Keefe said the policy was not aimed at


\(^2\) Mr. Cuomo stated:

As a Catholic, I accept the Church’s teaching authority. . . . I accept the Bishops’ position that abortion is to be avoided.

As Catholics, my wife and I were enjoined never to use abortion to destroy the life we created, and we never have. We thought Church doctrine was clear on this, and, more than that, both of us felt it in full agreement with what our hearts and our consciences told us.

*Id.* at 21.

\(^3\) *Id.* at 24.

\(^4\) *Id.* at 25.

\(^5\) *Id.* at 25-26.


Cuomo, though it would of course apply to him.8

The controversy has not subsided. In November 1989, the National Conference of Catholic Bishops passed a resolution declaring that “no Catholic can responsibly take a ‘pro-choice’ stand when the ‘choice’ in question” involves abortion.9 Three months later Bishop Thomas V. Daily, the new head of the Brooklyn Diocese (where Cuomo has lived most of his life), said he would not permit the governor to speak on abortion in any of his diocese’s churches.10 And in June 1990, Cardinal O’Connor warned that Catholic politicians who make public funds available for abortions “are at risk of excommunication.”11

I want to use this case as a context for thinking about three questions. First, why should Cuomo, as a Catholic, have to pay any heed to the views of the bishops? What are the grounds of the religious authority which the Catholic Church asserts over its members? Second, when and to what extent does Cuomo’s religion oblige him to heed his Church’s teaching? What are the scope and strength of the Catholic Church’s teaching authority over its members? Third, if Cuomo did heed his Church’s teaching out of a sense of religious obligation, would this be illegal, impolitic, or illiberal? Is this kind of religious authority inconsistent with the letter or spirit of the American system of government?

I. THE GROUNDS OF RELIGIOUS AUTHORITY

There was a time when people relied upon their religious sense to help them understand the idea of political authority. This is why German kings for centuries claimed the title of Holy Roman Emperor. I think the tables are turned today. For most of us political authority is a familiar — even congenial — notion, but it is hard to see why we should take seriously a claim of religious authority. Though the two ideas are not congruent there is some overlap, and a brief review of the grounds of political authority is a good way to approach the subject of Part I.

In what follows I will ask you to suppose that X is a citizen and Y

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8. Id. at 138-54.
is a political official, a political institution, or the government itself (in a collective sense) in X's society. When we say that Y has authority over X we mean, among other things, that X has an obligation to obey Y in certain matters. I pass over such details as the scope of Y's jurisdiction and the strength of X's obligation (whether it is certain or merely prima facie, absolute or defeasible), and so on. Authority is thus a kind of jural contradictory of freedom: If Y has authority over X then X lacks freedom to that extent. Why would X be willing to give up her freedom and submit to Y's political authority? Or more briefly, what are the grounds of political authority?

One obvious justification for political authority is that it is the only sensible solution to coordination problems. For many political issues it matters more that we resolve them than how we resolve them. It is a matter of indifference to me whether I drive on the right or the left side of the road; but I don't want any oncoming traffic on my side. To take a more timely subject, given that I have to pay income taxes, I don't really care whether I pay them on April 15 or July 1; but it is administratively simpler to have everyone pay on the same day. All that we need in these cases is a convention. There are a number of possibilities to which we would agree. The problem is how to signal everyone so that we can act harmoniously and not collide, like Alphonse and Gaston going through a doorway. The obvious solution is to let Y specify the convention and require everyone to observe it.

We can justify the use of authority to solve prisoners' dilemmas on similar grounds. Here the choice among outcomes is not a matter of indifference, but citizens will opt for a mutually harmful outcome unless they are assured that others will cooperate. The provision of public goods (street lights; the army) is an example. If no one enforced the tax laws, the wise course for each X would be to cheat: if others paid, X would get free lighting and defense; if others did not pay, X would be foolish to do so. And if each X reasoned that way, we would have no public goods. The solution that is mutually most satisfactory can only be reached if each X grants Y enough authority

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13. See the discussion in Raz, supra note 12, at 30, 49. A broader though related argument is made in Yves Simon, *Nature and Functions of Authority* (1940). Simon contends that authority would be necessary even in a community of intelligent adults acting with perfect good will. Its essential function would be "to assure the unity of action of a united multitude." Id. at 17. But he has in mind, apart from coordination problems, cases of persistent disagreement in matters of practical reason.
to prevent cheating.\textsuperscript{14}

Not all political issues, however, are simple problems of coordination. That is a justification for political authority that reaches only some of the things governments do. A second kind of argument holds that authority is justified when it rests on consent. This is a familiar theory to students of American government. The Declaration of Independence asserts that governments derive "their just powers from the consent of the governed." In the Constitution the people "vest" power in the three branches of government. Statutory law (made by elected officials) is superior to common law (made by judges) because the former are better attuned to the voice of the people.

Consent is also the organizing principle of social contract theory. Locke argues in \textit{The Second Treatise} that no one can be "subjected to the political power of another without his own consent."\textsuperscript{15} Now there are various ways of explaining why consent should be significant, but one very influential one is this: The primary axiom of moral theory (many people say) is that I should pursue my own good in my own way. Political authority appears to be inconsistent with this axiom, because it deprives me of the freedom to act as I wish. But if I authorize the authority to act for me — if I make it my agent — its acts are my own. So there is no loss of autonomy when I consent to authority.

Why, though, would I want an authority to act for me? One strand of social contract theory says I do so for instrumental reasons — I undertake obligations in return for other benefits which, on the whole, outweigh the burden of submission. When I hire a lawyer, I authorize the lawyer to bind me in negotiations, at trial, and so on. This has a cost, but it also amplifies my own power to act. So too with the government. Submission to political authority has a cost but, say Hobbes and Locke, it is the only sure way to preserve my life, liberty, and estate. It might also afford benefits (like culture) that are not possible outside political society.

The other strand of social contract theory, found in Rousseau, takes a noninstrumental view of consent. It holds that there is moral value in shaping my own world — the projects I undertake and the relationships I enter into. Just as the relationship between husband

\textsuperscript{14} See the discussion in \textit{Edna Ullmann-Margalit, The Emergence of Norms} 18-73 (1977).

and wife has intrinsic value, so it might be with the relation between
citizen and society. Consent is a constituent element in these
relationships.16

Like the need for coordinated action, consent is not a completely
satisfactory foundation for political authority. There are two obvious
problems with relying too heavily on it. One is that, except for natu-
ralized citizens, people do not actually consent to the government's
authority. The other is that the government's authority is so exten-
sive that even if people did consent, it is hard to see how their con-
sent could be informed and intelligent.

Joseph Raz has recently proposed a third ground for political au-
thority. He suggests that Y's authority depends on a showing that X
"is likely better to comply with reasons which apply to him (other
than the alleged authoritative directives) if he accepts the directives
. . . as authoritatively binding and tries to follow them, rather than
by trying to follow the reasons which apply to him directly."17 Con-
sider this illustration. I have investment objectives which I communi-
cate to my broker: do not do anything risky; aim for long-term
growth, not short-term profits; diversify; etc. These are what Raz
would call "reasons which apply to X." Until recently I made my
own investments and earned an average of five percent annually.
Now I let my broker choose for me, and I earn ten percent. I satisfy
my own investment objectives better by giving him authority over
my account.

I need to clear up a point about the nature of this authority. Sup-
pose that in 1991 I tried a mixed approach. I considered my broker's
advice as an independent and weighty reason bearing on each invest-
ment decision. But I also factored in my own hunches and tips and
made my own judgments, because sometimes my broker has been
wrong and I wanted to correct for those cases. In 1991 I made seven
percent. When I say that he now has authority over my account, I
mean that he has preemptive authority — I let him decide even in
cases where I think he is wrong.18

Raz calls this the "service conception" of authority, because the
"role and primary normal function [of authorities] is to serve the
governed."19 We often see the service conception at work in adminis-
trative law. The Environmental Protection Agency and the courts
have the same reasons for wishing to stamp out air pollution — the
reasons that moved Congress to pass the Clean Air Act. But in liti-
gation under the Act courts can best comply with these higher-order

76 (J. Roland Pennock & John W. Chapman eds., 1987); Raz, supra note 12, at 80-94.
17. Raz, supra note 12, at 53 (emphasis omitted).
18. Id. at 57-62.
19. Id. at 56.
reasons by following the EPA’s rules, because this is a complicated matter, the EPA knows a lot about science and industry, it has investigated the problem in depth, and it has to make a pattern of interlocking practical judgments. A court should not ignore the EPA’s rules just because it thinks they are wrong. Nor should it treat the EPA’s opinion as a kind of expert testimony, to be added in the mix of reasons for and against a particular policy. The EPA has authority, binding on the courts, to decide questions like these.\textsuperscript{20} But the basis for its authority is that it can best serve the people.

The service conception of authority is not an argument that works at wholesale. It is more or less convincing for different Ys, different Xs, and different subject matters. Some agencies (the SEC, the NLRB) get considerable deference from the courts; others get less. Some rules ("Stay out of the deep water") provide different levels of service to different Xs (this example may actually disserve the interests of good swimmers). And Y’s pronouncements on different subject matters may vary in authoritativeness. (Compare the respect the Supreme Court gives to Congress’ decisions on free speech and on federalism.)

Let me turn now to the question of religious authority, and particularly the authority of the Catholic Church. Why should individual Catholics heed the instructions of their Church in cases where, left to their own devices, they would do otherwise? The first justification I offered for political authority was that it solved coordination problems. The Catholic Church being a large institution, coordination problems naturally arise within it too, and its authority is a convenient solution. There are no specific religious reasons for celebrating the feast of the Assumption on August fifteenth. But because there are reasons for celebrating the feast some time, and celebration is a community enterprise, it suits everyone to let the Church pick a date.

If we recognize religious authority for reasons like these, however, we run little risk of conflict between church and state. In coordination cases people are only interested in having an issue resolved; they do not care how. This means that the Church will have a range of acceptable solutions, and it can accommodate the state’s demands without compromising any religious belief. If the Assumption were

\textsuperscript{20} Chevron, Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Chevron also relies heavily on the idea of consent. The EPA derives its authority in part, the Court argues, from the elected branches. Congress has delegated power to it, and the President influences its policy determinations.
celebrated on April fifteenth and this caused many Catholics to miss filing their income tax returns, there would be no reason not to move the feast to another date. (For that matter, the state could change the income tax filing date. This is what it has done in laying out the work week: people generally have Saturday and Sunday off.)

For this reason I will pass over the coordinating function as a basis for the authority of the Catholic Church. There is a second argument that looks very much like this one, but that is in fact quite different. The best way to understand it is by contrast with the notion of consent. In arguments about political authority, consent lets me square the government's commands with the assumption that I must be allowed to pursue my own good in my own way. This scheme is fundamentally individualist: what makes the government legitimate is that I adopt it as my agent. It serves my purposes by protecting my liberty and property. Or maybe it is one of my purposes—a relationship which I enter into because it has (for me) intrinsic value. The second argument for the Catholic view of church authority begins with a different assumption. It is a mistake to suppose that an individual can carry on a religious enterprise by herself. The smallest religiously significant unit is the Church. Consider the metaphors Catholics use for the Church: the family (we are all brothers and sisters of Christ, and God is our father), a flock of sheep (the Church is a flock, and Jesus is the Good Shepherd), the body (the Church's many members are parts of one body, and Jesus is the Head). This way of thinking carries over to Catholic methods of worship. The chief liturgical activity is the mass, a celebration in the form of a meal (communion) that all members of a local church are supposed to attend.\footnote{That Catholics (indeed, most Christians) think this way is obvious. The reasons are slightly more complex. One part of the explanation is that the communal way of thinking grows naturally out of the Old Testament. The Jews thought of themselves as God's chosen people who were collectively promised salvation. Christians imagine that God has made good on that promise but extended it to a larger group. The \textit{Dogmatic Constitution on the Church} approved by Vatican II states, \textit{"It has pleased God . . . to make men holy and save them not merely as individuals without any mutual bonds, but by making them into a single people. . . ."} So the group matters because God's plan of salvation is communal.}

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\footnote{\textit{Dogmatic Constitution on the Church (Lumen Gentium)}, in The Documents of Vatican II §§ 1-8 (Walter M. Abbott ed. & Joseph Gallagher trans. ed., 1966) [hereinafter \textit{Lumen Gentium}]. In discussing various documents promulgated by the Second Vatican Council, I refer to the section numbers used in the documents rather than to the page numbers in Abbott's compilation.}

\footnote{\textit{Id.} § 9. Cf. Jeremiah 31:31-34 ("I will be their God, and they shall be my}

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The group also matters because Catholics see in the Church a pre-
view of the kingdom of God. The relations of members with each
other and with God have intrinsic value. I do not want to say that
this union makes people happy—that suggests that we value it for
the individual emotions it produces. A more accurate way of putting
it is that being connected in this way just is good, the way the love of
husband and wife just is good (even though it does not always make
us happy).

A third reason for the Church’s communal aspect is that the
Church is a kind of sacrament: “a sign and an instrument” of “inti-
mate union with God, and of the unity of all mankind.”\(^2\) Part of its
job is to show the world by example how to love one another and live
together in peace. This has to be a collective undertaking.

Suppose that I accept this way of looking at the Church and my
role in it. In this scheme, authority does not rest on my consent.
Contract theorists use consent to harmonize political authority with
the axiom that I should pursue my own good in my own way. But
the Church’s communal value comes ahead of its value to me; we
start with a different axiom. One reason to support religious author-
ity could be that it promotes unity in the Church.

This is not the same as the idea that authority helps us solve coor-
dination problems. It is more like the notion of “family unity” that
relatives sometimes appeal to in times of bitterness and division. A
law that says “drive on the right” is a sensible signal that helps us
all accomplish what we want. Family unity is an independent value
that we invoke as a reason for tolerating unfair distributions and un-
just treatment.

Catholics argue for papal primacy chiefly on the ground that it
promotes unity. It “serves to promote or preserve the oneness of the
church by symbolizing unity, and by facilitating communication,
mutual assistance or correction, and collaboration in the church’s
mission.”\(^3\) On a smaller scale “[t]he individual bishop . . . is the
visible principle and foundation of unity in his particular church.”\(^4\)
Primacy is different from infallibility. There is a point to pursuing
Church unity and recognizing episcopal leadership even if it is some-
times wrong.

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24. *Papal Primacy and the Universal Church, Lutherans and Catholics
Let me turn now to a third justification for religious authority in the Catholic Church. This one has some points in common with Raz’s service conception of authority. Raz argued that we could justify Y’s authority by showing that X “is likely better to comply with reasons which apply to him” if he follows Y’s directives than if he tries to follow the reasons themselves. Is there some reason to think that religious authority renders such a service?

Catholics claim that there is, though in part for reasons that we would not admit in the political realm. They believe that local bishops, and the college of bishops under the leadership of the pope (the bishop of Rome), are guided by God himself in their teaching on matters of faith and morals. This does not mean that they will not make mistakes, though errors should not be frequent. And under certain circumstances the pope himself, or in company with the bishops, can make infallible declarations. These “definitions, of themselves, and not from the consent of the Church, are justly styled irreformable, for they are pronounced with the assistance of the Holy Spirit.”

I do not want to overstate these beliefs, as often happens both in and outside the Church. Catholics do not claim: (1) that popes and bishops can give correct direction effortlessly whenever they speak; nor (2) that they can do so over the objections of the Church’s members; nor even (3) that the magisterium (which means, in the narrow sense, the teaching authority grounded in episcopal office) is the only source of teaching authority within the Church. As to (1), Vatican II emphasized that the pope “and the bishops, in view of their office and of the importance of the matter, strive painstakingly and by appropriate means to inquire properly into . . . revelation and to give apt expression to its contents” before offering any direction. As to (2), though the consent of Church members is not required to ratify a decree (as the Senate must ratify a treaty), still the Church emphasizes that in the case of infallible teachings “the assent of the Church can never be wanting, on account of the activity of that same Holy Spirit, whereby the whole flock of Christ is preserved and progresses in unity of faith.” To turn it around, strong dissent is a sign that a teaching has not been infallible. As to (3), though there is no denying the hierarchical structure of the Catholic Church, it is a mistake to suppose that all teaching authority operates from the top down. The Church’s bishops are not by training or occupation its best informed members on questions of politics, science, social science, or even theology. The laity are expected to make practical, prophetic, and scholarly

27. Lumen Gentium, supra note 21, § 25.
28. Id.
contributions. These are issues I will return to in the next section. Having stated them here, I want to stress that they qualify, but do not negate, my main point, which is about the basis for the Church’s teaching authority. Catholics justify that authority in part by a kind of service conception. Just as I can advance my investment objectives by heeding the advice of my broker, so can I advance the cause of my salvation by heeding the Church’s advice on matters within its jurisdiction. The helpfulness of the Church’s advice has a different warrant, but if I accept it the cases are not all that different.

II. THE SCOPE OF RELIGIOUS AUTHORITY

In discussing Raz’s service conception of authority, I noted that it is a retail, not a wholesale, argument. Its effectiveness varies with the identities of authority and subject, the nature of the issue, and so forth. In this section I want to develop that observation and apply it to religious authority. My ultimate concern is to explain the kind of deference Governor Cuomo (as a practicing Catholic) should give to the Church’s teaching. But it turns out that we cannot state that explanation in a simple formula. In Part II, section A, I will examine the claims of authority that the Catholic Church makes over all its members in their daily lives. In Part II, section B, I will look at the special case of public officials.

A. Ordinary Catholics

The authoritativeness of the Church’s teaching for ordinary Catholics depends in part on who the teacher is. Vatican II states that the highest authority resides in the college of bishops with the pope at their head. In the modern Church this is a lot of bishops, and they do not often get together. When they do (in an ecumenical council like Vatican II), they exercise their authority in a particularly “solemn way.” Even when not gathered together the bishops can sometimes teach with the same authority, provided “they concur in a single viewpoint as the one which must be held conclusively.” The pope can also act alone with an authority equivalent to that of

30. Lumen Gentium, supra note 21, § 22.
31. Id. § 25.
an ecumenical council. He is, Vatican II observes, “the supreme teacher of the universal Church.” Each of these actors (ecumenical council, the dispersed college of bishops, the pope) is thought to be capable of acting infallibly, though they seldom do so, and such action depends on other factors.

These are not the only Church officials capable of acting authoritatively. Individual bishops have jurisdiction over Church members within their territory. Their pronouncements are obligatory (though not infallible) in a sense which I will explore below. Groups of bishops may also gather together on a national or territorial basis to form episcopal conferences, a practice encouraged by Vatican II. The National Conference of Catholic Bishops is a fairly active example. These groups, like their members, can act authoritatively but not infallibly. Then there is a whole host of congregations, commissions, offices, and so on that make up the Vatican bureaucracy, and that function in ways not unlike the modern administrative state.

I need not detail the positions of all the various actors within the Church hierarchy to make my first point, which is simply that the authoritativeness of Church teaching varies with (among other things) the identity of the speaker. It also varies with the speaker's intention. The pope teaches infallibly only when “he proclaims by a definitive act some doctrine of faith or morals.” The bishops do so only when “they concur in a single viewpoint as the one which must be held conclusively.” The principle is like the clear statement rule that we sometimes use in interpreting statutes: Y is understood to have acted with infallible authority only when it has made perfectly clear its intention to do so. And the significance of intentions is not

32. Id. It is a little puzzling to see plenary authority lodged thus in two institutions. It is as though lawmaking authority were given to parliament (with the prime minister at its head), and also to the prime minister acting alone. The best explanation for the arrangement is this. The standard method for making really important pronouncements is an ecumenical council. Sometimes popes will act on their own, as Pius IX did in 1854 (in proclaiming the dogma of the Immaculate Conception) and Pius XII did in 1950 (in proclaiming the dogma of the Assumption). When they do so they are exercising the authority of the college of bishops. The pope does not need authorization or consent to act in this manner. But it is practically impossible for him to act without extensive consultation. See Karl Rahner, On the Relationship between the Pope and the College of Bishops, 10 THEOLOGICAL INVESTIGATIONS 50-70 (1973); Francis A. Sullivan, MAGISTERIUM: TEACHING AUTHORITY IN THE CATHOLIC CHURCH 100-06 (1983).

33. Lumen Gentium, supra note 21, §§ 23, 25.


35. Lumen Gentium, supra note 21, § 25 (emphasis added); 1 COMMENTARY ON THE DOCUMENTS OF VATICAN II, at 210 (Herbert Vorgrimler ed., 1967).

36. Id. (emphasis added); 1 COMMENTARY ON THE DOCUMENTS OF VATICAN II, at 210 (Herbert Vorgrimler ed., 1967).

confined to the question of infallibility. None of the many documents produced by Vatican II was meant to be definitive in that way. But they bear various titles intended to indicate the degree of authoritativeness attached to each: "dogmatic constitution," "pastoral constitution," "constitution," "decree," "declaration."

The authoritativeness of Church teaching thus varies with the speaker's office and intentions. It also varies with the subject matter. The idea is a familiar one to lawyers. The United States Supreme Court is often said to have ultimate authority to interpret the federal constitution, but it has no such authority with regard to state law. We sometimes express this by talking about the scope of its jurisdiction. So it is with the Church, whose jurisdiction is limited to matters of "faith or morals." Though it has sometimes pretended otherwise, for example, it has no brief explaining to us the proper form (monarchical, democratic) that civil government ought to take.

Even within the domain of faith and morals there is a great variety of issues, and the Church speaks with more authority on some of them than on others. There are, in the first place, those things said to be revealed in the gospel message (for example, that Jesus is God). Theologians say that these are the primary object of the Church's magisterium, things about which it can speak with most authority—at times infallibly. Then there is a range of other matters, more or less closely related to these, to which the Church can speak with diminishing degrees of authority (recognition of a Church council as ecumenical; canonization of saints; etc.). I do not want to dwell on these details, but only mention them to indicate how highly refined and variable is the notion of authority, and because they bear on my main interest, which is the deference due from observant Catholics to the Church's instructions on moral questions—abortion in particular. That is a subject on which various authorities within the Church have taught with a fairly consistent voice for a long time. The Second Vatican Council condemned the practice in the Pastoral Constitution on the Church in the Modern World. Pope Paul VI repeated this condemnation in his encyclical Humanae Vitae. The National Conference of Catholic Bishops has done the same on numerous oc-

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So has the Congregation for the Doctrine of the Faith. Cardinal O'Connor and the bishop of Brooklyn have echoed these positions. What obligations do these teachings impose on Mr. Cuomo?

As a matter of Church law, Cuomo’s obligations depend in part on whether the teachings of the pope and the council are supposed to be infallible, and that is an uncertain point. Neither the Pastoral Constitution nor the encyclical displays the kind of clear intention that accompanies infallible pronouncements. It may nonetheless be that papal and episcopal opinion on the subject merits that status because it has been so unanimous and so longstanding. I will assume that it does not, for the sake of making a point that can be applied more widely. Here is what Vatican II said about the appropriate response to noninfallible moral teachings:

Bishops, teaching in communion with the Roman Pontiff, are to be respected by all as witnesses to divine and Catholic truth. In matters of faith and morals, the bishops speak in the name of Christ and the faithful are to accept their teaching and adhere to it with a religious assent of soul. This religious submission of will and of mind must be shown in a special way to the authentic teaching authority of the Roman Pontiff, even when he is not speaking ex cathedra.

I understand the two italicized phrases to be essentially equivalent, and for simplicity’s sake I will focus on the phrase “religious submission of will and of mind.” This claims two kinds of authority. One is practical, over how X acts (“submission of will”). The other is epistemic, over how X thinks (submission “of mind”). Political authority, by contrast, is strictly practical. It requires obedience but not agreement. Indeed, the First Amendment protects our freedom to disagree with the law. But the Church, because it is concerned with the formation of consciences, pays as much attention to mental states as it does to behavior.


There is a scene in Peter Pan where Peter is instructing the Darling children how to fly. The secret is to think lovely thoughts, but that is something he cannot get them to do. Like Peter, the Church cannot always get me to think lovely thoughts. Even when I am willing I may not be able. Suppose that I am a pregnant woman considering whether to have an abortion. I can conform my behavior (submission of will) to Church teaching by just refusing to abort. But how can I get myself to think that abortion is wrong (submission of mind) if, notwithstanding what the Church tells me, my mind will not go along with that proposition? Learning about morals is like learning geometry. I do not learn geometry by committing propositions to memory. Unless I work out the proofs, I cannot apply them and will not remember them — in a word, I do not understand them. So it is with the proposition that abortion is wrong. This will fit with some of my convictions (how I feel toward the life growing inside me; how I think I should behave toward my father who is on a respirator) and not with others (what I think about incest, rape, and pregnant teenagers), and I cannot affirm or deny it until I have worked it through.

What then does submission of mind mean for this process? It means, in the first place, that I should recheck my proof if I get a different answer than the Church did. The Church's teaching counts for something if it gives me reason to think that my own convictions may be wrong. Submission of mind might also mean that I should try reasoning backward through my proof, beginning with the authoritative answer. This sometimes works in mathematics, where knowing the answer helps me to figure out the other steps in the problem. And if none of this gets me to the orthodox conclusion, I think I should remain willing to hear new arguments and new evidence, i.e. make my judgment interlocutory rather than final. Finally, there will be cases where after long reflection I find the balance of moral reasons uncertain. (Suppose I simply cannot decide whether I think that human life begins at conception.) Here the Church's teaching could change the outcome of my thinking because it is an additional piece of evidence — a kind of morally expert testimony that changes the balance of proof.

These observations explain an important difference between epistemic and practical authority. In discussing Raz’s service conception, I noted how we give some authorities preemptive effect. My broker has this kind of authority over my account. I do not weigh his advice along with other reasons and sometimes reject it. I follow his direction even when I think it is wrong. Consider another example. A court decision rests on reasons (stated in an opinion); but once the decision becomes final it is itself a reason for $X$ to act as directed. $X$ cannot impeach the decision by showing that the reasons supporting it are weak; that is what it means for a matter to be res judicata. The decision preempts the reasons that led to it.

Epistemic authority, unlike practical authority, cannot have this preemptive effect. It can influence, and in uncertain cases determine, the direction of my thought. But if I think it is wrong, it ipso facto fails.

I now want to say a few words about the submission of will. Suppose I am pregnant and cannot bring myself to think — though I have tried—that abortion would be wrong in my case. (I am in frail health.) Must I nonetheless carry my pregnancy to term? In a word, yes. The Church’s practical authority is preemptive, like a conscription law whose morality I might dispute. An observant Catholic can and should comply with it notwithstanding her disagreement.

But is this not asking me to behave irrationally, and maybe at times immorally? (Think again about conscription laws.) In general I think not. One kind of justification for it is the service conception of the Church’s authority. This case is formally like the preemptive authority of my broker: I know that I will get a better return by following his advice than I will by making my own decisions in cases where I think he is wrong. This is true even though he sometimes is wrong, because his error rate is lower than mine. Of course I have different reasons for confidence in the two cases, but that cuts in the Church’s favor. I think that it has a low error rate because I believe that Jesus is God, and that Jesus remains with the Church in various ways (in its sacraments, its scripture, its tradition, etc.) — in a word, for reasons that are fairly fundamental.

The second kind of justification has nothing to do with whether the Church is right or wrong in its teaching in this case. It is that in at least some cases orthopraxis, like orthodoxy, is a way of expressing the principle of unity that has an independent religious value in the life of the Church. We see parallel examples in the affairs of unions (solidarity), political parties (party loyalty), families (“blood is thicker than water”), armies (“ours is not to reason why”), and nations (“my country right or wrong”). In many of these cases the principle is not a strong one. Indeed, the standard example is a caricature of the individual who gives this principle too much weight.
when it collides with another moral imperative. But the weight it deserves varies from one case to another depending on the justification for collective action, and Church unity may be more important than some other kinds.

I do not want to overstate this point. I have been picturing a case where X thinks that abortion is not immoral and favors that course because it would promote her own medical health. But imagine another case (make it compelling) where X has given her most conscientious attention to the Church’s epistemic authority, and yet concludes that the course prescribed by the Church would be actually immoral. Under these circumstances it is hard to justify giving the Church’s practical authority preemptive effect. The service conception holds that X can reduce her error rate by obedience in all cases. But it cannot justify immoral action as a means to that end. Nor should we urge immoral action as a way of achieving Church unity. In this case I think that X is morally obliged to deviate from the Church’s teaching, even though the Church might impose sanctions on her for doing so.49

B. Public Officials

All this talk so far, you might say, is beside the point, because Governor Cuomo concedes his obligation to conform (in mind and will) to the Church’s teaching in his own life. He quarrels only with the Cardinal’s assertion that he should make that teaching the law of the state of New York. What state officials must do in their official capacity, he contends, is a matter that is beyond the Church’s jurisdiction.

Not quite. The Church acknowledges (though it has not always) that “Christ [gave it] no proper mission in the political, economic, or social order.”50 But this does not mean everything that strict separationists might hope. The Church also rejects “the outmoded notion that ‘religion is a purely private affair’ or that ‘the Church belongs in the sacristy.’ Religion is relevant to the life and action of society.”51 In particular it maintains that it “has the right to pass moral judgments, even on matters touching the political order, whenever


51. Dignitatis Humanae, supra note 50, § 4 n.11.
basic personal rights or the salvation of souls make such judgments necessary." This of course entails that it should speak out on the issue of abortion, which it sees as involving both "personal rights" (of the fetus) and "salvation" (of those who procure and perform abortions). But there are several reasons why its teachings in this forum might be less authoritative than the model I have discussed above.

To begin with, of course, most citizens of the state are not members of the Church. Over them the Church has no authority at all, only such influence as the force of its arguments deserves. Cuomo is not exempt on that account, but it is a fact that bears on his obligations in a second way. It is no less true for Catholics than it is for others that duty is limited by possibility. Compromise is an unpleasant but necessary feature of political life. If the Governor finds it impossible to secure enactment of the Church's agenda, he can hardly be condemned for doing only what he can.

The need to compromise with nonmembers is not the only limit facing the observant Catholic politician. It is not self-evident that the full resources of the state should be used to enforce moral norms even in cases where a majority of the voters would stand for it. No one argues that Cuomo should work for passage of laws to enforce the moral norms (binding within the Church) against contraception and divorce. Consider the observation of Thomas Aquinas regarding the limits of law:

Laws when they are passed should take account of the condition of the men who will be subject to them; for, as Isidore says: the law should be possible both with regard to nature and with regard to the custom of the country. But capacity to act derives from habit, or interior disposition: not everything that is possible to a virtuous man is equally possible to one who lacks the habit of virtue . . .

Now human law is enacted on behalf of the mass of men, the majority of whom are far from perfect in virtue. For this reason human law does not prohibit every vice from which virtuous men abstain; but only the graver vices from which the majority can abstain; and particularly those vices which are damaging of others, and which, if they were not prohibited, would make it impossible for human society to endure: as murder, theft, and suchlike, which are prohibited by human law.°

The principal point here is that the moral law is a command of perfection that would land us all in jail were the state to enforce it to the letter. That would have disastrous implications for the Corrections budget. And it might mean that none of us would show up for work on Monday. There is also a subsidiary point which Aquinas overlooks, but which we who are more familiar with federal forms of

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52. Gaudium et Spes, supra note 29, § 76.
government can more easily appreciate. There are any number of institutional problems connected with efforts by one legal authority to assimilate the regulatory law of another. It would be hard for the secular legal system to be sure that it correctly understood the corpus of Catholic moral rules. The borrowed norms might clash with existing New York law in ways too numerous to anticipate. The borrowed offenses might involve elements (e.g. questions about a sinner's mental state) that the existing secular law system (adversary procedure, rules of discovery, evidence, methods of trial and review) was incompetent to prove. (Remember that in the Catholic Church penitents confess their sins.) The burden of enforcing a supplementary set of norms might overload a justice system designed to do other work. And so on.

All of the reasons I have given so far are jurisdictional (the problem of nonmembers) or prudential (the need for compromise; the danger of pursuing perfection; the costs of assimilation). They do not go to the merits. By that I mean that they are consistent with saying that the Church rules would be best if we could have them. But that is not necessarily so. Consider the rules about economic due process. Although the Supreme Court asserts authority over constitutional questions, it gives great leeway to other branches on matters of business regulation. One common justification is that it knows little about business and economics, and the legislature (or the agency), so long as it stays within wide limits, is more likely to reach the right answer. Conservative Catholics make precisely the same point about the Catholic bishops' efforts in the economic realm. Though they say they are in complete agreement with the bishops' ultimate aims, they argue that we can get there faster by concentrating on production rather than (as the bishops naively do) distribution. I do not necessarily endorse this conclusion, but the method of argument is perfectly sensible. Moral questions arise in contexts that Church authorities will know little about, and in such cases other people might get to the right answer first.

The Church's authority over observant Catholic public officials is, then, qualified in a number of important ways. Let us consider what this might mean for the question of abortion. I should rather say


questions, because there are many, and the answers differ. Consider first the precise issue for which Roe v. Wade is taken to stand: whether abortion is a fundamental human right protected by the Due Process Clause. That is a fairly abstract ethical proposition, unmixed with the kinds of contingencies that lead bishops astray. It is also obviously inconsistent with the Church's teaching that abortion is an "unspeakable crime." If we confine our attention to the simple question whether to recognize the right, there are few prudential reasons that would move one in sympathy with the Church's position to do so. It is difficult for me to see how Cuomo, if he accepts the Church's teaching about abortion, could agree with the Supreme Court's decision in Roe. But this is also an issue that he has no influence over. It can only be determined by the Supreme Court or by a constitutional amendment.

On the other hand, accepting the Church's teaching would not, I think, commit Cuomo to the proposition that New York should make procuring or performing an abortion a criminal offense. This is an issue, unlike the last, where enforcing the Church's position would control the behavior of nonmembers. That is not inherently improper; Cuomo routinely enforces the position of the Democratic Party against nonmembers. But it would lead non-Catholics to vote against him, and to undo any successes he had along this line. I am not convinced that Cuomo is morally obliged to pursue pyrrhic victories.

Quite apart from its effect on nonmembers, a criminal abortion law might entail very high enforcement costs. Proponents of abortion usually cite the example of Prohibition. The offense there is trivial but the point is not. If we had a high rate of illegal abortions and prosecuted violations vigorously we could put a lot of young women and doctors in jail. If doctors complied (I assume they would) and women continued to abort, they would run a new set of health risks. If juries balked at convicting (and they often would), we would encourage disrespect for the law and waste enforcement resources that we could employ elsewhere with more success (drunk drivers and drug dealers also kill people).

This is not to say that anti-abortion laws are, absolutely speaking, a bad idea — only that the government cannot successfully get too far out ahead of public opinion. I hasten to add that that has not been Cuomo's problem. I suspect that the people of New York are, if anything, more willing than he to accept some limitation on abortion

57. Gaudium et Spes, supra note 29, § 51.
58. Now that Roe has been decided, stare decisis is a reason for leaving it in place. See Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791, 2808-16 (1992). I cannot think of another.
rights. If that is so, the Governor could find common ground with Church nonmembers for doing something about the problem. And a law that had popular support would not entail the enforcement costs I have hypothesized. In short, I see no prudential reason that Cuomo can cite for declining to stand with at least one foot on his principles.60

The third abortion question involved in Cuomo’s case is the issue of government funding, which he supports. On this issue it is harder for the observant Catholic official to depart from the Church’s teaching. It is not just a matter of declining for prudential reasons to enforce the moral law. Funding abortions actually promotes (what Cuomo concedes is) evil. And taxing Church members to raise the funds implicates them too. Cuomo argues that it is unjust to withhold funds because doing so leaves poor women worse off than rich ones.61 But if he is concerned about equalizing standards of living this is hardly the place to start.

I want to conclude this section with a few observations about the enforcement of Church authority. Suppose that the Governor publicly contradicts some authoritative teaching of the Church, or like Cuomo, affirms that he will obey in his personal life but takes an inconsistent political position. What sanctions are (from the Church’s point of view) proper?

Under canon law, one who procures an abortion is subject to automatic excommunication.62 This means that she is unable to receive the sacraments, to participate in certain ways at mass and other public worship, and to hold any Church office or perform any official ecclesiastical function.63 The excommunication becomes effective

59. I do not have figures on New York itself. However, only about 20% of Americans support abortion on demand (about the same fraction that favors a total prohibition). BURTCHAELL, supra note 44, at 273-74. Mary Ann Glendon has shown that the American constitutional rules enforcing that regime are more permissive than those of any other nation (Glendon studies 20 other nations) in Europe and North America. MARY A. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES 145-57 (1987).

60. I have been assuming, in discussing this second issue, that the constitutional regime would permit abortion regulation if the voters wanted it. Ours does not, as a general matter, though there are some modest possibilities available after Planned Parenthood, 112 S. Ct. 2791.


62. 1983 CODE OF CANON LAW c.1398.

63. Id. c.1331, § 1.
without any trial, though this cannot happen inadvertently. The offender must know in advance not only about the gravity of the offense but also about the Church’s punishment.\textsuperscript{64}

But that is not the offense that Catholic politicians are typically concerned with. Cuomo, for example, has rejected abortion as a possibility in his own life.\textsuperscript{65} His offense (if it is one) has been to support the actions of women who want to have abortions, by a course of official conduct (failure to promote regulation; approval of Medicaid funding) and public statements (his speech at Notre Dame).\textsuperscript{66} I have suggested that some, at least, of these activities are inconsistent with the Church’s teaching on abortion, which Catholics are expected to heed. Canon 752 of the Code of Canon Law codifies the obligation to heed Church teaching and “to avoid whatever is not in harmony with that teaching.”\textsuperscript{67} Canon 1371 deals with sanctions for violation of these obligations:

The following are to be punished with a just penalty:

1. a person who teaches a doctrine condemned by the Roman Pontiff or by an ecumenical council or who pertinaciously rejects the doctrine mentioned in can. 752 . . . .\textsuperscript{68}

What counts as a “just penalty” can vary. The local bishop seems to have considerable discretion, and the Code encourages him to proceed cautiously.\textsuperscript{69} Cardinal O’Connor suggested that excommunication was a possibility, but no American bishop has tried it. Bishop Maher in San Diego withheld communion (a less severe sanction) from Lucy Killea, a state senator who advocated abortion rights.\textsuperscript{70} O’Connor’s Vicar and Bishop Daily of Brooklyn have barred Cuomo from speaking at parish churches.

These sanctions are intended to be coercive in the way that civil
contempt is coercive: they aim at reformation of the offender's conduct. But they are effective only against religious believers. If I had no interest in participating in the religious life of the Catholic community, excommunication would not concern me. (It would be like being thrown out of the Book of the Month Club.) And once I was willing to sever my religious ties, the Church would have no independent source of leverage. It does not, for example, have control over its members' financial assets.

III. RELIGIOUS AUTHORITY AND THE LIBERAL CONSTITUTION

I now want to consider two situations that a Catholic politician like Cuomo might find himself in if he heeded religious authority in his public life. I want to observe in each case whether our liberal principles and our Constitution permit him to comply with the requirements of his faith. In Case One Cuomo heeds and is persuaded by the Church's epistemic authority and wants to act accordingly. In Case Two Cuomo is unconvinced by the Church's teaching but willing to submit to its practical authority. Case One does not present any problems for the observant politician; Case Two does.

Suppose first, then, that Cuomo believes that abortion is evil because human life begins at conception. This conviction is consistent with Catholic Church teaching, and Cuomo reached it in part because of the Church's persuasion and example. But it is like a proposition in geometry that Cuomo has worked out for himself: the teacher helped him to get it, but now he can kick away the props and get it himself. Or consider another simile:

The alcoholic in the back row at the A.A. meeting does not go home and tell his wife that the speaker said that anyone with his drinking behavior is a drunk. He says that his eyes were finally opened and now, with the speaker's help, he sees what everyone else but himself had long seen but he could not bear to see. The man says this as something he owes to a wise and helpful mentor, but now it is something he is vouching for himself. The politician who holds this conviction in this way will not think that Roe v. Wade was right in saying that abortion is a fundamental right. Nor will he favor public funding of abortion (though he may have doubts about criminal penalties). Is there a problem with taking these positions on questions of public policy when the belief that underlies them had its origin in an exercise of religious

71. 2 SACRAMENTUM MUNDI, supra note 64, at 174-75.
72. BURTCHAELL, supra note 44, at 265.
73. 410 U.S. 113 (1973).
authority?

No. In the first place, what else would we have Cuomo do? This is not a case where he can centrifuge his beliefs and separate the religious element. We sometimes ask juries to do that when hearsay evidence slips in. But here religious teaching is not a piece of evidence. It is a way of looking at the world that Cuomo has appropriated. He can no more set it aside than he can set aside his idea of color or shape in looking at a picture. We cannot ask him to act without reliance on his religious convictions, because he probably has no idea what he would do in that case. It would be like asking him how he would decide if he were someone else.

If we were determined to avoid any religious influence on politics we might then ask Cuomo to recuse himself from any decision involving abortion. But as Kent Greenawalt has pointed out, it is not clear why a liberal society would want to exclude all religious influence in a case like this. The question about the moral worth of the fetus is not one that anyone can answer on the basis of shared premises and publicly accessible reasons. So everyone who thinks about the question (and it is unavoidable in making abortion policy) will have to rely on some ‘private’ or ‘personal’ grounds. Only a society actually hostile to religion would want to treat it worse than other kinds of ‘personal’ reasons.

Liberal principles, then, should not prevent Cuomo from acting on his religious belief about the morality of abortion. It would be both impossible and unfair to do so. As a matter of constitutional law, I think the case for Cuomo is even stronger, in large part because our Constitution does not rest entirely on liberal principles. The only conceivable constitutional objection would be that the Establishment Clause forbade public officials to act on beliefs that had religious origins. But this has the rules exactly backwards. I would argue not only that the Establishment Clause permits such action, but that the Free Exercise Clause positively encourages it.

That assertion requires a longer defense than I can make without changing the focus of this Article, so I will content myself with a sketch. I begin with the assumption that freedom of religion is a special form of protection for religious believers. From the Constitution's point of view, religious activity (ritual acts, the acquisition and propagation of religious knowledge, observance of moral obligations) is a good thing. The Free Exercise Clause encourages us to engage in it. There are several limits to our enthusiasm for such activity, but

74. KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 144-72 (1988).
75. Id.
76. Id.
77. Id.
they do not stem from doubts about its worth. One is that we should not coerce people to perform ceremonies they do not believe in (prayer, worship, declarations of belief) because it is futile, or even counterproductive from a religious point of view, to do so. Another is that the best way for society to grasp religious truth is to allow free inquiry for everyone — atheists and agnostics as well as believers. A third is that religious compulsion can cause civil strife and leave everyone worse off.

Official action to limit abortions (by outright restrictions, or by withholding funds), even if it has its origin in religious conviction, does not transgress these limits. Restrictions may be coercive, but they do not force women to engage in religious activity or affirm a religious belief. Nor do they affect in any way the dissenter's ability to complain. And while they may cause contention, that alone is not enough for an Establishment Clause violation. (Some people were moved by religious principle to vote for the 1964 Civil Rights Act, and it caused contention.) This is an argument that relies on the lessons of history. And if history is to be our guide, the kind of contention we should fear results from a division along identifiably religious lines (Puritan/Baptist, Catholic/Protestant, Christian/Jew, Muslim/Baha'i) over indisputably religious questions.

Let me turn now to Case Two, which I view as more difficult. Suppose that Cuomo has listened attentively to the Church's teaching on abortion and has tried to come around to that point of view in his own mind, but he just does not get it. (He thinks that the fetus very early in pregnancy is like the very old person in a persistent vegetative state: we are not obliged to keep either one alive at great personal cost.) But as an observant Catholic he is aware that the Church asks its members to conform their conduct to its teaching (submission of will) even if they do not agree (submission of mind). It asserts practical as well as epistemic authority.

Suppose too that Cuomo is willing to comply with the Church's

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78. In Milton's phrase, to force a ritual performance is "to compell hypocrisie not to advance religion." 7 JOHN MILTON, A Treatise of Civil Power in Ecclesiastical Causes, in COMPLETE PROSE WORKS OF JOHN MILTON 238, 256 (Yale, 1980).

79. We think of this as an argument for free speech, but Milton, to whom we most often attribute it, was actually making a theological claim. 2 JOHN MILTON, Areopagitica, in COMPLETE PROSE WORKS OF JOHN MILTON 480, 551 (Yale, 1959) ("this is the golden rule in Theology").

practical authority, for several reasons. One justification for the authority of the Catholic Church, as I explained in Part I, is that it promotes unity within the Church. Orthopraxy is a way of keeping faith with the religious community, and that might be important enough to Cuomo for him to act against his better judgment.

Cuomo might also be willing to conform his own behavior to the Church's teaching because of something like the service conception of authority. He is unable in his own mind to distinguish some cases of abortion and termination of life support. To that extent he does not agree with the Church's teaching. But his experience and his religious beliefs about God's guidance of his Church tell him that the Church has a lower error rate than he does. In doing as the Church requires he trusts, though he is by no means convinced, that he will be doing the right thing.

Suppose further that in this case Cuomo is willing to obey Church teaching not just in his personal life (he would not urge his wife to have an abortion) but also in his public life (he follows the "Catholic line" in his political positions). As I explained in Part II, the Church's teaching authority in this area is qualified in numerous ways. But there are some points (like abortion funding) about which it is quite clear, and here Cuomo heeds what the Church has to say. Is there anything illiberal or unconstitutional in obedience to authority under these circumstances?

Unlike Case One, here it is possible for Cuomo to separate his religious from his secular convictions. Cuomo actually believes that there is nothing wrong with abortion under some circumstances. If you asked him he would tell you that. The reason he votes against abortion funding and publicly opposes Roe v. Wade\textsuperscript{81} is that he feels obligated to follow his Church's teaching. In asking Cuomo to set aside his religious beliefs, then, we would not be asking him to do the impossible. Would we be asking something that was unfair or otherwise improper?

Notice a second difference between this case and the last one. In Case One Cuomo could justify his public actions (e.g., a veto of abortion funding) in terms of harms, benefits, and reasons that all citizens should recognize. He would say that abortion takes innocent life which society should protect. And he would argue that our concept of rights cannot embrace actions so intrinsically evil. It is true that he came to believe these things by a specifically Catholic route, but other people have reached the same conclusions by other roads (some religious, some not), and there is nothing sectarian about saving lives.

In Case Two it is harder for Cuomo to point to a public benefit

\textsuperscript{81} 410 U.S. 113 (1973).
that justifies his actions. One reason he follows the 'Catholic line' is that orthopraxy promotes Church unity, and that is good for a variety of religious reasons. But there is no reason why non-Catholic citizens should care about the unity of Cuomo's Church. If Cuomo vetoes abortion funding or approves abortion restrictions solely for that reason, he puts the interest of his Church ahead of the public interest. That is troubling, both morally and constitutionally. As a moral matter, Cuomo is bound both by oath and by promise to represent all the citizens of New York and to uphold the Constitution. As a constitutional matter, the case I have so far put is one where he takes official action for the sole purpose of promoting the religious aims of his Church. That is certainly inconsistent with the *Lemon* rule against religious purposes.\(^8\) It is also an invitation to civil strife along religious lines in the classical form: Cuomo's action appeals just to Catholics, rests only on religious reasons, and imposes the costs on nonmembers.

What makes me most uncomfortable about this case, I think, is that it confirms the stereotype of Catholics as citizens with divided loyalties. Cuomo's sole reason for acting is that his Church has directed him to — and by 'his Church' I mean here the bishops and the pope. Locke said he would not extend toleration to churches whose members "pass into the allegiance and service of another prince."\(^83\) His sentiments are still in fashion. Twentieth-century Americans have been willing to "imagine the papal submarine ready to land the First Lord of its Admiralty in Chesapeake Bay when the White House is properly occupied."\(^84\) Part of my effort in this Article has been to show that this dilemma will rarely arise because: (i) Church authority is binding in varying degrees; (ii) politicians need not always implement Church teaching; (iii) people may quite properly act on religious beliefs in cases like Case One; and of course (iv) the Catholic Church, unlike other sovereigns, has no control over unwilling members. But the dilemma for the observant Catholic in Case Two is real. The solution is not, as Justice Brennan once suggested, to set aside his religious beliefs.\(^85\) It is to recuse himself, if that is possible, or resign if it is not.

\(^84\) BURTCHAELL, *supra* note 44, at 260.
So far in discussing Case Two, I have supposed that Cuomo is willing to heed the Church’s practical authority only for the sake of Church unity. But suppose he also justified obedience by reference to the service conception of authority. He might believe that the Church was a better judge of moral questions (as my broker is a better judge of investments), and though he himself could not see the wrongness of abortion he might ‘take the Church’s word for it.’ Is there a problem with this kind of reliance on authority?

Here too, as in my first version of Case Two, Cuomo will have no difficulty separating his religious from his secular convictions. As far as he can tell there is nothing wrong with abortion under some circumstances. He acts on the contrary assumption only because the Church says otherwise and he trusts its judgment. Unlike Case One we would not be asking Cuomo to do the impossible in setting aside his religious beliefs.

But unlike my first version of Case Two, Cuomo here can honestly justify his public actions on grounds that all citizens should recognize. He would argue that abortion is bad because it takes innocent life which society should protect. It is true that he has only a tenuous grip on that proposition. He holds it the way I hold the special theory of relativity: I really do believe that mass increases with velocity, and that time slows down, but I have to say it does not make sense to me. Still, he does hold it, and it is a perfectly appropriate basis for making public policy.

Should it matter that Cuomo’s belief in the immorality of abortion derives wholly from religious premises (the Church teaches it, and God inspires the Church’s teaching)? This is a difficult question, but I think not. It is permissible for a public official to hold an activity immoral simply because our tradition teaches that it is. And such beliefs can be identical in form and substance to Cuomo’s belief about abortion. In form because we apply to tradition the service conception of authority: we think it is likely to be right even if we cannot see the point. In substance because the tradition itself can be plainly religious. (Consider the tradition against sodomy which the Court upheld in Bowers v. Hardwick.\(^{86}\)) The point is that most of us, not just Catholics, see nothing wrong with relying on authority to decide moral questions. And if that is so there is no reason to disqualify religious authorities.

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\(^{86}\) 478 U.S. 186, 190-96 (1986).